A 000 981 541 6
UC SOUTHERN REGIONAL LIBRARY FACILITY

LAW LIBRARY,
Sacramento County.




THE LIBRARY
OF
THE UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW


Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

http://www.archive.org/details/englishreports164greaiala

# THE ENGLISH REPORTS

ECCLESIASTICAL, ADMIRALTY, AND PROBATE AND DIVORCE

## CONSULTATIVE COMMITTEE

THE RIGHT HONOURABLE THE EARL OF HALSBURY,
LATELY LORD HIGH CHANCELLOR OF GREAT BRITAIN

THE RIGHT HONOURABLE BARON FINLAY OF NAIRN,
LATELY LORD HIGH CHANCELLOR OF GREAT BRITAIN

THE

# ENGLISH REPORTS

## VOLUME CLXIV

## ECCLESIASTICAL, ADMIRALTY, AND PROBATE AND DIVORCE

## IV

CONTAINING

SPINKS (ECCLESIASTICAL AND ADMIRALTY), VOLS. 1 AND 2;
SPINKS' PRIZE CASES; DEANE; SWABEY & TRISTRAM, VOLS. 1 TO 4

*EDITORIAL NOTE*

Only those cases are reprinted from Spinks' Prize Cases which are not included in Spinks' Ecclesiastical and Admiralty Cases. The Table of Cases at the end of this volume contains the references to all cases included in Spinks' Prize Cases.

W. GREEN & SON, LIMITED, EDINBURGH
STEVENS & SONS, LIMITED, LONDON
LAW PUBLISHERS
1921

PRINTED IN GREAT BRITAIN BY
NEILL AND CO., LTD.,
EDINBURGH.

*March 1921*

# The ECCLESIASTICAL and ADMIRALTY REPORTS; being REPORTS of CASES heard before the ARCHES and PREROGATIVE COURTS of CANTERBURY and the CONSISTORY COURT of LONDON respectively, the HIGH COURT of ADMIRALTY and the ADMIRALTY PRIZE COURT, together with such Cases as have been carried by Appeal from those Courts respectively to the Privy Council. By THOMAS SPINKS, D.C.L. Vol. I. Easter Term, 1853, to Michaelmas Term, 1854, 16 & 17 Vict., and 17 & 18 Vict. London, 1855.

[1] IN THE GOODS OF WILLIAM SIMKIN, Deceased. Prerogative Court of Canterbury, May 6, 1853.—Alterations in a will or codicil, bearing date in January, 1837, presumed to have been made prior to Jan. 1, 1838.

William Simkin died on the 20th July, 1847, leaving a will, dated 25th January, 1837, in which there were various alterations and interlineations. Both the will and alterations were in the handwriting of the deceased. No evidence could be obtained as to the time when the alterations were made. The will was found locked up in a bureau, the key of which was in the possession of the deceased.

Dr. Jenner moved the Court to grant probate of the will as it was found, with the alterations. He submitted that the presumption of law respecting alterations laid down by the Superior Court in *Cooper* v. *Bocket* (4 Notes of Cases, 688; 4 Moore, P. C. 419) did not apply here. The will was made before the Wills Act came into operation, and there was no reason to presume that the alterations were not made during the same year.

*Sir John Dodson.* Before the 1st January, 1838, these alterations would have been entitled to probate. In the absence of evidence I apprehend that the general presumption of omnia rite esse acta must prevail; and we must conclude that these al-[2]-terations were made by the testator before that period. I therefore decree probate of the will with the alterations.(*a*)

Proctor, Jellicoe.

---

(*a*) In *Pechell* v. *Jenkinson*, 2 Curt. 273, Sir H. J. Fust decreed probate of an unattested codicil on the same principle. The will was dated in 1830, the codicil had no date, and the testatrix died 20th January, 1839.



687971

IN THE GOODS OF RICHARD DINMORE, Deceased. Prerogative Court of Canterbury, May 6, 1853.—Signature of testator in the testimonium clause, not evidently intended for his final signature. Probate granted on consent.

[S. C. 2 Rob. Ecc. 641.]

Richard Dinmore died on the 9th of April last, leaving personal property under the value of 800l. The only testamentary paper found was one bearing date 1st September, 1842, in which his wife was appointed sole executrix and universal legatee.

This paper ended, "In witness whereof I, Richard Dinmore, have hereunto set my hand and seal, this first day of September, one thousand eight hundred and forty-two." There was no other signature of the testator, and no seal. There were three attesting witnesses; one of whom made an affidavit to the effect, "That the deceased had asked him to come and attest his will; that the deceased produced the will to him and his fellow-witnesses, with his name already signed in the testimonium clause; but made no further acknowledgment of such his signature; that such signature, as well as the rest of the will, were in the handwriting of the deceased."

Counsel, in moving for probate, submitted, 1st, That such signature was declared sufficient by 15 & 16 Vict. c. 24, s. 2, which provided that no will should be deemed invalid by reason of the signature of the testator being placed in the testimonium clause; and, 2ndly, That the signature was sufficiently acknowledged; and cited the cases of *Keigwin* v. *Keigwin* (3 Curt. 610), *Anne Ashmore* (3 Curt. 758), *Giles Davis* (3 Curt. 748); and, 3rdly, That the words "and seal" were mere surplusage, as the act required no seal.

*Sir John Dodson.* I should, perhaps, not have hesitated to pronounce both the signature and the acknowledgment sufficient, if the testator had omitted the words "and seal." These words induce the belief that the testator did not intend the name in the testimonium clause for his signature, but purposed adding another signature, together with his seal. The act requires that **[3]** it shall be apparent on the face of the will that the testator intended the name for his signature. I have some doubt of its being so in the present case. Let the case stand over that inquiries may be made respecting the parties entitled in distribution, and whether they will consent.

May 14.—On the following Court-day proxies of consent were brought in from a son and daughter of the deceased; but it appeared that there were some minor children of a deceased son of the testator.

Counsel again moved the Court to grant probate of the will, and cited as analogous the case of *Francis Lamb* (4 Notes of Cases, 561), in which Sir Herbert Jenner Fust decreed probate of a will of which he had doubts, upon similar consent, notwithstanding there were minors entitled in distribution.

*Sir John Dodson.* I am unwilling to put the parties to the expense of propounding the paper as the property is so small. I decree probate of the paper.

Proctors, J. R. and G. Burchett.

IN THE GOODS OF THE REVEREND JOHN HEWLETT, Clerk, Deceased. Prerogative Court of Canterbury, May 14, 1853.—Unpublished depositions cannot be given out of the custody of the Court, nor copies thereof be taken.

[S. C. 17 Jur. 630.]

Nathaniel Hewlett died in December, 1830, a widower, without (as was presumed) any issue; but leaving his brother and sister, the Rev. John Hewlett, and Mary, wife of William Watson, his only next of kin.

A suit was afterwards commenced in this Court by Edward Wood, as guardian of his wife Emma Wood, an alleged granddaughter of the deceased. An allegation was given in and witnesses were examined; but before publication the suit was compounded between the parties, and letters of administration were granted to Mrs. Watson, the deceased's sister; and a release was executed between the parties, which would be a bar to any further proceedings being afterwards taken here.

The deceased's brother, the said Rev. John Hewlett, also died, and a suit was instituted in the Court of Chancery for the administration of his affairs, entitled *Cooper* v. *Everett*, in which it was necessary to ascertain who was at his death the heir-at-law of the Rev John Hewlett; and, by direction of the Master to whom such cause was referred, an application was made to **[4]** this Court on the 10th March last, to allow the depositions taken here in the suit of *Wood* v. *Watson* to be attended

with before the Master in the reference in the suit of *Cooper* v. *Everett;* application the Court then granted.

Accordingly, upon the 21st April last, the officer of this Court attended before Master Humphrey with the original depositions, under instructions from the registry that the said Master might open them for his own use on such reference; but that the same were not to be used by the parties in the suit, and that he, the said officer, should wait and take back the evidence resealed by the Master.

The said Master read a portion of this evidence, and stated that as it was long, and he had to make a report thereon to the Court, he could not do so effectually, unless the original evidence, or an official copy of it, was deposited with him during such reference; and he, therefore, directed that a further application should be made to this Court to permit either such original depositions, or an official copy, to be deposited with him pending the reference before him.

Dr. Deane now moved the Court accordingly.

*Sir John Dodson.* The Master in the Court of Chancery is desirous of having the original depositions taken in this Court, in the suit of *Wood* v. *Watson* deposited with him. These depositions were never published; and I apprehend, that however much I might desire to comply with the Master's wishes, I am precluded from doing so by the rules of this Court. In permitting them to be attended with for his inspection, I have gone to the utmost length that either justice to the party concerned or the rules of this Court will allow. I have been informed, too, that under the new rules of the Court of Chancery there is no necessity for the course adopted; but if there were, I am not prepared to admit that, on that account, this Court can be called upon to depart from its own rules. I cannot extend the order. The officer may attend with the depositions as before.

Proctor, Tatham.

**[5]** BROADWOOD *v.* HOLLAND. The Consistory Court of London, May 17, 1853.—Proceedings in a suit for an inventory and account stayed until the result of proceedings in the Court of Chancery for the administration of the estate are known.—When proceedings have been commenced in the Court of Chancery the proctor is not justified in concealing that fact from the Court.

[S. C. 17 Jur. 653.]

Matthew Broadwood, late of Oxendon Street, Haymarket, died in the month of September, 1840, intestate, leaving Charlotte Broadwood, his widow and relict, and two minor children, David and Frederick. In the month of October, 1840, letters of administration were granted to the widow. She afterwards married, and again became a widow. On the 29th June, 1852, David Broadwood, the only then surviving son, took out a citation under seal of this Court, calling upon the administratrix Charlotte Holland, formerly Broadwood, to exhibit an inventory and account. On the 17th November she appeared personally, and was assigned to exhibit the same on the next Court-day. The cause then stood over until the 18th January, 1853, when the Judge, Dr. Lushington, at the petition of the proctor, pronounced her in contempt for not having exhibited the inventory and account as assigned, directed such contempt to be signified, and, on the further petition of the proctor, gave leave for the administration bond to be attended with and produced on the same being sued for at common law. On the following day, January 19th, Mrs. Holland appeared before a surrogate, took the usual oath, and was absolved from her contempt. A proctor then appeared for Mrs. Holland, and brought in an inventory and account duly sworn to by her. On the following Court-day, 26th January, the Court was moved to rescind so much of the order of the 18th January as directed the administration bond to be delivered out of the registry and produced, on the same being sued upon at common law. The Court refused to rescind the same, on the ground that such a course would imply error on the part of the Court in having made such order; whereas, in fact, at the time of making the order, there was a clear breach of the bond in the non-delivery of the inventory. But such inventory having been brought in on the following day, and the ground of the order being thereby removed, the Court directed the said order to be suspended. On the 4th sess. of Hilary term, the 10th February, the proctor of David Broadwood declared he objected to the inventory and account, prayed to be heard on his petition, and was assigned to deliver his act to Mrs. Holland's proctor upon the bye-day. This assignation was continued until the 2nd sess. of Easter

term, 29th April, when, upon Broadwood's proctor praying further time, on the ground that proceedings were pending in Chancery, counsel [6] appeared for Mrs. Holland and said that that was a sufficient ground for her dismissal from the suit in this Court, and moved the Court accordingly.

The judge complained that no notice of this motion had been given, and no papers had been sent to him, and directed the matter to stand over.

Affidavits made by the solicitors concerned for the parties in the suit in Chancery were brought in on both sides. From these it appeared that David Broadwood filed a claim for the administration of his father's estate against Mrs. Holland the administratrix, on the 22nd June, 1852, seven days before he cited her in the Consistory Court; that it had been referred; that the master had taken the accounts, and was nearly ready to make his report thereon; and further, that the parties to the suit in the Court of Chancery were identical with the parties to the suit in this Court.

Counsel now moved the Court to dismiss Mrs. Holland from this suit. The maxim of law, nemo debet bis vexari, fairly applied. That it is not applicable merely to a res judicata is shewn by the fact that the Courts of Common Law will interfere sometimes to stay proceedings in ejectment, as in the case of *Doe d. Pultney* v. *Freeman*, before Lord Kenyon (cited 2 Sellon's Pract. 144). The consolidation of actions proceeds upon the same principle. It has been recognised, too, in the Ecclesiastical Courts. In *Brotherton* v. *Hellier* (2 Cas. temp. Lee, 134) Sir George Lee said, "In the case of a creditor, or next of kin, who files a bill in Chancery and prays an inventory there, the Court will oblige him to make his option which Court he will proceed in; because it is unjust that the executor or administrator should be harassed in both Courts by the same person for the same thing." So in *Pearson* v. *Gamon* (2 Cas. temp. Lee, 269), and in *Middleton* v. *Rushout* (1 Phillim. 247). Mrs. Holland might have appeared under protest, but was at that time inops consilii. As soon as her proctor discovered that the suit was pending in the Court of Chancery, the application was made for her dismissal from the suit in this Court. The question of the bond is entirely distinct; that is between other parties. The order respecting it has been suspended. The sureties would probably have a good answer when called upon to shew cause why the bond should not be given out for the purpose of being sued upon at common law.

Dr. Jenner opposed. The cases cited are not authorities to bind the Court, but merely obiter dicta. The real question at [7] issue is the administration bond. The affidavits shew there has been mal-administration of the estate; the administratrix is in poor circumstances, and unable to pay the parties entitled in distribution; their only remedy, therefore, is against the sureties. This remedy would be taken away if Mrs. Holland were to be dismissed from the suit.

May 17.—*Dr. Lushington.* This is an application made on the part of the widow, who is the administratrix in the case, that she may be dismissed from the proceedings which have been instituted against her. This is opposed on behalf of the son, who is entitled to part of the property, his father having died intestate; and the prayer on behalf of the son is that the Court will not dismiss, as I understand, the sureties in the administration bond from any observance of justice to be enforced in this Court.

Now, all the parties have grievously mistaken their way in this case—grievously so. The first proceeding in this Court bore date on the 29th of June in last year; and, as I understand, proceedings had already been commenced in Chancery on the 22nd of June.

Now, supposing the party was aware of these proceedings in Chancery, it was a deception on the Court to have allowed the proceedings to take place here without that being communicated to the Court. Whatever the effect might be which the Court would have attributed to that suit, it was clearly a matter which ought to have been made known to the Court for it to exercise its own judgment upon. Instead of that the Court is unfortunately left in ignorance of the proceedings till a late period, till the cause had gone on; and the Court, according to the ordinary course of proceeding, had no option but to pronounce Mrs. Holland in contempt, which it never would have done, or thought of doing, had it been intimated that there were proceedings in the Court of Chancery for the purpose of obtaining a due administration of this estate.

However, so it was; and on the 18th of January, 1853, I did, at the prayer of

the party, cause this contempt to be signified, and gave leave for the administration bond to be produced on the same being sued for at common law.

Now, it is very true that Mrs. Holland was equally to blame in not making known to the Court—not having appeared—that such proceedings were instituted against her. If she had appeared and stated the fact, the Court would have held its hand. It is equally clear, supposing the proctor for Mr. Broadwood to be aware of the proceedings in Chancery, that the decree was obtained behind the back of the Court, if I may [8] use the expression, because it was in ignorance of what it was doing.

The course the Court would have taken, if it had been apprised of all these facts, would have been as plain as it is possible to be. It would have said on the party being cited, and being informed of the proceedings, "I hold my hand till the result is known of what has taken place in Chancery;" then if it had turned out that there was a decree against the party proceeded against in this Court and in Chancery, and that that decree could not be enforced without its aid and assistance, certainly then the Court would have afforded its aid and assistance. That would have been the state of the case instead of the Court doing what now unfortunately and unwittingly it has done.

It appears that, on the 19th of January, Mrs. Holland took the usual oath; she was absolved from her contempt; then she appeared by a proctor, and then for the first time the Court was apprised of all these circumstances.

The course I have now to pursue is equally clear. I shall not dismiss Mrs. Holland, unquestionably. The plea of alibi pendens, which in substance is intended to be set up, does not apply to this proceeding, and cannot, so far as relates to the bond being attended with. Of course it applies to the inventory and account; that is, the administration of the estate. That suit is going on in Chancery, and the Court would never pretend to exercise its limited power for the purpose of ascertaining whether she is really a debtor to the estate or not. But I shall not dismiss this suit altogether for this reason—if it should turn out that in the Court of Chancery the decree passes against her, that she does not or cannot comply with that decree, then I must hold the power and authority in my hand, if the Court of Chancery should direct it, of ordering the bond to be attended with in the Court of Chancery, or a Court of Common Law. And be it observed that this is not the first time when, at the instigation of the Court of Equity, the bond has been directed to be attended with in a Court of Equity or Common Law.

What I shall do is to stay all these proceedings till those in Chancery are known; and, upon their being known, at the instigation of that Court—not at the suitor, I do not bind myself to that—the Court will adopt those measures best calculated to do substantial justice in the case.

[9] IN THE MATTER OF THE WILL OF THE LATE NAPOLEON BONAPARTE. Prerogative Court of Canterbury, Feb. 17, 1853.—An original will, deposited in the registry of the Prerogative Court of Canterbury, can only be delivered out for the purpose of being given into the custody of the legal authorities of some other country, and that upon good cause shewn.

[S. C. 2 Rob. Ecc. 606; 17 Jur. 328.]

Napoleon Bonaparte died on the island of St. Helena on the 5th May 1821, leaving property under the value of 600l. within the province of Canterbury. His will with seven codicils, which had been proved in this Court in August, 1824, by one of the executors Charles, Count de Montholon, had remained in the registry up to the present time. A proxy of consent had been executed by the Count de Montholon, and an affidavit of Lord John Russell brought in, to the effect "that an application had been made by the French government to the government of her Majesty for the original will of the late Napoleon Bonaparte, now deposited in the registry of this Court, to be delivered over to the French government; that her Majesty's government considered it advisable, on grounds of public policy, that such application should be complied with, and that the will should be delivered out of the registry to her Majesty's principal secretary of state for foreign affairs, in order that the same might be by him forthwith delivered over to the French government accordingly." There was also an affidavit from the solicitor who had acted in administering the estate, to shew that no one would be prejudiced by the motion.

The Queen's advocate (Sir J. D. Harding) now moved the Court, on these grounds, to decree the will and codicils to be delivered out of the registry to her Majesty's principal secretary of state for foreign affairs, in order to be delivered over to the French government. He cited as precedents the cases of *Mary Renton*, 19th May, 1791 (not reported), *Duncan Forbes*, 23rd November, 1792 (not reported), and *Sir Herbert Taylor*, 4th July, 1839 (not reported).

*Sir John Dodson.* This is an application at the instance of the lords commissioners of the treasury that the will and seven codicils of the late Napoleon Bonaparte may be delivered out of the registry of this Court to her Majesty's principal secretary of state, for the purpose of their being given up to the French government. The ground on which the application is made is that of public policy. That is the reason assigned in the affidavit of Lord John Russell, and it has been relied upon in a great measure by the learned counsel who makes the **[10]** motion, and who stated that it was sufficient of itself to induce the Court to grant the prayer. But I apprehend that it is by no means sufficient to state that the proposed measure will be advantageous in point of public policy; it is further necessary to shew, and the learned counsel seemed to feel it, that the step proposed to be taken is conformable to law and comes within the authority of the Court. Undoubtedly this Court, like other Courts, would be most desirous to carry into effect the views of her Majesty's government; but however desirous it may be to do so, it cannot venture to go beyond the limits of legal authority. In a country governed by law it is necessary that the Court should look to the law of the country and not to the will and desire of the government. For instance, in the Prize Court of Admiralty it was by no means unusual for the Crown to send down an order that a vessel seized as a prize of war should be delivered up, and the Court obeyed it unless there had been a final decree condemning the ship and cargo to the captor. When that has been the case, the Crown has no longer power to release it; the property becomes vested in the captor.(*a*) Until that sentence has passed, it is the property of the Crown; consequently the Crown has the power of delivering it up, but after that period it has not. In this case the learned Queen's advocate has pointed out to the Court, not only that this motion is consonant with the views of her Majesty's government, but has also cited cases to shew that it is within the power of the Court to order the will and codicils to be delivered out of the registry for the purposes he has mentioned. The first case cited was that of *Mary Renton*, which occurred in 1791. In that case the will was proved here, and ordered to be transmitted to Edinburgh to be there deposited in the proper office for the registry of wills. But it was necessary, for legal purposes, that the will should be sent to Edinburgh, because it was stated that it was impossible to make a title to some property unless the original will was transmitted there. I col-**[11]**-lect from that case that the party was a domiciled Scotch subject, though the will had been proved in Doctors' Commons. The Court thought itself competent to make the order, and it accordingly decreed the will to be delivered out of the registry of the Court, for the purpose of its being deposited in the registry of the proper Court for the custody of wills at Edinburgh.

The next case mentioned was that of *Mr. Duncan Forbes*, which occurred in 1792. In that case the will was ordered to be delivered out of the registry for the purpose of its being placed in proper custody in the island of Grenada. But it there appeared that the will had been originally proved in that island, where the testator died; it was then sent over and proved here, and the Court directed it to be returned to

(*a*) In the case of *The "Elsebe"* (5 C. Rob. 173), Lord Stowell delivered an elaborate judgment upon this point. The government had ordered the release of several vessels, being part of a Swedish convoy, under particular circumstances. The question made on the part of the captors was, whether the Crown had such a power, or rather whether a right and interest in the thing taken did not vest in the captor at the time of seizure, under the grant of prize made to captors by the order of council, the proclamation, and the Prize Act, in such a manner as to entitle the captor to proceed to adjudication, notwithstanding an order of release on the part of government. Lord Stowell concluded his judgment in these words, "On the whole case I am of opinion that all principles of law, all forms of law, all considerations of public policy, concur to support the right of release prior to adjudication, which I must pronounce to be still inherent in the Crown."

Grenada. That case, for the reasons I have stated, is not very similar to the present. The last case cited, that of *Sir Herbert Taylor*, seems to have a much more direct bearing on the question before the Court. That occurred in 1839. It appeared that Sir H. Taylor had made a codicil to his will at Rome; that codicil was proved in London, and was afterwards ordered to be delivered out for the purpose of being given to the legal authority for the proper custody of wills in that country. That seemed to approach more nearly to the present case than either of the others mentioned by the Queen's advocate. Upon consideration of the matter, I think there is sufficient to justify the Court in complying with the prayer that has been made, but not exactly in the terms in which it was couched. That I cannot do. I am at liberty to follow the course pursued in the case of *Sir Herbert Taylor*, in which the Court directed that the codicil should be delivered out for the purpose of its being recorded or filed in the proper Court, or deposited with the legal authorities, a notarial copy of the will being left in the registry of this Court. Here I may decree the will and codicils to be delivered out, not for the purpose of their being delivered to the French government, because I apprehend I cannot do that; but I can order them to be delivered out for the purpose of being sent to and being put into the custody of the legal authorities in France, or to be recorded in the proper place there. I shall accordingly direct the registrar to attend on the secretary of state, and deliver the original will and codicils to him, notarial copies having been first made, and to take his receipt for them. It must be understood that they are to be delivered over to the secretary of state for foreign affairs, for the purpose of being delivered by him to the legal authorities in France.

The Queen's Proctor.

**[12]** A. FALSELY CALLED B. *against* B.(*a*) Consistory Court of , April 21, 1853.—Marriage declared null and void by reason of the husband's impotence, notwithstanding there had not been triennial cohabitation, and there was no visible defect. Costs against the husband.

[S. C. 2 Rob. Ecc. 625, nomine *N———r.* v. *M———e.* Referred to, *Lewis* v. *Hayward*, 1866, 35 L. T. (C. & M.) 105; *G.* v. *M.*, 1885, 10 A. C. 196.]

The facts of this case will sufficiently appear from the judgment.

*Dr. Lushington.* This is a suit brought by A. against B., to whom it is admitted she was married in 1848, and she prays the Court to pronounce such marriage to be null and void by reason of B.'s alleged impotency.

The parties separated in 1850, so that the cohabitation lasted only two years and some months. The suit was brought early in the year 1851. The man was about forty-five, and the woman about thirty years old at the time of the marriage. The libel is in the usual form.

Before I consider whether any and what legal consequences result from the cohabitation, either as regards the period during which it continued, or the circumstances attendant upon it, I will direct my attention to the two main issues—whether any incapacity exist in the woman, and the impotency of the man, and the evidence to prove it.

With regard to the first issue, the affirmative of her own fitness, necessarily pleaded by the woman, is contradicted in the plea and in the answers; and the man imputes to her either natural or supervenient incapacity. The report of the medical men states that she is a virgin, and that no impediment exists on her part; and this opinion they assert in very strong terms, having examined her with reference to the defect imputed. There is no opposing evidence worth consideration. I conclude, therefore, that she is a virgin, and capable of consummation.

With respect to the second issue, I must weigh the evidence with due consideration of the two facts which I hold to be proved, and which I have just mentioned. The primary evidence is the report, and from that I conclude that there was no defect whence impotency could be inferred visible on inspection. The evidence of the medical witnesses in the first part of the report is to the effect that there is apparent

---

(*a*) This case was heard in camerâ, but its importance requires it to be reported. For obvious reasons the names of the parties, as well as such circumstances as might identify them, are omitted. The Queen's advocate (Sir J. D. Harding), Dr. Addams, Dr. Bayford, and Dr. Twiss appeared for the respective parties.

capacity, or rather no apparent incapacity, in the man. Then follows the most important and, as I think, the most difficult part of this report. It is in these words, "that from his failure to accomplish sexual intercourse during a long period of cohabitation, we believe the said B. to be **[13]** impotent as regards the said A., and that such impotency cannot be removed by art or skill." Some discussion took place at the bar as to the meaning of this paragraph, whether the inspectors meant to say that the man was incompetent with respect to all women, or only with respect to this one. I must say I never entertained any doubt as to the true construction of this part of the report; but ex majori cautelâ, I desired a communication to be made through the registrar to one of the inspectors for an explanation. That explanation was made known to the proctors on both sides; it accords with what I conceive to be the plain meaning of the words, that the inspectors said and intended to say only that B. was incompetent quoad hanc.

Let me consider the effect of this restricted meaning, whether the report could have been, or, in order to influence the judgment of the Court, ought to have been comprised in terms which would have included the whole female sex. If the inspectors upon examination discover apparent impotency, that is, natural defects or injuries, the result of which their medical skill enables them to estimate, they may of course certify to impotency as to all women; but where there is no defect or injury apparent, what means have they of judging of impotency at all? I apprehend the primary ground of their judgment must be non-consummation after cohabitation for a long period of time, and no further or other assistance can they have, save that they may have been accustomed to advise in similar cases, and so have gained a species of experience, not of fact but of inference from fact. How under these circumstances do the media concludendi and the means of forming a judgment, possessed by these medical gentlemen, with regard to this latter paragraph, differ from the means possessed by the Court or any other person? In no other respect, I apprehend, than in the opportunity of frequently or more frequently having to consider circumstances of this description. The main ground of conclusion is non-consummation after long cohabitation. Why is such non-consummation evidence of impotency at all? Because, according to the ordinary course of nature, consummation does take place where persons both competent cohabit together. When therefore, after such cohabitation, the wife is found to be a virgin, and capable of consummation, the absence of consummation must necessarily be attributed to the apparent or non-discoverable impotence of the man.

All that I have now said is consistent with the known rule of law on this subject, which rule of law is founded upon sound principles of reason. But the report in this case narrows the averment of impotence to quoad hanc. Does the rule of law do more, or can it do more?

**[14]** This rule of law and the report necessarily go on the same grounds and no other—non-consummation after opportunity. Who by possibility can say that such a man is necessarily impotent as to all women? It may be so, or it may not. There is no evidence to establish the affirmative. The utmost that can be said is that a man impotent quoad hanc, would be impotent as to all. This, however, is inference, and not proof.

I abstain from entering into further useless speculation upon the subject. I think the report does go the whole length that the inspectors were justified in going. If I should be threatened with the danger of the man marrying again and having children, the answer is that the rule of law to which I have adverted does not and cannot provide against such danger. For the Court will not adopt the doctrine of the nullity of such second marriage by reason of the Church having been deceived.(*a*) I will add

(*a*) In *Welde* v. *Welde*, 2 Lee, 578, the Court is reported to have said, "If the parties should be divorced, and both should marry again, and he should have children by the second marriage, these second marriages must be by law set aside and the first marriage declared valid; for when the Church appears to have been deceived, the sentence must be revoked." Dec. lib. iv. tit. 15, c. 6. But in *Bury's case* (5 Rep. 98 b.), children born in such second marriage were adjudged legitimate, on the ground that, even admitting the second marriage to be voidable, yet it remains a marriage until it be dissolved, &c. Dr. Lushington, however, seems to intimate an opinion that such second marriage would not be deemed voidable.

one observation before I leave this part of the case, an observation, indeed, apparent to all, that impotency quoad hanc is just as prejudicial to the individual woman as universal impotency.

I come then to the conclusion that I am upon this ground justified in pronouncing this marriage to be null and void unless I am prohibited from so doing by some countervailing rule. The ordinary rule is, that there must have been a triennial cohabitation. After a triennial cohabitation without consummation, the law presumes impotence, though no defect be apparent; whether impotence universally, or impotence quoad hanc, the law says nothing, and can say nothing. In the present case the parties lived together for more than two years, but within the words of the rule the case certainly does not come. What, however, are the principles upon which this rule is founded? That there should be a cohabitation of so long a period that, if the man were potent and in good health, no temporary impediment could have prevented consummation, according to all the reasoning and experience which the subject admits of. By temporary impediment in such a case, I mean, nervous feeling on the part of the man, or resistance from fear on the part of the woman. Both causes preventing consummation, yet both causes incap-**[15]**-able of proof except by the testimony of the parties themselves. If such causes exist, no man can judge of the duration of such causes; there is no sound reason why they should terminate at the expiration of any particular period. The rule is founded on probability alone. The man may be incapable up to the moment when the three years have expired, and then capable; the law cannot meet all possibilities.

The duration of three years then does not mean lapse of time alone, but lapse of time combined with facility for consummation. Within certain bounds this facility must differ in all cases. Seldom, if ever, in cases of this description, do the parties sleep together constantly for the three years, nor has such strictness ever been required in any case to my knowledge. Time alone, even if three or more years, would not be sufficient unless there was also adequate facility for consummation; neither would facility for consummation, unless of duration to overcome temporary impediments. This, unless my judgment deceives me, is the true principle on which the rule depends.

I will now consider what, with reference to the circumstances of this case, are the decrees which the Court might pronounce. First, I might dismiss B. on the ground that A.'s case was not proved according to the strict rules of law. Secondly, I might, according to *Welde* v. *Welde*,(*a*) direct A. to return to cohabitation. Thirdly, I might pronounce that the marriage was null and void.

As to the first, looking at the evidence in this case, and even at the precedent in 2 Lee as to this point, I could not adopt it unless I were of opinion that the law imperatively compelled me so to do, or in other words that a triennial cohabitation was not only indispensable to a sentence in favour of the wife, but that without it the husband was entitled to be dismissed.

The second course I must follow, should I be of opinion that the rule of triennial cohabitation is absolutely binding. It must be admitted that such is the general rule in cases of non-apparent impotency. In *Lewis* v. *Lewis*,(*b*) cited in *Welde* v. *Welde*, the rule was enforced. In *Welde* v. *Welde* the parties had been married more than three years, but a great part of that time had lived separate, and further cohabitation was inferred. That is the spirit of the rule and not the letter. In *Greenstreet* v. *Cumyns* (2 Phillim. 10) the libel alleged that the husband's impotency was apparent; but this was disproved by the medical evidence, and he was found impotent on his own admission. Lord Stowell pronounced the marriage void, though only of two years' dura-**[16]**-tion. That was clearly a case of latent impotency, yet the Court thought it was not bound by the rule of triennial cohabitation. In Scotland there is no fixed period for cohabitation. In former times, indeed, it was three years; but the Courts now require that that shall be a sufficient cohabitation, according to the circumstances, to test the impotency. In *Sparrow* v. *Harrison* (3 Curt. 16) actual cohabitation was not so long as in the present case, but the Judicial Committee pronounced for the nullity. The marriage had taken place seven years before the separation, but it is not the period of marriage, but of cohabitation, to which this Court must look.

---

(*a*) 2 Lee, 578. Before Dr. Bettesworth, in the Arches, in the year 1731.

(*b*) Before Sir John Cooke, in the Arches, in 1702.

But admitting the general rule, are there not circumstances which would justify the Court in departing from the letter of the rule? I think there may be such, provided the actual cohabitation has been sufficiently long, together with the evidence, to satisfy the Court that the powers of the husband have been fully tried. The health of the wife may render such further cohabitation dangerous to life, and the parties may be so alienated that the attempt would be wholly futile.

Here I have the evidence of a medical man that A.'s health is already seriously impaired by distress of mind. Since the middle of 1850 the parties have de facto been separated. I do not inquire who is to blame; it is the fact only to which I advert. I think that to compel this lady to return to cohabitation would not only be a useless, but might be a mischievous, application of a technical rule, which in its spirit does not in my opinion apply to this case. I think I have no right to expose this lady to the humiliation, and probable injury to her health, which might be the effect of a further cohabitation. I therefore pronounce for the nullity, and the costs must follow the decree.(*a*)

Proctors for the wife, Fox, Nicholl & Fox; for the husband, Abbot.

**[17]** THE "MEDORA." The High Court of Admiralty, May 4, 1853.—The services of a steam-tug, within its usual locality, not necessarily towage, but may, by circumstances, be raised into salvage.

This was a cause of salvage, promoted by the steam-tug "James and Emma" against the brig "Medora," for services rendered on the night of the 12th December last. The owners contended that the service was merely towage, not salvage,(*b*) and tendered 4l., which was refused.

The circumstances of the case are stated sufficiently in the judgment of the Court.

Dr. Twiss appeared for the salvors; Dr. Addams for the owners.

*Dr. Lushington.* The Court has much to lament in this case. It has to lament, whatever may be its ultimate decision, that a case, where the amount involved is so exceedingly small, should have been brought before this jurisdiction. It has to lament the great multitude of affidavits which have been made on both sides; and it views with great sorrow the contradiction that prevails between them.

I have been urged to look at this case, and to form my opinion as to which side may have been guilty of the offence of perjury. This has never been done by any of my predecessors during the time I have practised in these Courts. The doctrine

---

(*a*) In *Lewis* v. *Lewis* a libel, in which no visible defect was laid, was rejected on the ground that it was given in before the three years were expired. In *Welde* v. *Welde* the parties had been married, but had not continuously cohabited for three years. But the husband denied his impotence, and the report of the medical inspectors supported his denial. In *Greenstreet* v. *Cumyns* the parties had been married somewhat more than two years, yet the husband in his answers admitted his impotency, and the report of the medical inspectors confirmed this admission. In *Pollard* v. *Wybourn* (1828), 1 Hagg. 725, though the husband had not given in his answers nor submitted his person to inspection, the parties had been married twelve years, there was a certificate that the woman was virgo intacta et apta viro, and there were also two confessions of the man of his own incapacity to two medical witnesses. In *Sparrow* v. *Harrison* (1841), 3 Curt. 16, there had been occasional cohabitation for about seven years, and though the husband had withdrawn himself from the jurisdiction of the Court, and refused to submit to inspection, yet in his answers he had admitted that he had never consummated the marriage.

(*b*) In *The "Princess Alice,"* Dr. Lushington delivered an elaborate judgment on this point, and stated the principles applicable to the case thus: "Without attempting any definition which may be universally true, a towage service may be described as the employment of a steamer to expedite the voyage of a vessel, when nothing more is required than the accelerating her arrival at the place of destination. Many circumstances, however, are constantly arising which will give to a towage service the character of a salvage service: it may be sufficient to mention some of them only; as where a ship is disabled in her hulk or rigging, where she is aground, or where the performance of the towage service is necessarily attended with danger, or extraordinary labour, or risk to the steamer. These and similar distinctions and circumstances deserve very careful consideration." 6 Notes of Cases, 585.

of Lord Stowell, followed up by Sir John Nicholl, and acted upon by Sir Christopher Robinson, was to get at the truth of the case, but never to take upon themselves to pronounce that one party or the other had been guilty of perjury. See the difficulty in which the Court would involve itself by undertaking so hopeless a task. I hold in my hand thirteen affidavits made on behalf of the case of the salvors; and ten of these are made by persons perfectly disinterested in the result. I apprehend nothing would justify me in coming to the conclusion that they have been guilty of the offence of perjury.

**[18]** The real question for the consideration of the Court is, whether this is a case of ordinary towage, or whether there are any other ingredients which would justify the Court in considering it rather in the nature of a salvage service, though one of a very inferior character.

Much has been said as to whether the vessel was upon the Herd Sand or not. On the one side it is distinctly sworn by persons on the spot that she was; and, on the other, that she was not; and one individual has gone the length of saying that he went between the vessel and the Herd Sand. The harbour master says that he continued on the sand till twelve o'clock at night; that he saw the "Medora" brought close to the edge of it; that it is a steep sand, and that he does not consider that she was on the sand during the night in question, though other vessels were. If he used a phrase of this description—and one would suppose that he had ample opportunity of swearing whether she was on the sand or not—is it to be wondered at that other individuals may have taken a different, though, perhaps, an erroneous view of the question, and have apprehended that she was on the sand?

Now, in order to ascertain whether it is a case of towage or not, I will look solely to the evidence on behalf of the owners. According to their statement, the night was perfectly calm, but dark; and there was no wind, or what there was was from S.S.W. In consequence of the draft of waters coming down no less than fifteen vessels broke from their anchors and drifted down the river. The whole of the river became, ex necessitate, in a very dangerous state. When I see that fifteen vessels drifted down the river, that the "Countess of Durham" is sworn to have been lost, that another vessel was rescued at the expense of 150l., and that another was on the sand, I must come to the conclusion, beyond all doubt, that any services rendered by steamers going out that night to render assistance to vessels so circumstanced, are not to be considered as mere towage. That very nearly disposes of the question. The steamer finds the vessel at anchor, I will not say on the Herd Sand, but in its immediate vicinity. She had a hawser ready to give assistance when the anchor was got up, and was compelled to wait till that was done. The service lasted three or four hours, and I think the tender is not sufficient. Again expressing my regret that I have to decide a case of such small value, I shall give the sum of 15l.(*a*)

Proctors for the salvors, Deacon; for the owners, Burchett.

**[19]** THE "HEDWIG." The High Court of Admiralty, April 29, 1853.—If a vessel out at sea, beyond the limits of pilotage ground, requires assistance to conduct her to a place of safety, that is not pilotage, but salvage.—Fishermen salvors cannot claim compensation for the loss of their fishing, unless they clearly state to a foreign master their intention to do so before their services are accepted.—Tender of 30l. overruled, 50l. given; but costs refused, because it appeared from salvors' affidavits that they had refused 80l.

[Applied, *The "Racer,"* 1874, 30 L. T. 904; 2 Asp. M. C. 317.]

This was a cause of salvage by the master, the owners, and the crew of the

---

(*a*) Criteria of salvage merit. "The amount of remuneration must depend on all the circumstances. It is not a mere question of work and labour, not a mere calculation of hours, though time is undoubtedly an ingredient; but there are various facts for consideration—the state of the weather, the degree of damage and danger as to the ship and cargo, the risk and peril of the salvors, the time employed, the value of the property; and, when all these are considered, there is still another principle—to encourage enterprise, reward exertion, and to be liberal in all that is due to the general interests of commerce, and the general benefit of owners and underwriters, even though the reward may fall upon an individual owner with some severity." Sir John Nicholl, 3 Hagg. Adm. Rep. 204.

"Ramona," of Yarmouth, a fishing-lugger of about 53 tons burthen, and 11 hands, to obtain a recompense for alleged salvage services rendered to the "Hedwig," a schooner of about 69 tons, bound on a voyage from Gottenburg to Hull with a cargo of timber and iron. The value of the property salved was 860l. A tender of 30l. had been made and rejected.

The act on petition on behalf of the salvors pleaded in substance that about 2 P.M. of the 8th of October last, during a heavy gale from the N.N.W., with a tremendous sea, they were riding at anchor about six miles to the S.E. of the "Lemon and Ower" light-ship in the North Sea, when they descried the schooner, reaching in under close-reefed sails; that in about half an hour they observed a large flag flying in her topmast rigging, but that the wind and sea were so heavy that they dared not set sail and proceed to her; that at 3 o'clock she had reached within the stream, and to the leeward of their lugger, but owing to the wind and tide being adverse could not fetch her; that the crew of the schooner waved and shouted to them, that they could not hear what was said, but observing the crew working at the pumps, they, with great difficulty, hove in their anchor, set their close-reefed foresail and bore down towards the schooner, over which the sea was making a fair breach; that her crew informed them in broken English that she was very leaky, and that they had lost themselves, and wanted them to go on board; that, after some time, three of them succeeded with great difficulty, and at the risk of their lives, in jumping for the schooner's quarter and getting on board; that at such time she had lost several stanchions and bulwarks on the starboard side, and one stanchion and part of the bulwark on the larboard, and had one foot and a half of water in the pump well; that her foretopmast staysail was split, and the main boom (which had been broken) was so badly warped, that the mainsail could not be set until she got into smooth water; that her master was [20] ignorant of his position, and informed them that he thought he was on the Well Bank, which was about 30 miles to the northward; that the master and crew soon went below, leaving her in charge of the salvors, one of whom took the helm, while the other two worked at the pump throughout the night; that their lugger kept close ahead of the schooner and at night hoisted their light as a beacon to her; that the wind continued to blow a heavy gale, and the sea frequently broke completely over the schooner; that soon after midnight they called up her master and crew to assist in veering her, which they did, and then again went to rest, and remained below till half-past four A.M. of the 9th; that they (the salvors) beat the schooner through Pakefield Gat, where she was boarded by a Trinity House pilot; that about two P.M. of the same day she was brought to anchor close to Lowestoft harbour. The act further alleged that, unless thus assisted, the schooner would have drifted upon some of the shoals to leeward, the master being quite ignorant of his position; and that, by reason of the said services, the lugger did not reach her fishing ground until the night of the 11th, having lost the fishing on the two previous nights; and that the average profit from fishing on the said ground, made on the said two nights by luggers of the same burthen as the "Ramona," was 60l. or thereabouts for each night.

The answer on the part of the owners of the "Hedwig" admitting to some extent their damaged state, alleged that, as she was approaching the English coast, her master, seeing a fishing boat about two miles off, hoisted a flag as a signal for a pilot, and about an hour afterwards, upon the "Ramona" coming alongside, hailed her, and requested one of her hands to come on board to pilot his schooner inside the banks to Yarmouth or Lowestoft; that the only flag hoisted on board the schooner was hoisted at her foretopmast head, and not in her rigging, and was the usual signal for a pilot and nothing more; that there was no waving nor shouting to the smacksmen, to whom no one spoke but the master of the schooner, who merely asked them to send a man on board to pilot her; that immediately upon the three smacksmen boarding her, he told them that he should employ one man only as a pilot, and that he required no other assistance whatever; that he insisted upon two of the men returning to their own vessel, and was only induced to allow them to remain on board the schooner upon their assuring him, as they did, that it would make no difference in the expense, and that the expense, which could be settled by the consul and gentlemen on shore, would not be much; that he never for a minute gave up the charge of his vessel to any person save to [21] his mate; that some of the crew never left the deck; that the regular watches on deck were kept as usual until the schooner got

into smooth water at noon of the following day; that none of the smacksmen worked throughout the night; but they sometimes persisted in working at the pumps, in spite of the master's orders that they should not touch them: that they occasionally pushed away the crew, and took forcible possession of the pumps; that soon after the men boarded the schooner, her master, noticing that the lugger was following, asked one of them why she was so doing; to which he replied, that there was too much wind for them to lay out their nets to fish, and that they were going into port; that two of the said men also stated to the same effect to the mate of the schooner.

The answer further denied specifically most of the allegations made on behalf of the salvors.

The reply on behalf of the salvors, and the rejoinder on the part of the owners, consisting chiefly of reciprocal denials, raised no further issue of importance.

Dr. Haggard and Dr. Jenner appeared for the salvors; Dr. Addams and Dr. Robinson for the owners.

April 29.—*Dr. Lushington.* In this case a tender of 30l. has been made, and, of course, in order to form an opinion whether that is a sufficient tender or not, the Court is bound to look at and to consider all the circumstances of the case as they appear in evidence; and, as usual, it is not a very easy matter to ascertain the truth where the statements on each side are so very conflicting. I think, on the present occasion, the difficulty is in some degree enhanced by circumstances to which I am about to advert.

It appears that the value of this vessel is 860l., and the service, whatever may be its nature, lasted about twenty-four hours. In cases of this kind the Court is in the constant habit of looking to the protest, but always with doubt and hesitation as to what consequences are fairly to be drawn from it, because it frequently happens that its contents depend much upon the notary public who draws it, whether he extracts all the necessary facts; in short, whether it be a perfect or an imperfect document. Upon the present occasion the protest is as full as is necessary for the purpose; but when the Court was about to consider it as a fair statement of the whole case it was met with this most unexpected obstacle—that it is denied by the master and the mate that it is a true protest. The master and mate swear, in their affidavit, that they well understand sea terms and general ordinary conversation in the English lan-[22]-guage; and I suppose, upon the faith of that, they make their protest in the English language; not so far as appears by interpretation. In the affidavit exonerating themselves, or attempting so to do, from certain statements therein contained, they say that, from inadvertence and mistake, that is, from their partial or imperfect knowledge, according to their own words, of the English language, certain words have been omitted of great importance. This statement is in no degree confirmed by the notary public, who ought to take care that there is no mistake in the protest, and that the whole instrument is understood. If he does not see that it is understood he deserts the duty of the office which he is sworn to perform, and instead of assisting the Court, necessarily leads it into doubt and difficulty. However, for very many purposes, I think myself fully justified in relying on this protest as containing a fair statement of the case.

It states the damage which was done to this vessel. "On Monday, the 4th of October, the top-gallant sail was split. On Thursday, the 7th, the wind had shifted to N.W. Appearers' said vessel shipped a heavy sea, which broke seven stanchions on the starboard side, and stove in and carried away all the bulwarks from the bows to the mainmast, knocking down and disabling two of appearers' crew; and large quantities of water having washed down the hatchways, it was necessary to set the pumps on and keep them constantly going." It states further that, "about half-past six o'clock P.M. of the same day, appearers shipped another heavy sea on the larboard side, which broke one stanchion and carried away a portion of the bulwarks, and stove in the upper streak of one of the small boats on the deck, again shipping at the same time large quantities of water down the hatchways, it being still necessary to keep the pumps constantly at work." They further say "that the pumps were so kept constantly at work till about 4 o'clock the next day, the 8th, when they observed a fishing-boat, and hoisted a flag to the foretopmast for a pilot; that, about an hour afterwards, the fishing-boat came alongside, the wind blowing a gale from N.W. and N. That appearers hailed them; that they wanted one man to pilot the vessel. These are the facts stated in the protest.

There is another document to which the Court always looks when it is produced for its consideration, namely, the report of the facts taken before the receiver of droits. On this occasion the Court is placed in this predicament: two copies of it differ one from the other; in one respect not material, in another it might be of very considerable importance. The omission as to **[23]** one is, as to the statement "as far forward as the mainmast." We all know that in cases of this kind the variation of a few words will alter the whole sense, meaning, and effect. And again, in a subsequent part, where they state "they would leave that to the consul on shore." The other copy of the report before the receiver has no such words.

I mention this, because, though it cannot seriously affect the judgment of the Court, yet it is absolutely necessary that something should be done to prevent it in future. I intend to direct the registrar to send the two copies to Messrs. Gowing and Son, and request them to certify to the Court which is the true copy, and also, if it is in their power, why there is any variation between them. If there be any good at all in the Wreck and Salvage Act; if it does not do more mischief than service, it is in taking these reports recenti facto; and if taken with great care and with perfect impartiality, I apprehend they would be of considerable use in assisting the Court to come to a right conclusion. The Court has seen some so concise that they have been of great assistance; others are so loose that it is impossible they can assist it.

Now the vessel having sustained damage, and two of the crew having received considerable injury, a signal was hoisted; and, accordingly, the rule which I laid down upon a former occasion,(*a*)[1] I hold it to be a signal for assistance, and not for a pilot. But, again, what was the nature of this case? Was it a case in which the words "pilotage" or "pilot" could with safety and propriety be applied? Why, the vessel was thirty-five miles out at sea. There are no pilots to be found there; that is out of pilotage ground altogether. It is true the vessel might require nothing but to be conducted to a place of safety; but that is not pilotage, it is salvage assistance.

Then in looking to it as a case of salvage, of course I come to consider the value of the services rendered. I do not apprehend that the vessel was in imminent danger; and, according to the statement of the salvors, as to the wind, it never could have brought her on the English coast. They say it blew a gale from the N.N.W. till twelve o'clock, when it veered and came back to N.N.E. So far as the Court can form an opinion there was no possibility of the vessel coming on any coast. The Court **[24]** will be governed by the value of the services rendered, and not by an ingredient imported into this case, viz. the alleged loss of the salvors. I think that the service rendered was of a salvage nature, deserving a fitting reward, for the use of the vessel herself, and for the detention of the crew; but if it be attempted, as has been done in this case, to say "we could have got in the herring fishery" the enormous sums which are stated in these affidavits, then I repeat what I said on a former occasion,(*a*)[2] no such sums ought to be awarded unless there was a full statement made to the foreign master, proved to my satisfaction, that, if the case came here, the demand would be to the immense extent made on the present occasion. I shall entirely reject from my mind all these six affidavits as to the alleged value of the service; and, not only because it would be a fraud on the foreign master to have effected the service without such disclosure, but also for another reason. I find it stated by the salvors that there was a heavy gale blowing the whole time. I find that when the service commenced they were at anchor; and I do not believe, that, if

---

(*a*)[1] In the case of *The "Felix,"* April 4, the Court said, "I have determined to decide these questions in this way—if the vessel is in a damaged state I shall determine that it is a signal for assistance, because the vessel wants it; but where the vessel is not in a damaged state, and a pilot only is wanted, I shall construe it to be a signal for a pilot. That seems consistent with probability."

(*a*)[2] In *The "Nicolai Heinrich,"* 17 Jur. 330, "The Court has to consider what has been the loss which the salvors have experienced in deserting their occupation of fishing and rendering this service. This latter circumstance is one to be treated with some tenderness, but the principle of taking into account the loss they have sustained is not to be carried too far. I entirely agree with an observation made by counsel on that point, that if the representation of the salvors as to the great loss they have suffered is true, considering the services they were called upon to render, they ought not to have taken charge of the vessel without having stated to the captain the sum

their affidavit be true, they would have fished at all. Still I am of opinion that this was a service entitled to be rewarded by a larger sum than the 30l. tendered. Leaving out of consideration all the supposed gain in the herring fishery, the judgment of the Court will be to overrule the tender and give the sum of 50l. But when I see it sworn by the salvors themselves in their own affidavit, that 80l. was offered and they refused it, I shall give them no costs, more especially when I look to the pretended value of the herring fishery. The next time salvors come before me with statements as to the herring fishery I think they will have reason to remember it.

Proctors for the salvors, Jenner; for the owners, Deacon.

**[25]** THE "HOUTHANDEL." The High Court of Admiralty, May 4, 1853.—Prima facie it is sufficient for salvors to shew that they conducted a vessel to a place of safety. The onus lies upon the objectors to prove that that place was not the one to which she should have been taken. Semble, it is not the duty of salvors to comply with the wish of a master to be conducted to a foreign port, to their own manifest inconvenience.

This was a suit for salvage, promoted by the masters, owners, and crews of the carrier cutter "Elizabeth," and the three fishing smacks "Ann and Francis," "Elizabeth," and "Britannia," against the "Houthandel," a Dutch galliot, of 138 tons burthen, valued with her cargo at 700l. It appeared that she was on a voyage from Christiansand, in Norway, to Harlingen, in Holland, laden with timber; when, upon the 7th October last, she met with a severe gale and was struck by a heavy sea, which broke and partly unshipped her rudder, and caused other considerable damage. About 7 A.M. on the following morning, when about thirty-five or forty miles from the Texel, she made signals of distress to the vessels proceeding in the cause. They took her in tow, and brought her safely to anchor at Lowestoft about 2 P.M. of the 10th October.

The service was not denied; but on the part of the Dutch owners it was alleged that the salvors had agreed with the master of the "Houthandel" to tow her to the Texel; that they intimidated her crew into leaving her, and that they had otherwise misconducted themselves by wasting and pilfering her stores. These averments were denied by the salvors, who further alleged in reply that it would have been extremely dangerous to proceed to the Texel at that time.

Dr. Haggard and Dr. Jenner appeared for the salvors; Dr. Bayford for the owners of the galliot.

*Dr. Lushington.* This is an application for a salvage reward, made on behalf of the owners, masters, and crews of four fishing smacks, amounting altogether in tonnage to 233 tons, with thirty-five men. They allege that they performed certain services to this vessel, which was in distress, and, therefore, claim to be rewarded.

The "Houthandel" was on a voyage from Christiansand to Harlingen; and I will first take the general representation of the salvors, and see how far it is supported by fact; and then, whether the defence of the owners is sufficiently or to any extent made out. The salvors represent that this vessel was at the time they saw her in a state of considerable distress. I think that that is a point which is not in any degree disputed in this case; because the Court was, and very properly so, referred to the protest made by the master—a protest which neither was nor could be contradicted in the facts which it contains. It appears that, on the day before that on which the salvors came on **[26]** board the vessel, a heavy sea struck her, and broke and partly unshipped the rudder. It is not necessary to go through the protest. It is stated that the vessel was driving at the mercy of the gale; that she was in an unmanageable state; and that they hoisted a flag for assistance. They state, moreover, that when the flag was hoisted she was then quite in an unmanageable

---

they would ask. I wish it to be distinctly understood, as these cases seem to be multiplying, that if persons engaged in fishing are employed in a service of this description, which is not really important, and afterwards think they can induce the Court to give them any possible amount of profit which they think they might have acquired, they had better go on with the latter and not afford their services. In cases of imminent danger, whatever amount of gain they would have acquired by fishing would undoubtedly be taken into consideration, but not in cases such as that now before me."

state; not that she had been so previously, but was so at that very period. In the first instance one of the salvors, according to their own statement, goes for the purpose of rendering assistance to this vessel, and a conversation takes place; but, from the state of the wind, or some other cause, there was not a clear understanding between the parties as to what was intended. The first salvor takes the vessel in tow; and a short time afterwards the tow rope was cut adrift. That proves to my mind that the master intended to be carried to the Texel, and finding they were taking her to the west instead of to the south-east he was dissatisfied, and cut the rope. But this does not shew in any degree that this was the apprehension or the intention of the original salvors, if I may so call them, because, from the very moment the rope was put on board the "Houthandel," they directed their attention to the English, not the Dutch, coast. About this time the three other smacks came up, and then the vessel is boarded by some of the persons; and, according to the statement of the salvors, the master and crew were so much alarmed, that they determined to quit the vessel, and carry away all their things. Whether they were instigated to the act, or whether they did it of their own accord, is a matter that may admit of considerable discussion; but the fact that they did quit the vessel, and go in separate divisions on board the three smacks, is undoubted. Immediately after that the vessel is taken in tow, and conducted across the North Sea to the port of Lowestoft.

The salvors say they are entitled to be rewarded upon several grounds. First, for having rescued the vessel, which, they say, was in considerable peril, and would have been lost but for them; secondly, that being engaged in carrying ice to a large number of vessels occupied in fishing, they made a great sacrifice, and lost a considerable pecuniary amount for the purpose of rendering this assistance.

Now, what is the answer on the part of the owners? They do not deny the condition of the vessel; they do not deny the necessity for assistance; they do not deny that assistance was successfully rendered; but they set up as a defence, not merely that this vessel ought to have been carried to the Texel, but they say that there was an engagement to that effect. I am **[27]** very clearly of opinion that there is no adequate proof of any such engagement having been entered into. Then the question arises, whether it was the duty of the salvors to take the vessel to the Texel, or whether they have discharged all which the law could require of them in carrying her to Lowestoft?

I entirely agree in all that has been cited by Dr. Bayford from the case of *The "Duke of Manchester"* (4 Notes of Cases, 575), that wherever salvors undertake to perform a service, it is their duty to shew adequate skill in performing it, so as to bring it to the best termination; but that case appears to me to be as little applicable to the present as can well be conceived. The "Duke of Manchester" was taken in tow by the steamer "Copeland," which might, with ordinary care, have prevented her getting upon Sandwich Flats. My judgment was affirmed by the Privy Council (*Shersby* v. *Hibbert*, 5 Notes of Cases, 470), and to the principle contained in it I am anxious to adhere; but I must not extend that principle to the present case, which appears to differ from it so essentially. How does the case stand? It is agreed that the Texel was a lee shore, but, on the other hand, the wind was favourable to conduct the "Houthandel" to it. It depends upon a variety of circumstances, upon which I am not competent to form an opinion, as to whether the vessel could have been carried to the Texel or not. When the case was first brought to my notice, this very point suggested itself to me, and I thought it right to mention it at the time, but neither party applied for the attendance of Trinity Masters.(*a*) The general rule on which I

(*a*) The practice of the Court of Admiralty in obtaining the skilled assistance in Court of the Trinity Masters, and out of Court of the registrar and merchants, has such peculiar advantages, that it is worth considering the principle upon which the Court proceeds. It is stated by Dr. Lushington in *The "Alfred,"* 7 Notes of Ca. 354: "With regard to the principle upon which the Court must proceed, I cannot quite accede to the arguments of counsel in support of the report. I apprehend that however incompetent I may be to discharge the duty devolving on me, yet it is a part of my duty, of which I am not entitled to divest myself, to form my own opinion upon the evidence laid before me, as to whether the items objected to have or have not been properly disallowed. I do not think that the instance which has been put, namely, the case where the Court is assisted by Trinity Masters, is either correct in

act is that if both [28] parties ask for Trinity Masters, I accede to the proposition; where one party only asks for them I read the papers and exercise my own judgment as to whether they shall attend; but where neither party prays them, I rarely direct them to be called in. So it is in the present case which I must now decide to the best of my own unaided judgment. Now it has been alleged that the salvors ought to shew that they have conducted themselves according to the safest mode of navigation; but I am of opinion that as they brought the vessel in safety to Lowestoft, and the objection is that they ought to have gone to another port, it lies on those who raise the objection to prove by adequate testimony to the satisfaction of the Court that it is right. Primâ facie, I am bound to believe on the credit of these persons, skilled as they are in navigation, that Lowestoft was as safe a port as the vessel could be conducted to.

But there is another question behind. I am by no means clear that had it been possible for the salvors to carry this vessel to the Texel, and that they had sufficient knowledge of the sands, they were bound to go out of their way to do it. I think I must dismiss that question altogether.

There is another point in the case to which I will advert, and that is, the alleged charge that the crew had been induced by the representations of the salvors to leave this vessel. It is almost impossible, amidst the contradictory evidence which appears in this case, to be able to say with confidence where the balance lies, and I must take the fact alone. I do not mean to say that the masters of the smacks conspired with their crews to induce the master and crew of the "Houthandel" to abandon the vessel; but it sometimes does happen that salvors are rather prone to induce a master and crew to leave a vessel, because it looks better, when they come into Court, to have a case where the master and crew have despaired so much of saving their ship that they have quitted it, while others saved it. I see nothing on the present occasion to justify the crew in having so done, but I am not satisfied that there was any conspiracy to induce [29] them to do it. In my final judgment I shall not rely on the abandonment as an ingredient in the case, proving that there was greater danger and risk than has been allowed on the part of the owners.

I must also refer to the charge which has been preferred of pilfering, of destroying the stores, consuming and making away with them. Such a charge as this must always be most distinctly proved. Where salvors are on board a vessel for the purpose of rendering her assistance, nobody can doubt that they are entitled to consume all that is necessary of the stores for the purpose of maintaining themselves in the discharge of that duty; and really, if there be some waste under circumstances of this kind, it is impossible for the Court to look into minutiæ or to rely upon it. When such a charge is set up by owners, by way of defence to a demand for salvage,

---

point of fact or apposite to the question: because I never yet pronounced a single decree, when I was assisted by Trinity Masters, in which I was not perfectly convinced that the advice they gave me was correct; and if I had entertained a contrary opinion, notwithstanding all their nautical skill and experience, I am clearly of opinion, having deliberated much on that question, that it would be my duty to pronounce such contrary opinion. The custom of the Court in asking the opinion of the Trinity Masters, is to request them to state their reasons and their explanations, and if these explanations are not satisfactory to the Court it does not take them; and the Court never allows persons, perhaps inexperienced in the administration of justice, to raise inferences from a supposed state of facts which does not appear in the cause. It fortunately has happened that, in but very few instances, has there been a difference of opinion between myself and the Trinity Masters, and in no case whatever have I pronounced any judgment except it was my own.

"Upon the present occasion the Court undoubtedly is disposed, in the first instance, to receive the report of the registrar and merchants with the strongest desire to believe that it is one correctly made, because the Court has from experience well known the pains, and labour, and judgment bestowed on these reports, which are very seldom objected to, and which I believe have given the greatest satisfaction to the public at large. But when a case is brought before me, and I have the evidence before me, if my judgment should differ from that of the registrar and merchants, I have no other alternative than to follow the dictates of my own mind."

it must be recollected that those who bring it have a great interest in supporting it. It appears to me that the charge is in no degree substantiated.

All that remains for the Court to do is to allot that sum of money which it thinks right and fit to give to the salvors. The whole value of the property is but 700l. For some reason, I cannot tell why, the action has been entered for no less than 600l.; and, what is worse, bail has been taken for that sum. The salvors could by no possibility have conceived that they would be entitled to that amount under any circumstances. With regard to the damage done to the hawser, and the loss of the ice, I mean to take that into consideration in the sum which I shall allot, which is 120l.

Proctor for the salvors, Jenner; for the owner, Deacon.

BROWNE AND THOMAS *v.* THOMAS. Prerogative Court of Canterbury, June 4, 1853.—Revocation of will by subsequent marriage.—Held, a party may plead the marriage generally, in order to obtain the answers of the other party as to the fact.

This was a business of proving, in solemn form of law, the last will of George Thomas, late of Old Broad Street, in the city of London, and of Woodside Lodge, Upper Norwood, deceased, bearing date 14th June, 1852, promoted by John Browne and Elizabeth Thomas, widow, the relict of the deceased, the executors named in the said will, against Henry Thomas, the brother and next of kin.

In the will the testator did not describe Elizabeth Thomas as his wife; but he gave her a legacy in these words: "I hereby give and bequeath to Elisabeth Thomas, of Woodside Lodge, **[30]** Weston Hill, Upper Norwood, all the furniture, plate, linen, jewellery, musical instruments, wine and spirits, belonging to me, now in the house we occupy (namely, Woodside Lodge, aforesaid), or may be in the house we are residing in at the time of my decease:" and further bequeathed her two-thirds of the residue, and nominated her executrix.

The will was propounded by the executors in an allegation, merely pleading the due execution of the will, and the appointment of John Browne and Elizabeth Thomas, his wife, executors.

A responsive allegation was then brought in on behalf of Henry Thomas, the brother, pleading as follows:—

First article. That George Thomas the deceased, in this cause, at the time of the execution of the will propounded in this cause, to wit, on the 14th June, 1852, was single and unmarried.

Second article. That on a day subsequently to the said 14th day of June, 1852, but the time more particularly the party proponent is unable to set forth, the said deceased duly and legally intermarried with Elizabeth Thomas, nominated and appointed an executrix in the said will, and one of the parties in this suit, whose maiden name the party proponent is unable to set forth.

Dr. Haggard and Dr. Twiss now opposed the admission of this allegation. It was desirable to take the opinion of the Court upon the proper mode of pleading revocation by marriage under the 18th section of the Wills Act, as this appeared to be the first case of the kind. The present allegation is far too general. The party should have made some investigations before opposing a will. He raises a point of law that this will is revoked by a subsequent marriage, and yet pleads no particulars of such marriage, not even its time or place, or the name of the lady. In fact it is nothing more than a "fishing" allegation to obtain the answers of Mrs. Thomas as to the fact of marriage. Parties who rely on a fact of marriage to revoke a will ought to be prepared to plead and prove some particulars respecting it. This allegation is merely a mode of asking a question, not pleading a fact.

Dr. Jenner, in support of the allegation, was not heard.

*Sir John Dodson.* I have no hesitation in admitting this allegation. It has been objected that the sole object of the party is to obtain the answers of Mrs. Thomas. But I apprehend parties have always a right to get an answer upon oath. There is nothing in this case to form an exception. **[31]** Two executors were appointed in the will propounded in this cause, one of whom is Elizabeth Thomas. A condidit has been given in on behalf of these two executors. On behalf of the brother of the deceased an allegation is brought in pleading that, subsequent to the date of the will propounded, the deceased intermarried with Elizabeth Thomas, the executrix. It

does not deny the execution of the will, but pleads that it has been revoked and nullified by a particular fact. That fact is peculiarly within the knowledge of the executrix; for she must know whether or not she was married to the deceased since the 14th of June, 1852; and I am clearly of opinion that the party is entitled to her answers upon that point, and therefore admit the allegation.

Proctors for the executors, J. K. and G. Burchett; for the brother, Glennie.

THE "PANTHER." High Court of Admiralty, May 25, 1853.—A vessel is not barred of her remedy in a case of collision by the mere fact of her having neglected to shew a light according to the orders of the commissioners, unless it appears that neglect in some degree contributed to the accident.

[S. C. 17 Jur. 1037.]

This was a suit for damage, by plea and proofs, promoted by the "New Union," a schooner of 162 tons burthen, against the "Panther," a steamship of 292 tons, belonging to the General Steam Navigation Company. The schooner was bound from London to Beesheer, in the Persian Gulf, with a general cargo of merchandise; the steamer was bound from Ostend to London with a general cargo and about twenty passengers. The loss sustained by the schooner was estimated at about 18,000l.

The libel on behalf of the schooner pleaded in substance that, about six o'clock A.M. of the 18th of December last, she was in mid-channel, and about a mile above the Nore light, on the larboard tack, heading E.S.E. with the wind from N. by E. and the morning clear; that while the crew were setting the reefed mainsail, the pilot, who was on the port bow, and the master, who was at the wheel, observed the two paddle-box lights of the steamer, distant about a mile, a little on the starboard bow, and rapidly approaching; that by order of the pilot the helm of the schooner was immediately put hard-a-port, and was so kept until after the collision; that she thereupon fell off several points; that the pilot loudly hailed the steamer to port her helm, but no notice thereof was taken by those on board; that shortly afterwards the steamer, without altering her course, ran stem on with full speed into the schooner, cutting her down below the water's edge, &c.; that the pilot, master, and crew thereupon got on board the steamer; that within a minute or two after the **[32]** collision the steamer backed clear of the schooner, and a boat having been lowered, the master, pilot, three of the schooner's crew, and two of the steamer's, boarded the schooner and found six feet water in her hold; that she was thereupon towed by the steamer to Shoeburyness, on the coast of Essex, where, being nearly full of water, she grounded on the sand, &c.; that the collision and the damage consequent thereon are imputable solely to those on board the steamship "Panther," to wit, from the want of a good look-out or otherwise on board that vessel; that the same were not owing to any misconduct of any description on the part of those on board the schooner "New Union"; that, &c.

The allegation on behalf of the owners of the "Panther" pleaded in substance that about a quarter past five, the wind blowing very heavy from N.W., and the morning extremely dark, she passed about half a mile to the northward of the Nore light, and proceeded up the river, her course then being about N.W. by W. half W.; that when about three miles above the Nore light, at about a quarter before six o'clock, the schooner "New Union" was seen from her distant about half a mile, and about two points on her starboard bow, running down with the wind (which still blew strong from about N.W.) free on her larboard quarter, and the tide then about half an hour ebb, and still well open on the steamship's starboard bow; that had the two vessels continued such their courses no collision could have occurred, but that when within about three or four ship's lengths from the steamship, the helm of the schooner was put hard-a-port, which brought her athwart the tide, and right across the track and bows of the steamship; that the helm of the steamship was thereupon immediately also put hard-a-port, and the engines stopped and reversed by direction of her commander; that, notwithstanding, the schooner almost immediately, with her larboard quarter near the main chains, came into contact with the stem of the steamship (although her engines at such time had made three or four revolutions astern) with such force that, &c.; that at such time there was a good look-out kept on board the steamship by the watch, and there were three lights exhibited in exact accordance with the orders of the commissioners for executing the office of lord high admiral,

made in pursuance of the provisions of 14 & 15 Vict. c. 79, s. 26; that at such time the schooner did not, as required by the said orders, shew a bright light, or any light, in any position that could be seen by those on board the steamship; and that the collision was occasioned by her non-observance of the said orders, and is not in any sort or degree imputable to the steamship, or to anyone on board her, but that the same is imputable solely to those on board the **[33]** schooner, to wit, for their non-observance of the said orders, and for their unskilfulness and unseamanlike conduct in putting her helm hard to port, and thereby bringing her right across the track and bows of the steamship when within three ship's lengths of her, and which if they had not done, from the then relative positions of the two vessels, no collision would or could have occurred.

Dr. Hagard and Dr. Twiss were heard for the "New Union," Dr. Addams and Dr. Robinson for the "Panther."

Dr. Lushington, addressing the Elder Brethren. Gentlemen, the action in this case has been entered at a very large amount, and though I would fain hope that the loss has in some degree been exaggerated, yet there is no doubt that, upon whomsoever it may fall, it will be exceedingly heavy.

Now, I think it is essential that we should, in the consideration of this case, keep the merits or demerits of the two vessels as distinct as possible. The statement of the "New Union" is that the collision took place about six o'clock on the morning of the 18th December, in mid-channel, about a mile above the Nore light ship, and that her course was E.S.E., and the wind N. and by E. The "Panther" represents the wind to have been N.W. There is a great difference as to the quarter from which it was blowing; but whether that is of the slightest importance in this case is a matter for your consideration. It appears that the tide was at that time about half an hour's ebb. The "New Union" had on board a regular Trinity House pilot. There is a difference between the parties as to the precise state of the weather: the one represents it as a dark morning, the other as clear. But I apprehend we may take it to have been an ordinary morning at that season of the year. The "New Union" goes on to state that the steamer was seen about a mile ahead on the starboard bow, and the steamer says that she saw the schooner two points on her starboard bow. The "New Union" states that she immediately ported her helm and fell off several points, but the steamer keeping her course ran into her, and struck her on her port beam. It is admitted on all hands that, previous to the collision, all the crew of the "New Union," with the exception of the cook, were employed in reefing the mainsail, that the pilot was on the look-out, and the master was at the helm.

The defence is to the following effect: that the wind was from the N.W., and that the course of the steamer was N.W. by W. ½ W., and that the collision took place by reason of the schooner having ported her helm. They would not have touched **[34]** each other if they had kept their courses. It is alleged that the steamer having observed that the schooner had ported her helm, then, and not before, also ported her helm. Then it is averred that no light was shewn on board the schooner, which is an admitted fact.

Now let us consider a little what is the law applicable to this question, as now laid down by the Act of Parliament, 14 & 15 Vict. c. 79, because, whatever doubts may have existed previously, that Act must be obeyed. The 27th section enacts that, "whenever any vessel proceeding in one direction meets a vessel proceeding in another direction, and the master, or other person having charge of either such vessel, perceives that if both vessels continue their respective courses, they will pass so near as to involve any risk of a collision, he shall put the helm of his vessel to port, so as to pass on the port side of the other vessel." In order to call for the fulfilment of this rule, both vessels must be in that situation that, if they continue their respective courses, they will pass so near as to involve a risk of collision. If there be any probability whatsoever of a collision, then it is the duty of each vessel (*a*) to put her helm to port. It appears that the schooner did put her helm to port; and we have

(*a*) This must be taken with the qualification, "due regard being had, as respects sailing vessels, to the keeping each vessel under command;" for in *The "Betsey,"* 8th July, 1853, Dr. Lushington said it was an absurd construction of the Act to contend that, in order to avoid a collision, a vessel close hauled on the starboard tack should port her helm instead of keeping her course.

to consider whether the circumstances were such as to bring the steamer within the rule.

But there is another question arising out of a part of the Act which applies to a steamer only, and in considering this, gentlemen, you will bear in mind that the "Panther," previous to the collision, was about mid-channel. The words of the Act are—"And the master of any steam-vessel navigating any river or narrow channel shall keep, as far as is practicable, to that side of the fairway or mid-channel thereof which lies on the starboard side of such vessel; and if the master or other person having charge of any steam-vessel neglect to observe these regulations or either of them, he shall, for every such offence, be liable to a penalty." Consequently, you will have to consider whether the steamer, at this time, ought not to have been further on the north or Essex shore.

The question then will be, first, whether the steamer was to blame for not keeping closer to the Essex shore; secondly, whether she ought not to have ported her helm as soon as she saw the schooner; and thirdly, whether, if she had so ported her helm, the collision would have taken place, it being certain that the schooner did port her helm. The master of the steamer **[35]** says that it would inevitably have taken place; but that is a matter of opinion, not of fact. You will also have to consider the shortest distance at which the steamer is represented to have first seen the schooner being half a mile; whether, if she had then ported her helm, she would not have avoided the collision.

With regard to the schooner, it is an admitted fact that she did not shew a light when she saw the steamer; and it is abundantly clear to my mind that the rule to do so was under the circumstances binding upon her. But what is the construction to be put on the Act of Parliament upon this point? This question of law it is my duty to decide. The 28th section is in these words: "If in any case of a collision between two or more vessels it appear that such collision was occasioned by the non-observance of either of the foregoing rules, with respect to the passing of steamers or the exhibition of lights, the owners of the vessel by which any such rule has been infringed shall not be entitled to recover any recompense whatever."

A case was cited at the bar in which Chief Baron Pollock (*a*) said truly, that at common law this made no alteration from the old law. I am not inclined in the slightest degree to differ from the construction which he has put upon the act. He said that if the neglect of the rule was the occasion or cause of the collision, in whole or in part, there could be no recovery. Accordingly, the question which I put to you is, whether you are of opinion that the collision was occasioned, either in whole or in part, by the schooner omitting to shew a light. It is necessary for us to be rather particular in affixing a meaning to the word "occasion." It has been averred by the "Panther" that the collision was occasioned by the non-observance of the order as to a light; but, with respect to evidence on that subject, there is next to none, and you will have to consider whether, in point of fact, the absence of a light altogether did occasion this collision, or whether it did not take place solely and entirely in consequence of the steamer not porting her helm, provided that she ought to have adopted that measure.

In order that we may not leave any point untouched which is important in the case, I mean to request your opinion upon this last question, whether the collision was occasioned solely by the fault of the "Panther" in not immediately porting her helm when she saw the schooner half a mile off. There is one other matter which I think it right to mention, Was there a proper look-out on board the schooner? It is unquestionably true that the only look-out was the pilot; but the question is, whether **[36]** there was a sufficient look-out to ascertain that a vessel was coming in time to avoid it?

The Court and the Elder Brethren having retired for consultation, on their return,

*Dr. Lushington* said: The first question which I addressed to the Trinity Masters was in these words:—"Ought not the steamer to have ported her helm as soon as she saw the schooner?" The answer is, "She ought." Secondly, "If the steamer had ported her helm as soon as she saw the schooner half a mile off, would the collision have taken place, it being certain that the schooner did port her helm?" Answer, "Certainly not." Thirdly, "Was the collision occasioned, in whole or in

(*a*) *Morrison* v. *The General Steam Navigation Co.*, 1 Com. L. Rep. 66.

part, by the schooner omitting to shew a light?" Answer, "Certainly not; for according to the statement of the steamer herself, she saw the schooner in ample time to have avoided the collision, had she immediately ported." Fourthly, "Was there a sufficient look-out on board the schooner?" Answer, "Under the circumstances the look-out was sufficient; the steamer was seen in time, and proper measures were pursued in time." Fifthly and lastly, "Was the collision occasioned solely by the fault of the 'Panther' in not immediately porting her helm, when she saw the schooner half a mile off?" Answer, "Yes."

I pronounce against the "Panther."

Proctor for the "New Union," F. Clarkson; for the "Panther," E. Toller.

"SEGREDO," OTHERWISE "ELIZA CORNISH." High Court of Admiralty, June 2 and 18, 1853.—A ship, belonging to a British owner at Liverpool, having been taken by alleged pirates, and recaptured by one of her Majesty's ships of war after her master had been killed, was placed in charge of a master of the royal navy to bring to Liverpool. Having suffered considerable damage, he put into the island of Fayal, and petitioned the director of the customs for an official survey. Three were made. The report was to the effect that the ship could be repaired for about 300l. The master, being dissatisfied, obtained a private survey, which resulted in a report that the ship was unseaworthy, and should be condemned. The director of the customs then, on the petition of the master, decreed the sale of the ship by public auction, and gave official notice thereof, according to the custom of the place. She was purchased by a Portuguese merchant, who immediately repaired her, and sent her with a cargo to Bristol, where she was arrested by the original owner in a cause of possession.—Held, 1. The master had the authority of an ordinary master, and no more. 2. The validity of the sale must be tried by the law maritime. 3. By the law maritime, as well as by the law of England, the sale of a ship by a master, though bonâ fide, can be justified only by urgent necessity. 4. With respect to ships, the lex loci contractus cannot prevail if opposed to the law maritime. 5. The circumstances of the case do not shew an urgent necessity for the sale; and 6. The sale was invalid, and the ship must be restored to the original owner with costs.

[S. C. 17 Jur. 738. Disapproved, *Cammell* v. *Sewell*, 1860, 5 H. & N. 728. Referred to, *Reg.* v. *M'Cleverty*, *The* "*Telegrafo*," 1871, L. R. 3 P. C. 686; 8 Moore, P. C. (N. S.) 43.]

This was a cause of possession instituted by Mr. Philip Henry Dean of Liverpool, shipowner, under the following circumstances, as stated in the proceedings. The act on petition **[37]** on behalf of Mr. Dean in substance alleged that this vessel, a brigantine of about 160 tons burthen, then belonging to Mr. Dean, sailed from Liverpool on the 5th of May, 1850, under the command of John Talbot, her master, laden with a cargo of coals and other merchandise, bound on a voyage to Valparaiso and Panama; that she safely arrived at these places and discharged her cargo; that, after having made some intermediate voyages, and having been thoroughly caulked and repaired at Valparaiso, she sailed thence for Liverpool on 7th of November, 1851, with a general cargo, and a quantity of specie and silver ore on board; that, having from bad weather sprung the foretopmast, she was on the 1st December following, in order to repair her damages, brought to an anchor at Sandy Point (in the Straits of Magellan) a convict settlement of the Chilian government, and that whilst there, an insurrection having broken out, she was seized by the insurgent soldiers of the said government, who immediately shot her master and supercargo; that she subsequently proceeded to sea with a number of the said insurgent soldiers on board, and whilst at sea was taken possession of by her Majesty's steam-vessel of war "Virago;" (*a*) that Commander Stewart, the commanding officer of the "Virago," having put Mr. Bawden, the master of her Majesty's ship "Dædalus," and several seamen in her Majesty's service on board the said brigantine to assist her crew to take her to Liverpool, she, on or about the 10th of March, 1852, sailed for Liverpool, where she never arrived; that in the month of December last she arrived in the port of Bristol with a cargo of oranges from the Azores, and was there discovered by P. H. Dean (her sole owner), though she was

(*a*) Two other suits arising out of this transaction, one for bounty the other for salvage, are now pending in the Admiralty Court, and will shortly be reported.

entered, not by her lawful name as the "Eliza Cornish," but by the Portuguese name of the "Segredo"; that she was thereupon arrested in a cause of possession.

The prayer was, that the Judge would decree the possession of the said brigantine, her tackle, apparel, and furniture, to the said J. P. Dean, with costs.

The answer, not denying the former part of the act, in substance pleaded "that in the month of March, 1852, the said brigantine was, by the said William Houston Stewart, Esq., acting under the sanction and by authority of Rear-Admiral Fairfax Thoresby, commander-in-chief of her Majesty's ships on the Pacific station (and not of his own authority merely), placed under the charge and command of Charles Bawden, a master in the royal navy, [38] who accordingly, on the 10th of the said month, set sail in her for Liverpool, having with him R. F. Broadrick, mate, &c.; that, by virtue of this appointment, the said Charles Bawden had full authority, as master of the said brigantine, to act in all things to the best of his judgment for the benefit of the owner, and of all parties concerned; that the said brigantine having suffered severely in a storm and hurricane, Mr. Bawden was compelled, on the 23rd of April, to put into Monte Video for repairs, which were effected at an expense of 875l.; that he again sailed for Liverpool on the 25th of June; that on the 15th of August following, when they were in latitude 36° 1′ north, and longitude 32° 46′ west, running E.N.E. with much swell from the N.W., but little or no wind, the vessel rolling very violently and the crew being engaged in sending down the royal and topgallant yards and fore-top gallant mast, the fore-topmast of the said brigantine broke short off at the cap, and caused very considerable damage; that eventually the wreck got under the bow and rendered the brigantine unmanageable, and threatened to beat a hole in her bottom; that for these reasons, and because it was found impossible to save any portions of the gear, from the great weight under water, it became necessary to cut everything away; that in consequence thereof Mr. C. Bawden was compelled to put into Fayal at the port of Horta, in which island, being the nearest accessible port, he arrived on the 19th of August; at which time the brigantine had lost, &c., and so much damage had been done to her ropes and shrouds, that she required a complete refit in that particular; that her hull was in a leaky state, and a considerable portion of her timber and planking was rotten and worm-eaten, owing to age and long service, particularly about the bends and counter, and as well below as above the copper; that she was totally unfit and unsafe to proceed in her voyage without a complete repair of the hull, as well as a refitting of her masts and rigging; that in consequence of such unseaworthiness of the said brigantine, the said C. Bawden, with the assistance of John S. Minchin, Esquire, her Majesty's vice-consul at Fayal, applied to the custom house authorities, and particularly to Don Joao de Carvalhal Noronha e Frias, the director of the custom house at the said port of Horta, to have a proper survey made of the ship, with the view of ascertaining her real condition; that accordingly three several surveys were made by the official persons connected with the said custom house; that the said C. Bawden, for further satisfaction in that behalf, also caused a survey of the said brigantine to be made by Francis Langlois, Francis M. Gardner, and Elisha C. Jenney, master mariners, Hugh Tre-[39]-goning, a caulker in her Majesty's service, and Thomas Vinmar, a carpenter, who reported that, &c., and recommended that she should be discharged to ascertain more fully her condition; that the cargo having been discharged, the said brigantine was, at the request of the said C. Bawden, again examined by Caleb Spooner, junior, Owen B. Higgins, master mariners, and Alexander Morrison, ship's carpenter, who reported that, &c. &c.; and that, considering the lateness of the season, together with the cost of spars, sails, cordage, and other things required, they were forced to say that she should be condemned as unseaworthy. The answer further pleaded that, from the state in which the brigantine then was, the sum that must have been expended on her repairs and in finding her with the tackle, apparel, and furniture that would have been required to refit her for sea in a proper manner, according to the rate of charges prevalent at Fayal, would have greatly exceeded her value when so refitted; that the port or harbour of Horta, where the brigantine was then lying (and which is the only convenient or commodious port in the said island or its vicinity) is so much exposed to gales from the S. and S.E., during which vessels are frequently driven on shore and lost, that it would have been unsafe to have left her at anchor there in her then disabled state at so advanced a period of the year; that there were no means of placing her in dock or otherwise securing her in safety; that there is no steam or

other regular communication between the said island and this country; that Mr. C. Bawden being satisfied of the unseaworthiness of the said ship determined, with the advice and concurrence of the said R. F. Broadrick, H. C. Sedmond, and J. W. Smith,(*a*) as also with the concurrence of John S. Minchin, H.M.'s vice-consul at Fayal, to have her condemned and sold for the benefit of the owners, as usual in the like cases, and accordingly again applied to the custom-house authorities on the subject, when such his application was acceded to, and the said brigantine was thereupon, by the said Don Joao de Carvalhal Noronha e Frias, the director of the said custom house, directed to be sold, and in consequence thereof was afterwards sold by public auction at the custom house, with her tackle, apparel, and furniture, in several lots, to wit, on the 14th and 15th September, and realised in the whole, after deducting the expense of advertising and commission, a sum equal to 185l. 4s. 11d. or thereabouts; that the said director of the custom house at Horta was and is empowered by his office, and by the laws and customs of Portugal **[40]** as received in the said island of Fayal, to proceed in the manner before mentioned to the survey and sale of any ship or vessel entering the said port, whether Portuguese or of any other nation considered or represented to him by the person in charge thereof to be unseaworthy; that the proceedings taken in the case of the said brigantine were in all respects agreeable to the laws and customs of the said island of Fayal; that due and public notice of the intended sale thereof was given in the manner customary in the like cases, previous to such sale taking place; that such sale was conducted by the official auctioneer employed by the said custom house, and that such the condemnation and sale of the said ship was in all respects an honest and bonâ fide transaction, determined upon and executed solely for the benefit of the parties interested in the ownership thereof, and of no other persons whomsoever; that at such sale Roberto Augusto de Mesquita Henriques became the purchaser of the hull and of portions of the tackle, apparel, and furniture thereof, and duly paid for the same, whereby he became the true, lawful, and sole owner of the said brigantine, and of the portions of her tackle, apparel, and furniture so purchased; that possession thereof was thereupon given to him, and that by the laws and customs of Portugal which prevail in the said island he thereby became the lawful possessor of the said ship; that immediately thereafter he proceeded to repair the damage she had sustained and to refit her for sea, which, from his local knowledge and connexions, he was enabled to do at much less expense than would have been incurred by a stranger in effecting similar repairs; that in order thereto the said brigantine was, &c. &c., and the total cost of such repairs, and of the expenses incident to the re-equipment of the said ship, amounted to the sum of 925l. and upwards; that the said brigantine, having been so repaired and refitted, was chartered by the said Roberto Augusto de Mesquita Henriques to Frederick Dabney, of the said island of Fayal, merchant, for a voyage to England with fruit, and thence to Lisbon, and accordingly sailed on the 10th November last bound for Bristol, at which port she arrived on the 28th day of the said month; that in the course of the voyage she was still very leaky, and made from three and a half to five inches of water per hour; that whilst at Bristol further repairs were effected at an expense of 140l. or thereabouts; that the said brigantine, having taken on board a cargo of coals, had proceeded as far as the King's Road on her voyage to Lisbon, when she was arrested at the suit of J. P. Dean.

The prayer was that the Judge would decree a supersedeas to the warrant of arrest issued in this cause, dismiss the said **[41]** Roberto Augusto de Mesquita Henriques, and condemn Philip Henry Dean in demurrage and costs.

On behalf of the original owner, a reply was brought in to the effect that, on the arrival of the brigantine, at Fayal, there was very little the matter with her, save that she had lost, &c. &c.; that her hull was sound and perfect although a few planks above water may have been somewhat worm-eaten, and a portion of her upper works wanted recaulking; that the whole loss in spars and sails was entirely occasioned by the mismanagement and want of skill and seamanship of Mr. Charles Bawden, a master in the navy, who had been unnecessarily put into the command of the said barque by Commander Stewart to the exclusion of her mate John William Smith, who was fully competent and willing to have taken command of her and brought her to Liverpool; that the said Charles Bawden caused several of her sails to be cut up

(*a*) The original mate of the vessel when she left England.

to make bags to hold the silver ore, notwithstanding that Mr. Dubary, a merchant of the place, offered to find canvas; that, on the 4th September, the barque was surveyed by José Francisco de Silveira, a master mariner and pilot; Adrian José Joaquim and Joao Menzies, carpenters; and Bernado Antonio da Costa and José Garcia da Roza, caulkers; whereby it appeared that her hull was in good condition, and that the whole sum required to be expended on her for shifting a few of the upper planks and recaulking her upper works, and for new spars, rigging, and sails, amounted to about 300l. sterling, which amount Mr. John Lane, Lloyd's agent at Horta, offered to advance, but which the said Charles Bawden refused to permit him to do; and instead thereof, without calling for the attendance of Lloyd's agents, or any of the aforesaid surveyors, obtained a private survey to be held on the said barque, and procured her to be condemned, and without any communication with her owner in England, sold her for the sum of 185l. 4s. 11d.; that having so sold her, the said Charles Bawden, in conjunction with John S. Minchin, employed by the said Charles Bawden as mercantile agent in respect of the cargo of the said ship, made out an account of the port charges and disbursements in regard to the said ship, which, with the mercantile commission of the said John S. Minchin, amounted to the sum of 658l. 2s. 10d.; that the said Charles Bawden thereupon opened one of the boxes of treasure, and took thereout the sum of 472l. 17s. 11d., and also a further sum of 200l. (part of the said treasure), which sum remains to be accounted for; and that the said Charles Bawden also claims a further large sum. The reply further expressly denied the expenditure of 925l. and 150l. by Mr. Henriques in repairs, as pleaded in the answer; **[42]** and then alleged, that it was not legally competent to the said Charles Bawden, under the circumstances pre-alleged, to have the said barque sold, and more especially without first communicating with her owner at Liverpool (the distance from Fayal to Liverpool occupying a sailing vessel only fourteen or fifteen days); that the said sale was illegal; that the name of the said barque was improperly changed, and that she had thereby nearly escaped from Bristol; and that the said barque, as she now lies at Bristol, is fully worth the sum of 1400l.

Dr. Haggard and Dr. Twiss argued the case in behalf of the British owner; Dr. Addams and Dr. Spinks for the Portuguese purchaser.

June 18.—*Dr. Lushington.* As I understand that the ship which is the subject of the present litigation is still detained and bail has not been given, I have been very anxious to dispose of this case at as early a period as possible, at least at as early a period as would enable me to pay due consideration to several points of no small difficulty that have been raised in the discussion in this case. I could have wished, indeed, to have more time and leisure, and to have placed in a much more lucid order the observations which I think it necessary to make; but still it appeared to me better to omit any attempt of that kind rather than incur any further delay.

The action brought is technically called a cause of possession; but, in fact, the question for the Court to try and decide is a question of title, to determine which of the parties litigant is entitled, not only to the possession of the ship, but to a full right of property in her.

This question the Court has now ample authority and jurisdiction to decide by virtue of the statute 3 & 4 Vict.(*a*) The limit of the jurisdiction of the Court of Admiralty in causes of possession antecedently to the passing of that statute, it would, in my judgment, be wholly impossible to define; suffice it to say, that I think this suit is properly brought as a cause of possession; and that, in such case, the statute renders it my duty to decide upon the title to the ship.

Perhaps it will be necessary, in the course of this judgment, to enter with particularity into consideration of some of the facts set forth in these proceedings; but at present, in order to **[43]** ascertain the questions to be determined in the cause, I think it would be most expedient to give only an outline of the case.

This vessel was originally a British vessel and the property of a British merchant,

(*a*) 3 & 4 Vict. c. 65, s. 4: "And be it enacted, that the said Court of Admiralty shall have jurisdiction to decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage damage, wages, or bottomry, which shall be instituted in the said Court after the passing of this Act."

who has instituted the present proceedings. She was sent to the Pacific, and there occupied in voyages that I need not specify. Finally, on or about the 7th November, 1851, she was dispatched from Valparaiso to Liverpool with a very valuable freight of specie, silver, and some other merchandise. In the course of that voyage she was under the necessity of coming to anchor at Sandy Point in the Straits of Magellan, a convict settlement belonging to the Chilian government. There she was seized and taken possession of by an overpowering force. From that force (whether that force was deemed to be insurgents or pirates, I stop not to inquire) she was rescued by her Majesty's ship "Virago," commanded by Captain Houston Stewart. I should observe it appears to me wholly immaterial for the purposes of this suit whether the ship was rescued from insurgents or pirates. Before this rescue had occurred the master, who is represented as supercargo and part owner in some of the proceedings, was murdered.

Captain Stewart, under the orders of Admiral Thoresby, who commanded upon that station, placed the vessel, which had been brought back to Valparaiso, under the command of Mr. Bawden, a master in the navy, with directions to take her to the port of Liverpool, whither she was originally destined. Mr. Bawden with two or three petty officers and some seamen in her Majesty's service, together with the remaining part of the crew of the vessel, took charge of her, the mate and several of the crew still remaining on board her, and the ship proceeded on her voyage. She proceeded on her voyage, as I understand the facts, with the same treasure with which she had been laden when she left Valparaiso originally, it having been rescued from the "Florida," an American vessel, also seized at Sandy Point under similar circumstances.

In the prosecution of that voyage, in consequence of contrary winds and tempestuous weather, the vessel was compelled to take shelter at Monte Video, where she arrived on the 23rd of April, 1852, and was detained till the 25th of June following; and the repairs there done amounted, together with the expenses, to 875l.

On the 25th day of June she left Monte Video for Liverpool, but having met again with bad weather and other accidents, she was compelled to make for the island of Fayal, and on or about the 19th of August came into the port of Horta. Mr. Bawden then adopted the following measures: He had surveys made of the **[44]** ship, and in his judgment it appeared inexpedient to repair her; and accordingly, with the consent of the superintendent of the customs in that island, she was sold by public auction; the cargo was transhipped, as I collect, into another vessel; and after many disasters and another transhipment, finally reached England. This vessel, the "Eliza Cornish," was repaired at considerable expense by the purchaser at Fayal, and he sent her on a voyage to the port of Bristol, where she was arrested at the suit of her original owner, Mr. Dean; and I have now to determine whether Mr. Dean is entitled to have possession of her given by the Court, whether he is entitled to the property in her, or whether the sale at Horta was legal and the Portuguese purchaser is entitled to hold her.

Now I may here mention that there does not appear to have been produced, and for what reason I am unable to say, any bill of sale whatsoever. Of course this is the document that the Court naturally looks for in the first instance, it being the ordinary title by which any and every ship is sold which is sold. But I neither find any bill of sale properly so called, nor do I find any thing equivalent to it, or in lieu of it. I am therefore left to conjecture what was the nature of the title purported to be given by those who sold her.

Now the above is a very imperfect outline, as I well know, of the history of this transaction; but, as I mentioned at the outset, I abstain from going into greater detail at present, because I must necessarily do so when certain particular questions arise hereafter. I think, however, what I have said is sufficient to lay the foundation for the following leading questions:—

The first question which presents itself to my mind is, By what law is the Court to be governed in resolving the points submitted to its decision?

1st. Am I to take that which is sometimes called the general maritime law of all nations engaged in marine enterprises?

2ndly. Am I to adopt the law of England, which may be different?

Or, 3rdly, Am I to be governed by the law prevailing at Fayal?

Now these are questions which require great consideration, and respecting which

the Court would be reluctant to lay down any rule or principle beyond that which is indispensably requisite to the decision of the present point. It would be rash indeed if in matters of this kind I were to endeavour to reconcile all the conflicting cases, and to extract out of them any general rule, when I find so many minds of great ability, talent, and **[45]** research have certainly abstained from anything like an attempt of the nature.

The Court must ever bear in mind that this is a transaction taking place in a foreign country, and in which the interests of a foreign subject resident in that country are concerned; but the Court must also recollect that in the same transactions are involved the interests of a British owner, and that the acts done were done by a British subject authorised in some way or other to govern and to dispose of the ship; and that he was there not as a permanent resident (I am speaking now of Mr. Bawden) but an individual, by the accident of the wind and weather, compelled to put in for a temporary purpose. There is a wide distinction in contracts which are entered into in a foreign country by a British subject resident there for a permanent purpose, and contracts entered into by a British subject accidentally entering it.

First, it strikes me that the law which I must seek to administer, if I am able to discover it, is the law maritime; a law which has been often adverted to by Lord Stowell and by others, whose lights I seek to guide me, but which has been defined by none. Perhaps it is not possible to define it with great accuracy, because the law of almost every foreign country in some part differs from that of other foreign countries. Still it is an expression in common use, and I apprehend it is intended to convey the meaning, that it is the law which generally is practised by maritime nations. I think, therefore, this is the law which I must seek to discover, and I must not deviate therefrom by introducing the English municipal law, unless I should happen to be compelled to do so by virtue of statutes which of course it is my duty to obey; because, if it seem fit to the Legislature of this country to pass any act which is intended by it to bind foreigners, I, sitting here as Judge in the Instance Court of Admiralty, am clearly bound to obey that statute, even though that statute law might not be consistent with the law maritime in any country where the transaction took place. I think, also, that I am equally prohibited from giving effect to the law of the island of Fayal, unless it accords with the general maritime law; or in other words, unless upon consideration of the peculiar circumstances of this case, I should be of opinion that the lex loci contractus is a part of the general maritime law, or ought to be imported—here is another alternative of great importance—or ought to be imported for special reasons into this cause.

Now, without saying what the immediate effect would be, I must again repeat what I said before. I ought to exercise great caution in dealing with the interests of foreign persons, and not **[46]** with the interests of British subjects only. In the many cases to which I have resorted for information, I regret to say this distinction does not seem to have been always perceived, nor always kept in mind; namely, in the judgments pronounced, the learned Judges have been considering the cases before them, and have not recollected, or at least not stated, with any clearness or precision, any difference which they might think existed between the administration of the law as related to foreigners and the administration of the law as related to British subjects. That would appear especially so with respect to questions of bottomry and hypothecation.

In the very commencement of Lord Tenterden's work on shipping, to which I was referred in the course of the argument, the general law as to the sale of ships is fully discussed; and I say the general law for this reason, because, without occupying time by reading that first chapter of Lord Tenterden's work, it is perfectly manifest from the whole of that chapter that Lord Tenterden had in view the general maritime law as well as the municipal law of this country. He refers to writers on the general maritime law, such as American and others, as well as he does to the authorities of our own Courts of law.

Now, by the laws, I take it to be a principle quite incapable of being disputed, that ships in general cannot be sold save by an instrument in writing; and it is equally clear that such instrument in writing must proceed either from the owners or some persons authorised to act and acting as their agents, or else by the decree of a competent Court.

Now, the master in general, as is admitted on all hands, has no authority to sell

the ship; but whatever opinion may have been doubtfully expressed on the subject (certainly there have been many opinions going the length that the master under no circumstances whatsoever can sell) it appears to me clear upon reason and authority, looking at what the law now is, that in case of necessity he must be invested with that authority and power with regard to the sale of British ships to British subjects. Lord Gifford in the case of *Robertson* v. *Clarke* (1 Bing. 445), which is cited at large in Abbott on Shipping, laid down the law in as clear terms as I think it has been expressed by any other Judge whatever, or any other authority. Now he expresses himself in these words: he says, "I agree that it is not sufficient to shew that the sale was bonâ fide, and for the benefit of all concerned, unless it be also shewn that there was an urgent necessity for its being resorted to." Lord Tenterden states that [47] the doctrine that necessity alone can justify the sale of a ship by its master, and sustain the title of a purchaser from him, is in strict conformity with the laws of other maritime nations; and that is a most important passage, because it shews therefore that, in this respect, that to which I am now adverting, the law laid down by the highest authority in this kingdom, is precisely the same law as is laid down, generally speaking, by all other maritime states; therefore the law of England and the great maritime law are in conformity with each other. Lord Tenterden cites several authorities for this position, and many similar authorities might easily be added; and especially there might be added many authorities from American writers and American reports. In the course of the argument counsel adverted to some which appear to have a clear bearing on the question, especially the case of the schooner "Tilton," (*a*) in which Mr. Justice Story delivered a very able and elaborate judgment. But it is unnecessary for me to do more than mention them.

Now, there is not only the authority of Lord Gifford in the King's Bench, but the position is laid down by Lord Tenterden himself. That decision of *Robertson* v. *Clarke* was in 1824, and Lord Tenterden published another edition subsequently to that; therefore there is his own confirmation. It would only be a waste of time to cite further authorities. The doctrine is confirmed by *Idle* v. *The Royal Exchange Assurance Co.* (8 Taunt. 755, 3 B. & B. 151), and confirmed by the last decision of all, *Hunter* v. *Parker* (7 M. & W. 322): therefore it may be taken to be, beyond all doubt and question, the law of this country as well as the law maritime. There are other reasons why I do not enter into it more particularly, because really, where a position is clear and supported by such authorities as I have stated, there is no necessity for it: there are other reasons, and among these, first, there is no authority to be cited against that doctrine; secondly, that it would be in my judgment most dangerous, it would be most detrimental to the interests of shipowners all over the world, to confer on a master by law a discretionary power of parting with the property of his owners.

I might enlarge very much on this subject, because I might enter into a consideration of how the matter would affect not merely the interests of owners, but the confusion it would create [48] as to the interests of the insurer and the insured. That is a matter of importance to be considered, and, as it appears to me, nothing is more desirable to avoid than that those great interests by which the mercantile navy are protected to the extent they are by insurance, should be thrown into confusion or weakened by the introduction of any different principle.

This being so, to render valid, therefore, the sale by a master, there must exist a necessity for that sale; the sale, though bonâ fide, and beneficial to the owners, will not avail without necessity. What circumstances constitute necessity cannot with accuracy be defined. I might say what writers have strained hard to arrive at something like a definition of what necessity is; but it is quite obvious that necessity must depend on a combination of circumstances, which it is impossible to foresee and impossible duly to estimate. In my judgment it would be more easy to state not what constitutes necessity, but under what circumstances necessity cannot exist. If, for instance, the ship is capable of repair, and the master can raise money either on

---

(*a*) The point of law was similar, but the circumstances different. The Court said, "Prima facie the title was suspicious and infirm. It was a sale by a wreck commissioner, who immediately became a purchaser under authority of a master, who also became a purchaser at the price given at the original sale." 5 Mason's (Amer.) Rep. 496.

the bottomry of the ship or cargo, then I conceive no legal necessity can exist for sale. That, I think, will be quite clear.

Now, having thus far endeavoured to clear the way, I must now address myself to the determination of two questions, but rather different; namely, first, the authority of Mr. Bawden to sell; and 2ndly, the existence of necessity which is alleged in this case; and 3rdly, a point to which I have already adverted, whether, under the circumstances, I should be justified in this case in administering any law differing from the general maritime law; or, to use another mode of expression, engrafting a peculiar exception upon it.

To proceed then to consider what authority there was in this case for the sale, I must look to the position in which Mr. Bawden was placed. For this purpose, I deem it unimportant whether the "Eliza Cornish" was rescued from insurgents or pirates; for whatever may have been the proper description of those who forcibly took possession of the vessel, I do not conceive that any distinction can be drawn important to the result of this case out of that forcible and illegal possession. She was rightly rescued by her Majesty's ship "Virago," and by the act of Captain Stewart, and the authority of Admiral Thoresby, I think the command of her was duly conferred on Mr. Bawden. I am of opinion that, looking at all the circumstances of this case, and considering the description of cargo that was on board her, that Captain Stewart may have been fully justified in entrusting the command to Mr. Bawden, a master in the navy, and in not allowing the mate to take the place of the deceased **[49]** master. It is true that, in ordinary cases, upon the death of a master, the first mate may succeed to the master, though we all know that very frequently, nay, I may say constantly, this course is interrupted by the interference of agents, consuls, or other persons who claim to have interest in the cargo, and the circumstances of this case seem to me to have made it fit that Captain Stewart should exercise his own discretion in this respect.

I am of opinion, therefore, that Mr. Bawden was duly invested with all legal authority as master; that he possessed the same power over the ship that the former master himself if alive would have had; but I cannot conceive upon what principles it could be contended that he possessed any other or greater power. It is indeed alleged, on behalf of the Portuguese owner, that, by virtue of this appointment, Mr. Bawden had full authority, as master of the ship, to act in all things—I believe I am citing the very words—"to the best of his judgment, for the benefit of the owners and all parties concerned." Now, that is the position laid down by the Portuguese owner, by virtue of his appointment; and if it be meant by this statement that Mr. Bawden had the same authority as an ordinary master, I concur; if it be contended that he had greater power and authority, then I cannot give my assent to the proposition, for I know of no rule, I know of no principle by which it can be maintained that either Admiral Thoresby or Captain Stewart had or could acquire any right over this ship, which would enable them to delegate to their own appointee any greater power than belongs to an ordinary master, and certainly not what is contended for in the act on petition—an arbitrary power to dispose of the ship herself. Whether it be a case of salvage or not, I am not to inquire, because, assuming it to be such, no right of sale was consequent on the right of claim for salvage. I conclude, therefore, this branch of the inquiry by repeating my opinion that Mr. Bawden, as relates to the sale of this ship, was an ordinary master, possessing the ordinary power and authority of master and no more.

I will now refer to the steps adopted in the island of Fayal, which appear to be as follows:—Mr. Bawden, on his arrival at the port of Horta, obtained the assistance of Mr. Minchin, her Majesty's vice-consul at that place; and he applied to a person, who is denominated either the director or superintendent of the custom house, to have a proper survey of the vessel, and very fitting measures they were to be taken. Three several surveys were accordingly made, on the 21st and 24th of August, and the 4th of September; and they were made by persons connected with the custom house; and to these surveys I must now direct my **[50]** attention. They are found annexed to the affidavit of Mr. Bawden and in the document marked C.

Now the first survey, bearing date the 21st of August, does not represent the vessel to be unseaworthy, but it merely states the loss which she had sustained with regard to the topmast and other matters; that I need not recapitulate; and that she required to be caulked, not making any water at anchor. That, I think, is the sub-

stance of that survey. Then the director of the custom house appears to have given an order that this survey should be carried into effect by doing what was mentioned in the survey itself.

However, this was not deemed satisfactory, and the next survey, which we have on the petition of Mr. Bawden, takes place on the 24th of August; and the surveyors there reported that they had newly examined the hull, and that they had found some worm holes which had been covered by the copper, and they directed that the vessel should be discharged. This survey, as well as the first, took place in the presence of Mr. Lane, who was agent for Lloyd's.

Now, the cargo having been taken out and the vessel discharged, the third survey was made on the 4th September. Then, of course, there was ample opportunity for those who made the survey to ascertain the precise state and condition of the vessel, whether capable of repair or not, and what was the extent of the repairs to be done, and what would be the probable amount of cost. They report, amongst other things, that the hull was in good repair, and she would be navigable when certain repairs therein stated were done; and the repairs there stated are estimated at about 300l. I believe I have stated accurately the summary of the contents of that survey.

But the matter does not rest here. Mr. Bawden was dissatisfied, and the course which he adopted I must now advert to. The proceeding taken by Mr. Bawden was not founded upon any further survey under the authority of the customs; but he presents a petition, on or about September 10th, stating, for the reasons therein set forth, that he considered it for the interest of all concerned to sell the vessel, and he petitions the director of the customs to give the necessary directions for the sale of her as customary; the petition is granted; the vessel is sold on the 14th or 15th September, and, after deducting the expenses, realised about 185l. 4s. 11d.

In considering this proceeding by the director of the customs, the first observation that necessarily strikes one is that the sale neither was nor could be justified by the official surveys already had, because these official surveys, so far from recommending **[51]** the sale, the purport of them is that the vessel was repairable, and that at the expense of 300l. only. I must observe I cannot but entertain some little hesitation as to the extent of consideration to be given to the proceedings of the superintendent of the customs who orders the surveys to be made; orders the three first to be carried into execution in the way he has done, and then, all of a sudden, without a fresh survey, upon the mere representation of persons acting for the master, gives up at once all he had previously determined and orders the vessel to be sold. It makes one distrust, like other Courts, the proceedings by the commissioners of wrecks: it makes one distrust proceedings by superintendents of custom houses: it makes one distrust acting under the advice of such masters and persons of that description.

Now, throughout all that proceeding it is quite manifest that Mr. Bawden was in reality not governed by anything that was done at the custom house, not at all; it was form, a mere shadow; it had no substance, no reality, because he had recourse to other advice. He had an examination made of the vessel in the first instance, on or about the 21st August, by persons on board her, who at that very early period signed the letter marked A, addressed by Mr. Bawden to Mr. Minchin, the British consul. That letter marked A is to the following effect:—"Sir, I have the honour to acquaint you that on further examination of the hull of this vessel, and after trying the planking in several places, there was found a considerable portion of her timbers rotten and worm-eaten, particularly about the bends and counter, so much so that after taking into consideration the expense and loss of time that would be incurred in refitting the vessel, together with the probability that the bottom would, on examination, prove worse than the upper portion of the hull; taking also into consideration the lateness of the season by the time the defects could be completed, I am of opinion, with all my officers, and likewise Captain Langlois, passenger, that the 'Eliza Cornish' is totally unfit and unsafe to proceed to England under such circumstances." So that, in fact, before the surveys were made, this gentleman had entirely made up his mind that the vessel was unfit to proceed to England at all.

Then again, about the 6th September, Mr. Bawden consults the masters of other vessels, together with the carpenter of a vessel called the "Peri," and these persons wrote the letters marked B and C. The one is the 24th August, merely as to the vessel being discharged; the other, which is marked C, is to the following effect:—"Agreeably to your request we have been **[52]** on board the 'Eliza Cornish,' and have

examined her. We report as follows. The outside plank very much worm-eaten; in fact, a perfect honeycomb. We shipped the copper and found the plank as much worm-eaten as above it. Rudder-head sprung, and otherwise bad, requiring a new one. Inside survey: the apron very rotten. The breast-hook requires fastening and we think there is very little substance to fasten it to. We found the ceiling wet through, and by cutting it found it rotten, and timbers very much so; and after considering the lateness of the season, together with the cost of spars, sails, cordage, and other things required, we are forced to say that she should be condemned as unseaworthy, and ever will be so."

Now it is upon this extra-official survey that Mr. Bawden thinks fit to act, and not upon the survey taken by persons appointed by the officers at the head of the customs.

There is another document marked D, signed by Mr. Spooner, the master of the "Sea Fox," in which he states his opinion. It is in the following words:—"I have sent in the report of the survey, which you have received, which was impartial, in which we expressed our opinion freely; in this I shall give my advice, if you think it worth the while to take it. The brigantine 'Eliza Cornish,' the vessel in your charge, she is neither seaworthy nor will she ever be. She could not be repaired in this port at any rate, as, by inspecting the outside plank, she must want a new bottom altogether. In addition to the report I should say to you, that if they did not condemn the vessel on that report I should advise you to abandon her at once, after taking out the cargo that remains."

I cannot help saying that though it might be an instance of very laudable anxiety on the part of Mr. Bawden to get the very best information he could as to the state and condition of his vessel, and as to the steps proper to be adopted, either for repairing her, or having her, what is called in this letter, condemned; yet I think it must be apparent to all that it is impossible to mix up these private and public surveys together; and least of all could it be contended that the course adopted by Mr. Bawden was justified by the surveys, or anything done by the order of the director of the custom house, except the order to sell, which was founded on the representation of Mr. Bawden himself.

Now I cannot help thinking that the result of the consideration of all this evidence is, there was, on the part of Mr. Bawden, a determination to sell this vessel, founded solely on private reports which Mr. Bawden caused to be made, and not on the official reports. That Mr. Bawden acted according to the best **[53]** of his judgment for the benefit of all concerned I do not doubt; but that this vessel was capable of being repaired at Horta, though, perhaps, at a very considerable expense, is most abundantly clear, for she was repaired by the new purchaser, and she did reach this country as early as the 28th November in the same year. The order for sale was dated on the 10th September; within little more than two months the vessel was repaired, and she brings a cargo to the port of Bristol.

I know it is sometimes contended that it is hardly fair to judge by the effect of subsequent transactions, and I agree in some measure with that argument; and if there had been any real doubt existing as to the capability of the repair of the vessel, I would not have rested on the mere fact that, subsequently, she was repaired and came to this country. But there is, it appears to me, the fact of the capability of being repaired proved by her coming to this country, which is in unison with all the official reports that took place at Fayal. It is in opposition to the private reports and the surveys taken by Mr. Bawden; but it is in conformity with all that was intended to be done under the authorities in the island of Fayal.

Now I must observe upon another thing; the Court has no affidavit either from Mr. Minchin, the vice-consul, or from Mr. Lane, Lloyd's agent. This, I must say, is an absence of proof which there is great reason to complain of in this case. I must consider what these gentlemen did, and the course of conduct they pursued. It is a part of the important res gestæ in this case, what those who had authority in the island of Fayal did or did not do; therefore, though the means of forming an opinion on the evidence from which I am to judge are exceedingly defective, yet I cannot avoid pursuing the investigation. In a place like the island of Fayal, where there are many British marine, the person who represents her Majesty as consul or vice-consul is of course an important personage, to whom masters of ships might very properly revert in all cases of difficulty. Again, under similar circumstances, we all

know there is no person whose advice is more to be relied upon in ordinary cases than that of Lloyd's agent; because, fortunately, it so happens there is hardly any port touched at in the world in which there is not an interest secured in this country.

I think, however, that I have enough to form the following opinion: namely, that these proceedings did meet with the approbation of Mr. Minchin; but there is no proof whatever that Lloyd's agent concurred in that opinion. It is stated that Lloyd's agent is far from approving; it is pleaded that, so far from approving of these proceedings, he offered to advance the **[54]** requisite funds. A letter (*a*) has been annexed, which, supposing it is evidence, establishes that fact. I am inclined to come to the following conclusion with regard to that letter, it is admissible for certain purposes; but I am not satisfied that I can use that letter as legal evidence to prove that fact. I am not able to discover, with respect to that very difficult subject, what is, or what is not, evidence in correspondence of this description which takes place abroad, or that any very definite principle can be laid down on the subject; but it appears to me to be the safer course on the present occasion, not to consider that letter as any evidence of the fact that Mr. Lane offered to advance the money. Suffice it then to assume that the sale was made with the consent of Mr. Minchin, but not with the concurrence of Mr. Lane; the rest must remain in the obscurity in which the parties have left it.

I must now briefly advert to what was done. The vessel was refitted at an expense amounting, as stated at Fayal, to the sum of 929l.; but that included all the expenses incident to equipments, and I am by no means satisfied on the evidence before me that the repairs necessary to be done to enable the ship to complete her voyage would have amounted to such a sum. I rely not entirely upon the estimate made by the survey, which was the sum of 300l.; but suppose I add to it 150l. or 200l. It is scarcely possible to suppose, if this estimate was made by a person of any competency to perform that duty, that he could be so mistaken as to estimate that at 300l. which would require 900l. It is also stated that a further expense was incurred at Bristol, amounting to 140l. This appears to me of no importance whatever in the solution of this case.

Under these circumstances, assuming that the sale was bonâ fide, assuming that it was advantageous to all concerned, which is a great proposition to assume, and I cannot by possibility say it is really true, for I cannot say how the interests of the underwriters would be affected, and they are persons concerned; I cannot say what right the owners have to go against the underwriters, or what right they have to resist; but assuming, for the purpose of argument, that it was advantageous to all concerned, the question is, whether it was necessary? The capability of repairs being established, were there the means of **[55]** paying for that repair? Of that there can be no doubt; for to say nothing of hypothecation, the cargo consisted of specie in considerable part, and presented a fund ready at hand for the discharge of all repairs; a fund which was actually employed for much less important purposes, namely, the payment of expenses incurred at Fayal. Again, I say, without attempting to define what constitutes necessity, I cannot bring myself to entertain a shadow of doubt that where a ship is capable of repair, and where means exist, by hypothecation or otherwise, of paying for those repairs, no necessity, in the legal sense of the term, can be said to exist. If, then, necessity is an indispensable ingredient in a case of this description to warrant a sale, here it is not to be found, and, consequently, I am of opinion that, by the general maritime law, and the law of England, no legal transfer of the property in the ship took place by this sale.

I have not quite finished my task, but I am approaching to the conclusion of it. It remains to be considered whether I am justified in engrafting any exception upon this law from a consideration of all the other facts appearing in this case. It is contended, and very properly so, that this sale was legal according to the law prevailing

---

(*a*) This letter, addressed by Mr. Lane, Lloyd's agent, to Thomas Court, Esq., of Liverpool, and dated Fayal, 8th Sept., 1852, was annexed to the affidavit of Mr. Dean, the original owner. This part of the affidavit ran thus: "This deponent says, in reference to such sale, this deponent annexes two letters marked A and B, received at Liverpool from W. H. Lane, Lloyd's agent." At the hearing, Dr. Addams objected to its reception.

in the island of Fayal, and that law is certified by two gentlemen said to be cognisant of it.

Now the law said to prevail in this island is, that the commissioners of the customs may sell the ship with the consent of the master where it is not worth the expense of repairing and outfitting—I use the words—but there must first be surveys thereof. What is meant and intended by this affidavit? This affidavit is in these words. I had better read it, for it is very important. After stating how well acquainted they are with the law and the mercantile usage of the country, they state that, "When a ship of any nation whatever arrives damaged in the ports of this island, and it appears to the master, or any other person having charge of the command, that she may not be in a navigable state, it is customary, and according to the laws of Portugal, for the master, or the person having charge of the command thereof, with the aid of his respective consul, vice-consul, or consular agent, to request the commissioner of the customs of this island to direct one or more surveys of such ship to be proceeded to; and after those surveys have taken place, it is likewise customary and lawful, and the laws of this country authorise the same, to sell the said ship when it is not worth the expense of repairing and outfit."

Now this opinion certainly appears to me to be framed to meet the precise circumstances of this case, because it does not state the law in any ordinary form; it states exactly what took [56] place to a certain extent in this very individual case; viz. the master and other persons having charge of her may request the commissioner of customs to direct one or more surveys, and then order her to be sold, which is exactly what took place on this occasion. In one particular I do not know that this is very satisfactory, because, for what purpose are these surveys had? These surveys, I apprehend, are for the purpose of guiding the discretion of the commissioner: it is perfectly useless to have a survey unless that survey is to have some operation and effect on the mind of the person who is to act upon it and who directs it. Now, can it be said for a single moment that these surveys are to be mere matters of form, and the commissioner is to decree a sale according to his mere will and pleasure? Then must not the true meaning be that if, after these surveys have been taken, it is made plain to the judgment of the commissioner that the said ship is not worth the expense of repairing and outfit, he is then to sell? Can any one say that this was the case after the surveys, when the surveys say that the vessel may be repaired, and that at the expense of 300l.?

I have thought it right to make these observations on this certificate, which comes in these terms without authority of any kind or description except the opinion of these gentlemen.

However, for the sake of completing the principle of law, I will take the fact to be that the survey was properly made, and that the order for the sale was derived from these surveys ordered by the director of the custom house; and I will take it to be true that the ship was not worth the expense of repair and outfit; and I will take the law to be as stated to be by these gentlemen, and then I come to the question at once. Am I at liberty to adopt this law as an exception to the general maritime law, a law which would sanction and render valid the sale of any British ship in a foreign port merely upon a conjecture and estimate whether the ship was worth the expense of repairing and outfit, and that too without calling in the aid of a Court of Justice, but merely through the executive power of an officer in the customs? That such a law would be for the general convenience and advantage of all maritime nations, I am by no means inclined to admit; on the contrary, I am well satisfied that in principle and in practice—in practice, too, looking at this very case—it would be most injurious to the interests of all those concerned in commercial shipping if I were to adopt any such principle; and I feel equally assured that it would be equally inconsistent with the present maritime law of the civilised world.

[57] But, then, am I to adopt such a rule on the principle of the lex loci contractus? In what way does the lex loci contractus in the case of the sale of a ship entitle itself to be so admitted? If such general proposition could be entertained, the law relative to the sale of ships would be a law varying with the law of each individual country wherever the sale happened to take place; in fact, there would be no general maritime law at all, but a law to be inquired into in every case where the transfer took place in a foreign country. I should have one law to look for at Fayal, another

in our own colonies, another in Demerara, another in Trinidad, another in French colonies, another in England.

Now, I know of no right which the purchaser of a ship in a foreign country, such ship not belonging to a subject of that country, has to call for the interposition of the lex loci contractus, save, indeed, in one case only where the title is derived from the decree of a competent Court administering the law in its own jurisdiction, and by its decree conferring a title. Now, had the ship been purchased under the decree of a Court of Admiralty, directing her to be sold in a case within its jurisdiction, or the law of a Court resembling our own Court of Exchequer, I should have hesitated long before I disputed that title.

Now, a word on that subject. It has been decided, as we all know in our Courts, with regard to a British ship, if it should be condemned by a Court of Vice-Admiralty, that gives no title to the purchaser whatever. That is decided and fixed law. It is equally decided law in the Courts of America that a sale made in a case of a commissioner of wreck confers no title. A case (*a*) was cited at the bar in which a judgment to that effect was delivered by Mr. Justice Story, and a most admirable judgment it is; it exhausts the whole subject. But when we speak of the decree of a Court of Admiralty, it is quite manifest, from a consideration of all the cases, that the reason why a decree of the Court of Admiralty had not the effect of giving a title was from want of jurisdiction in the Admiralty Court to entertain the trial at all. Lord Ellenborough says in his judgment in *Reid* v. *Darby* (10 East, 143) that he has made great inquiry: he says, he finds, though the practice has obtained in Vice-Admiralty Courts abroad of entertaining applications to examine whether a ship ought or ought not to be sold on account of damage for the benefit of all concerned; though that practice has prevailed, he states expressly that the result of his inquiry is that Vice-[58]-Admiralty Courts have no such jurisdiction. I think the judgments of common law proceeding on that principle are to be maintained on the principle and no other, because I wish to guard myself against this—supposing there was a Court of Admiralty existing in a foreign country, which by the law of that foreign country had a jurisdiction to entertain questions of this nature; I wish it to be distinctly understood that I do not, under circumstances of that kind, say I would not respect the title conferred by such a Court of Admiralty; I do not say I would; it is a point hereafter to be considered and weighed; but I wish to guard myself against supposing that it does not give a title. I remember that, many years ago, when I argued upon the point in *The Attorney-General* v. *Norstedt* (3 Price, 97), the great question at issue was, whether or not the decree of a Court of Admiralty proceeding in rem was not binding on all the world, and so that forfeiture to the Crown could not bar it? It was decided in the affirmative, and I think properly so; therefore I wish it to be understood that, in the event of a title being given by an Admiralty Court having jurisdiction, or a Court of Common Law, I do not preclude myself from considering that to be a valuable title. Again, I should consider this: supposing a vessel was sold by decree of the commissioners, or the Court of Exchequer, for forfeiture, that I should hold a good title, if such a case could occur. Supposing a vessel sold in a foreign country under the law prevailing in cases of insolvency or bankruptcy, I should hold that also to be a good sale. But I wish it to be understood that I go on the ground that nothing short of that appears capable of justifying a sale and making good a title.

Now, having made these observations, there are very many other considerations, which ought to be shortly adverted to, why I do not adopt that law. It is a general principle, to which I give my unfeigned consent and approbation, that the lex loci contractus generally governs the validity of every contract. Its mode of execution may depend on the place where it is to be carried into effect; but with respect to the validity of a contract itself, it is a principle adopted by all writers on the law of nations, almost without exception as a general principle, that the lex loci contractus ought to govern individual transactions.

But the question is, Whether the lex loci contractus is always applicable, or whether there are not certain exceptions to that rule, and whether this case does not form one of those [59] exceptions; and without entering into it minutely, for it would occupy time, I will refer to a note to be found to the 286th sect. of the last

(*a*) *The Schooner "Tilton,"* 5 Mason's (Amer.) Rep. 465.

edition of Mr. Justice Story on the Conflict of Laws. Now that note refers to several authorities; but there is a remarkable reference to a note which was written by Mr. Brodie, the very learned editor of Lord Stair's Institutes, in which this very point is discussed at considerable length, and he takes several distinctions, not having perhaps any particular case in view. All these distinctions do not apply to a case so very peculiar as that now under discussion; but there appear to me, according to his judgment, several reasons why the lex loci contractus is not always applicable. He says this: "A distinction is ever to be attended to between the case of a party casually entering a foreign country and that of one who resides in it; and the distinction is particularly strong in regard to an individual who, as master, has the charge of a vessel in a foreign port." Then he states he is under these circumstances likely to be ignorant of the law of the country, and not to be too tenaciously bound. Then there is another distinction, and that by far the most important. "The contract," says Mr. Brodie, "in such cases is made with the shipmaster, who acts as the implied mandatory of the owner; and the effect of the transaction must greatly depend on the extent of his authority. Now it is true that as a person who has been appointed to an office must be presumed to be invested with the usual powers, so restrictions upon the ordinary authority will not be effectual against another party who has not been apprised of them; yet it will be observed that, since it is the duty of those who deal with an agent to make themselves acquainted with the extent of his powers, whether expressed or fairly implied from his office, so the presumed mandate here must be measured, either by some general principle of maritime law or by the law of the country to which the ship belongs. Such a general principle of maritime law would of itself, though in a different way, tend in my apprehension to exclude the lex loci; but there is no such universally received principle, and the more positive exclusion of the principle of the lex loci is the consequence;" and then he goes on to state what the English law of hypothecation is, and how we should apply it.

Now I believe that, if this case had come under the consideration of Courts of Common Law instead of the Court of Admiralty, a great deal of the matter to which I have addressed myself would not have formed part of their consideration. My con-**[60]**-viction is they would have looked to that very argument used by Mr. Brodie, namely, what authority had the master to sell? They would have argued with regard to a ship all over the world, What power has the master to sell? They would have taken the extent of his power according to the definition of Lord Tenterden, and beyond that they would not have gone. They would have said, a contract as to a ship is contrary to other contracts: ships go all over the world; with regard to them the law of our own country must be primarily looked for: they would have said, the law maritime, so far as regards them, must prevail. That is my conviction of the mode the question would have been dealt with. I am confirmed in this by seeing that, in the ordinary cases on this subject, the fact of the sale taking place in a foreign country, to a foreign purchaser, never appears to have had any effect on our judges; for in the earliest case (*Tremenheere* v. *Tresilian*, 1 Sid. 452), that before Sir Matthew Hale, cited in Lord Tenterden's book, he decided that the sale of a ship by the master did not convey the property to the buyer, although the sale was made in a foreign country, in a case of inevitable danger. The incident of being in a foreign country forms a part of that judgment; and in looking, as I have with some degree of care, to the various judgments which have taken place in different Courts on the subject of title to ships, I do not see that the fact of sale being in a foreign country has ever induced our judges to form any different opinion from that which they would if it had taken place in a British colony, though I must say there is one case in which I find it relaxed. It was formerly the law—the law within the last forty years—that if a sale took place in a foreign country from a case of necessity, yet if the Registration Acts had not been complied with, that sale was void. That law was laid down by Lord Ellenborough in the Court of King's Bench, and, on the highest authority, has been relaxed. I should have held that I was doing an act of injustice if I had bound a foreign owner by all the technicalities of the Registration Acts. I should have good right to bind him by the general municipal law, so far as it was conformable to the general maritime law; but I should have no right in a case of absolute necessity to bind him by the Registration Acts. I think, though it ought to be presumed that the purchaser should look at and inquire as to the authority the master possesses—the

general authority—yet it never can be expected, with any show of justice or equity, that foreigners should, in a distant part of [61] the world, be supposed to know there were certain technicalities in the Registration Acts which would vitiate a sale otherwise valid: let it be understood I speak of a case when it would be otherwise valid.

Now there is another matter I will shortly advert to before I terminate this discussion, and that is with regard to cases of hypothecation.

Now I conceive that in cases of hypothecation the fair result to be drawn is that all our Courts which have had to consider that subject have never deemed themselves bound by the law of the country where the bond was given. It is singular, seeing the great number of cases which have occurred, and the points that have arisen, that this should not have been matter of discussion, because the great number of bonds that come under our consideration are bonds not given in British colonies, but in the ports of foreign countries; yet in no instance has it been prominently brought forward except incidentally in this way. It has been said, Why, by the law of nearly the whole of Europe—sometimes, even, the proposition has been pressed so far as to say, by the law of all civilised states except England—you have a right to a lien against the ship for anything done on her behalf in the way of repairs and furnishing necessaries; and that you might do more than that, you might, though the ship was not in your possession, you might take her in possession, and sell her to liquidate these demands. This has been alleged particularly in the case of *The "Augusta," De Bluhn* (1 Dodson, 283), as a ground for bottomry bonds.

Now it is rather difficult to say how that ought to operate: it never has been acknowledged to be a law that is binding in any degree upon the Courts here; but I have always myself considered that where there was an imminent degree of danger of a ship being so sold, unless the master was enabled to get money to prevent the sale, that it certainly was a case which to a certain extent I might rely upon as justifying the taking of money on hypothecation; not that I acknowledge the law as binding upon me, but it constitutes a part of the necessity of the master. These are two distinct and separate propositions. Now in no case that I am aware of—I do not say the subject may not have been discussed and agitated, but I am not aware of a decision upon it. In a case appealed from this Court not long ago, *The "Bonaparte,"* it formed no part of the discussion or decision.

[62] I may, however, further observe in this case, no attempt appears to have been made to communicate with the owners of the ship at home, though such a step was not very impracticable on their own showing. Even in the case of bottomry such communication ought, if possible, to be attempted; and where it is practicable and not done, even a foreign merchant advancing his money we know is not entitled to recover.

Here, too, there is no danger as relating to the cargo. The valuable part of the cargo was not of a nature to be deteriorated by keeping; and another consequence of such a sale as this is that it entirely destroys, and may disturb, all the rights subsisting between the owners of a ship and the owners of a cargo. We know that has taken place in several instances. I say nothing of the insurers and the insured, because I have already adverted to them.

Another proposition was made—that there was danger of the chance of the ship being damaged in the place where she lay. That danger is set forth here, and may have existed to a certain extent; but all the facts in this case satisfy my mind that this was not a substantial reason for sale; I therefore discard that from any further consideration.

Now, looking at the whole of the case, I have come to the conclusion that I cannot adopt the lex loci contractus; and, if I reject the lex loci contractus, it was not the sale of a ship from necessity which alone could justify such a disposition of it. I am therefore bound to hold that this sale was invalid, and to decree possession to be delivered over to the original British owner.(*a*)

---

(*a*) The law appears less severe in America, for Mr. Justice Story says: "I feel the less difficulty in having arrived at this conclusion, because, if I had felt it my duty to decree possession to the libellants, grounded upon the invalidity of the sale, the decree must have been upon the terms of making all due allowances to the claimants for the expenditures of the original purchasers in getting off the vessel and repairing her. This is the case of a clear bonâ fide purchase, under circumstances

**[63]** Dr. Haggard. And the costs, sir?

The Court. Yes; my only reason for giving costs is, it is now laid down by all the Courts that costs are to follow the results of the case. At this moment it is in agitation by the Privy Council that in every case where the appellants succeed, the respondents are to be condemned in the costs of the appeal. Therefore I am bound to go on that principle.

Proctors for the original owners, F. Clarkson & Son; for the purchaser, J. K. & G. Burchett.

THE "E. U." The High Court of Admiralty, June 7, 1853.—Salvors having made great exertions to save a ship and cargo, were at length with her crew compelled to abandon her. She was afterwards found and saved by a steamer.—Held that the original salvors were entitled to salvage under the circumstances.

[Considered, *The* "*Reupor*," 1883, 8 P. D. 115. Dictum applied, *The* "*Camellia*," 1883, 9 P. D. 27. Referred to, *The* "*Kate B. Jones*," [1892] P. 373.]

This was a cause of salvage promoted by the crew of the Broadstairs life-boat, and the owners and crews of the luggers "Ondine" and "Ruby," against a vessel called the "E. U." Of the facts of the case there was but little dispute. This vessel sailed on the 13th December last from Antwerp, bound for Liverpool, and on the 24th, when off Brighton, met with a severe gale from the S.W., which obliged her to bear up for the Downs, where she anchored on the 25th. The gale increased, and about 2 o'clock A.M. of the 27th a second anchor was let go, but at 5 A.M. she drove, with both anchors down, broadside on towards the Brake Sand, upon which she struck heavily about 6 A.M., the sea flying over the maintop. The double-reefed foretopsail was set, but was soon blown to pieces. At 8 o'clock she beat over the Brake, and, on sounding the pumps, was found to have three feet water in her. At 9 o'clock she was near the Elbow Buoy drifting, when the Broadstairs life-boat with twelve men came alongside. Seven of them remained to assist her, while the rest went ashore in the life-boat to bring off an anchor and chain. Those on board made every exertion, and at length succeeded in wearing the ship's head towards the land; but finding the water increasing in the hold, and the ship very unmanageable, they signalled to the "Ruby," a Margate lugger then in sight, and requested her master and crew of five hands to stay by the ship, which they did until about half-past twelve, when the life-boat's men, as well as the master and crew of the "E. U.," abandoning the hope of saving her, got on board the lugger, proceeded to shore, and reached Margate in safety. In the meantime the five men who had returned to shore in the life-boat had reached Ramsgate, procured an anchor and cable, and put them on board the lugger "Ondine." They were afterwards joined by **[64]** some of the others who had come overland from Margate, and, together with two of the "Ondine's" crew, proceeded in search of the ship, which, after some time, they discovered being towed by a steamer. The lugger accompanied her to Margate, and there put the anchor and cable ashore. For these services the owners had tendered 200l., which was refused. They alleged in defence that they had already paid 1650l. as salvage to the master, owners, and crew of the steamer, and denied that the parties proceeding in this case had rendered any effectual service whatever towards the saving of the ship.

Dr. Addams and Dr. Twiss appeared for the salvors, and Dr. Bayford for the owners.

*Dr. Lushington.* Before the Court can decide upon the sufficiency of the tender in

---

calling for no inconsiderable indulgence, even if the strict law had been against the title. The general practice of the Admiralty in all such cases is to restore possession upon making compensation for all meliorations by the purchaser.(*b*) It is an equitable principle, analogous to that which is constantly acted upon in Courts of Equity, and probably borrowed from the same common source, the civil law. And if meliorations ought to be decreed generally à fortiori, the actual disbursements and expenses ought to be allowed which were incurred to deliver the vessel from her peril; for they are in the nature of salvage. Where, indeed, the title is not only invalid, but the transaction is tainted with fraud or ill faith (which is not pretended in the present case), the rule would be different;" *The Brig* "*Sarah Anne*," 2 Sumner's (Amer.) Rep. 220.

(*b*) See *The* "*Perseverance*," 2 Rob. R. 239; "*Nostra de Conceicas*," 5 Rob. R. 294.

this case, it must have some idea of the value of the property. The original value was 4995l.; various deductions have been claimed by the owners, but I apprehend I shall do no injustice if I estimate its value, after reasonable deductions, at between 2000l. and 3000l. The owners have tendered 200l. as a sufficient remuneration for the services performed.

In the course of the argument certain points, worthy of great consideration, and attended with no small degree of difficulty, have been touched upon by counsel. I mean this, What is the principle the Court should adopt where services have been rendered, but have proved inefficient; and things have been done to a ship in distress which hardly partake of the nature of salvage service, and are scarcely productive of any benefit to the ship? In order to make my meaning clear, I will suppose a vessel in distress, and an order sent to put an anchor and cable on board, and that that is done; but that afterwards, from the violence of the weather, the vessel is carried away and lost; the service, however, is such as must be paid for whether the vessel is lost or not. The Court is always in the habit, when awarding remuneration for services of this description, of considering the difficulty and danger attendant upon performing them; and I know that many instances have occurred at Deal in which putting an anchor and cable on board has been considered a service of the greatest merit. The case I particularly remember came here on appeal, where the commissioners had awarded 120l. for this service; and I thought it my duty, according to the best of my judgment, to alter that decree by reducing the award. That led to a remonstrance from the commissioners, who thought, perhaps, that I was not so well aware of the difficulty of putting an anchor and cable on board [65] as those who were on the spot. Whether I was right or wrong in that particular instance, the circumstances have ever since strangely impressed themselves upon my mind.

Suppose another case: a vessel is fallen in with in the Bay of Biscay in a disabled state; she is brought to Plymouth, and then, in consequence of the weather being tempestuous, or other circumstances, she is altogether abandoned by the salvors, who are on board of her. I apprehend that if, in a case of that kind, another vessel comes up, and finally brings the disabled ship into a place of safety, it is by no means to be laid down as clear law that the original salvors are not entitled to some reward; because, in fact, they would have brought her from a place where destruction was certain, to a place where, though there was considerable danger, there was a chance of salvation.

But there is a third case, in which parties are entitled to no compensation at all; that is, supposing they go out at the risk of life, and make the most meritorious exertions, and yet do nothing successfully towards saving the vessel and cargo in the slightest degree. The Court cannot, I apprehend, under those circumstances, give any salvage reward whatever; because the very principle of salvage is, to give reward for exertions which have been successful.

These circumstances I have thought it right to mention, from the course which the argument has taken, and in some degree from the facts stated in the pleadings. I will now proceed to the consideration, what the services were in the present case, and under what principle they range themselves.

There is no doubt that this vessel of 435 tons burthen was in a state of very imminent danger. The weather is represented to have been the most tempestuous experienced for many years. The men on board the life-boat saw this vessel in a state of danger, with a signal of distress hoisted; and I must say that the very greatest credit is due to those who went on board the life-boat, and exposed their lives to what I consider most serious peril, for the purpose of rendering assistance to men whose lives were in danger, and to the property of which they were in charge. I think I could scarcely exaggerate the merits of those who encountered these risks. Now, of the facts there is no denial. The question is, What resulted from the facts? They found the vessel in a state which I need not describe, and adopted measures for her preservation. These were, in the first place, to bring her head to the N.W., though that was not effectual; in the second place, to send the life-boat for an anchor and cable, because the vessel never could be safe until [66] she had them on board. While some of the party went away for this purpose, the remainder used every exertion in their power to save the vessel. They found the water in the hold increase from six feet to nine, and all their exertions were unavailing, so that there was imminent danger to the lives of those on board. They again wore the ship, and, they say, with some success, but it could not have been very great. After a time, when

the danger had so increased that it would have been inconsistent with their duty to themselves to incur further risk, the crew of the vessel, together with the master and the crew of the life-boat, left the ship. In this I hold them to be fully justified. For it never can be contended that life is to be sacrificed for the sake of property, however valuable. On reaching the shore at Margate in the "Ruby," they proceeded overland, and found that the "Ondine" had been hired to bring out an anchor and cable; and then, with a preseverance which is in itself exceedingly praiseworthy, they go in search of the vessel. In the meantime she had been taken in tow by a steamer, which had accidentally fallen in with her. I apprehend there can be no doubt that the "Ondine" is entitled to be paid for taking out an anchor and cable of no less than 20 cwt. The "Ruby," however, was the mere vehicle in which the persons were carried, and I cannot say that she has, strictly speaking, any claim for salvage. The learned counsel for the owners has said, with great propriety and great force—Take the service altogether, what has it to do towards completing the salvage of the ship? The answer is, in my opinion, this: No one can tell the precise effect of the head of the vessel being put to the N. by those on board the life-boat. It may have been productive of great benefit, or, on the other hand, it may not have been in the slightest degree instrumental towards the ultimate safety of the vessel. Looking, however, to the whole case, and especially to the intrepid manner in which the salvors went on board the life-boat, and the general maritime benefit in inducing persons to go on in extreme difficulty to save the lives of those in danger, I shall overrule the tender, and give the sum of 300l.

Proctor for the salvors, Rothery; for the owners, Gostling.

**[67]** THE "SIR GEORGE SEYMOUR."(*a*) The High Court of Admiralty, March 24, 1853.—Objection to the report of the registrars and merchants, in a cause of collision. Practice of the Court. Assessors appointed to assist the registrar and merchants in the reconsideration of their report, the Judge himself being also present in the registry.

[S. C. 17 Jur. 402.]

This was originally a cause of damage by collision, promoted by the "Victoria" against the "Sir George Seymour." The "Victoria" was run down on her outward voyage to Trinidad. She was compelled to put into Corunna, whence she proceeded to Trinidad. The case was argued on January 22, 1851, and sentence pronounced in favour of the "Victoria." This sentence was affirmed on appeal, by the Judicial Committee, who remitted the cause. It was then as usual referred to the registrar and merchants, to ascertain the extent of the damage, and the sum due to the "Victoria." The sum claimed was 705l. 2s. 5d. The registrar and merchants made their report, disallowing various demands of the owners, to the amount of 243l. 18s. 7d. To this report the owners of the "Victoria" objected.

*Dr. Lushington.* This was originally a case of damage, in which the owners of the "Victoria" succeeded against the "Sir George Seymour." The amount of damage was referred to the registrar and merchants, and their report has been objected to.

The sum in dispute is 243l. 18s. 7d. The demands disallowed were: part of the repairs done in London; yellow metal; part of the ropemaker's account; part of the blockmaker's bill; the charge for Lloyd's surveyor; part of the account for canvas supplied to the vessel; and part of the demurrage. I need hardly say that, where the registrar and merchants have made a report, the presumption is in favour of the report so made by the officers of the Court; because they are persons of skill and experience, and disinterested between the parties. When, however, an objection is taken, it is a duty which the Court cannot abandon, to consider the report and the objections thereto, and to form the best opinion it can as to the accuracy of such report, or the validity of the objections. There are, indeed, in the present mode of proceeding very great difficulties with which the Court has to contend in discharging that duty. It is necessarily without that knowledge which is peculiarly requisite to the ascertaining the truth in such matters. For instance, in this case there are questions which require the knowledge and skill of a shipwright or surveyor of shipping, and other questions calling for the practical experience of a merchant. To none of these qualifications, even in the least degree, can the Court pretend. All that the

(*a*) Reported by Dr. Spinks.

Court can do is, to weigh the evidence in the case. If the Court had the same [68] evidence, and none other, than that which was before the registrar and merchants, it might be enabled to form something of an opinion, however imperfect for want of their practical knowledge and experience. But how stands the case? First, I have not before me the whole evidence on which the registrar and merchants proceeded. According to the practice, much passed vivâ voce, of which no record is kept. Nor is this all. I have, on the present occasion, no less than seven affidavits from one side only, which never were before the registrar and merchants at all, and two affidavits on the part of the owners of the "Sir George Seymour." Then, what am I doing? I am reviewing a report. I am called upon to say whether a report be right or wrong, without some of the evidence on which it is founded, and with evidence, on the other hand, unknown to those who made it. A more anomalous undertaking, or more impracticable to be well executed, no Court was ever compelled to embark in. For this most inconvenient proceeding, I will use all the means in my power to obtain a remedy; and it is the more necessary to do so, as these reports upon damage are every day increasing. One remedy will be, to obtain a power for the registrar and merchants to examine on oath, and to confine the evidence as far as practicable to what can afterwards be brought before the Court.

But be this as it may, I must come to some conclusion in the present case; and the parties must not be surprised if I am driven of necessity to resort to a course for which, perhaps, strictly, there may not be any precise precedent. I consider that I am not in a condition to form any positive opinion as to whether the report be correct or not. Suppose I uphold the objections; it might be that the registrar and merchants, if they had had the same evidence as I have, would have made a different report; and then I should be deciding originally that which ought only to be decided upon appeal. I should be saying that the registrar and merchants are wrong upon evidence they never had an opportunity of considering. I am of opinion that no evidence should come before the Court which was not before them.

After commenting upon the conflicting evidence, the Court said:—The course I shall adopt is this, for I will attain justice if I can, whatever trouble it may involve. If the owners of the "Victoria" assent to the proposition, I will refer back to the registrar and merchants the whole of the papers now before the Court, and will select, without communication with them, two persons, one a merchant, the other a surveyor of shipping, to consider, with the registrar and merchants, all these documents [69] and evidence, with power to examine the master of the "Victoria," if he be forthcoming, as he should be. Then, upon this further report, I shall come to the best decision that I can, reserving the question of costs for the present. If it be necessary I will attend myself in the registry when the examination goes on.

If the owners of the "Victoria" decline acceding to this proposition, I must overrule the objections, and for the following reasons: because, though I think the evidence produced by them has created great doubt, at least, in my mind, whether the report be well founded or not, yet that evidence has not satisfied my judgment that the objections are established by competent proof; and I cannot overrule a report unless the affirmative of the objections be distinctly established.

June 7.—The owners assented to the suggestion of the Court, and a further investigation having taken place in the registry, at which the learned Judge himself attended, the matter came again before the Court for its final decision.

In the course of his judgment, Dr. Lushington made the following remarks upon the practice of the Court: I think it right to make one or two observations as to the course which is generally adopted in making these reports, and the manner in which they are brought under the cognisance of the Court. In theory, perhaps, they are not altogether defensible; but I believe that in practice they have worked exceedingly well, and justice, for the most part, has been done as speedily and as effectually as it could be done in any other manner.

The damage is referred to the registrar and merchants to ascertain the amount and degree; and it must frequently happen that questions of no small difficulty are presented for their consideration; for they have to ascertain, not merely the expense of the damage which is done by the collision itself, but to calculate the losses which have happened to the owners in consequence of the disappointment of the voyage, called sometimes demurrage, though not strictly and properly so, and other considerations of the like nature. These are considerations involving frequently questions of

great nicety and great difficulty, more especially when there is no possibility of those who have to judge the case having a personal inspection of the property damaged.

The mode pursued by the registrar and merchants is not only [70] to have affidavits, but the attendance of persons concerned on the one side and on the other, who they think can throw any light on the question. They then make their report, and I have always found that these reports have been made with the utmost care and caution. I apprehend that, upon principle, as well as for other reasons, it is the duty of the Court to be very cautious before it overthrows any report so made, unless there be an overpowering case, which shall satisfy the mind of the Court that justice has not been done. In other words, the presumption is strongly in favour of the report.

When, however, cases do come under the consideration of the Court, it has the affidavits made before the registrar and merchants, and of course it can form its own opinion upon them, exactly in the same way as they can form theirs; but the Court loses the benefit of the oral communications which take place between the registrar and merchants and the parties concerned; of those vivâ voce explanations which may be of the utmost utility to ascertain the truth of any particular item. So far the Court is placed in a worse position than they; but in many cases I have affidavits which were never before them at all.

I mention these matters because I think it desirable that they should be well known; but, notwithstanding these apparent anomalies, I am perfectly convinced that in great part justice is entirely done to the parties concerned.

Taking into consideration the affidavits produced in the present case, and being reluctant to pronounce any judgment without my own mind being perfectly satisfied of its truth and justice, I resorted to what is, perhaps, the first instance in which such a step has been taken, but one which I do not repent. I determined to go to the registry, and, with the registrar and merchants, investigate the case, and obtain the assistance of one of her Majesty's surveyors of shipping, and of a merchant of very high character, so that I might secure the very best advice I could before I came to a final decision. All that I have now to do is to state the decision to which I have come.

The learned Judge then referred to the various items in dispute, in some cases upheld, in others overruled the objections taken, and gave the costs incurred by taking the objection.(*a*)

[71] Proctors, for the "Victoria," Rothery; for the "Sir George Seymour," Deacon.

---

(*a*) With regard to the costs of reference to the registrar and merchants, the Court stated the principles on which it proceeded in *The "Nimrod"* (May 25th), thus:—"I am of opinion that there is a distinction between a reference to the registrar and merchants in a question of bottomry and in one of damage. With respect to bottomry, persons who go to a reference ought to be provided with the charges which they mean to prefer. These are charges already incurred, disbursements made; and the accounts ought to be fair and accurate; not binding them down too tightly in that matter. I should always be disposed, in questions of bottomry, wherever I find that, in a reference to the registrar and merchants, a considerable sum has been demanded over and above that which the bondholder was fairly entitled to, to compel him to pay the expenses of that reference. With respect to cases of damage there is this difference: it is difficult to lay down a positive rule whereby you can ascertain the damage done to the ship or cargo in consequence of collision. It frequently happens that there are many items to take into consideration, of which the person who has received damage cannot make a precise estimate, and which may be fair matter of dispute and discussion before the registrar and merchants, and which discussion the person so receiving damage—the person damnified in the case, considering its nature—is fairly entitled to raise and complain of, at the cost of the wrongdoers. Yet I am by no means disposed to come to the conclusion that it is the right of a party receiving damage to make preposterous demands, exposing the other side to considerable expense. Wherever the Court finds a party so conducting himself with respect to items preferred in a claim for damage, I think, in justice to the other party and the public—for the public have an interest in justice being administered—I ought to take cognisance of it" (17 Jur. 768). In accordance with these principles, the Court in that case condemned a party in the costs of reference as to four extravagant items, disallowed by the registrar

THE "JULINDUR."(*b*) The High Court of Admiralty, March 24, 1853.—The master's lien on a vessel, when the owner is bankrupt, is limited to services in that vessel. A balance due from the owner to the master for services in another vessel disallowed. The Court, in the exercise of its equitable jurisdiction, may give a party the opportunity of further proof.

Mr. E. R. Arthur, the owner of the "Julindur," having become bankrupt, the master, Mr. H. Burns, under the 7 & 8 Vict. c. 112, s. 16, proceeded against the vessel for his wages. The mortgagee of the vessel appeared in defence of his own interest. The question being entirely one of account between the master and owner, it was referred to the registrar and merchants. They made their report to the effect that on the balance of account the master, instead of having any claim upon the vessel, was a debtor to the amount of 271l. 17s. 7d. To this report the master took objections. The two principal items in **[72]** dispute were 200l. 4s. 5d., balance of a previous account due from the owner to the master, and 803l. 1s. 10d. for bills dishonoured. These items in the master's account were disallowed.

Dr. Addams appeared for the master, in opposition to the report, and Dr. Bayford in support of it.

*Dr. Lushington.* I shall be able to dispose of this case in a few words. This is a case of objection to the report of the registrar and merchants. It was originally a claim for wages made by the master; the wages were pronounced for, but a reference was made to the registrar and merchants in order to ascertain whether, after taking the accounts, anything was due or not. The report was that no wages were due; to which the master has taken objection, and has brought the case under the consideration of the Court; and of course the first consideration is, whether this objection is sustained by evidence.

[The Court, having examined and confirmed certain allowances as against the master, proceeded:—]

Now the master's claim for sums which the registrar and merchants disallowed stands on a totally different footing. The question which I must now resolve is, not only whether they were justified in the step they took, but whether, according to principles of justice, which the Court is bound to administer, I ought to open the report with regard to the sums.

The sums are as follow:—"Balance of previous account, 200l. 4s. 5d." "Bills to Lyall, Scott & Co. dishonoured, with charges and re-exchange, 803l. 1s. 10d." "A small sum of five guineas to an accountant." And lastly, "Interest on a previous account, 25l. 0s. 5d." With respect to these sums it is stated by the master as to the first item, viz., the balance of a previous account for a former voyage, which ended in the month of October, 1849, that all the accounts were handed to Mr. Arthur in the course of the same month and were never objected to. The answer to this is, that no vouchers were produced at all; and certainly, if no vouchers were produced of any species or kind, it would be next to impossible that the registrar and merchants, in the discharge of their duty, could have allowed these sums, however justly they might have been due. There is an affidavit produced from Mr. H. Burns with an account annexed, which account was never before the registrar and merchants at all, though why it was not, I am utterly unable to state; but it is an account which brings it to the amount of 200l. 4s. 5d.; an account between him and Mr. Arthur, who is the owner of the ship, but now become a bankrupt.

**[73]** In my opinion the registrar and merchants acted rightly; in the first place they had no account, in the second, they had no vouchers whatsoever upon which they could rely; but it will be another consideration whether I may not give this master some opportunity of establishing these claims, which in point of fact are not negatived. They are not proved by competent evidence, but they are not negatived in the case.

I now come to a very important item. There are certain bills drawn on Scott, Lyall & Co.; bills drawn on the owner, as is evident, for the purchase of coals at

---

and merchants, and amounting to 1109l.; and in the case of *The "Cynthia Ann"* (June 21st), where the sum claimed was 275l., and the amount allowed only 91l., condemned the party in the whole costs of the reference, and of the motion to that effect.

(*b*) Reported by Dr. Spinks.

Sydney, which coals were sold at a considerable profit at San Francisco, and 5000 dollars were sent home. No account was rendered of this, but the transaction does not seem to have demanded it.

[The Court, having commented upon the affidavits, which shewed that the master had forwarded 1000l. to meet these bills, that the 1000l. had come into the hands of the assignees of the bankrupt, and that the parties interested were about to sue the master on the bills, then proceeded:—]

Now, it appears to me that the registrar and merchants in this respect as well as in the other acted perfectly correct, in the absence of all vouchers and documents, in rejecting these demands; but I cannot but feel that the facts themselves are not negatived; either that the owner was indebted in the sum of above 200l., or that the bills were drawn for the coals by the master on the owners, or that the assignees are, in fact, in possession of the very profit made by this bargain.

Now, it would be a measure of inequity, I will not say illegality, if the master should be deprived of these sums which are bonâ fide due to him in the account. I am of opinion, therefore, this being a bankrupt estate, where the property belongs to the creditors, that it is necessary to require strict proof, and that, as there are no vouchers, the affidavit of the master is not sufficient; but it appears to me that I may take the following step: I will allow the master, if he thinks fit, at the risk of costs, to examine Mr. Arthur, the owner, before the Court here. I have not power to send him before the registrar and merchants, but I have power to send for him to examine him here. If he thinks fit to incur the expense, and run the risk of costs, he shall examine Mr. Arthur to prove these demands, which are not denied, and also call for the accounts of the mortgagees and assignees; for I really think the registrar and merchants, for some reason which I cannot conjecture, were left without the means of coming to a satisfactory conclusion on the point. What they did, I think, is perfectly right; but I think the Court, in the exercise of its equitable jurisdiction, is entitled to **[74]** inquire whether these demands on the part of the master cannot be established by adequate evidence, through the medium of Mr. Arthur, who must be cognisant of the facts, or by other evidence, and by calling for the accounts. I will give the master the opportunity of obtaining the evidence. I do not overrule the report: I hold my hand.

June 10.—The matter was again brought before the Court, and Mr. Arthur, the owner of the ship, Mr. Gillespie, the clerk to the official assignee, and Mr. Bottomley, a shipowner, were examined vivâ voce, on behalf of the master; and Mr. Atkins, the holder of the bills, on behalf of the mortgagee.

*Dr. Lushington.* Before entering on the proceedings in this case, I think it is expedient to advert in the first instance to the authority under which the Court acts, and to see what limitations are necessarily imposed upon the power of the Court; and if it should so happen—unfortunately happen—that the Court is, in some instances, incapable of working out the whole consistently with justice, the blame must lie upon the Legislature which passed the Act, and not upon the Court which administers it.

Now, it pleased the Legislature to pass an Act, entitled "An Act to amend and consolidate the Laws relating to Merchant Seamen," and to insert in that Act, for the first time, a provision relating to masters' wages, and that in these words: "That all the rights, liens, privileges, and remedies (save such remedies as are against a master himself), which by this Act, or by any law, statute, custom, or usage, belong to any seaman or mariner, not being a master mariner, in respect to the recovery of his wages, shall, in the case of the bankruptcy or insolvency of the owner of the ship, also belong and be extended to masters of ships or master mariners, in respect to the recovery of wages due to them from the owner of any ship belonging to any of her Majesty's subjects" (s. 16).

The consequence of the Legislature passing this Act of Parliament was, that it imposed upon this Court, to which the jurisdiction was given, the necessity, in all cases, of entertaining the claim of the master to his wages, where the owner had either become insolvent or bankrupt. Nothing was mentioned in the Act but the word "wages," and I am to administer the law exactly in the same manner as I administered it antecedently to the passing of the Act with regard to seamen.

**[75]** Now, with regard to seamen, it is well known that the way in which we always proceeded in these cases was to deduct the advance made to them on account of wages, and to deduct also anything which might have been received in the nature

of slops, and to give the balance. These were very simple matters, never requiring a reference to the registrar and merchants, but were decided on the spot, and, generally speaking, without any objection on the one side or the other; but when we came to consider the amount of wages due to masters, it assumed a very different aspect; because it is well known that the ordinary practice in ships, particularly ships of any large size going distant voyages, is that the master is in the habit of expending on account of his owner very considerable sums of money, and receiving credit to a very great extent. Then the Court was placed in this predicament. I must either have decreed to the master the whole of his wages, without regard to anything he received, or I must go into the question of accounts. Now, anything more unjust to owners than to compel them to pay a master his wages, without looking to what he had received, cannot well be imagined; the Court therefore found it necessary to go into the accounts; but yet the Court is placed under difficult circumstances, because the Court has no jurisdiction, under the Act, to give the master one shilling beyond his wages, though 1000l. might be due. Again, on the other hand, if it be found that 1000l. are due from the master to the owners, the Court can do nothing in that case. All the Court can do is to see what certain sum is due in the nature of wages, and, if the master has received certain sums, to make the deduction. That is the state in which the Court is placed, and the law which it has to administer.

In this particular case the action is entered in the usual form as against the ship, and an appearance is given on behalf of the mortgagee of the ship; and no doubt the mortgagee is fully entitled to come before the Court, and ask to protect his own interests, and it would be an act of injustice to allow a claim against a mortgagee which could not be substantiated against the owner, as owner of the ship; that is to say, I must take the account with regard to a mortgage in exactly the same manner as I must have taken it provided I could have had the owner before me to protect his own interest in the ship.

In this case, with a view to the saving of expense, it was at once determined to go before the registrar and merchants for the purpose of ascertaining what was due to the master, if anything was due, and to let the registrar and merchants take the whole of the facts into their consideration. They pro-[76]-nounced that the balance of account was against the master prosecuting the suit, and not in his favour.

To this report of the registrar and merchants objection was taken on behalf of the master, and that objection was argued before the Court; and it appeared to me that it was rather hard on the master, supposing these items to be justly due to him, to be deprived of the benefit arising from those items, and to be left debtor to the ship, if in fact they were truly due, and the deficiency was merely a want of proof at the time. Not that I in the slightest degree doubted that the registrar and merchants had, from the materials before them, decided rightly; because, of course, they can never allow a demand, unless that demand is substantiated by proper vouchers or by proper evidence. It is one thing, and a totally different thing, to take admissions against a man himself, that a sum is due; but it does not in the slightest degree follow that, because you take such admissions of particular items, you are to allow on the other side an account which is not sufficiently vouched or established by competent evidence.

This, however, related to two, and only to two items. These I allowed to become the subject of discussion, and to be proved by evidence, if the master had evidence to substantiate them. The one was a balance of a previous account amounting to 200l. 4s. 5d. Now, no doubt, if it had appeared by satisfactory evidence that there was due to the master, on account of a previous voyage in the same ship, the sum of 200l. 4s. 5d., I could have allowed it in his favour, and for an obvious reason; because he would be perfectly entitled to sue for wages on a former voyage. Therefore I must take that into consideration. But when I come to look at the evidence of Mr. Arthur, though his memory failed him in the first instance, he not being able to state specifically whether the master had been one or two voyages in this vessel, yet when I put the question to him how the "Julindur" was employed, and in whose command, it was perfectly satisfactory to my mind that the voyage for which the master is now suing is the only voyage for which he has a claim. Mr. Arthur stated that he purchased the ship in 1847; that she went to the East Indies and back, under the command of Captain Howlett; that she then went, I think, to North America and

returned; that Captain Howlett died; and then it was that Mr. Burns was appointed commander. What can be more satisfactory than this? because Mr. Arthur proves what was the date of the purchase and the date of the employment of the vessel from the commencement to the end. I am therefore perfectly [77] satisfied in my own mind that the demand of 200l. 4s. 5d. cannot now be inserted in the account.

With regard to the other sum, these bills were drawn in New South Wales, and for what they were drawn does not very distinctly appear from any evidence before me; but I will presume them to have been drawn on account of the purchase of a cargo of coals, which were subsequently carried to San Francisco, there sold, and produced a benefit to Mr. Arthur, the owner of the cargo as well as the ship. I take that to be granted for the purpose of argument.

Now, it appears to me impossible to allow this in the account of the master, and for obvious reasons: first, I have not the slightest proof whatever that he had the authority of the owner to purchase this cargo at all; secondly, I have no proof whatever that he has paid one single sixpence on account of the bills, but the contrary; and the only argument addressed to the Court is, that though he has not yet paid the money, yet he may be called upon by the holders of the bills in this country; the bills having been dishonoured, proceedings may be had, he may be sued, and he may pay. If that be true as stated, no doubt with great accuracy by Mr. Arthur, it is not a case where I can put liability in the nature of actual payment as a set off.

The learned counsel with great propriety argued another question, on which I do not know that it is necessary for me to pronounce a decided opinion; but it is this: that these bills having been given in order to pay for the cargo, whatever might be the case, however beneficial that might be to the owner of the ship, as owner of the cargo, or as entire owner, still that was not a proper demand against the ship itself. I do not think it is necessary for me to dispose of this question, because I am quite satisfied that in this case I cannot allow it to the master. The result is that I must confirm the report of the registrar and merchants, and as I gave the master liberty to produce witnesses at the peril of costs, I am, in justice to the mortgagee, bound to condemn him in costs.

Proctor for the master, Coote; for the mortgagee, Cattley.

THE "VIRTUE."(*a*) The High Court of Admiralty, July 9, 1853.—Transfer of shares by sale at auction, not legally completed as required by the Registry Act, though the purchaser had paid a large sum of money. Vendors proceeding against the purchaser, in a cause of possession, not allowed their costs.

[S. C. 17 Jur. 843.]

This was originally a cause of possession, brought by the assignees of the estate of William Williams and Joseph Sawtell (trading under the firm of Phillips & Co.), bankrupts, the holders of 40-64th shares of this vessel, against John Hughes, [78] the master of the said vessel and the owner of the remaining shares. The vessel was arrested on September 13, 1849, and Hughes being unable to procure bail, it was not released.

It appeared that in April, 1847, at a public auction of the assignees, the 40-64th shares were purchased by Hughes for the sum of 375l., of which 37l. 10s. was paid at the time to the auctioneer as a deposit of 10 per cent., and two further sums of 240l. and 50l. were paid shortly afterwards to Mr. Phelps, who was acting as solicitor to the assignees. The balance, however, was not paid, and no bill of sale was delivered. Phelps did not pay over to the assignees the money received; and, on its being discovered that he was in difficulties, was removed from the solicitorship in October, 1848. On the assignees arresting the vessel, Hughes tendered the balance of the purchase-money, which was refused.

Hughes thereupon filed a bill in Chancery against the creditors' assignee and official assignee for specific performance, for an injunction to restrain the defendants from selling or parting with the ship, and for the damage which had been incurred by the proceedings taken by the assignees in the Admiralty Court. On the 4th of December, 1849, an injunction was granted upon the terms of the money being paid into Court (see *Hughes* v. *Morris*, 9 Hare, 636).

The case was heard in March, 1852, before Sir G. Turner, V.-C., who dismissed

(*a*) Reported by Dr. Spinks.

the bill, but without costs. This decision, against which Hughes appealed, was affirmed by the Lords Justices in the following June, on the ground that the Ship Registry Act, 8 & 9 Vict. c. 89, had not been complied with; but the Court gave the respondents no costs beyond the deposit (see *Hughes* v. *Morris*, 2 De G. M. & Gor. 349).

The injunction being dissolved, the assignees applied to this Court, on the 28th of July, 1852, to grant a decree of appraisement and sale, and Hughes, by counsel, moved the Court to direct 40-64ths only to be sold. The Court directed the ship to be sold. On the 8th of October the proceeds of the sale were brought into the registry, and amounted only, through deterioration and expenses, to the sum of eight shillings and three pence, though at the commencement of the proceedings its value was about 600l.

The assignees then applied to the Court to condemn Hughes in costs, in objection to which he prayed to be heard on his petition. This petition, stating the facts of the case, and the answer of the assignees denying the relevancy of the averments in the act, now came on for argument.

**[79]** Dr. Jenner appeared for Hughes; Dr. Deane for the assignees.

*Dr. Lushington.* The circumstances of this case are not disputed with regard to any of the important facts. It appears to have been originally a cause of possession, and to have been instituted by the official assignees, as I understand it, of a person who was trading under the firm of Phillips & Co., and who became bankrupt.

They alleged themselves to be the owners of 40-64ths of the schooner "Virtue," and proceeded in this Court in a cause of possession. Now, it is a fact not disputed on the present occasion that Mr. Hughes, the party against whom the cause was in substance promoted, had been a purchaser at a public auction, sanctioned by the assignees themselves, of these 40-64th shares, and that he paid on that occasion to the auctioneer the sum of 37l. 10s., and that he paid to the solicitor of the assignees at one time 240l., and at another time 50l., and offered to pay the balance, but no bill of sale was made out to him. It is an important fact in this case, and it is not denied, that Mr. Hughes did pay this money to this person of the name of Phelps, who was the authorised solicitor or agent of the assignees.

The property being arrested here, three defaults were granted, and on the 21st of November, 1849, a proctor appeared for Mr. Hughes, alleged him to be the sole owner of the ship, and undertook the payment of the contumacy fees, which, of course, must be paid; and the Court thereupon assigned the proctor for the assignees to bring in an act on petition, and, at his prayer, decreed a monition against Mr. Hughes to bring in the ship's register.

At this time Mr. Hughes was advised to have resort to the Court of Chancery, and an injunction was issued by that Court, by which the proceedings in this were suspended until that injunction was finally dissolved, after the hearing before Sir G. J. Turner, V.-C., and also the hearing before the Lords Justices.

It appears, from the report of that case, that the Lords Justices, as well as the Vice-Chancellor, decided that Mr. Hughes had no legal right to the 40-64ths, because there was no bill of sale, and because the provisions of the Ship Registry Act (8 & 9 Vict. c. 89) had not been complied with; but at the same time, though he had no legal right or equitable title, and neither the Lords Justices nor the Vice-Chancellor thought they could enforce a specific performance of the agreement, yet it does not seem to have been **[80]** denied that he paid the money, and it is not denied at the present moment.

The case comes back, the ship is sold, and the proceeds are spent to pay for the detention, which is not in the slightest degree to be ascribed to this Court, but to the proceedings in Chancery.

It is not for me to blame Mr. Hughes for going to a Court of Equity, because I presume he went under the advice of a person quite competent to point out to him the best course to follow; but I must observe that if, in the exercise of my jurisdiction, all these facts had come before me, I most undoubtedly should have considered myself at liberty to hold my hand before I decreed possession to the assignees; because it would have appeared to me contrary to all justice and every principle of equity that I should have decreed possession of 40-64ths of this vessel, for which the assignees, through their agent, had actually received the purchase-money in a sale by auction which had been sanctioned by themselves. I think I should have held my

hand, unless I had been compelled by the decision of a superior Court to carry into execution the powers with which the Court is invested. I do not think the assignees, under these circumstances, would easily have induced me to decree possession of that property for which they held the value in their own hands.

But be that as it may, the only question I have to determine is whether I shall condemn Mr. Hughes in costs. Of course he must pay the contumacy fees. It has been urged that I ought to condemn him by reason of the creditors suffering. They, however, must always suffer by the acts of their assignees, who represent them. They have a certain power of control if the assignees do not do their duty, and they must always abide for good or evil by the legal acts of those assignees. Now, I think, under the circumstances of this case, that the Lords Justices and the Vice-Chancellor having refused to interfere for Mr. Hughes solely on technical points, and not because the equity was not with him, not having given costs against him save the 20l. paid by way of deposit, and Lord Justice Knight Bruce having expressed himself in terms in which it is not denied he did express himself, I do not think I am bound to adopt another course, and inflict the penalty of costs on Mr. Hughes. I shall, therefore, do no such thing.

Proctor for the assignees, Tatham; for Mr. Hughes, Jenner.

**[81]** THE MAGELLAN PIRATES. The High Court of Admiralty, July 26, 1853.—Three hundred and thirty-four subjects of the Chilian Government, who had risen in rebellion against it, and had also seized the vessels of other countries, held to be pirates within the meaning of 13 & 14 Vict. c. 26.

[S. C. 18 Jur. 18.]

This was a cause arising under 13 & 14 Vict. c. 26, in pursuance of which the Court was prayed to determine and pronounce that certain persons captured by Her Majesty's sloop "Virago," in the Straits of Magellan, were pirates, and to adjudge the number of them, in order to the usual application being made for the bounty.

The circumstances which gave rise to the capture are detailed in the case of *The "Segredo" otherwise "Eliza Cornish"* (ante, p. 36), and in the judgment (post, p. 85).

These cases have generally been decided in a summary manner on the hearing of the petition; but in the present case the petition was opposed by the Queen's Proctor, the Admiralty Proctor, and also a proctor for the owner of the "Eliza Cornish," who asserted an interest, inasmuch as, if the men who seized the "Eliza Cornish" were not pirates, but only revolted subjects of the Chilian Government, his party would then have a claim for damages against that Government; which, if the men were pirates, could not, as he was advised, be supported.

The Queen's advocate, the Admiralty advocate, Dr. Deane, Dr. Haggard, and Dr. Twiss, appeared against the petition; Dr. Addams and Dr. Bayford in support of it.

*Dr. Lushington.* The Court has two questions to determine; first, whether the acts set forth in these proceedings were done by persons falling under the denomination of pirates according to the true construction of the two Acts of Parliament passed upon this subject. I say the two Acts, because, though I am fully aware that the first, viz. 6 Geo. 4, c. 49, is repealed, yet I think that in ascertaining the true meaning of the statute now in existence, viz. 13 & 14 Vict. c. 26, I am bound to look at both Acts.

Should this first question be decided in the affirmative, then it will be necessary to determine as to the number of persons which the Court is to pronounce as having been concerned in this piracy.

The last Act of Parliament which I have mentioned must certainly govern the decision of the Court; but my reason for thinking that I must not lay out of consideration the preceding statute is, that I think these two Acts must be taken together in any attempt which is made to ascertain the true meaning of **[82]** the latter. The last Act, it is true, in many respects, has essentially departed from the preceding, but I think it is exceedingly doubtful, though the terms differ, whether it was intended by the Legislature to alter the definition or meaning of the word "pirates"; or in other words, whether a different set of persons, on account of whom bounty was to be granted, was contemplated by the second Act. It is true, that the expressions differ, but it is possible that the same idea is intended to be conveyed in different words.

Now, the words of the first Act of Parliament are these:—"The actual taking, sinking, or destroying of boats, &c., manned by pirates or persons engaged in acts of piracy;" and the second Act has these words: "After the said 1st day of June,

attack or be engaged with any persons alleged to be pirates, afloat or ashore." The words omitted, therefore, in this latter Act are—"persons engaged in acts of piracy," and the words substituted are—"persons alleged to be pirates."

It is perfectly true, as a general principle, that effect ought to be given, if practicable, to every word in an Act of Parliament; but I think that that principle may be answered in two ways—either by holding that the words have two distinct and separate meanings, or that the second expression is merely explanatory of the first. I am very much inclined to think, looking at the original Act of Parliament, that the words "pirates or persons engaged in acts of piracy," were not intended to embrace two different sets of people. Of course I need not say how very difficult it is to ascertain what the real intention of the Legislature is, or what was to be expressed by words of this description. But I have the greatest difficulty in satisfying my own mind that there is any substantial or real difference between "pirates" and "persons engaged in acts of piracy."

Assuming, however, that the words have two distinct meanings, viz. that by the first Act "pirates" in the strict sense of the term are meant, and that the expression "persons committing piratical acts" has another meaning, though we are not able to say what; it does not appear to me necessarily to follow that the omission of the words in the second statute entails the necessity of putting a more limited construction upon it, because the words are altogether changed, and simply are what I have stated, "persons alleged to be pirates."

It may be well, I think, to bear in mind what is the object of both statutes, because respecting that matter there can be no doubt. The title to the first is, "An Act for the encouraging the Capture or Destruction of Piratical Ships and Vessels," and it must have been the wish and intention of the Legislature to **[83]** put down piratical acts by whomsoever committed. Now, how am I to determine who are pirates, except by the acts that they have committed? I apprehend that, in the administration of our criminal law, generally speaking, all persons are held to be pirates who are found guilty of piratical acts; and piratical acts are robbery and murder upon the high seas. I do not believe that, even where human life was at stake, our Courts of Common Law ever thought it necessary to extend their inquiries further, if it was clearly proved against the accused that they had committed robbery and murder upon the high seas. In that case they were adjudged to be pirates, and suffered accordingly. Whatever may have been the definition in some of the books, and I have been referred by Her Majesty's advocate to an American case (*The United States* v. *Smith,* 5 Wheaton, 153, post, p. 90), where, I believe, all the authorities bearing on this subject are collected, it was never, so far as I am able to find, deemed necessary to inquire whether parties so convicted of these crimes had intended to rob on the high seas, or to murder on the high seas indiscriminately.

Though the municipal law of different countries may and does differ in many respects as to its definition of piracy, yet I apprehend that all nations agree in this: that acts, such as those which I have mentioned, when committed on the high seas, are piratical acts, and contrary to the law of nations.

It is true that where the subjects of one country may rebel against the ruling power, and commit divers acts of violence with regard to that ruling power, that other nations may not think fit to consider them as acts of piracy. But however this may be, I do not think it necessary to follow up that disquisition on the present occasion. I think it does not follow that, because persons who are rebels or insurgents may commit against the ruling power of their own country acts of violence, they may not be, as well as insurgents and rebels, pirates also; pirates for other acts committed towards other persons. It does not follow that rebels or insurgents may not commit piratical acts against the subjects of other states, especially if such acts were in no degree connected with the insurrection or rebellion.

Even an independent state may, in my opinion, be guilty of piratical acts. What were the Barbary pirates of olden times? What many of the African tribes at this moment? It is, I believe, notorious, that tribes now inhabiting the African coast of the Mediterranean will send out their boats and capture any ships becalmed upon their coasts. Are they not pirates, because, perhaps, their whole livelihood may not depend on piratical acts? I am well aware that it has been said that a **[84]** state cannot be piratical; but I am not disposed to assent to such dictum as a universal proposition.

It appears to me, therefore, that in affixing a construction to this statute, I am entitled to hold that the intention of the Legislature was, that acts of piracy might constitute men pirates, notwithstanding they were committed by the subjects of a barbarous state, or by insurgents. It appears to me this is true as a general, though perhaps not as a universal, proposition.

Having thus briefly stated my opinion as to the construction of the statute, I will now advert, with equal brevity, to what appears to have been our own law; and for this purpose: because in considering what is the true meaning of an Act of Parliament where any expression is used, I think the probability is, where nothing appears in the context to the contrary, the term in the Act of Parliament is used in conformity with a similar term known in Common Law, and not in a more general or extensive sense.

Now, I refer to Russell on Crimes, where we find the result of many older authorities. He commences in these words: "The offence of piracy, at Common Law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there" (Russell on Crimes, book ii. ch. 8, s. 1): and in a subsequent part I find the following: "If a robbery be committed in creeks, harbours, ports, &c., in foreign countries, the Court of Admiralty indisputably has jurisdiction of it, and such offence is consequently piracy" (ibid. s. 2). There is a case also stated here which I think applies: "Where a prisoner was indicted for stealing three chests of tea out of the 'Aurora,' of London, on the high seas, and it was proved that the larceny was committed while the vessel lay off Wampa, in the river, twenty or thirty miles from the sea, but there was no evidence as to the tide flowing or otherwise, at the place where the vessel lay, it was held, from the circumstance that the tea was stolen on board the vessel which had crossed the ocean, that there was sufficient evidence that the larceny was committed on the high seas" (ibid.).

Again, it was decided in another case, that where A., standing on the shore of a harbour, fired a loaded musket at a revenue cutter which had struck upon a sand-bank in the sea, about 100 yards from the shore, by which firing a person was maliciously killed on board the vessel, it was piracy (ibid.).

It appears to me, therefore, that, from the quotations which I have just made, I derive two advantages; one, in being [85] enabled with greater certainty to affix a true meaning to the statute itself; the other, a reference to what I must more particularly consider—the place where the occurrence happened.

I will now advert to so much of the facts as will be sufficient to enable me to judge whether the present claim is well-founded.

It appears that, towards the latter end of 1851, there was an insurrection in some of the dominions belonging to the States of Chili. General Cruz was at the head of this insurrection, failed, and retired into the country. There was a Chilian convict settlement at a place called Punta Arenas, the garrison of which consisted of 160 soldiers and 450 male convicts. An officer in that garrison raised an insurrection against the governor, murdered him, and, in conjunction with those who conspired with him, seized a British vessel, called the "Eliza Cornish," and also an American vessel called the "Florida." They murdered the master of the "Eliza Cornish," and a Mr. Deane, a passenger and part owner, and they also murdered the owner of the "Florida," who was on board. These facts coming to the knowledge of Admiral Thoresby, the commander-in-chief of that station, he despatched the "Virago," a British steamer, under the command of Captain Houston Stewart, to the Straits of Magellan. On the 28th January, 1852, a vessel, which proved to be the "Eliza Cornish," was descried working out of the Straits; chase was made; a shot fired across her bows brought her to; she was boarded and seized by orders of Captain Stewart.

At the time she was so seized she was in possession of a large number of the persons who had raised the insurrection at Punta Arenas. There were found on board her 128 men, 24 women, and 18 children; the guns were loaded and the men were armed. These were under the command of a man named Bruno Brionis, who held a commission from Cambiaso, the leader of the insurrection, and the instigator of the murders and robberies then committed; and these men were afterwards delivered up to the Chilian authorities at Valparaiso. Captain Stewart proceeded in search of Cambiaso and the other insurgents, giving that name to those who had left Punta Arenas. He secured fifty-six at a place called Wood's Bay, and on the 15th

February he discovered the "Florida" herself, in the possession of a large number of the same people. It was said that these insurgents had, whilst at sea, risen against Cambiaso and five others, and, with the aid of the American master and crew, brought the vessel to the port where Captain Stewart had found her.

[86] On board the "Florida" was found treasure which had been plundered from the "Eliza Cornish." All the persons on board the "Florida," not American, were delivered up to the Chilian authorities.

As to the general character of these transactions, I really cannot bring myself to entertain a doubt. Even if I could be induced to adopt the distinction, that the acts in question were the acts of insurgents, I should still, even from that, adhere to the opinion that they were piratical acts; piratical acts, too, in my judgment, in no degree whatsoever connected with the insurrection or rebellion, or with the intention of these parties to go to any other part of the world. They were acts, in one sense, of wanton cruelty, in the murder of foreign subjects, and in the indiscriminate plunder of their property. I am of opinion that the persons who did these acts were guilty of piracy, and were to be deemed pirates, unless some of the other objections which have been urged ought to prevail.

It has been said that these acts were not committed on the high seas, and therefore the murder and robbery not properly or legally piratical. This objection well deserves consideration; for it is true that murder and robbery, done upon land, and not by persons notoriously pirates, would not be piracy. Here, as I understand the facts, the "Eliza Cornish" and the "Florida" were seized in port, and the murders committed in port or committed on land, on the persons taken out of the vessels. Had the vessels been recaptured whilst lying in port, there might be raised an argument, though I do not say it would prevail, that these offences, legally speaking, would not be classed as acts of piracy. I say it might be so; though I am not disposed to hold that the doctrine that the port, forming a part of the dominions of the State to which it belongs, ought in all cases to divest robbery and murder done in such port of the character of piracy. I am much more strongly inclined to hold this from the facts quoted from Russell; and I am still more inclined to come to that conclusion for another reason, because the statute expressly contemplates acts done on shore, for these are the words: "Shall, after the said first day of June, attack or be engaged with any person alleged to be pirates, afloat or ashore," manifestly intending to take cognisance of piratical offences, or offences of that class, when they were committed on shore. It would quite fail if it were not so; because we all know that pirates are not perpetually at sea, but under the necessity of going on shore at various places; and, of course, they must be followed and taken there, or not at all.

In this case, however, the ships were carried away and navi-[87]-gated by the very same persons who originally seized them. Now, I consider the possession at sea to have been a piratical possession; to have been a continuation of the murder and robbery; and the carrying away the ships on the high seas, to have been piratical acts, quite independently of the original seizure.

The next question for consideration is, whether there was such an attack or engagement as satisfies the true meaning of the Act of Parliament, which requires me to certify. The words of the Act are "shall attack or be engaged with any persons alleged to be pirates, afloat or ashore." I am to determine whether the persons or any of them so attacked or engaged were pirates, and to adjudge what was the total number of pirates so engaged or attacked. These are the words of the Act of Parliament.

There is, I apprehend, a clear difference in the meaning of these two words. I take an attack to be the use of, or the attempt to use, force or violence. I take it, it is not necessary, to constitute an attack, that there should be any resistance, or any actual combat or any blood spilt. Engagement is a different word, and seems necessarily to imply that there was something of a combat or fight.

Now, with respect to the capture of the "Eliza Cornish," it appears to me fairly to fall within the meaning of the Act of Parliament. She was in possession of pirates; her capture was effected by intimidation, by an overpowering force: she yielded of necessity, when a gun was fired across her bows. I cannot conceive that, in order to bring this case within the meaning of the statute, it was necessary that a gun should be fired into her. I think that bloodshed is not an indispensable ingredient to form an attack within the meaning of the statute, and that the Legislature never

intended that, in order to entitle themselves to reward, the captors must take away human life.

My opinion on this point is not shaken by the statement of the mate of the "Eliza Cornish." Mr. Smith represents that Brionis was in command of the "Eliza Cornish," and, upon descrying the steamer, desired him to hoist Russian colours, which he refused to do. He says that, after a struggle, he threw them away, and that he assured Brionis that if he and his comrades would go below, he would pass the steamer unobserved; that they accordingly did go below, and that the steamer soon afterwards fired a gun, and that he (Smith) then brought the brigantine to, and she was taken possession of by the "Virago."

In my judgment, if all these facts were literally true, they offer no important consideration for the decision of this case. All this was utterly unknown to Captain Stewart; resistance [88] would have been offered by those in possession of the "Eliza Cornish" if it had been possible; they only availed themselves of the device of Mr. Smith, for the chance of an escape when resistance, which they were willing to offer, would have been in vain. No man, I think, can reasonably doubt that the capture of the "Eliza Cornish" was effected by force alone—not, indeed, by actual violence, but by an intimidation which rendered it unnecessary; and this I conceive to be as much an attack as where a highwayman presents his pistol and the traveller yields without attempting resistance.

I must next determine as to the capture of the fifty-six persons at Wood's Bay. I must here observe, that I believe it is utterly impossible to obtain, and I believe the Legislature never intended to require, precise and accurate evidence as to the capture or destruction of persons of this description, nor as to the character which belonged to each and all of them. It is clearly impracticable to ascertain or designate individually all those who were concerned in this atrocious transaction. It is, I think, fair to conclude that all who embarked on board the "Eliza Cornish" or the "Florida," save the American crew, were conspirators in the original murders and robberies which I have already mentioned.

It appears that Cambiaso, the ringleader of this band of ruffians, had landed from the "Florida" fifty-six persons at Wood's Bay, and these were amongst those embarked at Punta Arenas, and were on board the American vessel at that place. By a judicious arrangement of the force at his command, Captain Stewart surrounded and made prisoners of the whole, and so, in execution of his orders to clear the Straits of all difficulties opposed to navigation, he did clear them of a band of persons who, by their past misconduct, had shown themselves ready to commit any crime, however atrocious. Looking at this transaction as I am compelled to do, in its narrowest point of view, my opinion is, that it fairly falls within the just construction of the words of the Act of Parliament.

Lastly, my attention must be directed to the recapture of the "Florida." In the port of San Carlos, in the island of Chili, Captain Stewart found her, with a considerable portion of the treasure originally shipped in the "Eliza Cornish" on board of her. Cambiaso had originally embarked on board this vessel at Punta Arenas, and had intended to prosecute his voyage to the eastward, and, as I think is proved from the evidence, to some port not in the dominions of Chili. But that I hold to be a matter of no importance, and shall not endeavour to ascertain how that may be. Here she was when the "Virago" found [89] her at San Carlos, in possession of a part of the persons who had originally embarked in her at Punta Arenas; but they had risen on Cambiaso, and he and some of his comrades were in confinement. She then was in the actual possession of those who, according to the judgment I must form, had been concerned in acts of piracy, and not only that, but who had continued the acts by carrying the vessel away over the sea for their own object and for their own advantage.

It does not appear to me to matter which of the pirates were in possession—which, for the time, had the upper hand; whether Cambiaso and those that adhered to him, or whether those who rose against Cambiaso and put him into confinement with others. I think they are all to be placed in the same category, and all to be deemed pirates.

It was suggested that there were two vessels of war present at the time belonging to the Chilian Government, but whether capable or not of effecting a recapture, they had neither done nor attempted anything when Captain Stewart arrived. He, on his

arrival, immediately placed his vessel alongside the "Florida" and boarded her with a party of officers and men, and took forcible possession of her again.

I say that, looking at all these circumstances, I think this recapture could only have been effected from terror of the superior force which was brought to bear against the vessel; and again, I think it does, with the previous acts, fairly fall within that construction which the Act of Parliament admits of.

It only remains to determine the number for which it is the duty of the Court to pronounce. There are three claims: for 128 taken in the "Eliza Cornish," for the 56 taken at Wood's Bay, and for 200 taken on board the "Florida." For the first and second I pronounce; but with regard to the last, more doubt may be entertained, and, in order to keep within due bounds, I shall fix that at 150 instead of 200.

I cannot conclude my judgment without expressing my opinion that it was for services like these that the Legislature intended to provide a reward; services of great importance to the safe navigation of the seas in that part of the world, and effected by the capture of a band of persons whose acts of murder and plunder, both on land and at sea, rendered their capture and punishment indispensable to the safety of ships of all nations occupied in those waters.

I trust I have not put too latitudinarian a construction on this Act of Parliament, from my high consideration of the services so rendered, and of the decision and promptitude whereby those measures were so successfully taken; and I repeat my [90] opinion, that the persons so taken are justly to be deemed pirates, and were, when captured, within the meaning of the Act.(*a*)

Proctors for the respective parties before the Court: the Queen's Proctor, the Admiralty Proctor, F. Clarkson, and Burchett.

### UNITED STATES *v.* SMITH (5 Wheat. 153).

The jury found a special verdict as follows:—"We, of the jury, find that the prisoner Thomas Smith, in the month of March, 1819, and others, were part of the crew of a private armed vessel, called the 'Creollo' (commissioned by the government of Buenos Ayres, a colony then at war with Spain), and lying in the port of Margaritta; that in the month of March, 1819, the said prisoner and others of the crew mutinied, confined their officer, left the vessel, and, in the said port of Margaritta, seized by violence a vessel called the 'Irresistible,' a private armed vessel lying in that port, commissioned by the Government of Artigas, who was also at war with Spain; that the said prisoner and others having so possessed themselves of the said vessel, the 'Irresistible,' appointed their officers, proceeded to sea, on a cruize, without any documents or commission whatever, and while on that cruize, in the month of April, 1819, on the high seas, committed the offence charged in the indictment, by the plunder and robbery of the Spanish vessel therein mentioned. If the plunder and robbery aforesaid be piracy under the Act of Congress (*c*) of the United States, entitled 'An Act to protect the Commerce of the United States and punish the Crime of Piracy,' then we find the said prisoner guilty; if the plunder and robbery above stated be not piracy under the said Act of Congress, then we find him not guilty."

The Circuit Court of Virginia divided on the question, whether this was piracy as defined by the Law of Nations, and was to be punishable under the Act of Congress of the 3rd of March, 1819, and thereupon the question was certified to the Supreme Court of the United States for its decision. The Court certified that it was piracy, and in the course of the judgment Mr. Justice Story said, "It is next to be considered whether the crime of piracy is defined by the Law of Nations with reasonable certainty. What the Law of Nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law, or by the general usage and practice of nations, or by judicial decisions recognising and enforcing that law. There is scarcely a writer on the Law of Nations who does not [91] allude to piracy as a crime of a settled and determinate nature; and whatever may be the diversity of definitions on other respects, all writers concur in holding, that robbery or forcible

---

(*a*) This decision also terminates, in fact, the suit for salvage, arising out of the same transaction; for the salvage reward for such recapture from pirates is fixed by the Act of Parliament at one-eighth of the value.

(*c*) Which provides, "that if any person or persons whatsoever shall, on the high seas, commit the crime of piracy, as defined by the Law of Nations, &c."

depredations upon the sea, animo furandi, is piracy. The same doctrine is held by all the great writers on maritime law, in terms that admit of no reasonable doubt. The Common Law, too, recognises and punishes piracy as an offence, not against its own municipal code, but as an offence against the Law of Nations (which is part of the Common Law), as an offence against the universal law of society; a pirate being deemed an enemy of the human race. Indeed, until the statute of 28 Hen. 8, c. 15, piracy was punishable in England only in the Admiralty as a civil law offence, and that statute, in changing the jurisdiction, has been universally admitted not to have changed the nature of the offence (Hawk. P. C. c. 37, s. 2). Sir Charles Hedges, in his charge at the Admiralty Sessions, in the case of *Rex* v. *Dawson* (State Trials), declared in emphatic terms, that "piracy is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty." Sir Leoline Jenkins, too, on a like occasion, declared that "a robbery, when committed upon the sea, is what we call piracy," and he cited the civil law writers in proof. And it is manifest from the language of Sir William Blackstone in his comments on piracy, that he considered the Common Law definition as distinguishable in no respect from that of the Law of Nations. So that whether we advert to the writers on the Common Law, or the Maritime Law, or the Law of Nations, we shall find that they universally treat of piracy as an offence against the Law of Nations, and that its true definition by that law is, robbery upon the sea."

THE "CARRON." The High Court of Admiralty, Nov. 17, 1853.—Collision. A collier brig out at sea in foggy weather, descrying a steamer at a distance, as she stated, of three or four cables' length, held to blame for not having given notice by blowing a fog-horn.

This was a cause of damage, promoted by the owners of the "Pursuit," a collier brig of 180 tons burthen, against the steamship "Carron."

The collision occurred off Flamborough Head, about ten or twelve miles from the land, between seven and eight o'clock on the morning of the 2nd of May, 1853. The brig was on a voyage from Hartlepool to London, laden with coal, was close hauled on the larboard tack, steering about south and by east, and under all sail. She alleged, that the mate was at the wheel of the brig, and a seaman forward on the larboard side of the forecastle, keeping a strict look-out, inasmuch as the weather was foggy, though not so much so as to prevent vessels from being seen from each other at the distance of about three cables' length; that at this time, and in this state of things, the "Carron" was seen by the look-out at the distance of about three cables' lengths on the brig's starboard bow, steering about north, and rapidly approaching the brig; that the look-out, as also the mate, who kept the brig's helm steady, never altering **[92]** her course, immediately and loudly hailed the steamer, but to no purpose, inasmuch as she also kept her course, and without (so far as appeared) either altering her helm or slackening her speed, presently came into collision with the brig, striking her a sliding blow on the starboard quarter abaft the midships with her (the steamer's) starboard bow; that the collision was imputable to those on board the "Carron," inasmuch as if they had had a good look-out they might and must have seen the brig in ample time to have enabled them, taking the proper steps for that purpose, to have avoided coming in contact with the brig, &c.

The "Carron," in answer alleged, that on the said morning the fog was so thick that an object could not be seen beyond the ship's length; that she was proceeding with the greatest caution at no greater speed than was sufficient to navigate her, and kept her bell and steam whistle alternately going; that several men were on the look-out, and suddenly descried the brig within a ship's length on her starboard bow, no notice of her approach or proximity to the steamship having been given by any bell, whistle, hailing, or other signal from on board the said brig; that the helm of the steamship was immediately put to starboard, and her engines stopped and reversed, but from the nearness of the two vessels to each other a collision could not be avoided between them; that the same was occasioned by the state of the weather, and the want of a proper precaution on the part of the brig in not keeping a bell, whistle, or some other signal going, as a notice of their approach, &c.

Dr. Addams and Dr. Spinks appeared for the owners of the "Pursuit"; Dr. Robinson and Dr. Jenner for those of the "Carron."

*Dr. Lushington*, addressing the Elder Brethren:—Gentlemen, it frequently happens

in these, and I might say in other cases, that the safest mode of coming to a conclusion is, where you find certain facts and circumstances admitted, or indisputably proved, and where others are doubtful, to make those doubtful facts consistent, if possible, with those that are certain and proved indisputably. I must rather explain myself on that subject. If you have the fact, for instance, of the state of the wind, of the description of the vessels, and of the course they are steering, time and place, all indisputably proved, and if it be doubtful on the evidence produced, which very frequently happens, as to other parts of the case, you must endeavour to frame your decision so as to make the doubtful facts conform with those which are indisputably proved.

**[93]** Now, upon the present occasion, there may be four different results: it may be, firstly, that the "Carron" was alone to blame; secondly, that the "Pursuit" was alone to blame, for want of a sufficient look-out or a fog-horn; thirdly, that both were to blame; and, lastly, that it was a case of inevitable accident, in which neither was to blame; and we are to determine upon the facts and circumstances which I am now about to bring to your attention, which of these four conclusions is the just and right one.

But before I proceed to do so, I will take the liberty of explaining the meaning, as it affects the decision of the case, of the onus probandi, the burthen of proof, of which you have heard something in the course of the argument. The party who charges another with an act is bound in the first instance to make out something like a case, the burthen of proof lies upon the plaintiff so far; but it does not at all follow that it lies upon him throughout the whole case; for frequently, by proving certain circumstances, the burthen of proof is thrown back upon the defendant, and he is bound to make out his case. This I will presently illustrate to you.

I will now approach the facts of the case, of which some are admitted; and, following the method which I have already mentioned, we will, if you please, take the facts so admitted, and then we will consider what are the litigated facts, and what degree of credence we should give to the one side or the other.

According to the statement of the "Pursuit" she was a vessel of the burthen of 180 tons, bound from Hartlepool to London, laden with coals. The time when the collision took place was about half-past seven, A.M., on the 2nd of May; the place was off Flamborough Head; the wind was S.E., and she was close-hauled on the larboard tack. She represents her course to have been S. by E., which is not strictly correct, and she was under all sail. Now, I apprehend that, being so close-hauled on the larboard tack, and it being a foggy morning, she could not be going at any very great rate at that time. She states that she saw the "Carron" steamer at the distance of three or four cables' length, hailed her, and kept her own course, and that the "Carron," without taking any notice, ran into her, and struck her on the starboard quarter.

Now, the result of that case, without considering the other, is that it was the duty of the steamer, provided circumstances would allow her, to give way, and not to come into collision with a sailing vessel close-hauled, as this vessel was at that time. That is the rule of navigation, as we all admit. She has fulfilled the burthen of proof laid upon her; she has thrown **[94]** the burthen of proof back again; and it now becomes the duty of the "Carron" to state why she ought to be excused from the blame of this collision.

Now, the defence of the "Carron" is twofold. First, she says you, the "Pursuit," were to blame for not having intimated your approach by sounding a fog-horn, or by some other means; but it will be for you, gentlemen, to consider whether any culpability arises from that circumstance, because it is quite clear that no signal was given, that no fog-horn was blown. The next defence of the "Carron" is this, we did all that could possibly be done; we took every possible measure that we could adopt by way of precaution; but, unfortunately, from the state of the weather, and the absence of any signal from the "Pursuit," notwithstanding we did all that any one could require from persons so circumstanced, the collision took place.

Now, with respect to this point, I will bring under your consideration the representation given on behalf of the "Carron" herself, viz. the affidavit which has been made by the master and several others, and then you must form your judgment on what ought to be the result. Now, they represent the morning as being exceedingly foggy, that objects could not be seen at a greater distance than the ship's length.

They say, too, that the steamship proceeded with the greatest caution, and not at a greater speed than was sufficient to navigate her, the bell and the steam whistle being kept alternately going. These facts are all distinctly sworn to in this affidavit, and there is nothing to contradict the statement so made; therefore, if the statement is credible, which it is if it is not contradicted by other facts, of which we have adequate and complete proof, it must be taken to be true. Passing by circumstances of no importance I go to this part of the affidavit, which is to the following effect:—"A vessel, which afterwards proved to be the 'Pursuit,' was suddenly seen by these deponents coming in a southerly direction, with all sail set;"—this is admitted to be true—"and within a ship's length of the said steamship, on her starboard bow." Assuming this to be true, you will have to consider whether, if there was a proper look-out, they ought or ought not, according to your opinion, to have seen her at an earlier period. And you will also bear in mind the fact that she was seen on the steamship's starboard bow. Then they say, no notice was given of her approach; and "the master of the steam-vessel immediately gave orders to have her helm put to starboard, and her engines stopped and reversed, which orders were instantly obeyed; but, from the nearness of the two vessels to each other at the time, a collision could not be avoided."

**[95]** If you are of opinion that all this statement is correct, and that it is reconcileable with other statements, of course you will give it credit; but you will bear in mind that it is stated in this very affidavit, first, that she was seen on the starboard bow; and, secondly, that the helm of the steamship was put to starboard, and that, notwithstanding that, these two vessels came into collision; which is an admitted fact, the steamer striking the "Pursuit" on the starboard bow.

Now these are all the facts and circumstances of the case. I can render you no further assistance in the formation of your opinion upon them. You, as nautical men, will have the kindness to tell me whether the "Carron" was to blame at all; whether she was solely to blame, or to blame in conjunction with the "Pursuit"; or whether you think, all proper measures having been taken on board the "Carron," this collision was the result of inevitable accident, arising from the foggy state of the weather, which rendered all precautions whatever, when taken, inefficient to avoid the collision.

The Court and the Elder Brethren having retired for consultation, on their return *Dr. Lushington* said—The gentlemen with whose assistance I am favoured are of opinion that the "Pursuit" was to blame in this respect, that having seen the "Carron" at the distance at which they represent they did see her, she ought to have given notice by blowing a fog-horn,(*a*) which she omitted to do. They are also of opinion, that the representations made on behalf of the "Carron" cannot be consonant with the fact, for if she did descry the vessel in the manner therein stated, and immediately starboarded her helm, it was utterly impossible she could have struck the "Pursuit" on the starboard quarter. Under these circumstances they are of opinion that the "Carron" was also to blame. I must pronounce, therefore, that both vessels are to blame.

Proctors for the "Pursuit," Burchett; for the "Carron," E. Toller.

**[96]** THE "ALIWAL." The High Court of Admiralty, Nov. 21, 1853.—Neither of two sailing vessels, which came into collision, having observed the Admiralty regulations respecting lights, and neither having pleaded that the collision was occasioned by such non-observance on the part of the other, the Court, nevertheless, held that under the circumstances of the case, both vessels were barred of recovery by 14 & 15 Vict. c. 79, s. 28.—Protest is of great importance in salvage, but not in collision, cases.

This was an action for damage promoted by the "Ann Moore," a brig of 238 tons burthen, against the "Aliwal," a brig of 203 tons. The latter was proceeding in ballast from Gravesend to the Tyne; the former with a cargo of coals from Shields to London, when they came into collision about ten miles from Flamborough Head,

(*a*) The following passage appeared in the protest of the master and seamen of the "Pursuit":—"On the steamer, in the course of a few minutes (after the collision), a bell was rung, which was answered by a fog-horn from the 'Pursuit,' and the steamer then returned," &c.

on the night of the 9th of January last. As the case on both sides is stated by the Judge in his "summing up," and the judgment, moreover, turned upon a point which was neither put in plea nor touched upon in argument, it is unnecessary to give the pleadings.

A cross action was entered on behalf of the "Aliwal."

Dr. Addams and Dr. Deane appeared for the "Ann Moore."

Sir J. D. Harding, Q. A. and Dr. Bayford for the "Aliwal."

*Dr. Lushington*, addressing the Elder Brethren:—Gentlemen, I must trouble you with a brief statement of the leading facts in this case in order to lead you to the questions upon which I wish to have your opinion.

Now, the case of the "Ann Moore" may be stated very concisely. She was bound from Shields to London, laden with coals; the time when the collision took place was about half-past eleven o'clock, P.M., on the 9th January last, and the place was nine or ten miles distant from Flamborough Head. According to the statement of the "Ann Moore," the wind blew from the W.S.W., which I apprehend was an adverse wind. According to her representation the night was dark, but clear, and she was on the starboard tack, close hauled. She represents that she saw the "Aliwal" three points on her starboard bow, and running N. by E., distant about one mile and that when within 100 yards of each other, the helm of the "Aliwal" was put to port. They hailed the "Aliwal" to keep her course, but soon afterwards she put her helm to starboard, the result of which was that she ran into the "Ann Moore," striking her with her fore rigging on her starboard bow. That is her statement.

It was represented, and strongly argued by counsel, that this statement cannot be consistent with truth, because no collision could have taken place in the manner stated. You will give such weight to that argument as you think the circumstances will justify; but be that as it may, the fault of the "Aliwal" is said to be, that without necessity she attempted to cross the [97] bows of the "Ann Moore" by porting her helm, and that then, instead of keeping her helm aport, she starboarded. That is the case of the "Ann Moore," and it seems a simple one, provided it be consistent with ordinary probability.

The case of the "Aliwal" is, that she is a vessel of 203 tons, was in ballast, bound from Gravesend to the Tyne; was on the larboard tack, going from four to five knots an hour, with the wind blowing from S.W. by W. There is a difference in the statements as to the wind, the other vessel stating that it was W.S.W.; but I do not think it is of any consequence. She states her own course to have been N.W., and that she could see vessels only at a distance of a quarter of a mile; so that, according to her representation, the night was dark, and there was much more difficulty in discerning objects at a distance than is represented by the "Ann Moore." She farther states that the "Ann Moore" was seen one point on the "Aliwal's" larboard bow; that the "Ann Moore" was steering S.S.E.; that the "Aliwal's" helm was put hard aport, and then the "Ann Moore" starboarded, whereby a collision was rendered almost inevitable; that the "Aliwal's" helm was starboarded, and then the "Ann Moore" ported. She states that immediately after the "Ann Moore" had ported she struck the "Aliwal" stem on, in the way of her main rigging, on the starboard side. She then alleges that the blame was attributable to the "Ann Moore" for not continuing her course, but in the first instance starboarding, and then porting her helm.

These statements appear irreconcileable in themselves; you will therefore favour me with your judgment as to which is consistent with truth—on which side the decision ought to be.

It was argued by counsel, and, I must say, very concisely, and at the same time with great ability, that the "Ann Moore" ought to have luffed at the time: that will be a question for you to determine. Comment was also made on the fact of there being no protest in this case. I put very little weight on that argument, because I know very many vessels insured in mutual insurance clubs do not make a protest in cases of collision. It is constantly so represented. It is a common fact. But upon another ground I mind very little about protests in cases of collision. In salvage cases they are of importance, because the parties are obliged to make a representation of the facts, in order to claim from the insurance companies; they therefore proceed at once to state them, and they cannot afterwards deny what has taken place. But in these collision cases each party makes the best statement he can.

It is also objected that there is no affidavit from the man at [98] the helm. Certainly, if his evidence had been important on the part of the "Ann Moore," they ought to have brought in an affidavit that he could not be produced; but there is the evidence of the master and other men.

With respect to the statement made before the receiver of droits, so far as there is a statement by the master himself, it is deserving of attention; so far as it is hearsay, it must be rejected; because hearsay evidence cannot be received in a Court of Justice.

I have now made all the observations which I think necessary, because you are so much more capable of comprehending the whole case than I am, except one. It was very well for counsel to pass it over, but I must not omit to refer to an Act of Parliament which involves one or both parties, or may so do. You know, gentlemen, there is a regulation under an Act of Parliament, which directs that "all sailing vessels, when under sail, or being towed, approaching or being approached by any other vessel, shall be bound to show, between sunset and sunrise, a bright light in such a position as can be best seen by such vessel or vessels, and in sufficient time to avoid collision." (*a*)[1] Now it is quite clear that neither of these vessels obeyed the Act of Parliament; there is no doubt about that; they neglected to obey that which was imperative upon them. But the Act of Parliament qualifies the rules and regulations laid down by the Lords Commissoners of the Admiralty, for it states, "If in any case of a collision between two or more vessels it appear that such collision was occasioned by the non-observance either of the foregoing rules with respect to the passing of steamers, or of the rules to be made as aforesaid by the Lord High Admiral, or the Commissioners for executing the office of Lord High Admiral with respect to the exhibition of lights, the owner of the vessel by which any such rule has been infringed shall not be entitled to recover any recompense whatsoever for any damage sustained" (14 & 15 Vict. c. 7. s. 28).

Now if you should be of opinion, on the present occasion, that this collision was occasioned by the non-exhibition of lights by these two vessels, the result will be, that neither can recover in the present action. Whether you think, under the circumstances, the collision was occasioned by not hoisting a light, is a matter for your consideration upon the whole of the evidence. Upon that matter you must come to a conclusion.

[99] The learned Judge and the Elder Brethren having retired for consultation, on their return

*Dr. Lushington* said—The gentlemen, with whose assistance I am favoured, have considered the facts and arguments adduced in this case, and we have come to three conclusions: first, we are of opinion that the "Aliwal" is clearly to blame in this case; secondly, we are of opinion that evidence has not been produced to satisfy our minds that the helm of the "Ann Moore" was not starboarded; and thirdly, we think, under all the circumstances, the Act of Parliament has not been observed; that lights ought to have been hoisted. Therefore, under the 28th sect., neither party can recover, and each party must pay their own costs.(*a*)[2]

Proctor for the "Ann Moore," Crosse; for the "Aliwal," Bathurst.

THE "TWO SISTERS." The High Court of Admiralty, Nov. 25, 1853.—Objection to report of Registrar and Merchants.—A claim by the owners of a damaged vessel for loss sustained, estimated moderately to avoid litigation, having been rejected, and the matter afterwards referred to the Registrar and Merchants, the owners are not bound by their original estimate, nor barred of their right to prove an actual loss greater than that estimate.—Statement.

This was originally a cause of damage promoted by the owners of the fishing-boat "Good Samaritan," against the schooner "Two Sisters."

The collision took place on the 26th of September, 1851; a few days after some negociation took place, and the agents of the owners of the "Good Samaritan"

---

(*a*)[1] Admiralty notice respecting lights, dated May 1st, 1852, given by the commissioners by virtue of the authority vested in them by 14 & 15 Vict. c. 79, s. 26.

(*a*)[2] An appeal has been entered, in this case, on behalf of the owners of the "Ann Moore."

handed to the agent of the owner of the "Two Sisters" a statement of their claim, amounting to 126l. 7s. 3d.

Payment being refused, proceedings went on in the Admiralty Court, where, on the 19th November, 1852, the damage was pronounced for, and the accounts referred to the Registrar and Merchants.

The owners of the "Good Samaritan," in making up their accounts, calculated their loss at 183l. 14s. 7d., but the proctor for the "Two Sisters" made a tender in acts of court of 126l. 7s. 3d., the amount of the claim originally made by the agent for the "Good Samaritan," together with interest at the rate of 4l. per cent. from the date of the delivery of such claim.

This tender was refused, and the accounts were submitted to the Registrar and Merchants, who, by their report, dated August 5, 1853, pronounced for the sufficiency of such tender.

**[100]** To this report the proctor for the owners of the "Good Samaritan" objected, and brought in an act on petition, alleging, among other things, that, on the 14th of the said month of October, the agent for the owner of the schooner called upon the agent of the owners of the said lugger for an account of the damage caused by the said collision, expressing a wish to settle the matter if it could be arranged upon fair terms; that the agent for the lugger thereupon, from verbal directions of one of the owners of the lugger, and without reference to any of his books or accounts, wrote out the claim annexed to the interrogatories to the witnesses examined on the libel given in in this cause, amounting to 126l. 7s. 3d., and which claim was then handed to the agent for the owner of the schooner; that shortly after the decree of this Court pronouncing for the damage, the owners of the lugger caused her to be further repaired, at an additional cost of 6l. 11s. 1d., such further repairs having been rendered necessary by the collision with the schooner, and not by any other cause whatever; that after the said decree, the agent for the owners of the lugger ascertained, upon reference to the books and accounts of his clients, that too small a sum had been charged for the value of the nets and ropes lost from the lugger, or sunk at the time of the collision, and of the fish on board the lugger at that time, and also of the loss incurred by the detention of the lugger at Hull; and accordingly prepared a fresh claim, amounting to 183l. 14s. 7d., which was delivered to the proctor for the owner of the schooner, who thereupon tendered in acts of court the sum of 126l. 7s. 3d., the amount of the claim originally handed to his client, and 8l. 2s. 10d. for interest thereon, which was refused; that it appears by the second schedule annexed to the report of the Registrar and Merchants, that they have adopted the claim so originally delivered to the agent of the owner of the schooner in every respect, and notwithstanding that evidence was tendered to them on behalf of the owners of the lugger that their actual loss considerably exceeded the said sum of 126l. 7s. 3d.; that, &c.

The answer denied that the additional repairs done to the lugger after the decree of the Court were rendered necessary by the collision; that after the said decree, the agent for the owners of the lugger ascertained, or that the fact was, that too small a sum had been charged, &c., and alleged that the original claim made by the owners of the lugger, amounting to 126l. 7s. 3d., was made by them deliberately, and after due consideration, the said collision having occurred on the 26th **[101]** September, 1851, and the claim having been delivered on the 14th October following; that, &c.

Affidavits were brought in, and Mr. Clarke, the agent for the owners of the lugger, swore: "that when he handed the claim of 126l. 7s. 3d. to the agent of the owner of the schooner he told him that such amount would be accepted, provided the same was paid at once; that he verily believes that such sum was considerably below the loss which the owners of the lugger sustained by reason of the collision, and that the claim was sent in at the time with the view of getting the matter settled without going to law."

Dr. Jenner appeared in opposition to the report of the Registrar and Merchants.

Dr. Twiss in support of it.

*Dr. Lushington.* I disclaim any attempt to express or to form an opinion of the real amount of damage occasioned by the collision in this case. I have not adequate materials for a decision upon that point, though possibly I may have materials to enable me to say that the Registrar and Merchants were right in the conclusion they have drawn from the evidence before them.

This case has been likened to a tender; but I must say that, in my opinion, if there is any resemblance at all it is so remote that no argument can fairly be drawn from it. It appears that after the collision, which was the subject of the suit in this Court, had taken place some negociations were entered into by the agents of the parties with a view to a settlement without the necessity of coming here at all, and that the agent for the "Good Samaritan" made a rough estimate of the damage she had received, and offered to settle the whole matter at once on the immediate payment of 126l. 7s. 3d. The negociations failed, the suit commenced in this Court, the damage was pronounced for, and the accounts were referred to the Registrar and Merchants, whereupon the proctor for the "Two Sisters" tendered in acts of court the sum of 126l. 7s. 3d., with interest, which was rejected. In the report, to which objection is now taken, the Registrar and Merchants have pronounced for the sufficiency of this tender.

Now, whether they have taken the estimate originally made on behalf of the damaged vessel as conclusive and binding on the party, I have no sufficient means of forming an opinion; but I will state that, if they have done so, I have no hesitation in saying they have adopted an erroneous principle. The adoption of such a principle would be unjust to the parties, and also **[102]** injurious in its tendency to prevent the settlement of these cases without the necessity of going to law. For how does the case stand? One party makes a rough estimate, and, as is stated, a very low estimate, of the various items of damage he has received, and then makes an offer to the other party—"If you will pay me this sum down at once I shall be content"; the other party rejects this offer, and legal proceedings are the consequence. Now, can it be said that such an offer, made for the express purpose, as distinctly appears from the affidavit of the agent, of prompt and immediate payment, can bind the party at all after its rejection and bar him of all proof that such estimate was far below the amount of damage actually sustained? I am of opinion that it cannot; and that though the Registrar and Merchants were justified in using it as evidence, yet, if they have used it as conclusive, instead of auxiliary, they have undoubtedly lost their way.

It does not follow, however, that because the Court holds that the party is not bound by the estimate, therefore the damage actually sustained was greater than the amount of that estimate. That is still a matter for evidence; and evidence which is fully entitled to due consideration has been adduced upon this point.

The learned Judge, after referring to some of the items in the account, continued: I regret very much, the sums in dispute being so small, to be obliged to put the parties to any further expense, but I have no hesitation in saying, that if the Registrar and Merchants have adopted the original estimate as conclusive evidence of the damage, they have committed an error, and I must refer the report back for their further consideration.

Proctors for the "Good Samaritan," Jenner; for the "Two Sisters," Deacon.

MITCHELL *against* MITCHELL. Consistory Court of London, July 27, 1853.—Until the marriage is either proved or confessed in a suit for divorce the Court cannot enforce, but only recommend, a payment to the wife in the nature of alimony pendente lite.

This was a suit for divorce à mensâ et thoro by reason of adultery, promoted by the husband against the wife. The libel on behalf of the husband had been brought in, and stood for admission on the extra Court day in August (the 5th). An allegation of faculties had also been given in by the wife. An affidavit by the wife was now brought in to the effect: "that since the month of October, 1852, she had not received any sum of money whatever from her husband for her support and maintenance; that in consequence thereof she had been in a **[103]** state of the greatest distress; and that, unless a sum of money was directed by the Court to be paid forthwith to her on account of alimony, she would have no alternative for herself and child but to seek assistance from the parish or go into the workhouse."

Dr. Deane now moved the Court to be pleased to direct some sum of money to be paid to the wife, as on account of alimony, during the long vacation. He admitted that as the marriage was not yet proved or confessed he must ask it as a matter of favour and not of right, and cited *Smyth* v. *Smyth* (2 Add. 254).

The Court said that certainly, in the present stage of the proceedings, it was not

in its power to enforce any payment to the wife, but strongly recommended that the husband should pay twenty-five shillings a-week to the wife during the long vacation.

Dr. Haggard, on the part of the husband, stated that he was willing to allow a guinea a-week, but the Court considered it too little, advised compliance with its recommendation, and strongly intimated that in the event of non-compliance the husband would have reason to repent it when the formal allotment of alimony, pendente lite, came before the Court after the long vacation.

Nov. 16, 2nd Sess. Mich. Term.—The case came now before the Court for the formal allotment of alimony upon the answer of the husband to the allegation of faculties.

Dr. Deane and Dr. Twiss appeared for the wife.

Dr. Haggard and Dr. Robinson for the husband.

The Court decreed alimony at the rate of 80l. per annum from the return of the citation, deducting such sums as may have been paid to Mrs. Mitchell during the intermediate time.

Proctor for the husband, Toller; for the wife, Jennings.

IN THE GOODS OF THOMAS DEWELL, Deceased. Prerogative Court of Canterbury, Nov. 5, 1853.—Interlineations were made in a will by the testator after execution. He sent for the witnesses, pointed out the alterations, declared he republished his will, and then acknowledged his original signature, but did not re-sign. The witnesses placed their initials opposite to the alterations, and also signed a memorandum at the foot of the will. Held, a sufficient execution of the interlineations.

[S. C. 17 Jur. 1130.]

The deceased died in August last, leaving a will dated February 2, 1847, and a codicil dated November 13, 1850. Both the will and codicil were in his own handwriting, and **[104]** duly executed. But subsequent to the execution of the will two interlineations were made therein, opposite to which, in the margin, appeared the initials of the subscribing witnesses, but not the initials nor signature of the testator. At the end, however, of the will, and below the names of the subscribing witnesses, was the following memorandum in the testator's handwriting: "Republished and declared by the testator, with the words, 'for her own use' interlined in the last line of the first page, and the words, 'in the names of the same trustees,' interlined in the eleventh line of the second page, in the presence of us who, in his presence, at his request, and in the presence of each other, have hereunto subscribed our names as witnesses, this first day of December, 1848." The names of the two subscribing witnesses to the will, but not the name of the testator, appeared immediately below this memorandum.

One of the witnesses was dead; the other made an affidavit to the effect, that on or about the date of this memorandum the testator sent for them, produced his will to them, told them that he had made certain alterations, which he pointed out, and that it was necessary for him to republish it; that he then acknowledged his original signature, and they both subscribed their names to the memorandum, having previously placed their initials against the alterations, but the testator did not subscribe his name.

Dr. Waddilove moved for probate with the alterations, and submitted that the signature of the testator being already upon the will as altered, his acknowledgment of it in the presence of the two witnesses, who subscribed their names, was a sufficient compliance with the 21st sect. of the Wills Act, without a re-signing on the part of the testator.

*Sir John Dodson.* I am inclined to take the same view of it. What is stated in the affidavit respecting the transaction clearly proves the acknowledgment of the signature, and the witnesses having put their initials to the alterations, as well as their names to the memorandum, I think the party is entitled to probate of the will as it now stands with the alterations. The proper course, perhaps, would have been for the testator to have re-signed his name, as the witnesses did; but I don't know that the omission is fatal to the validity of these interlineations. I grant the motion.

Proctor, H. P. Clarke.

**[105]** IN THE GOODS OF THOMAS SMITH, Deceased. Prerogative Court of Canterbury. Nov. 5, 1853.—A testator duly executed his will, appointing his wife, H. S., universal legatee for life. She dies. He then marries her sister, and afterwards dies. The Court refused to grant probate of the said will as unrevoked by the incestuous marriage upon an affidavit of the facts, without the pretended widow having been first duly cited.

[S. C. 18 Jur. 180.]

T. Smith died on the 16th of February, 1852, having duly executed his will on 25th April, 1837, in which he named T. H. and W. W. executors and universal legatees in trust, and directed them to convert the whole of his personal property into money, to invest the same in the funds, to pay the interest thereof to his wife, Hannah, during her life, at her decease to his daughter-in-law, Eliza Tugwood, during her life, and at her death, to his grandchildren absolutely.

His said wife, Hannah, and W. W. died in his lifetime, and T. H. survived the testator, but died without having proved the will.

On the 6th May, 1850, the testator was married to Elizabeth Flavell, widow, who is still living.

An affidavit of J. S., an old and intimate friend of the testator, and of his wife's family, to the effect that Elizabeth Flavell is the natural and lawful sister of the testator's first wife, Hannah, was brought in with the certificates of the two marriages annexed.

Counsel now moved the Court to decree letters of administration (with the said will annexed) to be granted to the said Eliza Tugwood, and submitted that there was sufficient proof of the nullity of the second marriage, and that, consequently, the said will was not thereby revoked.

*Sir John Dodson.* What is stated may be perfectly true, but it is a matter of too great importance for the Court to decide upon the single affidavit which is before it. J. S. certainly states himself to be an old and intimate friend of the parties, and swears that the second wife was the natural and lawful sister of the first. In that case no doubt the marriage is null and void, and the will remains in force; still, I apprehend, the Court cannot, upon the evidence before it, entirely ignore the fact of the second marriage, and grant this motion without having the widow, or the pretended widow, cited. It may be true that she has been informed of this application, and has refused to make an affidavit of her own incest; but I think the Court is bound to require official notice to be given to her, and to have her cited, to shew cause why letters of administration, with the said will annexed, should not be granted.

Proctors for Eliza Tugwood, Thomas & Capes.

**[106]** IN THE GOODS OF DAVID DOWNER, Deceased. Prerogative Court of Canterbury, Nov. 23, 1853.—Testator, having duly executed his will, became afterwards of unsound mind; and while in that state destroyed it. Having partially recovered he expressed regret, and gave directions for the preparation of another will to the same effect. Before this was prepared, he destroyed himself. Probate granted of the unexecuted draft of the original will.

[S. C. 18 Jur. 66.]

David Downer, late of Watford, in the county of Hertford, destroyed himself by drowning, on the 10th April, 1853, and at the coroner's inquest held upon his body a verdict of temporary insanity was returned.

The deceased was married on the 16th November, 1846, and in the month of October, 1850, being then of perfectly sound mind, gave instructions for his will to Henry Fellows, his brother-in-law, a farmer, near Watford, and requested him to prepare it in accordance therewith. But Mr. Fellows, deeming it right to have professional assistance in the matter, gave the instructions, with the concurrence of the deceased, to his own solicitor, Mr. Clark, who thereupon drew a will in accordance therewith, giving the whole of the property of the deceased to his wife, Ann Downer, and appointing her and Mr. Fellows executors. This will was duly executed on the 27th October, 1850.

In the spring of 1851, the deceased began to shew symptoms of derangement of intellect, which continued to increase until the deceased was generally believed by his friends and relations to be of unsound mind.

On a Monday evening in the month of October, 1851, the deceased being at the

time very violent and wild in his conduct, suddenly left the room in which he had been sitting with his wife at his house at Watford, and fetched the said will from a box in which he kept it, and attempted to destroy it by putting it in the fire, which, however, his wife on that occasion prevented. But on the following Monday, the deceased being then wholly devoid of his reasoning faculties, succeeded in destroying the said will by cramming it into the fire with a poker.

In the course of the following November, the deceased appeared in a measure to recover from his attack, and frequently expressed great regret at having destroyed his will.

Early in March, 1853, the deceased called on Mr. Fellows, and asked him whether he would get another will drawn up the same as before, whereupon he asked the deceased what he had done with the will, to which the deceased replied, "That time I was mad, I burnt it," and expressed great regret at having so done. Mr. Fellows thereupon promised that when he had occasion to go to London, he would get another will prepared to the exact purport and effect of the one destroyed.

But on the 29th of the same month, Mr. Fellows again saw **[107]** the deceased, and became satisfied, from the great alteration in his manners and appearance, that he was relapsing into his former state of madness.

The deceased had always refused to see any medical attendant, but on the 9th April, when he was very bad, his wife called in Mr. Bidcock, a surgeon at Watford, to see him. He prescribed for him, but on the same day the deceased left his home and did not return till the following day, when, after remaining at home for a short time, he again left the house, and then drowned himself.

Several affidavits fully verified these circumstances; an affidavit also of Mr. Clark, the solicitor, with the original instructions, and the original draft of the said will annexed, proved the perfect accordance of this draft with the will of the deceased, as executed, whereupon

Dr. Bayford moved the Court to decree probate of the said draft of the said will, as containing the substance, purport, and effect of the will of the said David Downer to be granted to the executors named therein, by reason of the said deceased having destroyed the original thereof whilst of unsound mind.

*Sir John Dodson.* From the affidavits made in this case there can be no doubt that the deceased was of unsound mind, and that while in that state he destroyed the will There was, therefore, no animus revocandi, and I think the executors are entitled to probate of this draft.

Proctor for the executors, Scurlock.

LUCAS, OTHERWISE JOHN, *against* JOHNSON, IN THE GOODS OF JOHN LUCAS, Deceased. Prerogative Court of Canterbury, Nov. 23, 1853.—Testator died in the East Indies, leaving property in England. His son and executor, J. L., being in Calcutta, his attorney, J. J., took out the usual letters of administration and afterwards brought into the registry an inventory, and an account which shewed a large balance. J. L. having afterwards himself applied for and obtained probate, and J. J.'s authority being thereby terminated, a proctor appeared for J. L., and exhibited a special proxy; and the Court on his petition granted a monition to J. J. to pay the balance of the said account which had been allowed to him, the said proctor, for the use of his party.

[S. C. 17 Jur. 1186.]

John Lucas, late of Calcutta, in the East Indies, merchant, died on the 3rd June, 1828, having duly executed his will appointing Constantine Pandazie (since deceased), and his son, John Lucas, otherwise Lucas John, his executors.

On the 6th May, 1844, letters of administration, with the said will annexed, limited to the estate and effects within the province of Canterbury, were granted by authority of this Court **[108]** to John Johnson, as the lawful attorney, and for the use and benefit of the said John Lucas, otherwise Lucas John, then residing in Calcutta, and until he should duly apply for and obtain probate of the said will to be granted to him.

On the 8th December, 1852, Mr. Johnson voluntarily exhibited and brought into the registry of the Court an inventory of the goods, and an acconnt of his administration thereof, which shewed a balance of 1602l. 18s. 2d.

On the 26th June, 1853, the executor, Mr. John Lucas, duly applied for and

obtained probate of the said will, whereby the authority of the said letters of administration ceased.

On the 16th of July a proctor appeared for Mr. Lucas, and on the 4th of August, Dr. Twiss moved the Court to grant a decree against John Johnson "to shew cause why his account, heretofore brought into and now remaining in the registry of this Court, should not be examined and allowed by the Judge or his surrogate; and why he, the said John Johnson, should not dispose of the rest of the limited goods, chattels, and credits of the deceased which should be found remaining on his said account, in such manner and form as should be limited by the discretion of the said Judge or his surrogate, with the usual intimation."

This decree, with intimation, was granted; and was afterwards personally served on Mr. Johnson, and duly returned into Court on the caveat day in October, the certificate being continued.

On the 2nd session of Michaelmas Term, November 14, in pain, &c., the proctor exhibited a further proxy under the hand and seal of his party, and the Judge, at his petition, admitted the contents of the inventory and account exhibited by John Johnson, and decreed a monition against the said John Johnson "to pay the balance appearing on the said account, viz. the sum of 1602l. 18s. 2d.," the certificete of the decree being continued to the 3rd session.

A question, however, then arose as to the person to whom Mr. Johnson should be monished to pay the balance appearing on his account, inasmuch as Mr. John Lucas, otherwise Lucas John, the executor, was still residing in India, and had no agent in this country specially authorized to receive the money in his behalf. Consequently considerable delay with regard to ulterior proceedings, in the event of the monition to pay the balance not being obeyed, would be occasioned by the necessity of communicating with the executor himself, and of obtaining from him an affidavit to the effect that he had not received the money.

Under these circumstances it was suggested that the proxy **[109]** exhibited in the cause invested the proctor with authority to receive the said balance. It was to this effect: "I hereby nominate, &c. &c. to exhibit this, my special proxy, and by virtue hereof to pay and procure the rest and residue of the limited goods, chattels, and credits of the said deceased which shall be found remaining on the account of Mr. Johnson, to be examined and allowed by the said master keeper, &c., and the said John Johnson to be ordered and decreed to dispose thereof in such manner and form as shall be limited and appointed by the said Judge or his surrogate; and in default thereof, to pray the said Judge or his surrogate to permit the bond or obligation given and entered into by C. W. G. and J. F. E., together with the said John Johnson, for his faithful administration of the limited goods, &c., to be sued for at Common Law; and on the same being so sued for, to permit the said bond to be attended with and produced as may be requisite and necessary for the furtherance of justice, and generally to do, perform, and execute all such other acts, matters, and things as shall or may be requisite and necessary to be done for me, and in my name herein."

Dr. Twiss now moved the Court to direct that, by the monition decreed on the 2nd session of the Term, Mr. Johnson shall be monished to pay, or cause to be paid, the said sum of 1602l. 18s. 2d., being the balance remaining on his account, the said account being comprised in the inventory of the goods of the deceased, heretofore brought into and now remaining in the registry of this Court, to Charles John Middleton, the original proctor of the said John Lucas, for the use of his party, within such time as the Judge should think fit to limit and appoint.

The Court granted the application.

Proctor for the executor, Middleton.

IN THE GOODS OF VINCENZO FEDERICI, OTHERWISE VINCENT FREDERICI, Deceased. Consistory Court of London. Nov. 25, 1853.—An Austrian subject in Milan, by a legal will, in which no executor was appointed, made C. M., spinister, universal legatee. C. M. was duly put in possession of the estate of the deceased, by authorities at Milan, and afterwards duly executed, according to the law of Milan, an irrevocable deed of gift of all her estate in favour of Madame R. C., and shortly afterwards died intestate. Madame R. C. was duly put in possession of the estate in Milan. It being afterwards discovered that

the testator was entitled to 1000l. under some proceedings in Chancery in England, and application being made to this Court, it decreed letters of administration, with the will annexed, limited to the estate taken under the deed of gift, to Madame R. C., the donee, upon an affidavit of the Austrian consul, verifying the documents produced, being left in the registry.

The deceased in this case was Superintendant of the Imperial Royal Conservatory of Music at Milan, and died in September, 1826, having first duly made his last will and testament in conformity with the laws in force at Milan, without having appointed any executor thereof, but having therein named Cattarina Mella, spinster, universal legatee.

Mademoiselle Mella caused the said will to be duly registered and deposited in the archives of the Imperial Royal Civil [110] Tribunal of First Instance at Milan; and in the month of October, 1826, she was, by the order of that Court and pursuant to the said will, duly put into possession of the estate and effects of the said deceased in Milan.

On the 16th May, 1836, Mademoiselle Mella duly executed, conformably to the laws of Milan, an irrevocable deed of gift of all her estate and effects in favour of her niece, Madame Rosa Castiglioni (wife of Paolo Castiglioni), formerly Moro, spinster. This deed of donation had been duly accepted by Madame Castiglioni and her husband, and in virtue thereof they had been duly put in possession, by the authorities at Milan, of the estate and effects of the deceased there situate.

On the 22nd July, 1836, Mademoiselle Mella died intestate. It had only recently been discovered that the said Vincenzo Federici died possessed in this country of a sum of about 1000l., due to him under certain proceedings in the Court of Chancery.

This fund Monsieur and Madame Castiglioni claimed to be entitled to under the said will and deed of gift.

An affidavit of Monsieur Rosaz, a French advocate in this country, to the effect that Madame Castiglioni had been put in possession, by the Milanese authorities, of the estate and effects of the deceased there situate, by virtue and in pursuance of the will and deed of gift, was brought in with official copies in the Italian language of the will and deed of gift, and with translations thereof annexed thereto.

An affidavit was also brought in, sworn by Mr. Adolphus Bach, a counsel of the German law, and the German legal adviser of the Imperial Legation of Austria in this country, to the effect that "by the civil law of Austria in force at Milan, the said will of the deceased is a good and valid will, and has been duly recorded as such by the Tribunal of First Instance at Milan, as appears by the said exhibits, &c."

Sir J. D. Harding, Q. A., moved the Court to grant letters of administration (with the will annexed) of the estate of the said Vincenzo Federici to Madame Castiglioni.

*Dr. Lushington.* The difficulty which I feel in this case is, that nobody has made an affidavit as to the correctness of the documents before the Court. The affidavits no doubt sufficiently prove the law of Austria, and the legal effect of these documents, assuming them to be correct. The application is very peculiar; and I think myself bound, therefore, to require some verification of the documents. There would, I apprehend, be no difficulty in obtaining an affidavit from Milan, or from the Austrian consul in England. I should be quite content, and I [111] think, Mr. Registrar, the grant may pass upon an affidavit of the Austrian consul being left in the registry that he verily believes these documents to be what they purport to be. The grant must be limited to the estate taken under the deed of donation.

Proctor for Madame Castiglioni, Pritchard.

IN THE GOODS OF RICHARD HILHOUSE, ESQ., Deceased. Prerogative Court of Canterbury, Dec. 3, 1853.—Probate decreed of an unattested paper purporting to be a first codicil, dated 4th July, 1850, and a duly executed codicil, dated 8th October, 1853, as together containing a codicil to the will.

[S. C. 17 Jur. 1186.]

The deceased died on the 9th October last, leaving a will duly executed, and bearing date 29th July, 1840. He also left a paper writing, purporting to be a codicil, and to bequeath various legacies, and bearing date 4th July, 1850. This was signed by the deceased; but, although there was a full and perfect attestation clause, there were no witnesses thereto. On the 8th October, 1853, he duly executed, in the presence of two witnesses, what purported to be a second codicil to his will.

It appeared from the affidavits brought in that both the codicils were prepared by E. S., the deceased's solicitor; that in or about the month of July, 1840, the deceased handed the first to his wife to deposit with his will, which she did, and that it so remained with the will until after deceased's death; that shortly before his death, as he expressed a desire that some other friends should receive a small token of remembrance, his sons thought it advisable that a codicil should be drawn for that purpose, and, with his consent, gave instructions to E. S. to that effect; that this was read over to, and approved by, the deceased, who thereupon duly executed it.

It commenced thus, "This is a second codicil to the will of me," &c.; and, among other legacies, it bequeathed some to three of his grandchildren, in these words, "I give to each, &c., the sum of 500l., at the same time, and subject to the like provisions as are contained in my first codicil with regard to the like legacies to my three other grandchildren." To one of the legatees it gave the sum of nineteen guineas "to be in addition to the annuity given to her by the said first codicil;" and to another, "a further legacy of 50l." These references all corresponded with the dispositions in the unattested paper, dated the 4th July, 1850; and no other testamentary paper appeared.

Dr. Addams moved the Court to decree probate of the will and two codicils to be granted to the executors; and submitted **[112]** that the reference in the duly executed codicil to the unattested paper completely identified it, and entitled it to probate, notwithstanding the want of attestation.

*Sir John Dodson.* I have no doubt whatever, from the circumstances of this case and from the distinct references in the later instrument, that the former is sufficiently identified to be entitled to probate. My only doubt is, whether I should decree it as prayed. By doing so, I should pronounce an unattested paper to be a codicil. I apprehend the more correct course would be to consider the former incorporated in the latter, and decree probate of the will and the two paper writings as together containing a codicil to the will.

Decree accordingly.

Proctors for the executors, Thomas & Capes.

IN THE GOODS OF ELIZABETH ANN NEALE, Spinster, Deceased. Prerogative Court of Canterbury, Dec. 9, 1853.—E. A. N., a spinster, having invested money in the funds, and described herself as E. A. R., widow, and afterwards invested other money in her right name, the Court refused to decide the question of identity by granting a special probate of her will, which was in her right name, and shewed no ambiguity.

Elizabeth Ann Neale, late of Welford Cottage, King's Road, Chelsea, died on the 7th of November, 1853, leaving a duly executed will, of which H. A. and C. G. B. were executors.

It appeared from the affidavit of H. A., that some months before her death she had informed one of her executors that she had invested some moneys of her own in the funds in the name of "Russell" instead of Neale; that, after her death he found amongst her papers, in a cash-box belonging to her, stock receipts dated from September, 1845, to September, 1851, for sums amounting in the whole to 2336l. 0s. 11d. 3¼ per cents. in the name of "Elizabeth Ann Russell." The deceased was also possessed of 3000l. 3¼ per cents. in her correct name, which was purchased out of the estate of her late father, whose sole executrix and residuary legatee she was.

An affidavit of Mrs. Howard, a cousin of the deceased, proved that deceased was in the habit of visiting her in York Street, Blackfriars Road; that, on one occasion, about eight years ago, she took with her a widow's cap and fall, and having dressed herself therein, left the said house, and returned in about two or three hours, but made no mention of the object of her disguise; that on several occasions the deceased informed Mrs. Howard that she had invested several sums of money in the funds in the name of Elizabeth Ann Russell (Russell being **[113]** Mrs. Howard's maiden surname); that the first of such investments was made on the occasion when she disguised herself in the widow's cap and fall; and that she did so in order that her father might not know she had money invested in the funds, &c.

Upon inquiry at the Bank of England, since the deceased's death, it was found that the said investments had been made in the name of "Elizabeth Ann Russell, of York Street, Blackfriars Road, widow."

Counsel moved the Court to decree a special probate of the said will of the deceased to issue to the executors, with the following addition to the deceased's description therein, to wit—"in the books of the Governor and Company of the Bank of England, also described as Elizabeth Ann Russell, of York Street, Blackfriar's Road, widow;" and submitted that the affidavits of the circumstances, and the finding of the bank receipts among deceased's papers, sufficiently established the identity.

*Sir John Dodson.* I am not quite satisfied that there is evidence sufficient to establish the identity. In such a case, the strongest evidence that can be got should be produced; and I think I should have had an affidavit from the broker employed in the transaction. No doubt he could be found. But there is another ground on which I shall reject this motion. There is no ambiguity or difficulty whatever arising from the will itself, and therefore I apprehend it to be no part of the duty of the Court of Probate to take upon itself the decision of this question of identity. It appears to me that that is entirely a question for the authorities of the Bank of England, and that neither they, nor the parties concerned, have any right, in a case so approximating to fraud, to throw the responsibility of its decision upon this Court. I reject the motion.

Proctors for the executors, Wills.

IN THE GOODS OF JOHN HENRY OGDEN, Deceased. Prerogative Court of Canterbury, December 9, 1853.—The widow of the deceased, being confined under the Queen's warrant as a criminal lunatic, letters of administration were granted absolutely to a cousin german as next of kin, no medical certificate of insanity being required.

The deceased died intestate on the 16th of September, 1853, leaving Mary Ann Ogden, his lawful relict, and some cousins **[114]** german, the parties entitled in distribution to his personal property, which amounted to about 200l.

On the 2nd of July, 1849, Mary Ann Ogden, his wife, was indicted for the wilful murder of her child; but upon her arraignment in the Central Criminal Court, was found to be insane by a jury lawfully impanelled, so that she could not be tried upon such indictment; whereupon she was ordered to be left in strict custody until Her Majesty's pleasure should be known. She was accordingly confined in Horsemonger Lane Gaol until the 6th of April, 1850, when she was removed under Her Majesty's warrant to Bedlam Lunatic Asylum, where she still remains confined as a criminal lunatic.

These facts were deposed to by S. F., one of the next of kin, and G. E., the criminal prisoners' clerk in the office of the Secretary of State for the Home Department, but no affidavit was brought in, according to the usual practice, from any medical attendant.(*a*)

Counsel moved the Court to decree letters of administration of the goods of the deceased to be granted to S. F. the lawful cousin german, and one of the next of kin, "for the use and benefit of the said Mary Ann Ogden, widow, the relict of the said deceased, during her lunacy, and until she shall become of sound mind."

*Sir John Dodson.* There is no necessity for the limitation. It is in the discretion of the Court to make the grant either to the widow or to the next of kin; and it may at any time, upon good and sufficient cause being shown, prefer the next of kin to the widow. In the present case, the widow being confined as a criminal lunatic is surely a valid reason for passing her over. An absolute grant may pass to the next of kin.

Proctor for the next of kin, Scurlock.

THE OFFICE OF THE JUDGE PROMOTED BY BURDER *against* SELMES. Arches Court of Canterbury, 4th Sess. Mich. Term., November 28, 1853.—A churchwarden proceeded against for brawling and laying violent hands upon a person in the church, under the general Ecclesiastical Law, and not under the Statute. An

---

(*a*) The medical officer of the lunatic asylum declined, it is understood, to make an affidavit of the widow's insanity, on the ground that he could not do so conscientiously; as, notwithstanding the position in which she stood, he believed her now to be perfectly sane, and capable of managing herself and her affairs.

affirmative issue being given, he was monished to abstain for the future, and was condemned in costs.

[S. C. 18 Jur. 252.]

This was a cause or business of the office of the judge promoted in virtue of letters of request from the Consistorial Episcopal Court of Chichester, by John Burder, the secretary of **[115]** the bishop of the diocese, against Henry Selmes, of the parish of Beckley, in the county of Sussex, for quarrelling, chiding, and brawling by words, and for smiting and laying violent hands upon a person of the name of Thomas Fuller, in the chancel of the parish church of Beckley, on the afternoon of Sunday, the 5th June, 1853, whilst persons were therein assembling for public worship.

Articles were brought in to the following effect:

First. That by the laws, statutes, and canons ecclesiastical of this realm, all and every the parishioners and inhabitants of and within every parish within the said realm, and all other persons whatsoever, ought, when they repair to their parish church, or any other church or chapel, upon any occasion whatever, to conduct themselves, orderly, soberly, peaceably, and reverently therein, as becometh the house of God, and not to chide, brawl, scold, quarrel, or make any disturbance whatever therein, or lay violent hands upon any person therein, upon pain of ecclesiastical censures, to be inflicted according to the offence.(*a*)

Second. That Henry Selmes, on Sunday, 5th June, 1853, **[116]** whilst persons were assembling in the parish church of Beckley, for public worship, at the usual hour of divine service, and whilst Thomas Fuller, a parishioner of the said parish was quietly and peaceably in occupation of a certain pew in the chancel of the said parish church, entered the church, accompanied by several men (who had been previously engaged by him to commit the offence, and one of whom was his groom), and proceeded with them to the pew in which T. F. then was, and directed him to leave the pew; that on the said T. F. declining to do so by reason that he had been authorized by the rector of the parish to occupy the said pew, H. S., in a brawling, chiding, and quarrelsome manner, directed the men, to the number of four or five, to climb into the pew, and lift the said T. F. out of the pew, and himself assisted them in so doing,

---

(*a*) This proceeding was taken under the general law, and not under the stat. 5 & 6 Edw. 6, c. 4., "which," said Lord Stowell (*Hutchins* v. *Denziloe*, 1 Hag. Con. 181), "did not create the offence, as it subsisted by the common law before the statute was enacted, and there is no doubt that the Ecclesiastical Court had a right to intervene to correct or punish any act of disturbance of the public worship. A party may now proceed either upon the statute or upon the ancient law." This was also so held by Sir H. Jenner Fust, in the case of *Taylor* v. *Morley*, 1 Curt. 481, where objection was taken that the Ecclesiastical Court had no jurisdiction in such matters except under the statute, and the learned Judge observed, "In many cases it is advisable to proceed under the general law, because the statute requires two witnesses in proof of the charge; while, under the general law, one witness to certain words, and one to circumstances, is sufficient, and it may not always be in the power of a party to produce two witnesses in support of the specific charge." Another distinction between the proceedings under the general law and under the statute, in such a case as the present, is the discretion of the Court as to the punishment; for, in *Hoile* v. *Scales*, 2 Hagg. Ec. 595, Dr. Lushington said, "What are the consequences of a conviction in my mind that the proofs establish a violation of the statute? Here the Court has no discretion, the words of the statute are imperative, 'If any person or persons shall smite or lay violent hands upon any other either in any church or churchyard, then, ipso facto, every person so offending shall be deemed excommunicate." This is the penalty for the offence of smiting in a sacred place, and the Court has no power to alter or vary it. But since the passing of 53 Geo. 3, c. 127, the consequences of a sentence of excommunication are very different from what they were previously, for the ancient punishment of excommunication is taken away; and the person excommunicated incurs no civil penalties except such imprisonment as the Court in the exercise of its discretion may think proper to direct, not exceeding six months." In that case the Court pronounced the defendant excommunicate, and that he be imprisoned for seven days and pay the costs of the suit; but as the counsel for the promoter did not press the Court to proceed to the execution of the sentence, no significavit issued, and the defendant, therefore, suffered no imprisonment.

and laid violent hands on the said T. F., and forcibly and violently pushed him, and assisted the men to turn him out of the pew, and thereby created a disturbance in the church, to the great scandal of the persons therein assembled for public worship, and in violation of the aforesaid laws.

Third. That the said H. S. was duly nominated churchwarden by the rector, and was duly admitted into the office of churchwarden of the parish, and that at the time of the commission of the said offence he was churchwarden of the said parish.

Fourth, fifth, and sixth. The jurisdiction and the usual concluding article.

These articles having been admitted on the third session of Michaelmas Term without opposition, and an affirmative issue having been given, the Court now gave sentence.

Dr. R. Phillimore (Dr. Deane with him) appeared for the promoter, and said he was instructed by the Bishop of Chichester, whose only object in causing the writ to be promoted was to maintain decency and order in places of public worship, to ask the Court to pass a lenient sentence on Mr. Selmes. He therefore prayed the Court merely to admonish him to abstain from such conduct in future, and to condemn him in the costs of the proceedings.

Dr. Addams appeared for Mr. Selmes. He thought there was no necessity for the suit whatever. Mr. Selmes was the churchwarden of the parish, and it was to be presumed that he was only acting in the discharge of what he considered a duty. He thought it a case in which the Court would not condemn the defendant in the whole costs, but only in a sum nomine expensarum.

**[117]** *Sir John Dodson.* Mr. Selmes having given an affirmative issue, there is no necessity for the Court to enter into the particulars of the charge. He has clearly committed and admitted an offence under the Ecclesiastical Law; and though I think it probable that he proceeded to greater lengths than he originally intended, and may perhaps have misconceived his duty, yet the Court is bound to admonish him to abstain from such conduct in future, and to condemn him in the costs, which cannot be very heavy.

Proctors for the promoter, Bathurst; for the defendant, Robarts.

MONEY *against* MONEY. Arches Court of Canterbury, Nov. 28, 1853.—In a matrimonial suit, the husband retained one counsel only, and the wife's proctor, conceiving she could not claim the privilège of two, also retained one only, but for the hearing was induced to retain a second. The costs thereof being allowed upon taxation, the proctor for the husband objected to the Registrar's report. Held that the ordinary practice of the Court was to have two counsel on each side; that a wife was primâ facie therefore entitled thereto; and that the special circumstances of the present case did not afford sufficient ground for exception.

[S. C. 18 Jur. 179.]

This was a suit brought by letters of request from the Diocesan Court of Bath and Wells, by Edward James D'Oyley Thrale Money, against Harriet Catherine Elizabeth Money, his wife, for restitution of conjugal rights. She pleaded her husband's cruelty in bar, and prayed a divorce.

Currey, the husband's proctor, having in the commencement of the suit retained but one counsel, Tebbs, the proctor for the wife, also retained one counsel only, the Queen's Advocate. In this manner the case proceeded till towards the end of Trinity Term last, when the evidence having become very voluminous, Tebbs inquired in the Registry whether a second counsel might not be allowed, but was informed, that under the circumstances of the case, if the husband was content with one counsel, the costs of a second counsel would not be allowed to the wife.

The case then proceeded for hearing, and Tebbs took the papers to the Queen's Advocate, who thereupon required the assistance of another counsel, and said that he, Tebbs, was bound, by his professional duty to his party, to insist upon her right thereto. On further reference to the Registry, Tebbs was informed that a second counsel would be allowed, as it was discovered that it had been allowed in a similar case. A correspondence ensued between the proctors, which led to nothing; but on the cause coming on for hearing the Queen's Advocate submitted to the Court that he could not do justice to so heavy and intricate a case without the assistance of a junior counsel, and that Mrs. Money was entitled to have one. The Court having intimated its opinion to that effect, Tebbs retained a second counsel to argue the case on behalf

of Mrs. Money; and the costs and expenses of this counsel were allowed by the [118] Registrar upon taxation. Currey excepted to the Registrar's report allowing the costs of such second counsel against the husband, and brought in an act on petition in objection thereto, and prayed that the bill might be referred again to the Registrar for taxation.

This question was argued before the Court proceeded with the hearing of the principal cause.

Dr. R. Phillimore, in objection to the report. The decision of the Court will form a precedent for future cases. It must be given on two grounds: first, upon the general principle; and secondly, upon the general circumstances of the case. The general principle that a wife is allowed counsel at the expense of her husband, is only a corollary to the proposition that she is entitled to receive necessaries from him as long as she is not divorced. The principle is laid down in Shelford on Marriage, 650. There can be no absolute rule that the wife, irrespective of circumstances, is entitled to two counsel. It must be a question of degree, not of fixed principle. A pauper was entitled to counsel, but the Court never assigned two. A husband might have an income of 50l. per annum only, and yet be unable to take the oath that he was a pauper; it would be absurd to say that the Court would compel him to find his wife two counsel. Mr. Money had paid a large bill of costs; and if his resources will not allow him to avail himself of two counsel, his wife cannot claim two. She would thereby be placed in a position of inequality and advantage, not of equality and justice.

With regard to the special circumstances of this case, the letter of Mrs. Money's proctor put him out of Court. The Queen's Advocate might be fully justified, especially in a case of such difficulty and publicity, in demanding the assistance of a second counsel, but that will not affect any agreement which has been made. The proctor is dominus litis, and can therefore bind his client. In the letter of Mrs. Money's proctor is a direct and positive acknowledgment of an agreement subsisting between the two proctors that there should be only one counsel on each side, and Mrs. Money must be bound by it. The proctor is barred from giving his consent to the employment of a second counsel.

Sir J. D. Harding, Q. A., in support of the report. It is hardly possible to exaggerate the importance of this question. There can be nothing more alarming to a client, nor more opposed to the first principles of justice, than that he is bound by whatever his proctor writes or says out of Court with a view of expediting a cause. Suppose one proctor said to another that he was anxious to have the case heard on a given [119] day, and that if he would facilitate it, he would undertake not to appeal it, could the client be bound by such an undertaking? Certainly not. On the contrary, the client might compel him to prosecute the appeal; he must discharge his duty. His proxy only binds him to do what is lawful; it could not extend to everything said out of Court. If the proctor has made the agreement referred to, Mrs. Money is not to be bound by it. The proctor has endeavoured to carry out the alleged agreement as far as he can; but when I saw the injury likely to arise to my client from persisting in it, I used my utmost exertions to overthrow the arrangement. Mrs. Money's proctor had derived an impression from what he heard in the Registry, that he was entitled to one counsel only, and under that impression made the agreement. It was made under complete ignorance of the circumstances, and as soon as he found that he had been misinformed, he repudiated it. No practical harm has been done to Mr. Money. The whole transaction is highly creditable to Mrs. Money's proctor, who was unwilling to put the husband to expense; and the step he has taken now was adopted under the advice of his counsel, who could not permit Mrs. Money to be deprived of her rights. With respect to Mr. Money's pecuniary resources, he has stated in answer to an interrogatory that the sum over which he has a disposing power, in a will executed since his marriage, is about 7000l. subject to an annuity of 100l. That is his private property, in addition to his pay as a lieutenant in the Bombay Native Infantry. According to the principles laid down in Shelford, the wife is entitled to necessaries. Can any one look at the bulk of papers in this case, and say that a second counsel is not necessary? If ever there was a case in which it was requisite, it is this. It is not pretended that Mrs. Money has a single shilling beyond what her husband allows her.

*Sir John Dodson.* It has been contended by the learned counsel for Mrs. Money,

that neither upon general principles, nor upon the special circumstances of the case, was the wife entitled to the benefit of a second counsel, and consequently that the report of the Registrar could not be allowed. With regard to the general principle, according to the law and practice of the Court, the usual course is to have two counsel on each side, subject to certain exceptions. This case has been brought before the Court by the husband himself, by virtue of letters of request, in which he has stated that he was desirous of proceeding in this Court, because in the Court below the parties would not have the benefit of counsel such as they had **[120]** here. It is, therefore, primâ facie, a case in which the Court would not be inclined to depart from its ordinary and usual practice. It certainly is a case, so far as I have been able to look into it, attended with very considerable difficulty, and one in which the Court would require the aid of counsel beyond what it would do in ordinary cases. It appears to me to abound with difficulties. The pleadings are very long, and a large number of witnesses has been examined; some on subjects of medical and surgical science. It is admitted that the wife is entitled to necessaries; and if proceedings at law are necessary for her protection, she is entitled to have her expenses paid by the husband, if he is able to pay them.

Now, do the special circumstances of the case exempt the husband from liability to the payment of two counsel for his wife? If his entire income had amounted to only 108l. per annum, out of which he allowed his wife 100l. for sustentation, the Court might have been placed in considerable difficulty; but I do not know that I would, even on that ground, have exempted him from the payment of necessary costs. It appears, however, that in addition to an annual income of 108l. while absent from duty, he has received from 7000l. to 8000l. under the will of his father. It is admitted, that when in actual service he has larger pay, and it also appears he has other emoluments arising from other appointments which he holds. There is no ground, therefore, for saying that he cannot pay the necessary and proper expenses for conducting the case of his wife.

But it is said that an agreement has been entered into, that the wife has hitherto proceeded with one counsel only, and that Mr. Money has paid the costs up to the hearing. A correspondence has passed between the proctors, and it certainly does appear that there was an agreement, direct or implied, that the case should be heard with one counsel only on each side. It seems, however, that the husband having but one counsel, the wife's proctor, having received some erroneous information in the Registry, thought he should not be at liberty to retain two on her behalf. When the papers were put into the hands of the Queen's Advocate, he intimated that such was the nature of the case, that he could not undertake to conduct it alone; but upon being apprised of the understanding between the proctors, he did not press the subject further; on looking, however, into the papers he considered a second counsel necessary, and insisted upon having one. Notice was then given, without loss of time, to the other side, and no disadvantage has been sustained by Mr. Money in his having paid the costs at the time he did. The agreement or understanding entered **[121]** into by the proctors affords no reason for taking the case out of the general rule, by which the wife is entitled to the assistance of two counsel. Upon the general principle, therefore, as well as upon the special circumstances of this case, I must affirm the report of the Registrar, with costs.

Proctor for the husband, Currey; for the wife, Tebbs.

CIOCCI *against* CIOCCI. Consistory Court of London, Nov. 8, &c., 1853.—Charge of cruelty in wilfully marrying while infected with the venereal disease, and communicating the same, not sustained. Held, the wilful risk, without the actual communication of the disease, is not legal cruelty. Husband's defence against the charge of association and adultery with various prostitutes, that he was agent for a society for their reformation, and associated with them solely from pure and laudable motives, not sustained by the evidence. Sentence of divorce by reason of adultery only.

[S. C. 18 Jur. 194. Referred to, *Boardman* v. *Boardman*, 1866, L. R. 1 P. & D. 236. Discussed, *Browning* v. *Browning* [1911] P. 166.]

This was a suit for divorce, a mensâ et thoro, promoted by Jemima Mary Bacon Ciocci against her husband, Raffaele Ciocci, by reason of his cruelty and adultery.

The libel was given in behalf of the wife on the 19th February, 1853, to the following effect:—

1st Article. Pleads the marriage of the said parties in the parish church of Brighton, on the 15th January, 1851.

2nd. In part supply of proof, exhibits and annexes a collated copy of the entry of the marriage in the Register Book.

3rd. Pleads the cohabitation of the parties, the consummation of the marriage, and their general reputation as husband and wife.

4th. Pleads generally cruelty and adultery from the very day of the said marriage, or from a very early period thereafter.

5th. Pleads—That on the evening of the marriage, about ten o'clock, the said R. Ciocci absented himself from the house, No. 8 Grosvenor Street, Grosvenor Square (to which they had repaired from Brighton immediately after the ceremony), and did not return until about two o'clock A.M. of the following morning, having spent the interval smoking and drinking at a restaurant in Golden Square, kept by an Italian named Cesarini. That during the succeeding fortnight, while they remained in London, the said R. C. in a similar way absented himself continually from his wife, constantly quarrelling with her without cause or provocation, and treated her generally with neglect and contumely.

6th. That for some time before, and at the time of and after the period of his said marriage, the said R. C. was suffering from venereal disease,(*a*)[1] for which he was attended by divers medical persons practising at Brighton and elsewhere; that knowing himself to be so affected with venereal disease, and in **[122]** spite of the warning given him by one or more of them very shortly before his marriage, viz. that he the said R. C. was not justified in marrying at the time when he did marry, the said R. C. did nevertheless contract a marriage and have sexual intercourse with his said wife; that the said R. C. did thereby communicate to her the venereal disease; that her health was thereby for a considerable period seriously impaired; that by this cause, as well as by the general unkind treatment of the said R. C., his said wife was reduced to a state of extreme debility, which confined her to the house until the 14th of March, 1851, when she quitted her husband's house, and has ever since lived separate and apart from him, and has never since resided either at Brighton or London.

7th. That within a month after the said marriage, R. C. was accused by a person called San Giovanni, one of his personal friends, then residing at Clarence Place, Brighton, with being at that time infected with the venereal disease; that the said R. C. did not deny, *but in effect, though not in words, admitted* (*a*)[2] the same; that the said R. C., also within a month after his marriage, confessed to a female known by the name of Polly Miller, that he had been suffering from the venereal disease, and had communicated the same to his said wife.

8th. That ever since the marriage of the said R. C. and J. M. B. C. in the month of January, 1851, the said R. C. has been in the constant habit of consorting with prostitutes, both in London and in Brighton, generally late in the evening, and has been constantly seen walking and conversing with them.

9th. That the said R. C. was *in the habit of visiting at a house,*(*b*) No. 3 Shaftesbury Crescent, Pimlico; that on a Sunday afternoon occurring very shortly after the aforesaid marriage, the said R. C. called at the *said* house *and* (*c*) caught hold of the female servant, who opened the door; took indecent liberties with her person, endeavoured to push her into the parlour of the house, and solicited her to let him have sexual connection with her.

10th. That on divers other occasions the said R. C., both *in the said house in*

---

(*a*)[1] In his answers Mr. C. denied having had the disease at that or any other time. See the judgment.

(*a*)[2] The words in italics having been objected to, were omitted in the libel when admitted as reformed.

(*b*) The words in italics were substituted for "was an intimate friend of Dr. Achilli, and a frequent visitor at his house," struck out of the libel as originally brought in.

(*c*) Substituted for the words "of the said Dr. Achilli, and having inquired for the said Dr. Achilli."

*Shaftesbury Crescent* (*d*) and when he met the said female servant in the street, attempted to take indecent **[123]** liberties with her person, and solicited her to let him have sexual intercourse with her, and especially in the month of May or June, 1852, after the said servant had left *her service in the said house*,(*a*) the said R. C. endeavoured to induce her to go with him to Brighton, for the purpose of carrying on an adulterous connection with him.

11th. That on or about the 29th January, 1851, the said R. C. and his wife, J. M. B. C., returned to Brighton, and went to reside at No. 8 Clarence Square where the said R. C. pursued his occupation as a professor or teacher of languages; that from and immediately after such his return to Brighton, the said R. C. went frequently to a brothel or house of ill fame in Gardener Street, and also to a brothel or house of ill fame in Carlton Street, in Brighton, and that he there habitually committed adultery with a person known by the name of Polly Miller, and divers other prostitutes.

12th. That after his wife separated herself from him, the said R. C. continued to reside in the house in Clarence Square for about four months, and habitually committed adultery with Emma Brown, his cook.

13th. That on the evening of a certain Saturday in the month of June, 1852, R. C., then residing in London, met a certain female, known to be a prostitute, and accompanied her to a house of ill fame in Chelsea, where he passed the night, and committed adultery with her.

14th. That in the early part of the following month R. C. again met the said prostitute, late in the evening, in the neighbourhood of Vauxhall Bridge Road, walked about with her for two or three hours, took indecent liberties with her person, and solicited her to let him have sexual connection with her in the street, which she refused; that on divers subsequent occasions, in the summer and autumn of the said year, R. C. met the said prostitute in the streets of Pimlico and Chelsea, walked about with her, took indecent liberties with her, solicited her to let him have connection with her, and gave her money.

15th. That on or about 2nd November 1852, the said prostitute received a letter (*b*) *purporting to come* from the said R. C., which letter is not now in existence, requesting her to call upon him at his lodgings, No. 16 Grosvenor Street West, on the following morning; that accordingly, *and in consequence of the receipt of such letter*,(*b*) she went to the said house and saw the said R. C., who asked her to accompany him to a magistrate **[124]** and to deny having had connection with him, if questioned by such magistrate; that the said R. C. thereupon accompanied her in a cab to the police station in Cottage Row, Pimlico, into which he entered, she, the said prostitute, remaining in the cab; that after waiting for about half an hour, the said R. C. re-entered the cab, and accompanied her to the police station in Rochester Row, into which he entered while the said prostitute remained, as before, in the cab; that after an interval of some two hours the said R. C. again re-entered the cab, in which he proceeded with the said prostitute to a house in Shaftesbury Crescent, and thence to his aforesaid lodgings, No. 16 Grosvenor Street West, where the said prostitute remained alone with the said R. C. for two or three hours, during which time the said R. C. committed adultery with her.

16th. That in the course of the few months immediately preceding the date of this libel, the said R. C. received another prostitute in his said lodgings, and committed adultery with her.

17th, 18th, 19th, and 20th. The usual formal articles, pleading the identity and diversity of the parties, and the jurisdiction of the Court.

An allegation was given in on behalf of the husband to the following effect:—

1st Article—Counterpleads the fourth article of the libel, and pleads that during their stay in London he devoted himself almost entirely to his wife, frequently escorting her to places of amusement and public resort, and making expensive purchases for her personal ornament, and doing everything else in his power to contribute to her gratification.

2nd. That about six weeks after their return to Brighton, on the 14th March,

---

(*d*) Substituted for "at Dr. Achilli's house."

(*a*) Substituted for "the service of Dr. Achilli."

(*b*) The words in italics in this article were not in the libel as originally brought in.

1851, his wife, who, as well for some considerable period before, as at the time and ever since her said marriage, had been suffering from ill health, went, with the consent of her husband, on a visit to a friend of hers, resident at Cuckfield, in Sussex, for change of air; that her expressed intention at such time was, to be absent for a few days only, and then to return; but that instead of so doing, she, to wit, on the 2nd April following, signified to her husband, by means of a letter, addressed to him by her solicitor, that she was determined never to return to him, and never again to live and cohabit with him; that to such determination she adhered, though earnestly remonstrated with (by letter), and entreated to forego it, by her said husband; that from such time she carefully concealed her place of residence from him; that he, in vain, endeavoured to discover the same, and heard (directly) neither **[125]** from nor of his said wife until after an interval of about a year and a half, when, to wit, on the 10th January, 1853, he was served with the citation in this cause.

3rd. Exhibits and annexes certain letters.

4th. Counterpleads the 13th and 14th articles of the libel, and alleges that the said R. C. (who was, and is, a member of a certain society called the "Female Aid Society," established in Red Lion Square, London, and who, from the year 1850, had taken, as he still takes, an active part in promoting the object of that society) sometime in the said month of July, 1852, for the first time, met and accosted a female, being the female meant or intended (obviously a woman of the town, and who has since been produced and examined as a witness in this cause on behalf of his wife, the said J. M. B. C.,) by the names of "Fanny Alexander," but who then, in answer to his inquiry, stated to the said R. C. that her names were Helen Alexander, in the said Vauxhall Bridge Road; that the said R. C., in conversing with the said female on such occasion, urged and endeavoured only to persuade her to abandon her course of life, and to put herself under the protection of the said society; that it is utterly untrue that he then or at any other time took indecent (or any) liberties with the person of the said female, or that on the said occasion or any other, he had sexual connection with the said female, or committed adultery with her.

5th. Counterpleads the 15th article of the libel; and with reference to circumstances therein mentioned, alleges that, in the evening of a day early in the month of August, 1852, the said R. C. accidentally saw a fellow-countryman of his, named Guadaleta, conversing with a female (whom he immediately recognised as the female he had seen and conversed with, in the manner as and to the effect mentioned in the preceding article of this allegation), in the neighbourhood of his, Guadaleta's lodgings, in Gillingham Street, Pimlico, and into which lodgings the said Guadaleta presently entered with the said Fanny (or Helen) Alexander, though at such time the said Guadaleta was a candidate for the office of minister of the Italian Protestant Church, in Newman Street, Oxford Street, London; and in reference thereto, an advertisement had shortly before, to wit, on the 26th of the preceding month of July, appeared in the *Times* newspaper, calling upon any one who had aught to object to the moral character of the said Guadaleta, to communicate the same to the Rev. Mr. Glennie, one of the secretaries to the Society for the Promotion of Christian Knowledge; and that it was the circumstance of such advertisement, and his knowledge of the fact of the said Guadaleta being such candidate, **[126]** that induced the said R. C. to notice (as he did) the fact of the said Guadaleta taking the said female to his, Guadaleta's lodgings, as hereinbefore pleaded; that in the month of October following, the said R. C., who was and is the Italian translator of the said Society for the Promotion of Christian Knowledge, was induced (though with some reluctance) to mention what he had seen of the said Guadaleta's conduct aforesaid to the said Mr. Glennie, who was also honorary secretary to a committee of which the Rev. Mr. Burgess, the rector of Upper Chelsea, was a member, for the selection of minister for the Italian Protestant Church in London, and who again communicated such information to the said Rev. Mr. Burgess; whereupon the said Rev. Mr. B. had an interview with the said R. C., and requested of him (at least as understood by the said R. C.) some evidence of the improper (if improper) connection of the said Guadaleta with the said female; that in compliance with such, the request of the said Rev. Mr. B., the said R. C., not being aware of the residence of the said Fanny (or Helen) Alexander, or when or where he might fall in with her, he on the 2nd of November following, described her to a policeman on duty in Stafford Street, Pimlico, (believing that such was one of her haunts), who said he well knew her, and promised to send her to his lodgings, No. 16 Grosvenor

Street West, Pimlico, the next time he met her; for which purpose the said R. C. gave the said policeman a printed card, with his name and his said address; that on the evening of the said day, the said R. C. (being then in company with another fellow-countryman, a Signor Patriarchi), himself met accidentally the said Fanny (or Helen) Alexander, whom he had not seen since her previous interview with him hereinbefore pleaded, and requested her to come to his said lodgings on the following day, which she promised to do; that accordingly on the following day, November 3rd, the said Fanny (or Helen) Alexander went to the said lodgings, and found there the said R. C., and with him the said Signor Patriarchi, and when and where the said Signor P., in the presence of the said R. C., put certain questions to the said Fanny (or Helen) Alexander concerning her connection with the said Guadaleta; which questions, as also her answers thereto, he put down in writing, to wit, on the paper writing hereto annexed, marked No. 10, (*a*), (to which the party proponent prays leave **[127]** to refer in part supply of proof of the premises), and to authenticate the same, added his signature thereto, as and where such signature now appears thereon; that after this had been done, the said R. C. (as conceiving that such was proper, if not necessary), took the said Fanny (or Helen) Alexander with him in a cab to the police station, in Cottage Row, Pimlico, and thence (at the recommendation of the Police Inspector in Cottage Row) to the police court in Rochester Row, as pleaded in the said fifteenth article of the said libel, but not for the purpose therein most falsely pleaded, of inducing her to disclaim upon her oath any illicit connection between her and himself, which he neither had had, nor (to his knowledge) was believed or suspected to have had; but for the purpose, and no other, of having her sworn to the truth of the statement contained in her answers to the questions put to her as aforesaid by the said Signor P., relative to her illicit connection with the said Guadaleta, though such his purpose was frustrated, by the refusal of the magistrate,

---

(*a*) On the 3rd of November, 1852, the following questions were addressed to Miss Helen Alexander, and answered as follows:—

1. Have you ever seen this gentleman walking with another gentleman in Shaftesbury Crescent?—Yes.
2. What day?—On the 4th of August, 1852.
3. If you see the gentleman could you know him again?—Yes.
4. Have you had anything to do with him?—Yes; I went with him that evening.
5. Did you stay with him all the night?—Yes.
6. At what o'kloc did you left in the morning?—About eight o'kloc.
7. What did he say to you during the night?—That he was going to leive that appartement; that next day was going in the country to pay a visit to some friends.
8. How much did he gave you?—Five shillings.
9. Have you seen him since that evening?—Yes, twice; once near Vauxhall Bridge, and another time in Belgrave Road.
10. What did he say to you?—That I am a very bad girle to go and tell to his friend every thing.
11. Where he lived?—At 39 Gillingham Street, Pimlico.
12. What part of the house had he?—The parlour, and de back parlour for his bedroom.
13. Did you really sleep with him?—Yes.
14. Have you been with him afterwards?—No.
15. Did any one see you in the house?—Nobody.
16. Have you seen this gentleman when you entered the house?—I did not; I thought he had go on away.
17. Have you seen him before that evening?—Yes; and I told him all my life.
18. What did he say to you?—He wished me to chang my life, to go to servis; and he sayed that he would send me in an establishment at Red Lion Square, where they would take care of me, and so find me a place.
19. Were you glad to go and change your life?—Yes.
Would you go now?—No.
20. Make a description of the gentleman.—He is rather toll, and tin face, with large mouth, black wiskers, and bold.
21. Have you ever had anything to do with this gentleman?—Never.

(Witness) C. Patriarchi.

at the said police office, to swear the said Fanny (or Helen) Alexander to the truth of such statement; that the said R. C. thereupon went back in the cab to his said lodgings, at No. 16 Grosvenor Street West, taking the said Fanny (or Helen) Alexander back in the cab with him as far as it went her way, but set her down at the corner of Windsor Terrace, Pimlico, that (as she said) being near where she lived, and where she desired to be set down; which having done, the said R. C. **[128]** returned alone in the cab to his said lodgings, where the said Signor P. then was expecting his return, and who spent the rest of the day with the said R. C.; that in his way home from the said police court, the said R. C. called at a house in Shaftesbury Crescent, as mentioned in the said fifteenth article of the libel, and went into it for a short time to speak to an acquaintance of his who resided there; but that he left the said Fanny (or Helen) Alexander, whilst he was so in the said house, sitting by herself in the cab at the street door; that the said Fanny (or Helen) Alexander was never at the said house, No. 16 Grosvenor Street West (at least to the knowledge of the said R. C), save at the time, and for the purpose, and under the circumstances hereinbefore pleaded; that it is utterly false, as pleaded in the said fifteenth article, that she was again, or a second time, at the house on the said day, and that then and there, as falsely pleaded (or at any other time or place), he, the said R. C., had the carnal use and knowledge of the said Fanny (or Helen) Alexander.

6th. Pleads, that by the words "another gentleman," occurring in the question No. 1, and the words "the gentleman," occurring in the questions numbered 3 and 20 in the exhibit marked No. 10 annexed to this allegation, was meant or intended the aforesaid Italian, Signor Guadaleta, and that by the words "this gentleman," occurring in the questions numbered 1, 16, and 21, the words "his friend," occurring in the question numbered 10, and the word "him," occurring in the question numbered 17 in the same exhibit, was meant or intended Raffaele Ciocci, the party in this cause.

The cause was argued at great length, on several days, by Dr. R. Phillimore and Dr. Deane, on behalf of the wife; and Dr. Addams and Dr. Twiss, on behalf of the husband.

Judgment deferred.

Jan. 18, 1854.—*Dr. Lushington.* This case has been fully discussed at the bar, the argument occupying no less than four days, and I think that time has been well spent; for on the present occasion the veracity of many witnesses is called in question, and the evidence is contradictory to a very great extent, and much time must necessarily be consumed in the investigation requisite to the discovery of the truth.

I must commence with stating a few of the admitted facts. The marriage took place on the 15th January, 1851. It appears that Mr. Ciocci was an Italian refugee, and for some years resident in this country; that he derived his maintenance by teaching languages, and, for some time previous to the marriage, at Brighton. The lady was Jemima Mary Bacon Frank, **[129]** resided at Brighton and possessed a considerable fortune. The ages of the parties do not distinctly appear, but the lady was the elder.

There is enough in these circumstances to satisfy my mind that, according to all probability, this was not a marriage likely to produce much happiness. The parties moved in a different sphere of life, and the fortune was well secured to the lady.

The parties separated on the 14th of March, 1851. What were the particular circumstances which led to this separation are not disclosed by the evidence in the cause. Much is very inconveniently left to the Court to conjecture. For instance, I know no fact immediately preceding March 14, 1851, which caused the cohabitation to cease. However, cease it did; and I find Mr. Ciocci in London, and Mrs. Ciocci elsewhere. From this time to the commencement of this suit in Hilary Term, 1853, there is an entire blank, with one exception: that it appears that Mrs. Ciocci, by her agents, was endeavouring to find proofs to support charges of adultery against her husband. All I know is from the correspondence; whence it may be collected that Mr. Ciocci, in conformity with his declarations, did not endeavour to enforce cohabitation, and from the same source I form the conclusion that Mrs. Ciocci had no knowledge of the special act of cruelty now charged, for such knowledge would be wholly inconsistent with her letters.

With respect to the charge of general cruelty and ill-treatment, I am of opinion that it wholly fails, and that the evidence brought to support it is so entirely

insufficient that it would be a waste of time to discuss it, and more especially because that evidence has no bearing on the specific act of cruelty charged in the libel.

I now address my attention to the 6th article of the libel, to the facts pleaded therein, and to the evidence adduced to substantiate the charges therein contained. The 6th article charges that Mr. Ciocci before, at, and after his marriage was suffering from the venereal disease; that he was attended by divers medical persons; that he was warned against the risk of communicating the disease if he then married; that he did marry, and did communicate the disease to his wife.

If these averments are proved, I should, both on principle and authority, entertain no doubt in deciding that an act of legal cruelty had been committed. The proof necessary to establish such charges is twofold: evidence that Mr. Ciocci himself had the disease, and evidence that his wife was also affected thereby.

Mr. Watson is the first witness to whose testimony I shall advert; and I see not the slightest reason why I should not **[130]** give the fullest credit to his testimony. This gentleman had been acquainted with Ciocci for three or four years prior to November, 1850. On the 17th of this month Mr. Watson, who practised as a surgeon at Brighton, attended Ciocci, and found him suffering from the venereal disease, and so continued to attend him till the 27th December, when he was not cured, and when Mr. Watson left him in charge of Dr. Starr, who succeeded to his practice.

Dr. Starr states that Mr. Watson left Brighton towards the end of December, 1850, and was absent the greater part of January; that he succeeded to his practice, called upon Ciocci as a patient, and saw him. On the 10th of January Ciocci told Dr. Starr that he had consulted a foreign gentleman, whose medicines had been of service to him. An inspection then took place, and Dr. Starr swears that Ciocci then had a venereal sore which had been a bad syphilitic chancre, but was then in a healing state. Dr. Starr further deposes, in answer to the 63rd interrogatory, that it appears from Mr. Watson's books that the medicines furnished were mercurial pills, sarsaparilla, and nitric acid. Dr. Starr did not prescribe himself.

To this evidence there is nothing whatever opposed; there is no contradictory, no conflicting testimony. I have no right, either legally or morally, to doubt either the veracity or the medical knowledge of these gentlemen. It is therefore proved beyond all question, that Ciocci had the venereal disease for some time immediately prior to the marriage, and that it was in a healing state, but not healed, on the 10th of January.

The next question is, whether he communicated this disease to Mrs. Ciocci. I hardly think it necessary to inquire whether there is evidence of his having been warned of the danger if he married in the state in which he is clearly proved to have been; for I am of opinion that common sense, ordinary experience (I speak not of higher motives), must have suggested to him the probable consequences—the consequences likely to result in the ordinary course of things—from marriage under the circumstances proved to have existed; and if this were a point necessary to be determined, I should hold, and without doubt, that if a man married under such circumstances, and communicated to his wife the venereal disease, it was, to use the mildest term applicable to such conduct, such utter recklessness of the health and comfort of his wife, that if he did communicate such disease he was guilty of cruelty in the eye of the law; and I should hold this upon the principle that whoever does an act likely to produce injury, and the injury fol-**[131]**-lows, can never excuse himself by saying, that he hoped a probable consequence might, by some peculiar good fortune, not follow.

But if warning was necessary, warning he had, and ample warning too, from Mr. Watson, who told him that it was impossible for him to marry until he was quite cured—impossible for him to marry in the state in which he was. This was his state on the 27th of December. What his state was on the 10th of January, five days before the marriage, I learn from Dr. Starr.

It would be a mockery of all that is decent, honest, or honourable, to say that Mr. Ciocci was then in a state to consummate marriage. I will not debase the office I hold by weighing degrees of risk; to marry and consummate a marriage with the slightest chance of communicating such a disease was a crime and a sin.

But to revert to the question: Was the disease so communicated to the wife? Let me again refer to Mr. Watson. He says, "I was still in Brighton in February, 1851. He told me he was married, and wished me to prescribe for his wife. I did not know

her; I never saw her. When I called on the 17th of February at his house in Clarence Square, she refused to see me. I prescribed for her from his description of her ailment."

Before I comment on the evidence bearing upon this point I must express my surprise and deep regret that the examiner has left the evidence on this article in the doubtful state in which I find it. Surely it was his duty to have asked what was Ciocci's description of his wife's ailment, for he has taken down that description there was. Surely he should have asked for what disease Mr. Watson prescribed; what his prescription was. Had this been done the case would have been comparatively, if not entirely, clear, one way or the other. This most unfortunate omission has left this most material part of the evidence in doubt, from which it will not be easy to extricate it.

Before I express my opinion as to the effect of this evidence I will consider Mr. Seabrook's.

Mr. Seabrook was the medical attendant of Mrs. Ciocci both before and after marriage. On the 17th of February he attended upon her. She was suffering from inflammation of her legs, and generally out of health. He prescribed for such inflammation, and about the second week in March she recovered. During the early part of his attendance she mentioned having a discharge from the parts of generation, which he attributed to natural causes. On interrogatory, he says, **[132]** "That this discharge lasted about two weeks, and then ceased, as Mrs. Ciocci stated. He never attended her for the venereal disease; she never complained of it. His prescriptions were for a different disorder."

The question is, what conclusion the Court ought to draw from the evidence of these medical persons considered together. 1st. I am of opinion that it being clearly proved that Mr. Ciocci was suffering under the venereal disease, and so late as January the 10th, and the marriage taking place January the 13th, the probability is that he communicated it to his wife. 2ndly. I think this probability strengthened by the fact of Mr. Ciocci consulting Mr. Watson as to the health of his wife; not as to her having the venereal disease; that is not so. 3rdly. Further evidence is furnished by the fact of the discharge spoken to by Mr. Seabrook.

But against these presumptions, strong as they are, there is evidence which weighs in a contrary direction, and the absence of evidence of still greater importance. The fact of Mrs. Ciocci having another disorder, and being attended by Mr. Seabrook, to whom no disclosure was made; but above all other circumstances, the fact that Mrs. Ciocci recovered from the symptoms, whatever they were, without any medicine for the venereal disease, as far as appears by the evidence, must have considerable weight. If she had taken that infection I apprehend that she would not be relieved from its effects without medicine adapted to the cure of that disease. Mr. Seabrook gave her none. What Mr. Watson prescribed the examiner has, most unfortunately, I repeat, left in the dark. Moreover, I do not find in Mrs. Ciocci's answers (and the fact might have been stated in answer to the 2nd article) nor elsewhere, when she discovered that she had such disease, nor how she was cured.

Strong as the probabilities may be, I cannot presume the affirmative; and this being so, I am compelled to come to the conclusion that it is not proved by affirmative evidence that Mrs. Ciocci was infected with the venereal disease.

I think, therefore, that the charge of cruelty fails; for I am of opinion that it is essential, to support that charge, that the corpus delicti should be proved, and here there is not adequate proof. And if there be not adequate proof of the fact, however great the moral delinquency of consummating a marriage with the probable chance of communicating the venereal infection, I am not prepared to say that so doing constitutes legally an act of cruelty as understood in these Courts. In order to constitute an act of legal cruelty there must be, in my opinion, an actual communication of the disease, and the running the risk is not **[133]** sufficient.(*a*) I must therefore pronounce that the charge of cruelty is not sustained.

---

(*a*) Mrs. Ciocci's counsel argued strongly that the risk would be cruelty without actual communication of the disease, and cited *Popkin* v. *Popkin*, 1 Hagg. 765 n. In that case it was pleaded as an act of cruelty "that the husband, when infected with the venereal disease, attempted to sleep in the same bed with his wife, and that on her refusal he became violently enraged made use of many outrageous and dreadful

Before I address my attention to the evidence adduced to support the charge of adultery, I must notice that there is an extraordinary gap in the history of this case accounted for neither in plea nor evidence, at least with any accuracy.

I presume that this lady continued to live somewhere apart from her husband from March, 1851; that he came to reside in London, and follow his occupation as a teacher of the Italian language (this I am left to presume, as it is nowhere distinctly stated); and that some intimation having in some way reached Mrs. Ciocci or her friends, the inquiry was instituted, which appears by the evidence of Edser and others.

This has led to the employment of policemen, of persons also who had been in the police, and to the examination as witnesses of common women of the town. Whenever persons of this description, such as Owen and others, are employed for money to procure evidence to establish any fact, all they do or say must be watched with great vigilance, and for divers reasons; such persons are naturally anxious to attain their object, and generally to a certain extent their pecuniary reward depends, or is by them supposed to depend, on their success; and the very nature of their employment —the constant mixing with the lowest characters—does not tend to make them the most scrupulous agents. Great care and caution, therefore, is necessary; but such caution must not be carried to an extravagant length, for we all know that upon evidence so procured the lives of many men formerly depended, and even at this day all but life does frequently depend. Somewhat similar observations apply to the other class of witnesses—the testes lupinares, as we are in the habit of calling them, especially when they are accomplices; but if voluntary association with such persons **[134]** should be proved or admitted, such objection will come with an ill grace, and will be entitled to much less weight if urged by a person so circumstanced.

From all the circumstances, from the probabilities, from the conduct generally of Mr. Ciocci, from corroboration, if any, the Court must form the best judgment it can, remembering always that if there be reasonable doubt, the balance should preponderate in favour of innocence, and against guilt.

I cannot pass over altogether in silence the extraordinary nature of some of the interrogatories addressed to the witnesses on the libel. Amongst other parts of the 8th and 9th interrogatories the witnesses are asked, "Whether Mr. Ciocci is not a member of the Church of England." What that has to do with the question to be decided in this case I am at a loss to conceive. It cannot, I trust, for an instant be supposed that the same measure of justice will not be meted out to all parties litigating in a court of justice, whatever may be their religious persuasions, nor that any party will derive any advantage, because either from education originally, or from adoption, he professed one faith or another. No impression could possibly be made upon the mind of the Court by such an interrogatory.

Then there is an interrogatory as to the religious faith of Mrs. Ciocci, and whether some Roman Catholic Priest or Cardinal has not been in communication with her, and that generally, without any reference to this suit. I cannot conceive what is the legitimate drift (*a*) of these interrogatories; but be the drift what it may, there is not the least evidence touching this cause produced by them. I shall have occasion hereafter to comment upon some of the other interrogatories, and will now only observe that for all useful purposes I think they might have been greatly reduced in number.

But to return to the evidence. Following the order of the libel, the 9th and 10th article pleads what I will, though perhaps incorrectly, term the solicitation of chastity

---

menaces to compel her; and, on one occasion, seized her in his arms and forcibly dragged her along towards his bed." In his judgment Lord Stowell said, "Here cruelty is carried down to the latest period of the cohabitation, the husband forcing his wife to his bed when he was violently affected with venereal disease. It is not necessary, when there is an attempt at violence by an overt act, to wait till it is actually put into execution. Here he attempted to draw her to his bed when infected with venereal disease; an injury of a most malignant kind, and attempted in the most improper and violent manner."

The circumstances of the two cases being so different, especially quoad the knowledge of the wife, the present decision does not appear in any respect to impeach that in *Popkin* v. *Popkin*.

(*a*) Reference to the rejected passages in the libel will explain the reciprocal insinuations. Vide p. 122.

of Jane Legg. I am of opinion that the evidence of Jane Legg alone, unsupported by other testimony cannot be safely relied on to establish the charges; but to prevent misapprehension I will observe that it is possible that such evidence may have more bearing upon other parts of the cause, though not sufficient to establish the charge here made. I do not say that it will have such bearing, but that it may.

The next case which presents itself for consideration is that of Charlotte Thomas. This case is most materially distinguished **[135]** from that of Jane Legg; for the acquaintance, and I may say intimacy, with Charlotte Thomas is not only not denied, but admitted; and the sole question is, whether that acquaintance was of a criminal or innocent nature.

The explanation offered by Ciocci is to the following effect, as appears from the interrogatories addressed to Charlotte Thomas, from the 42nd to the 49th inclusive: That he, Ciocci, was connected with a society called the Female Aid Society, in Red Lion Square; that from pure and laudable motives he induced her to return to her mother, then living at Chelsea, and it must be inferred from the interrogatory, though not so stated therein, that she was a prostitute at the time; and further, that Ciocci's conduct was free from all improper motives, and was, to use the words of the interrogatory, paternal. Some of these circumstances, though not as relates specially to Charlotte Thomas, are afterwards put in plea.

This being so, the questions will be, 1st. Is there a primâ facie case of adultery with Charlotte Thomas established? 2nd. Is that case rebutted by proof that the acquaintance was guiltless, and the conduct of Ciocci free from blame?

The 16th article of the libel charges adultery with a prostitute not named, during the few months preceding the date of the libel, viz. 19th February, 1853, at Ciocci's lodgings, No. 16 Grosvenor Street West. It is clear from the exhibits, as well as from the interrogatories, that Ciocci's legal advisers were aware that Charlotte Thomas was to be examined.

On the 16th article, Owen deposes, that towards the end of the time he was employed, which would be December, 1852, he saw Charlotte Thomas at the window of Ciocci's lodgings, the second floor of No. 16 Grosvenor Street West.

Charlotte Thomas gives her account of her intercourse with Ciocci; at the commencement of which she was about seventeen years of age. It began at a dining house in Lisle Street, which appears to have been frequented by Italians and prostitutes. It was said in the course of the argument that Ciocci was driven by the want of pecuniary means to resort to such places. I cannot say that argument was convincing to my mind, for I do not believe that frugal accommodation cannot be procured in this metropolis without the contamination of such associations. I do not look with a very favourable eye upon these symposiums of Italian refugees and prostitutes. However, I make these observations to shew that the argument did not escape me.

But to proceed with Charlotte Thomas's evidence. She did not see him afterwards for some time, but on returning to lodge in Lisle Street (about November, 1852) she met him in the **[136]** street, and went to his lodgings in Grosvenor Street West, several times, and, according to her statement, committed adultery with him.

This at once raises the question whether she is credible or not: the issue at once becomes, "Is Charlotte Thomas speaking true or false?"

First, let me consider what she states on cross-examination. In answer to the 42nd interrogatory, she negatives all knowledge of the society. She says, "I do not know anything of any such society as the interrogate 'Female Aid Society.' I am not aware that the ministrant ever acted for any such society. I am not aware that he has been the means of restoring any females of a certain class to a moral course of life." Therefore we must conclude from this, that Ciocci did not make the communication to her.

In answer to the 43rd interrogatory, she makes a statement which requires great consideration; she says, "The ministrant's acquaintance with me did commence by his asking me (after some inquiries about my history and circumstances) whether I would not consent to go home to my mother's, if, at his intercession, she would consent to receive me. I did say that I would consider of it; and, upon seeing him a day or two afterwards, say to him that I would be glad to go home. He did then immediately accompany me to my mother, who then lived at Chelsea, and induce her to receive me into her house. He has been a kind friend to me, and taken a great

interest in my welfare. He could not have done more than he has done for me, if he had been my father."

Now, to be sure such evidence coming from the mouth of a witness produced by Mrs. Ciocci to prove adultery, is not only exculpation, but high commendation, and I must say it is somewhat startling. Here is a female examined upon the 19th and the 21st of April, and she is brought up on the 22nd for cross-examination. She then makes a statement altogether inconsistent with her previous deposition; I have no means whatever of ascertaining how this was effected, but there can be no doubt that something had taken place during the intervening time. It is impossible for me to say which is the truth, but I do say that by some means or other the witness was induced to make a different statement; and I think it probable that if the examination had not been interrupted, such an answer as that to the 43rd interrogatory would never have been given. If I am to believe that evidence, the conduct of Mr. Ciocci, with respect to Charlotte Thomas, was highly praiseworthy.

It is, however, a little strange, that in the very next breath, **[137]** this witness refuses to answer whether Mr. Ciocci had had a criminal connection with her or not. She says, "I refuse to answer upon oath the question, whether he has ever had sexual intercourse with me, or taken indecent liberties with me. He certainly has behaved most gentlemanly and paternally towards me. I am sorry for having told the examiner what I did when I was with him the first day to be examined in chief." One would have supposed that there could have been no difficulty in answering this question, when the answer to the preceding part of the interrogatory is borne in mind, and the paternal conduct of Ciocci so distinctly averred. I must follow up this evidence a little farther.

In answer to the 47th interrogatory, the witness admits an interview with Mr. Adamson, the solicitor, in consequence of a letter (which has not been produced) addressed to her, stating that she was to go there. The date of this interview was the 10th of February, at which time the suit had been commenced, though the libel was not given in until the 19th. She further admits that she then declared that Ciocci was totally innocent, and had restored her to her mother; and she admits paper A.(*a*) to have been a statement made by her, and signed by her. Paper A. is to this effect:—

"10th February, 1853. I, Charlotte Thomas, declare that I first saw Signor Ciocci, with three or four other gentlemen, at the Restaurant in Lisle Street, Leicester Square. I was then in company with a Mr. Matthew, an Italian. I did not speak to Signor Ciocci on this occasion, but I afterwards saw him when going into the Restaurant alone; he was coming down stairs; we had some little conversation together, when he asked me if I would like to go home to my mother's, if he interceded with her on my behalf. I said I would consider of it, and let him know: I saw him a day or two afterwards, and told him I should be glad to go home, and he immediately accompanied me to my mother's at Chelsea; and when my mother removed to Sydenham I accompanied her thither, and it being so very dull I determined to come again to London. At this time, my sister, now living with , was in service at Sloane Street, where she remained altogether about three months, when she left her situation and came to live with me at 35 Lisle Street, since which time my sister has assisted me in the business of a dressmaker; but I solemnly declare that not the least impropriety of conduct whatever has ever taken place between myself **[138]** and Signor Ciocci; my first meeting with Signor Ciocci was about nine months ago, and I voluntary, and without the least expectation of any reward for so doing, make this statement, that Signor Ciocci has occasionally given me small sums of money, but out of pure kindness, and most certainly not for any improper purpose.

"CHARLOTTE THOMAS."

Now, singular enough, the witness is not asked whether that statement was true or not—a question which would have been most important to this cause, and most pertinent to the issue; but she is only asked whether or not it was her signature.

This statement, marked A., does not and cannot contain the words spoken by the witness, though it may be that she stated the substance. It was procured, I do not say unduly, for the purpose of discrediting this girl, should she be produced as a witness for Mrs. Ciocci.

---

(*a*) This was annexed to an interrogatory.

Looking at all these circumstances, it is very manifest that the evidence of this witness must be handled with much circumspection. The object of Mr. Ciocci must be to shew that she is not deserving of credit; it must be, not to set her up, but to set her down. Her evidence in chief, as to adultery, is not contradicted directly by her evidence on interrogatory, but it is contradicted by her statement to Mr. Adamson, and so far her testimony is impeached. It will not, however, necessarily follow that her evidence is to be wholly rejected on this ground; for I take it to have been decided that a witness may, under certain circumstances, be believed in part and discredited in part; that it is not necessary to reject her in toto.

It is somewhat singular, however, that looking at the 16th article of the libel, no interrogatories were put as to the visits in Grosvenor Street West; for such numerous visits, if deposed to, were not very consistent with the defence set up. I think, too, the Court was entitled to some information how this paper A. was procured. That matter might have been cleared up by the attorney or his clerk. I shall have to comment, in another part of this case, upon parties obtaining statements from witnesses; and although I do not say that this should not be done, yet I do think that the Court should be fully informed how it happens, and of all the circumstances under which such paper was obtained.

There is one other omission, which I think particularly deserving of notice. The gist of Mr. Ciocci's defence to this charge is, not to deny his acquaintance with this girl but to admit it, and to claim credit for having restored her to her mother. How comes it that this defence was not pleaded, and **[139]** the mother examined? The mother came up with the daughter when she was examined. Surely any intercourse between a married man, separated from his wife, and a prostitute of this description, does require the best explanation which can be given.

I regret to say that I am left wholly without evidence as to anything which may have occurred between the examination and the cross-examination of Charlotte Thomas. But when I look at the inconsistency of her evidence given upon interrogatory with that given in her examination in chief, I cannot but entertain a grave suspicion that this witness had, in the meantime, been tampered with. This suspicion is confirmed on reference to the interrogatories administered to the witnesses examined on the libel. The first interrogatory is in these words: "Let each witness designed hereto be asked, On your oath, have you not seen one or more of your fellow witnesses since the completion of his or their examination? If you admit that you have, which have you seen? Has such witness made no disclosures whatever to you as to the tenor of his, her, or their deposition in chief, or of the interrogatories administered to them, or of his, her, or their answers thereto? If any witness has made any such disclosures, say whom, by name? On your solemn oath, are you wholly unapprised of the tenor of the interrogatories which you may suppose are about to be administered to you? If on any, what have you been apprised, and by whom, in respect thereto.

Now, this interrogatory was not administered to this witness. The first administered to her was the third, and not the first. From this it is as clear as daylight that the witness had been tampered with, and that this interrogatory was not administered to her lest it should become known to the Court by whom she had been so tampered with. I wish, indeed, I could by any means discover by whom it had been done; he should answer, if not here, most assuredly before another tribunal, for such proceedings. It has been a shameful attempt to deceive the Court, and to prevent its arriving at the truth by a suppression of this interrogatory.

I have now, at some length, discussed the evidence on this 16th article. Before I come to any conclusion I shall go through the rest of this case, and for this reason, that as the defence turns so mainly on the character of Mr. Ciocci, on his being actuated by pure and benevolent motives in his intercourse with this and other girls, I wish to ascertain, as far as I am able, what is the effect of the evidence with respect to Mr. Ciocci's conduct and motives with regard to women of this **[140]** description. I postpone, therefore, for the present, pronouncing any opinion on this charge.

With regard to the charge of adultery, at a brothel at Brighton, with a woman named Polly Miller, it is supported by the evidence of Juliana Bech alone. Whether she is mistaken as to the identity of Mr. Ciocci or not, I need not stop to inquire, for I could not safely proceed to any conclusion adverse to Mr. Ciocci on her evidence alone, unless corroborated by further testimony.

The additional articles charge adultery with Polly Miller, in Market Street, in

February or March, 1853, but of this also there is no evidence save that of Mary Ann Hadley, and she is a common prostitute. The interrogatories do indeed shew that Polly Miller must have been in communication with Mr. Ciocci's legal advisers; but this circumstance alone is not a sufficient corroboration, though it shews that Hadley is correct in the account she gives of herself and Polly Miller. It would not, I think, be safe or consistent with justice to found any conclusion adverse to Mr. Ciocci on this evidence. All I say is, that it is not sufficient alone.

Before proceeding to the case of Fanny Alexander, I shall very briefly notice the 8th article, and the evidence thereon. The 8th article pleads the habitual consorting with prostitutes, and constantly walking with them, both in Brighton and London.

Owen's evidence is to the following effect:—That he commenced watching Ciocci on the 6th of October, 1852, and continued to do so up to the 3rd of December. During this period he saw Ciocci conversing with prostitutes no less than seven times, both in the morning and in the evening. There can be no reason to doubt the general correctness of this evidence, because the conversing with prostitutes is a part of Mr. Ciocci's own case. It is his case in plea; it is his case in interrogatory.

I do not here stop to inquire whether the mode of consorting with prostitutes, spoken to by Owen, is consistent with the motives to which Mr. Ciocci makes claim. I reserve that consideration till I have discussed the evidence on Mr. Ciocci's allegation. The fact of so consorting is proved and admitted; whether explained satisfactorily or not I must determine. The onus probandi is upon Mr. Ciocci.

I am thankful to say I have reached the last case, namely, the charge of adultery with Fanny Alexander. But as the discussion of this portion of the case occupied by far the greater part of the time of counsel in the argument, so I fear it will be **[141]** necessary for the Court to enter with considerable minuteness into its examination.

This charge is contained in three articles, the 13th, 14th, and 15th, and Fanny Alexander has herself been examined. She is, according to her own account, a prostitute, and aged about twenty. On the 13th article she deposes to her first criminal connection with Ciocci, somewhere about May, 1852, at a brothel in Chelsea, which she knows not to describe, nor even the street in which it is situate. On the 14th, that she frequently met Ciocci in Windsor Terrace, Vauxhall Road, and that he offered to take improper liberties with her. On the 15th the great controversy has arisen. The time to which the witness is speaking will otherwise appear; from her evidence it would be in the summer or autumn of 1852. It was in the beginning of November.

She states that Mr. Ciocci was ignorant of her residence in Westminster; she asked him to direct to her at 7 Stafford Place, Pimlico; she received a note desiring her to call upon him at No. 16 Grosvenor Street West; she went, and afterwards accompanied him to the police-office in Cottage Row; then to Rochester Row; he told her to deny ever having had connection with him; then they went to No. 15 Shaftesbury Crescent, then back to Grosvenor Street, and there he had connection with her.

This being the substance of her evidence in chief, let me next consider what she has said upon interrogatory.

It is a fact in the case that the solicitor for Mrs. Ciocci employed Mr. Edser, a builder at Vauxhall, and a friend of his, to use means to obtain evidence in support of the charges against Mr. Ciocci; that through Mr. Edser's means various persons were so employed, as Owen, Russell, and others.

Now, the 17th interrogatory inquires whether the witness (Alexander) knows anything of these persons, and amongst others of Guadaleta; and then the witness states that he had slept with her one night. This fact must be borne in mind in the examination of the subsequent evidence.

The answer to the 21st interrogatory, which relates to the Red Lion Square Society, is a negative, save that she says that Mr. Ciocci asked her if she would like to change her mode of life, telling her that if she would be a good girl he would get her a situation. It is no easy matter to sift the evidence where there are parts which are true and parts which are not; and it is difficult to discover what parts are supported by the evidence; but I must not shrink from the task.

The 22nd interrogatory runs thus, "On your oath, is it not **[142]** the fact that the ministrant afterwards, having seen you in company with an Italian named Guadaleta, did speak to you concerning the said Guadaleta, and ask you what you

knew of him, and make an appointment with you to go to his house, in order to receiving a statement of what you knew in respect to the said Guadaleta?" Let us pause a little to consider what the witness is called upon to answer, and what she has answered. She is interrogated in the words I have read. It seems intended to ask her whether the seeing her with Guadaleta, and the appointment to come to Grosvenor Street, were not almost contemporaneous; but what are the facts of the case, what are the dates? Why, the Guadaleta business was, according to Ciocci's own case, on the 4th of August, and the appointment was not made until the 2nd of November.

Now, I must say that the interrogatory, as put, appears to me calculated to lead to confusion, to say nothing else of it. But what is her answer to it. "On my oath, it is not the fact that the ministrant afterwards, having seen me with an Italian named Guadaleta, spoke to me concerning the said Guadaleta, and made an appointment with me to go to his house in order to receiving a statement of what I knew in respect to the said Guadaleta." It is quite clear that both the examiner and the witness understood the interrogatory as I understand it, viz. that the appointment was immediately subsequent to the girl's having been seen in company with Guadaleta. The answer to the 23rd interrogatory is important: the witness admits seeing Patriarchi in Grosvenor Street on the 3rd November, but she denies that the object related to Guadaleta; denies any statement in writing by Patriarchi; admits going to Cadogan Place; denies that Ciocci left her at the corner of Windsor Terrace, and went on alone in the cab.

Now this witness having admitted, in her answer to the 23rd interrogatory, that she had been staying at the house of Miss Jones, at Boxmoor, whither she had been sent by Mr. Edser and Owen, the Court is bound to exercise the greatest vigilance in the examination of her evidence; for although circumstances may sometimes render it necessary or advisable thus to take charge of witnesses, yet it must necessarily attach to their evidence a degree of suspicion.

But whatever may be the value of her evidence, the question mainly put in issue by her answer to the 23rd interrogatory is, whether she did or did not, after leaving No. 15 Shaftesbury Terrace, go with Ciocci to his lodgings in Grosvenor Street West.

The affirmative is sworn by Alexander, Edser, Owen, and **[143]** Horsey. The question I am now to try is the mere fact; the inference therefrom must, of course, be considered hereafter.

Mr. Ciocci has counterpleaded this 15th article of the libel in the 5th article of his allegation. The 4th article of the allegation counterpleads the 13th of the libel, but on this article no witness has been examined. The 5th article pleads, &c.(*a*)

So that three times, in July, in August, and in November, Ciocci accidentally meets this girl, accidentally as pleaded, yet not inopportunely; for the second time Ciocci obtains proof against Guadaleta, whose appointment he was opposing; and the third time he has the good fortune to find her when he wanted her to make oath against Guadaleta, and perhaps, also, for another purpose, to exculpate himself.

These matters require close sifting. 1st. How does this statement as to the early meetings agree with the evidence of Fanny Alexander? Other evidence there is none. Her evidence does not at all agree with the plea of Ciocci's allegation, except that there was a meeting in July, 1852, in the Vauxhall Road. The precise time is of no importance, but as to the result of the meeting there is a total difference. I cannot collect from the plea that there was any other meeting than those in July, August, and November; but Fanny Alexander deposes to several. On the 17th and 22nd interrogatories, this witness gives an account of her connection with Guadaleta; but it differs wholly from Ciocci's plea, for she states that Guadaleta was walking with Ciocci, when Guadaleta quitted him and joined her: Ciocci's account is, that he accidentally saw them together and recognised her. He states that this took place in August, early in the month. And so, according to Ciocci's statement, the matter sleeps till October, when he mentions it to Mr. Glennie, according to his own account.

Mr. Glennie says Ciocci was opposed to the selection of Guadaleta as minister (this would be prior to August), but with reference more to his incapacity. Unfortunately, Mr. Glennie cannot say at what time—August, September, or October—

---

(*a*) Vide article, p. 125.

the communication of Guadaleta's alleged incontinence was made; so that I must take Ciocci's own account, that he did not make this communication for two months.

Mr. Burgess deposes to the charge against Guadaleta made by Ciocci in October, 1852. Mr. Burgess did not desire him to ascertain the nature of the charge; Ciocci proposed to substantiate it. Mr. Burgess does not support the plea as laid, but this does not appear to me of importance. It matters little whether he asked Ciocci to prove the charge, or whether, after **[144]** what passed, Ciocci volunteered to do so. Ciocci afterwards sent in a document, but not No. 10 (vide p. 126, n.), which was never seen by Mr. Burgess or Mr. Glennie. All this with Mr. Burgess occurred the end of October or the beginning of November.

Now comes the question, how the meeting of November 3 took place—of no importance, indeed, in itself, but as relating to the credit due to Mr. Ciocci's statement, and the credit due to the witnesses, of very great moment.

I must begin with the 2nd of November. According to Patriarchi's account, on the 2nd of November he and Ciocci went in search of Fanny Alexander. Where they went this witness does not say; nor at what time, day or night—I mean, in his examination in chief; but inquiries were made of a policeman, who has not, however, been examined in the cause. They met the object of their search, and Ciocci gave her an envelope with his address, and made an appointment for the next morning. On cross-examination Patriarchi states that the meeting with Alexander was in the evening, and somewhere about Eaton Square.

As the policeman is not examined, all this stands on the evidence of Patriarchi alone, save as hereinafter excepted. The 76th interrogatory is in these words: "Did you not, in or about the month of October or November last, and when particularly, see the ministrant speak to a police constable in or near Stafford Place South? Did he not give to such policeman his card? After the ministrant had left the policeman, did you not ask of him, the policeman, what the gentleman, meaning the ministrant, wanted? Did he not then inform you that the ministrant wanted him to make inquiries about a female who had given her address 7 Stafford Place South, and that he, the ministrant, wanted such female as a witness?" Now, it clearly appears from this interrogatory, and incidentally from Owen's answer to it, that Alexander had given to Ciocci her address as at 7 Stafford Place South; and further, that Ciocci had given the policeman his card. It is clear, therefore, both from the interrogatory and the answer, that before the evening of the 2nd of November, Ciocci was aware that Alexander had given her address as in Stafford Place; not one word of which is to be found in Patriarchi's evidence in chief. He is entirely silent as to any address being known, and his answer to the 7th interrogatory is to the same effect.

Two things, then, are clear: that Ciocci knew of the address and spoke to the policeman, and gave him his card; but whether Ciocci and Patriarchi met Alexander accidentally that same **[145]** evening, and whether he wrote her a note, are different questions.

The next task is to examine the evidence on the other side. On the 15th article Sarah French says, "I knew Alexander from August to Christmas, 1852. She once asked me to allow a letter to be taken in for her at the house where I then lodged, No. 7 Stafford Place South. I consented, believing I should be doing her a service by so doing. I cannot at all speak to the date of this; it may have been about the middle of the time during which I was in the habit of meeting her. Very soon after I had consented to the letter being taken in, a foreign gentleman, whom I believe to have been Mr. Ciocci, called at the said house; it was on a Sunday evening that he did so. I saw him; he asked for the girl Alexander. I told him she did not live there; but if he wrote a letter to her, that she would have the letter, and he then went away; and early in the same week, I think it was on the Tuesday or the Wednesday, a letter came to the house, addressed to Alexander. It came there by the public post. I did not take it in, but I got it, and took it to Alexander. I gave it to her the same evening; we read it just at the corner of Eccleston Square; we both read it under a gas-lamp. The letter was a letter from Ciocci to Alexander; to the best of my recollection its contents were to appoint Alexander to go on the following morning to Ciocci's lodgings, 16 Grosvenor Street West; and it told her to come neatly dressed, and to dress herself as like a maid-servant as possible. It also added, that if she would not come, she was to write to Ciocci to tell him so; and it enclosed an envelope directed to Mr. Ciocci, 16 Grosvenor Street West, for her to put a letter into, if necessary to

inform him of her not coming. I gave the letter to Alexander, and I believe she put it into her pocket, and took it away with her. I think the letter was directed to Miss Ellen Alexander."

If this evidence be at all consistent with the truth, it is clear that it cannot easily be reconciled with Ciocci's statement of the accidental meeting, or with Patriarchi's evidence. I am well aware that this witness is not a person of character, but of that hereafter.

I will now see how her evidence tallies with that of Alexander. Unfortunately, Alexander's evidence at the commencement of this article is taken down very briefly. The examiner did not, and probably could not, foresee of how much importance detail would have been. As far as it goes, her evidence corroborates that of French, and contradicts that of Patriarchi, and on the 22nd interrogatory in the strongest terms. The **[146]** result is, that Patriarchi, as to the accidental meeting, is confirmed by no one; she is by several, and by the fact that Ciocci did know Alexander's address.

I now resume my examination of Patriarchi's evidence, especially that part which cannot be contradicted save by Alexander. Patriarchi was examined on the 31st May, 1853. His answer to the 3rd interrogatory shews his state of knowledge on the 2nd and 3rd of November as to the matters now agitated. He was asked to give evidence as to what happened between Ciocci, himself, and the girl Alexander, in that affair about Guadaleta; he was then ignorant of the charges of cruelty and adultery; Ciocci never spoke to him of them, only that he had been accused of being with the girl Alexander, and he says, "that was *only a few days ago* that he told me this." Consequently it was long after the 2nd of November, 1852. Patriarchi, therefore, proceeds with the knowledge of, and for the purpose of substantiating the charge against Guadaleta, and wholly ignorant, on the 2nd and 3rd of November, of the charges against Ciocci.

Now, with reference to this meeting between Ciocci, Alexander, and himself, upon the 3rd of November, 1852, he says in his examination in chief, "I put certain questions, all of which I wrote down on paper, and then took down her answers. Those questions were concerning her connection with Guadaleta." He then identifies the paper No. 10, and in answer to the 4th interrogatory he says, "All the questions were written down before Alexander came into the room." Now, making all just allowance for an imperfect knowledge of the English language, there are still some circumstances deserving notice as to this paper. First, was the date, August 4, stated by the witness, or merely a suggestion from Ciocci? In answer to the 5th interrogatory he says, "The girl gave the date of her own accord. I asked her if it was the 4th of August, 1852, and she said 'Yes.'" In other words the date is Ciocci's own, suggested to Patriarchi. In the 9th answer she is made to say that she met Guadaleta twice afterwards; and in the 10th, that he said she was a very bad girl to go and tell his friend everything. But did she do so, and did the meeting with Guadaleta occur according to the evidence furnished by this statement? The 16th question suggests that the girl had seen Ciocci that evening. The plea, however, represents that Ciocci saw accidentally Guadaleta pick up the girl Alexander, and the first question represents Ciocci and Guadaleta as walking together; and must not this be true, if there be any truth in the whole matter? How could the girl tell Ciocci all this if Ciocci's plea **[147]** be true? How did she know that Guadaleta was a friend of Ciocci's unless she saw them together? How could she make a communication to Ciocci, except she saw him? And not a word of this is said in Ciocci's plea. The plea represents that he saw her three times *accidentally*; not a word more. Then I draw this conclusion, that this paper, No. 10, does not agree with the plea deliberately drawn from Ciocci's instructions; and the fact of that difference is remarkable.

To go on with Patriarchi and the paper No. 10. He deposes that Ciocci took the girl in the cab for the purpose of her being sworn to the answers as to her connection with Guadaleta. Those questions, 17, 18, 19, and 21 all relate to Ciocci. First, then, I ask, what has this to do with the charges against Guadaleta? Patriarchi, according to his own statement, knew nothing of the charge against Ciocci. Next, who suggested those questions, and for what purpose? Patriarchi, as I have said, knew no charge against Ciocci at that time; why volunteer the suggestion? The reason which he gives is most singular; it is in his answer to the 5th interrogatory, as follows: "I put the question No. 21, the last on the exhibit No. 10, of my own accord; my motive was because, if any one should, in a matter of that sort, want to

know how Mr. Ciocci got that information, it should not be fancied he got it in an improper way. Mr. Ciocci was present when I put the question. I had not put a question of the same purport to Mr. Ciocci previously. I put it entirely after my own mind. I did not think it possible that he might have had sexual connection with Alexander. I did it to prevent mischief, to prevent Guadaleta doing the same against him. It was intended by such question to ask Alexander if she had ever had sexual connection with Ciocci." This does appear to me a most singular reason for such a question—to prevent Guadaleta saying the same against Ciocci; and I must say that, making all allowance for shrewdness, domestic or foreign, it does appear to me somewhat improbable that at that time Patriarchi should have had the foresight to arm his friend against the possibility of attack, by taking such a deposition.

But, even supposing Patriarchi's account to be true, what is to be derived from this document in support of Ciocci's case? Here is an unfortunate girl brought into the presence of two persons leagued together for objects of their own, to take away the character of one man absent, and to set up the character of one present. And this girl is to be examined on a set of questions already written down, expressly framed to carry out the views of the parties. All this being done, the document itself is kept in retentis—is not proved to be even in existence **[148]** by any one but Patriarchi—is never shewn to Mr. Burgess or Mr. Glennie, for whose especial use it was to be procured. I ought also to add, that the answers are so framed as to induce a strong suspicion that, if even written about the time, viz. Nov. 3rd, they were framed by the very persons who wrote the questions.(*a*) One instance, and that not an immaterial one, that these answers emanated not from the girl herself, is the date. The answer to the 18th question bears strong marks of suggestion, if not of fabrication. I have no hesitation in saying that such a document so procured cannot affect the credit of Alexander, or of any witness: it is a document disgracefully procured, and, if in existence at the time, disgracefully held back. To attempt to discredit a witness by such means as these is, I believe, unparalleled in any Court of Justice.

But I will now refer to Alexander's evidence as to what passed on this memorable occasion, when this secret conclave was held in Grosvenor Street West. Alexander in chief is silent as to this matter; the 15th Article would not lead to it. On the 21st interrogatory she negatives all knowledge of the Red Lion Square Society; and if this answer be true, what becomes of the answer to the 18th query in paper No. 10? On the 23rd interrogatory she denies that she went to the house to state what she knew of Guadaleta. She denies that Patriarchi wrote down any statement of her's as to Guadaleta. With respect to the further question, as to where she went with Ciocci, on leaving his house on the 3rd of November, she answers affirmatively, and in accordance with the interrogatory. Patriarchi, however, swears that though she went away with Ciocci, she never returned to Grosvenor Street, nor saw Ciocci again that day, for that he spent the remainder of the day after Ciocci's return, alone with Ciocci.

Now the issue is simply, Did Alexander return to Ciocci's or not? Who is to be believed? Am I to believe Patriarchi or Edser, Owen, Horsey, and Alexander? West, who drove Ciocci, is not examined. Here we have four witnesses to one, and three of them not of the description which Alexander is. To whom shall I give credit?

I will again postpone the answer until I have examined a main position in Mr. Ciocci's defence, viz. his connection with **[149]** the Red Lion Square Society, his acting as agent for that society, and his consequent intercourse for pure purposes with prostitutes. I must observe, however, by the way, that even the establishment of such connection does not of necessity prove innocence. No one could contend that a support of such societies, however laudable in itself, constituted a panoply of

(*a*) It was strongly argued by Mrs. Ciocci's counsel, that Patriarchi's statement respecting the exhibit No. 10, viz. that the questions were all written down before Alexander came, and that her answers were then added to them, was disproved by the appearance of the paper itself; inasmuch as some of the questions were of such a nature that the precise length of the answers could not have been anticipated, and yet in every instance the exact space had been left.

purity. I fear mankind is too prone to error, too liable to inconsistencies, not sometimes to yield to those very temptations, from the effect of which they were anxious to shield others. Still a bonâ fide connection with such a society—a bonâ fide and prudent furtherance of its objects would go a long way to account for conduct otherwise suspicious, if not explained.

I am very anxious to do Mr. Ciocci justice in this matter; it is most important as relates to his character, and may have no slight bearing on the decision of this cause. I shall therefore state the plea, and then the proof.

This important averment is to be found in the 4th Article of Ciocci's allegation, which pleads—"That Ciocci was, and is a member of a certain society known as the Female Aid Society, in Red Lion Square; that from 1850 he had taken, as he still takes, an active part in promoting the objects of that society; that he accosted and conversed with Fanny Alexander; and that he urged and endeavoured only to persuade her to abandon her course of life, and put herself under the protection of the said society;" and then the article denies adultery. The witness to this part of the article is Mr. Smith, the secretary of that society, who deposes that he had known Ciocci for eight or ten years, since he (Smith) was secretary to the Protestant Association, when Ciocci came to him, he (Ciocci) being about to publish a book under some such title as the *Cruelties of the Inquisition*. He says, "So far as voluntary efforts are concerned, he was a member of that society. He has undertaken to distribute tracts in connection with that society. He has not been nor is he a member of that society in any other way than in naming persons from whom I might obtain subscriptions. The tracts which he distributed were addressed to women with a view of inducing them to enter a penitentiary. He frequently called on me to ask me to introduce cases which he might find into the penitentiary. He has from 1848, up to the present time, taken an active part in promoting the objects of that society. I cannot at all depose to any particular case by the names of Fanny or Helen Alexander. He frequently, from 1848 up to the present time, has spoken to me of his endeavours to persuade females of the town to abandon their course of life, and to place them under the protection of the **[150]** society. As to anything which has occurred between him and any female, I cannot of my own knowledge depose, except that from what I know of him I disbelieve that anything improper occurred. His object was purely benevolent."

I do not find it very easy to ascertain with precision the effect which ought to be attributed to this evidence. In answer to the 11th interrogatory, Mr Smith deposes as follows:—"It is only from his own statements, and from the hearsay of other persons that I know of the producent's exertions in promoting the objects of our society." It is clear that this evidence does not come up to the plea; and the most I can make of it is, that Mr. Ciocci conversed with Mr. Smith as to the objects of the society; that he suggested subscribers; that he undertook to distribute tracts; and, in short, satisfied Mr Smith that he took an interest in the welfare of the society.

But this matter must be more deeply sifted, so far as I have the materials to enable me so to do. The object for which the connection is pleaded is to account for accosting Alexander in Vauxhall Road. I should have been glad of further explanation. I know nothing of this society, save from this evidence; but I really doubt whether such societies are so affluent in their resources, and at the same time have such a scarcity of applicants that it is usual to send out agents into the highways and byeways to bring in persons to receive the benefit of such institutions. However, still this may be so.

Let us see how it works in the case before us. There are two girls so accosted, and so induced to reform—Charlotte Thomas and Fanny Alexander—and they both retort by charging the pious agent with the commission of adultery. Not one of them comes to the institution, and both of them swear they never heard of it till under examination. Both admit that Mr. Ciocci spoke of reform. Charlotte Thomas, not in chief, but on interrogatory, deposes that Mr. Ciocci took her back to her mother; this first comes out as I have said on interrogatory; and, under the circumstances which I have already mentioned, it is much less credible on interrogatory, and the mother is not produced to prove it.

I cannot say that these efforts have been so successful, in my judgment, as to afford matter for unmixed congratulation to the society. Another step in this case-Does this evidence of Mr. Smith, and this interest in the society, call for such associa-

tion with prostitutes, as is described by Owen in his evidence on the 8th Article? Was it a part of the vocation for Mr. Ciocci to be drinking with Polly Miller at the corner of Tichbourne Street, and to be constantly accosting prostitutes? I confess **[151]** these things do somewhat surprise me, who have so little evidence as to the proceedings of these societies. If I am to believe that the acting as agent of this society removes all suspicions from associations the most suspicious, I am to expect that the agent is "integer vitæ scelerisque purus," at least to the ordinary extent of fallible man. Does Mr. Ciocci, by the evidence in this case, appear to be such a character? Can I pronounce him so to be? What facts are there proved in this case beyond all reasonable doubt? That Mr. Ciocci, in December, 1850, and January, 1851, had the venereal disease, derived from association with some of these females; that not being assured of perfect cure on the 10th, he married on the 15th. Is this all? How stands Mr. Ciocci's character for veracity and regard for the solemn obligation of an oath? Is it possible to read the evidence and his answers and avoid coming to one conclusion? I will not waste time with noticing the argument that the salvo to Mr. Ciocci's is contained in the words, the magical words, "as articulate" —which I am sorry to say have served, and, as appears, are likely to serve again, as a cloak for disguising the truth, and for the promulgation of falsehood. I rely on Mr. Ciocci's answers to the 6th Article. He denies that he was ever affected with the venereal disease. Mr. Watson and Dr. Starr depose that at the very time of, or immediately before the marriage, he was suffering from such disease. Can I doubt the evidence of these gentlemen? If they have spoken the truth, Ciocci has not. I am bound to look to character, for in this case the defence is character.

Now for the result of this investigation into the alleged connection with the Red Lion Square Society, which is brought forward as the explanation of all Mr. Ciocci's intercourse with women of the town, and is a defence against all the charges. I am of opinion that the defence wholly fails; that the attempt to ascribe to Mr. Ciocci the true and laudable motives which, no doubt, govern the society itself, is not supported by affirmative evidence; and that any presumption arising from the evidence of Mr. Smith is rebutted and annihilated by the proved conduct and character of Mr. Ciocci himself. All honour to those who, from pure and laudable motives, dedicate their money and their time to rescue from vice and misery the outcasts of this world; but nothing can be more disgusting than when an ostensible connection with such society is paraded for selfish motives to conceal corrupt indulgence and to defeat justice.

I trust that I have with due patience and care examined all the evidence to establish the alleged explanation and justification of Mr. Ciocci's conduct; and I have not forgotten that he is a **[152]** foreigner, though, after eight years' residence here, that is an element of little importance. I am of opinion that the explanation and attempted justification wholly fail. And now the question which I have reserved remains for determination, and I seek to find the bearing and effect of this failure on the evidence to prove adultery.

As to Charlotte Thomas: there is her own oath, supported by the evidence of Owen, who saw her in Mr. Ciocci's room. I am of opinion that her evidence in chief is not shaken by her cross-examination, but confirmed; for I deem it to be perfectly clear that, between her examination and cross-examination, she has been tampered with; and as to the supposed restoration to her mother, I am not to be deceived by the mere words of the witness on such a cross-examination, when the best proof, the evidence of the mother, is withheld. Intercourse, though said to be not illicit, is the very foundation of Mr. Ciocci's defence; and as I think the averment of benevolence and philanthropy wholly fails, it follows that such admissions corroborate the evidence to actual guilt.

Similar observations apply, though more strongly, to the case of Alexander. Patriarchi is contradicted by both French and Alexander as to the arrangement for the meeting of November 3; by Edser, Owen, Horsey, and Alexander as to the return to Grosvenor Street; and, so far from his evidence being confirmed by the exhibit No. 10, it bears in my mind strong suspicion of fabrication. I have no doubt that Alexander did return to Grosvenor Street; and, if that be so, the false defence set up is the strongest corroboration of the truth of her evidence; if there for purposes wholly unexplained, to what other conclusion, according to the dictates of common sense and every day's experience, could a Court of Justice come.

I pronounce for the separation, on the ground of adultery with Charlotte Thomas and Fanny Alexander, and I condemn Mr. Ciocci in the costs.

Proctor for the wife, Bathurst; for the husband, Lochner.

THE "NORTHAMPTON." The High Court of Admiralty, Nov. 7, 1853.—A vessel dragging her anchor, and coming into collision with another, held to blame for not having let go another anchor. Held, also, that this was the fault of the pilot alone, and that the owners were therefore not liable. No costs.

This was a suit brought by the owners of the "Feronia," a schooner of 96 tons burthen, against the "Northampton," an American vessel, of the burthen of 982 tons, for damage occasioned by a collision between them off Liverpool, on the 24th of February last.

**[153]** The act on petition alleged that the "Feronia" sailed from Wexford, in Ireland, on the 22nd February, laden with a cargo of oats and flour, bound to Liverpool; that on the following day she arrived off the Great Orme's Head, and was there boarded by a duly licensed Liverpool pilot, under whose charge she was brought safely to anchor, it being ebb tide, abreast the landing-stage, opposite the George's Pier Head, at Liverpool, with her best bower anchor and sixty fathoms of chain, at 11.30 P.M. of the said 23rd February, in order to be docked with the flood tide; that all sails were then furled, an able seaman stationed as anchor watch, and a lighted patent signal lamp, which was visible all around, was placed at the masthead; that the wind was blowing fresh from the north, and the night very clear; that under these circumstances, about 12.55 A.M. of the following day, as she was lying with her helm a-starboard broad sheer in towards the said landing-stage, the anchor watch observed a large ship coming across from the Cheshire side of the river, dragging her anchor, and immediately reported the same to the pilot; that the said pilot and the mate immediately came on deck, and saw the said ship (which proved to be the "Northampton") coming across the river, dragging her anchor, and apparently about to pass under the stern of the "Feronia," and then distant from her about forty yards to the N.W.; that they thereupon hailed the said ship first to port her helm, and then to give her more chain, but received no answer; that the ship sheered on towards the landing-stage to a position N.E. of the "Feronia"; that the mate of the "Feronia" hailed the ship to starboard her helm, in order to keep her on the inside, but still got no answer; that two or three minutes afterwards a man came on the forecastle of the said ship, and was then hailed by the mate of the "Feronia" to give his ship more chain; that immediately after this hailing the ship broke her sheer, and came into the "Feronia," and did her considerable damage; that the ship then dragged the schooner under her bows from the place where she had first brought up, and from which she had never moved until the period of the collision, to the middle of the river, in the direction of Seacombe, and thereupon went clear of her; that afterwards, in consequence of being so far out in the force of the tide, the "Feronia" began to drive, whereupon a second anchor was let go, which brought her up, and at 11 o'clock A.M. of the same day she was taken into the King's Dock at Liverpool. That the said collision, and the damages consequent thereon, are solely to be attributed to those on board the said ship "Northampton," owing to their want either of a good look-out or of proper skill and seaman-**[154]**-ship, and are not in the slightest degree to be attributed to the said schooner "Feronia."

The answer alleged, that the "Northampton," on her voyage from New Orleans with a cargo of cotton, arrived on the 23rd February last off the port of Liverpool, when, to wit, at about 9 A.M., George Rogers, a duly licensed pilot for the port of Liverpool, was taken on board, and employed by the master of the said ship to pilot her into one of the wet docks, within the said port, in accordance with the provisions of an Act of Parliament passed in the fifth year of the reign of King George the Fourth, intituled (5 Geo. 4, c. 73) "An Act for the better Regulation and Encouragement of Pilots for the conducting of Ships and Vessels into and out of the Port of Liverpool;" that from such time, and until after the collision in question, the said ship continued to be and remain under the sole charge and direction of the said duly licensed pilot, and that during the whole of such time the orders of the said pilot were obeyed in every respect; that the said ship proceeded up the river Mersey, and at about three P.M. of the same day her starboard anchor was, by the pilot's orders, dropped, and she was brought up off the south end of the landing-stage, at about a

cable and a half length across the river from the Liverpool side, preparatory to her being taken into docks.(*a*)[1] That it being then ebb tide, and the wind blowing fresh from N.N.E., about seventy fathoms of chain were paid out from the windlass; that about half-past five the same evening, the tide began to flow and the "Northampton" swung round with her head to the northward, or down the river, and, under the pilot's orders, a sheer was given her to the westward, by keeping her helm to starboard; that she rode securely to her anchors in that position against the united strength of tide and wind; that at dusk a bright signal lantern was hung up, and remained burning brightly, and a regular watch of three hands was set; that at about half-past eleven P.M. the same evening, as it was then near high water, George Rogers, the pilot, was called and came on deck, where he remained in charge of the said ship until after the collision; that in consequence of the strong wind from N.N.E. the "Northampton" did not begin to swing to the ebb tide for a considerable time after high water; that as soon as she began to swing, which she did with **[155]** her stern to the westward, on the Cheshire shore, the pilot ordered the helm to be put to port, but that as the ship came round, the force of the wind upon her larboard quarter drove her in towards the landing-stage aforesaid, until her anchor checked her and brought her up, head to the tide, whereupon the strong N.N.E. wind drove her ahead, and her chain got under the quarter of the schooner "Feronia," which had then recently been brought up so near to the "Northampton" as to give that vessel a foul berth; that the said schooner in consequence of the chain so getting under her quarter, began to swing athwart the tide with her head to the eastward, and the "Northampton's" jib-boom passed over her bows, and fouled her foremast; that thereupon, by the pilot's directions, the "Northampton's" yards were immediately braced sharp up, and all the remaining cable paid out, by which means, and by the schooner's head sail being set, the "Northampton's" jib-boom cleared the schooner's foremast, but got between the fore and mainmasts; and the tide kept forcing the schooner against and under the ship's bows; that the additional strain on the "Northampton's" cable then caused her to begin to drive, but that her helm being, by the pilot's directions, kept to port, her head sheered more to the westward, and her larboard anchor caught the schooner's larboard bulwarks, and thereby did some damage; that the schooner at length sheered clear with her head to the N.E., and the ship immediately brought up, not having drifted more than twice her own length during the whole time, and remained there at anchor until the following day, when she was taken, still in charge of the said George Rogers, into the Bramley Moore Dock. And after denying several averments on the part of the "Feronia," it alleged that collision was entirely occasioned by the want of care and skill of those on board the said schooner "Feronia," in bringing up as they did in a foul berth or otherwise; and that the said collision, if imputable to any one on board the "Northampton," was occasioned solely by the neglect, default, incompetency, or incapacity of George Rogers, the pilot, who, as well at the time when the said ship came to an anchor, as afterwards, until the collision, remained solely and entirely in charge of the said ship, and all whose orders were implicitly obeyed by the officers and crew of the said ship; that by the provisions of the said Act 5 Geo. 4, c. 73, the master of the "Northampton" was bound (*a*)[2] to receive on **[156]** board, and deliver over the charge of the

---

(*a*)[1] In the somewhat similar case of *The "Montreal"* (March 18, 22, and 24, 1853) it was contended that the services of the pilot ended when she anchored off the Albert Dock wall, but the Court was clearly of opinion that the so anchoring was no interruption of the original agreement, and that proceeding to the Queen's Dock, when the tide suited, was one continuous service, and that therefore at the time of the collision the pilot was compulsorily employed under the Liverpool Pilot Act.

(*a*)[2] Exemption on the ground of having a duly licensed pilot on board must be pleaded specifically. In *The "Philomele"* (March 18, 1853) the Court said, "It is stated in the defence that the galliot had on board a duly licensed pilot and three assistants; but it is not said under what Act of Parliament he was taken, or whether it was compulsory or not, or whether any blame attached to him. If it had been intended to raise the question of the exoneration of the owners, it ought to have been stated explicitly that all the orders of the pilot were duly obeyed, and that if any mistake was made, it was attributable to him. The question not having been raised,

said ship to the said George Rogers, or to any other duly licensed pilot who might first have presented himself, and that by the 32nd section of the said Act, every duly licensed pilot who shall pilot or conduct any ship or vessel into the said port of Liverpool, is required to take care (if need be) to cause such ship to be properly moored at anchor in the river Mersey, and afterwards to conduct such ship into one of the wet docks within the said port. That by reason of the premises, and of the provisions of the said Act, and also of the General Pilot Act, the owners of the said ship are not liable for the damage alleged to have been sustained by the owners of the "Feronia."

The reply denied that the "Feronia" gave the "Northampton" a foul berth, and alleged that the place where the schooner was brought up was about half a cable's length from the landing-stage at Liverpool, in a clear and open berth, and nearly half a mile from the "Northampton"; that it would have been impossible for the two vessels to have come into collision unless either the one or the other had dragged her anchor; that in the state of the weather and tide in the Mersey at the time when the "Northampton" brought up, it was the bounden duty of the master to have had her top-gallant yards sent down, and her top-gallant masts struck, and that had that been done, and had her chain been veered out to an end, in all probability the "Northampton" would not have driven, and so no collision would have occurred between the two vessels; and it further denied, that when the "Northampton" first drove, George Rogers, her pilot, was on deck, and in command of her; and alleged that he was below, and that there was no persons whatsoever on the deck of that vessel until just immediately before the collision.

The rejoinder denied the averment as to the top-gallant masts and yards, and alleged, on the contrary, that the wind being N.N.E., the "Northampton" was less likely to have driven down with the ebb tide with her top-gallant masts and yards set than if they had been lowered; it further denied the averment respecting the pilot, and that there was no person on deck until just immediately before the collision.

The case was argued on the 4th and 7th of November, by **[157]** Dr. Addams and Dr. Twiss for the "Feronia"; Sir J. D. Harding, Q. A., and Dr. Bayford for the "Northampton."

*Dr. Lushington*, addressing the Trinity Masters (*a*):

Gentlemen—To a very considerable extent I concur in opinion with her Majesty's Advocate, that many of the facts in this case are not the subjects of dispute between the parties; but I am afraid, from the nature of the case itself, that that circumstance will not relieve me from performing my bounden duty, if necessary, of setting forth, somewhat at length, the facts of the case. I do not mean that it will be requisite to go into the evidence; that has been fully discussed, and you are perfectly masters of it. But it will be necessary, before I conclude, to bring under your consideration, not merely questions of fact, but I should say, questions of nautical knowledge, in addition to matters of fact, in order that I may form my opinion on that part of the question which rests on me to determine—namely, who is responsible for the consequences of misconduct?

I will begin by an observation in which, I trust, you will concur. I apprehend the law to be clearly this—that whenever a master is on shore, and a ship is left in charge of the mate, or any one else, the matter stands in the same position with respect to the law, and in all other respects, as if it had been the master himself. That is a general principle from which we cannot depart. I should just observe, in passing, as to the case of the "Feronia."

Subject to your better judgment, it appears to me that she could cause the collision only from the adoption of two propositions—first, assuming that she had taken a foul berth in her original position, then she might be to blame; and secondly, supposing, from any fault in the anchors, she parted from them, innocently or otherwise, she might have occasioned the collision. Now, let us consider a little the circumstances of the case, and see how the charge proceeds.

The action is brought by the "Feronia," which is a small vessel, under 100 tons burthen, and which came up the river Mersey after the period when the "Northampton" had come to anchor opposite St. George's Pier Head, with her best bower

---

it would be injustice to the other party, who has had no opportunity of defending himself, if I were to take cognizance of it."

(*a*) Capt. Nelson and Capt. Owen.

anchor, and sixty fathoms of chain. It is agreed on all hands that it was a light night. With regard to the wind, it appears to me that the description is, it blew during the night from the N.E. with occasional squalls. It is alleged, on behalf of the "Feronia," that about 1 A.M. on the 24th, the "Northampton" [158] came across from the Cheshire side of the river, dragging her anchor, apparently about to pass under the stern of the schooner, distant about forty yards. You have had a great deal of discussion as to dragging her anchor and driving, and, of course, that I must leave entirely to your consideration. I may, hereafter, think it necessary to advert to the distinction between driving and dragging. She says the "Northampton" broke her sheer, and came with her stern against the schooner. She subsequently alleges that the "Northampton" ought to have sent down her maintopmast, top-gallant mast, and so on. This is her case against the "Northampton."

Now the case of the "Northampton" I would rather read in her words, that I may not misstate it. She states, "that as soon as she began to swing," which is represented to have been some time after the tide began to ebb, and the tide seems to have ebbed somewhat before twelve o'clock at night, "which she did with her stern to the westward of the Cheshire shore, the pilot ordered the helm to be put to port, but that, as the ship came round, the force of the wind upon her larboard quarter drew her in towards the landing-stage until her anchor checked her and brought her up, head to tide, whereupon the N.N.E. wind drove her ahead; and her chain got under the quarter of the schooner "Feronia," which had then been recently brought up so near to the "Northampton" as to give that vessel a foul berth." Here it is distinctly alleged, on behalf of the "Northampton," that the cause of collision was the "Feronia" having given the "Northampton" a foul berth. Then they go on:— "In consequence of the chain so getting under her quarters, the schooner began to swing athwart the tide, and the collision took place," &c., with which I need not trouble you. Then they allege that the schooner at length sheered clear with her head to the N.E., and the ship immediately brought up, not having drifted more than twice her whole length during that time, according to the statement made here. Then they go on to allege that the "Northampton" did not drag her anchor at all until the "Feronia" got across her bows, and thereby brought a severe strain upon her anchor and cable.

If the "Feronia" got across her bows, it must be from the "Feronia" being in a foul berth, or because the "Feronia" moved from her original berth, otherwise the collision could not possibly have taken place. With regard to whether she was in a foul berth or not, that will be a question for your consideration; but, with respect to the "Feronia" having moved from her berth towards the "Northampton," it certainly appears to [159] me that there is no evidence that she did so. This being the state of the case, in order to ascertain the cause of the collision and who, in the eyes of the law, will be to blame, we must determine, first, certain questions of fact; secondly, who is to blame according to nautical practice, which will be your department; and, thirdly—which will be my department of the case—who is legally responsible for the damage. You will ascertain from the evidence, so far as you think it important, whether the "Northampton" anchored on the Liverpool or Cheshire side of the river, and then whether she parted from her anchor prior to the collision, or whether, supposing there to be a difference, she drove with or dragged her anchor.

Captain Owen. The difference between driving and dragging I take to be this. If a ship lying at anchor, from the strength of the tide, drifted with her anchor, that would be driving; if the wind drove her across the tide, and she fairly dragged her anchors, that would be dragging.

*Dr. Lushington.* Let me put my notion of it, and then you shall correct me if I am wrong. The river here was lying north and south, and when this vessel swung to her anchor, her head would be to the south. Now, if by reason of the force of the tide she had drifted down the river, that is driving; but if her anchor had gone after her, she would both have drifted and dragged her anchor.

In this state of the case it is alleged, on behalf of the "Feronia," that the wind took the "Northampton," and sent her across the river towards the "Feronia." But I will put the case in the alternative. Assuming for a moment that you come to a determination in the affirmative that she drove or dragged, would she, or ought she, to have taken any measures to prevent the collision? Ought she to have sent down her top-gallant masts and yards? Again, if she ought to have taken measures, and

did not, who was to blame—the pilot solely, or the officers in charge? That will be a nautical question.

I will now draw your attention to the case of *The "Christiana"* (7 N. C. 2), which, in its circumstances and facts, is very different from the present; and the real consideration will be, whether these differences amount to a distinction. We cannot expect to have any two cases the same in every respect. *The "Christiana"* was in the Downs, in a gale of wind, and did not send down her yards, topmasts, and so on, and, in that case it was the opinion of the Trinity Masters who then attended, and it has since been affirmed by the Judicial Committee (*Hammond* v. *Rogers*, 7 N. C. Supp. xli.), that **[160]** it was the duty not merely of the pilot, but of the master as well, to take that precaution. The difference is very clear: the distinction I leave to you.

There is another question I shall put, because it is raised in the pleadings, though it does not appear to me there is any evidence to establish the charge, whether there was an adequate watch on board the "Northampton." I cannot say I am satisfied, from the evidence adduced by the "Feronia," that there was any defective watch at all. Then, secondly, you will have to determine, with regard to the "Feronia," whether she was in a foul berth or not, the evidence being, so far as my opinion goes, strongly to the contrary. If I correctly understand this matter, it appears to me—assuming, for a moment, that the "Feronia" was not in a foul berth—that fact is of considerable importance. If I understand the meaning of the words "foul berth," I apprehend that the "Feronia" was not in a foul berth; the two vessels could not have come in contact, except by the one or other moving from her former position. If one vessel anchors there, and another here, there should be that space left for the swinging to the anchor, that, in ordinary circumstances, the two vessels cannot come together. If that space is not left, I apprehend it is a foul berth.(*a*)[1] It is quite clear, from the case of the "Feronia," that the pilot alone is responsible as to whether there is a foul berth or not.

The Court and the Elder Brethren having retired for consultation, on their return *Dr. Lushington* said—I addressed to the Trinity Masters the questions in the following order: 1st. With regard to the "Feronia," whether she was in foul berth? Answer. No. 2nd. Whether, previous to the collision, she moved or not? A. No. 3rd. Whether the "Northampton" dragged her anchor, or whether she drove, and in either way occasioned the collision? A. She did drag her anchor, and so occasioned the collision. 4th. Could she, and ought she, to have taken any measure to prevent the collision? A. Yes; by letting go the other anchor. 5th. Who was to blame for not letting go the other anchor? A. The pilot exclusively. 6th. Ought she to have sent down her top-gallant mast and yards? A. It was advisable to have done so; but, under the circumstances of the case, not doing so **[161]** did not cause the collision. Under the circumstances it appears to me that the collision was occasioned by omitting to let go another anchor, and was the fault of the pilot exclusively; and in a previous case I have determined that the owners are not responsible. I pronounce against this claim for damage, but give no costs.(*a*)[2]

Proctors for the "Feronia," F. Clarkson; for the "Northampton," Rothery.

THE "ORBONA." The High Court of Admiralty, Nov. 11, 1853.—Salvors in possession of a vessel abandoned by all her crew but two, who had been unable to effect their escape, would not be bound to delay their course for the sake of taking on board again the crew of that vessel. A policy of insurance is not rendered void by deviation to assist a vessel in distress.

[Referred to, *Scaramanga* v. *Stamp*, 1880, L. R. 5 C. P. D. 302.]

This was an action by the owners, master, and crew of the barque "Poictiers,"

---

(*a*)[1] In the cases of *The "Countess of Morley"* (Nov. 22, 1853) and *The "Highland Chief"* (Dec. 7, 1853) the Court pronounced against those vessels, on the ground that they had anchored too close to the vessels with which they came into collision, and had thereby given them a foul berth.

(*a*)[2] In the case of *The "Presto"* (Nov. 17) there was a similar result. The collision occurred in the Thames; *The "Presto"* was held to blame, but her owners were exempted by reason of a duly licensed pilot being on board and solely in fault.

for services rendered on the 20th January, 1853. The value of the property salved was 5082l.

The "Orbona," a barque of the burthen of 292 tons, sailed from London, with a crew of eleven hands, besides the master, on the 1st of January, 1853, bound for Glasgow, with a cargo of wheat. She met with rough weather; and about 3 o'clock A.M. of the 20th, whilst close hauled to the wind on the starboard tack, about twenty-five miles to the southward of the Needles, was run into by the barque "Actæon," (*b*) which carried away her bowsprit, and then, swinging round, also carried away her cutwater, and the sails and stanchions on her starboard side, stove her deck, and did her other very considerable damage. While separating from the collision, the master and crew of the "Orbona" (two only excepted) succeeded in getting on board the "Actæon," which was soon carried away some distance from the "Orbona." The "Orbona" was thus left disabled, with only two men on board, when the "Poictiers" discovered her, and came to her assistance.

The act on petition, besides the usual exaggerations of the merit of the service, alleged, that the "Poictiers" incurred a detention of five days, at an expense to her owner of at least 6l. per day for wages and provisions, and of 30l. for dues and other disbursements, necessarily consequent upon such detention; that she is of the value of 6800l., and was chartered by the British Government for the conveyance of troops, and that the stores and provisions for the use of such troops, together with the stores and provisions for the ship's use, were of the value of 3200l.; that the freight for the intended voyage amounted to **[162]** the sum of 4500l.; that had she been lost in rendering the services aforesaid her owners would have forfeited all insurance, and would have been liable to the Government for the value of the provisions for the troops; that her owner would also have lost her freight, and that, by rendering the services, property of the value of 14,500l. was placed in jeopardy, &c.

The answer, inter alia, pleaded, that after the collision the "Actæon" lay to till daylight, when she descried the "Orbona" about three miles on her weather beam, and thereupon made all possible sail to beat towards her, but that when she had arrived within about half a mile of her it was discovered that she had just been boarded by a boat's crew from a vessel which proved to be the "Poictiers"; that the "Actæon" was then run under the stern of the "Orbona," which by that time was under sail, and those on board her were hailed by the master of the "Orbona" to heave to and permit him and the rest of his crew to come on board; but that instead of so doing one of the men on board the "Orbona" (since ascertained to be the second mate of the "Poictiers") only answered "All right," and the "Orbona" was kept on under sail; that all three vessels proceeded in company for the Motherbank, where the "Orbona" was brought to anchor about 4.30 P.M. of the same day; that the "Orbona" was immediately boarded by her master, who asked the second mate of the "Poictiers" what he meant by not heaving the "Orbona" to, and letting him and his crew come on board when the two vessels were so close, and as he had been hailed to do; to which the said mate replied, that he was only a servant, doing as he was told, and he had had his orders, &c.

This was all denied in the reply.

Sir J. D. Harding, Q. A., and Dr. Bayford appeared for the salvors; Dr. Addams and Dr. Twiss, for the owners.

*Dr. Lushington.* This is a claim preferred on behalf of the owners, master, and crew of a vessel named the "Poictiers," of the burden of 736 tons, and manned with thirty-one hands. She was proceeding, at the period when this transaction took place, from the port of London to Cork, under a contract with the Government. It appears, on the 18th or 19th of January, just antecedent to the time when the collision of which I must presently speak occurred, she had met with very tempestuous weather. In the course of the morning of the 20th of January, the vessel proceeded against—named the "Orbona," of the burden of 292 tons, with a crew of eleven hands—had come into collision with a vessel named the "Actæon"; and in con-**[163]**-sequence of the alarm arising from it, the master and eight of the crew abandoned her, and jumped on board the "Actæon," for the preservation of their lives. There were on board this vessel of 292 tons only two seamen, who either did not or could not attempt to go on board the "Actæon."

(*b*) Vide post, p. 176.

In that state the vessel remained until between nine and ten A.M., when she was descried by those on board the "Poictiers"; and as soon as the master of that vessel saw her, and perceived that she had a signal of distress flying, and had suffered some damage, though to what extent he could not know, he determined to bear down for the purpose of rendering assistance; and then, according to his own statement, he was desired by the two persons on board to come to their aid. He desired his crew to volunteer, being reluctant to give an order, in consequence of the danger to which he apprehended they would be exposed. With regard to that danger, which is not an unimportant circumstance in this case, I cannot help thinking—looking at the description of the weather, and even softening the description down, as we are generally accustomed to do when strong statements are made, and at the condition of the vessel itself, being left with these two men on board, and in the damaged state she was—the boarding was attended with some degree of danger, and no doubt great difficulty. However, at last she was boarded by four men, sent to take charge of her, the boat being manned by four other persons. I cannot think that this danger was diminished by the circumstance stated by counsel, supposing it strictly accurate, that the four persons jumped at one spring. I apprehend that they would jump when on the top of a wave, which would give them the opportunity of springing to get hold of the rigging, which they did. But this proves to me, if they were under the necessity of jumping to get on board the vessel, it could not be at that time very smooth water, or be done with great facility. Having got on board the vessel, they proceeded to do what was necessary in order to bring her to a place of safety; and the wind having gone round to the westward, they proceeded to conduct her to the Motherbank.

There is no doubt this vessel had received considerable damage, and it is abundantly clear that she must have been in considerable danger, having been left with such damage, at such a season of the year, with only two men on board. It is quite unnecessary to dwell on circumstances which appear to me to lead to conclusions so inevitable as such facts do. The ship having been so conveyed to the Motherbank, the service in itself would be very meritorious, as being the means of saving **[164]** the property and saving the lives of the two individuals on board the vessel.

Now let us consider whether the statement on the other side does to any, and what extent, detract from the services of the salvors, or diminish from the reward which I ought to give, supposing those facts strictly true and not counterbalanced by other facts. I look at the protest made by the master and two of the crew of the "Orbona"—that is perhaps as favourable a document as I can resort to for the purpose of seeing what is the real case of the "Orbona" as set up on behalf of the owners. I need not go through the preliminary circumstances as to the collision that took place with the "Actæon," but I will commence where it is said that "the master and nine of his crew, fearing that his vessel would sink, and seeing that the stranger was rapidly driving past this appearer's vessel, and fearing that there might be no other chance of escape, scrambled on board the stranger only half clothed, as they had rushed from their beds, and found the stranger to be the barque 'Actæon,' of Glasgow, Captain Benson; and this appearer then found that two of his crew had been left in this appearer's vessel. That the appearer then requested the master of the 'Actæon' to lie to till daylight, in order that the appearer and his crew might get on board their vessel again if she should not founder"—which he expected, of course, she would do—"which he did; and at daylight this appearer discovered his said vessel."

It is a matter of no importance that the Court should trouble itself to decide whether the "Actæon" did or did not lie to to assist the vessel. The probability is, she did, and for the reasons stated by counsel, that it would have been atrocious conduct on the part of the master of the "Orbona," whensoever the collision took place, if he had abandoned, not the property only, but the lives of these persons, without some effort to save it and them. I take it for granted he did lie by. "He discovered his said vessel about three miles upon the weather beam of the 'Actæon,' whereupon the 'Actæon' made all possible sail to get on board the 'Orbona,' and cleared away the boat of the 'Actæon' to be ready to board her, and also hoisted the ensign upon the 'Actæon's' mizen rigging, in order to be a signal to the 'Orbona's' men, still on board." Now, according to this statement, the appearer saw his own vessel about three miles upon the weather beam of the "Actæon." I do not know that I have accurate constat of the wind; it was subsequently W., and if it was W. at the time, the "Actæon" would have had no difficulty, in a less space of time than is

represented here, in coming up to the "Orbona." **[165]** If the wind was the other way, of course it would occupy more time, she having to go contrary to the wind.

However, he says the "Actæon" made all possible sail, and also hoisted the ensign, "and about an hour and a half after the 'Actæon's' signal had been hoisted, the 'Orbona' hoisted a signal of distress." Now, this is a circumstance which I do think does require some little consideration, because, if the persons on board the "Orbona" were aware that that was the "Actæon," and she was coming down to her assistance, I do not understand why they should have hoisted a signal of distress at so late a period. The hoisting of a signal at all clearly shows that they had no confidence in the "Actæon" coming to their assistance. "When the 'Orbona's' signal was hoisted," the protest says, "the 'Actæon' was beating up towards her, and was then not more than two miles distant, the 'Actæon's' signal being then flying; that soon after the 'Orbona' hoisted her signal of distress, this appearer discovered a vessel running down upon her, before the wind, which afterwards proved to be the 'Poictiers'; and when the 'Actæon' was within about a mile, they saw the 'Poictiers' close to the 'Orbona,' and some of the 'Poictiers'' men boarded her, it being then about 10 A.M.

Now, I am not about to attempt to solve the difficulty of how it happened that, from daylight in the morning till 10 A.M., the "Actæon" was occupied in traversing this short space of sea. I am not quite satisfied from which quarter the wind was blowing, though I suspect it was from the east, and got round to the west in the afternoon. But the fact was, the "Actæon" did come up, and hailed the "Orbona" to heave to. I will take it for granted that she was told the "Actæon" had the crew of the "Orbona" on board, and, I do not think, under the circumstances in which the "Orbona" was placed, it was any part of the duty of the salvors to have hove to, and taken on board the master and crew, who had gone on board the "Actæon." I do not say there are no circumstances in which it is the bounden duty of the master and crew to come on board and resume the control of their own vessel; but not under circumstances like these. Looking at the season of the year, and the state in which the vessel was in, the salvors had an undoubted right to keep possession and carry the vessel to a port of safety. I dismiss, therefore, some of those facts put in direct contradiction.

It is always difficult to determine, when one set of persons who stand precisely in the same degree of veracity as another are directly at issue, which are speaking correctly, but whichever it may be, it makes no material difference. I therefore proceed to my adjudication without reference to these facts. **[166]** It was a most meritorious service, and I am bound to give an adequate reward; the service, however, did not last a long time, and was effected without great difficulty or risk, beyond boarding the vessel. There are circumstances mentioned in the act on petition which do not weigh with the Court, and which are put in to influence the case. It is said that the insurance of the "Poictiers" was void. That is not true in law, for it is not the law that if one vessel goes out of her way to assist another in distress the insurance is void. It has often been stated, but in the only case in which it has been agitated —for it did not come to a final decision—the Judges were of opinion that it did not.(*a*) I leave that out of consideration, and looking at the value, 5082l., I shall allot the sum of 700l.

Proctors of the salvors, Deacon; for the owners, F. Clarkson.

---

(*a*) In *Lawrence* v. *Sydebotham* (6 East, 52) the point was touched upon in argument, and Lord Ellenborough, C. J., said, "This does not affect the question how far slackening sail from motives of humanity to succour another ship in distress is allowable; nor is it necessary to touch upon it. Perhaps when such a case does arise, it may be found to be for the general benefit of all insurers to allow such succour to be given without imputing deviation to the succouring ship." And Lawrence, J., said, "as to deviations for the purpose of succouring ships at sea in distress, it is for the common advantage of all persons, underwriters and others, to give and receive assistance to and from each other in distress."

In America it is laid down that deviation to save life would not, but merely to save property would, void the insurance. Mr. Justice Story said, "I entirely agree with my lamented brother Mr. Justice Washington, in declaring that no stoppage on the high seas for the purpose of saving life is or can be deemed a deviation from the voyage so as to discharge the insurance on ship or cargo. The duties of humanity

THE "PERSIA." The High Court of Admiralty, Nov. 11, 1853.—A vessel of the value, with her cargo, of 17,337l., got off the rocks by the assistance of a pilot and about thirty-four hands, for which the owners tendered 250l.; but the Court awarded 400l., and held that the fact of an officer in the navy, who held an official appointment there, having given directions to the salvors, did not detract from the merit of their service.

This was an action brought by Hugh Williams, a pilot, and the masters and crews of five smacks, consisting together of thirty-four hands, against the "Persia," for services rendered to her on the 11th July, 1853. She was a vessel of 2002 tons burthen, laden with timber, and, upon a voyage from Quebec to Liverpool, got upon or between some rocks, about half a mile to the northward of Port Griffith Creek, on the S.W. coast of the island of Holyhead. Mr. Williams, having heard of the accident, proceeded overland, and found her, according to his account, upon two ledges of rocks on which she was rolling heavily. His services, as well as those of the "Hercules" steamer, were [167] at first rejected by the master, who had telegraphed to Liverpool for some steam tugs, and expected them at 2 o'clock in the afternoon; and the principal ground of defence was, that Captain Skinner, of the Royal Navy, Government inspector of steamers at Holyhead, came, and, holding a conversation with the master from the rocks, represented himself as a friend of the consignee of the ship, informed him that it would be impossible for the tugs to arrive from Liverpool to get the ship off that tide, and advised him to endeavour to get her off by running a hawser out astern, and heaving upon it; that the master, on receiving such information from Captain Skinner, immediately acceded to his recommendation, and Captain Skinner then gave directions to various persons to assist, &c., &c.; that the entire direction of any measure taken in laying out the anchor was done at the suggestion of Captain Skinner and Captain Davis, the master; that Hugh Williams and the other boatmen were promised that they would be paid for their services whatever was right; that the master throughout considered that Hugh Williams and the others were employed under the guidance of Captain Skinner, and had no idea whatever that he was allowing unconditional salvors to take any part in getting the "Persia" off; that otherwise the services could and would have been performed by his own ship's crew, &c., &c.

Dr. Addams and Dr. Twiss appeared for the salvors; Sir J. D. Harding, Q. A., and Dr. Bayford, for the owners.

*Dr. Lushington.* There are several matters which have been mentioned by counsel in arguing this case, which, it appears to me, it will not be necessary to enter upon; because, if they have any bearing on the decision to which the Court is about to come, they have, in my opinion, a very remote one. The first question which I have to solve is, What will be the proper reward to be paid to the present salvors for the services which they have rendered to this vessel—supposing they have rendered them—without any reference to Captain Skinner himself? That they are entitled to some reward is not the question which I have to discuss, because the sum of 250l. has been tendered, and the simple question is, whether that is enough, or whether I ought to give more. Presuming I can settle this, I am to take into consideration whether what has been averred by Captain Skinner ought or ought not to detract from the sum which it will be proper to award to Hugh Williams and the other salvors. I will briefly allude to some of the circumstances.

This vessel—in what way or from what cause is not of the slightest consequence—got upon the coast two miles to the [168] S.W. of Holyhead, on the night of the 10th July; and, it is agreed on all hands, got on a rocky coast, was jammed on two rocks, and there remained fast, with very deep water, as stated, on her stern. The question which seems then to have been agitated was, in what way she could be most effectively got off, and how far it was prudent to wait till assistance could be derived from another quarter. It appears that Williams, the chief pilot, when he first tendered his services, was rejected by the master of the "Persia." Undoubtedly the master of

---

call upon every human being to do such acts of mercy and charity; and that duty is enforced by all the authoritative precepts of Christianity, which no one is at liberty to disregard. But I further agree with him in holding that any farther stoppage for the purpose of saving property is a deviation from the voyage and discharges the underwriters." *The Ship "Henry Ewbank" and Cargo*, 1 Sumner, Am. Rep. 424.

the "Persia" had full right to the exercise of his own discretion, as to whether he would accept assistance or not; but it is a totally different question whether he exercised that discretion wisely or unwisely under the circumstances of the case. He was placed in authority by the owners, the property was entrusted to his charge, and he had a right to use his own judgment. It appears that assistance was offered by the "Hercules" steamer, and he had a right to discard it. The course he adopted was, to send the mate to Holyhead, and from thence to telegraph to Liverpool for the assistance of four tugs. These tugs he expected would arrive at 2 P.M., when it would be high water. It is clear he was mistaken, both from information received and from the fact also. One of them did not reach Holyhead till 7 in the afternoon.

Having stated these facts, the first point to which the Court will direct its attention is this: What was the degree of danger in which the vessel was placed? because the amount of the reward is measured, with other circumstances, by that danger at the time when the services were rendered her. The vessel was jammed between two rocks, and it is quite clear was incapable of extricating herself. If any change had taken place in the weather she would have been placed in extreme peril; as it was she was exposed to considerable danger, because she suffered, what is not denied, very considerable damage. It is quite true the cargo was not of a description to undergo injury from becoming wet; at the same time, if the vessel had gone to pieces, I apprehend the cargo would have been in imminent danger of being lost.

But it may be said that, although there was danger, yet it was not imminent; but Captain Skinner, a friend of the consignees, and fully competent to form an opinion, and all the people at Holyhead who knew that the tide was flowing, unite in opinion that there was that degree of peril that it was not right to wait for assistance, but that it was the duty of the master to avail himself as quickly as possible of that which was at hand. The master having refused assistance, Captain Skinner, who knew what was best for the interest of the owners, advised **[169]** the master, in the strongest terms, to take assistance, which could only be rendered by laying out an anchor. The master thinks he ought to be influenced by the judgment of Captain Skinner. I see no blame attaching to the master for yielding to that opinion; and I attach no blame to him for having been a little obstinate in the first instance. The master must have weighed the chance of the four tugs coming against the chance of a suit in the Admiralty Court. It was very clear that if the vessel was removed from the situation in which she was placed there would be such a suit, or there would be an arbitration, which was only one degree less expensive. In considering the reward to be given, there is another fact to be looked at: in nineteen cases out of twenty, if the insurers had seen this vessel, of the value of 17,000l., jammed between two rocks, I think they would have been ready to give 250l. for her rescue. That is a view I am accustomed to take when there is doubtful danger, which was precisely the condition of this vessel. Looking at all the circumstances of this case, I shall award the sum of 400l.

Proctors for the salvors, Rothery; for the owners, Gostling.

THE "BATAVIER." The High Court of Admiralty, Nov. 25, 1853.—A passenger steamer on a voyage from London to Rotterdam, having broken the main shaft of her engines, engaged a tug to tow her over to Holland, being a distance of about ninety miles, which was done successfully. A tender of 175l. having been rejected, was held to be sufficient. Salvors condemned in costs.

[Referred to, *Ballantyne* v. *Mackinnon*, [1896] 2 Q. B. 463.]

This was a suit brought by the master, owners, and crew of the steam-tug "Thomas Petley," for salvage remuneration, for services rendered to the "Batavier," a steam-vessel of 227 tons burthen, on the 9th of May last. The action was entered for the sum of 1500l.

On the main facts of the case there was little or no dispute. The "Batavier," a regular trader between London and Rotterdam, left London at noon, on Sunday, the 8th of May last, with a small general cargo and eighteen passengers; passed the Tongue Light and the entrance of the Thames about seven o'clock P.M., and about nine o'clock broke the main shaft of her engines. Her master made signals by blue lights and rockets, which were seen by the "Ravensbourne," a steam-vessel on her voyage from Antwerp to London. She bore down to the "Batavier," and took her in tow, but cast her off, after a short time, about fifteen miles from the North Foreland, at the request of the master of the "Batavier," who found that her machinery was

being injured by the strain, as the floats of the paddle-wheels had not been taken off. The "Ravensbourne" continued her voyage, and afterwards sent the tug "Thomas Petley" to the assistance of the "Batavier." The master of the tug, after some demur, agreed to tow the [170] "Batavier" over to Holland, which he accordingly did, the "Batavier" having supplied him with coals for the voyage and the return. For this service the owners of the "Batavier" tendered the sum of 175l., which was rejected.

Among other averments on behalf of the "Thomas Petley," it was alleged that the steam-vessel "Batavier," when taken in tow by the said steam-tug "Thomas Petley," was in a position of great peril and danger; that, without the assistance of the said steam-tug, or of some other steam-vessel equally efficient, the "Batavier" could not on that day, or the following night, have reached a port of safety; that the wind would have prevented her getting into any English port; and that she could not have ventured to run leeward towards the Dutch coast with the night coming on; that, consequently, she must have been exposed to the gale which blew on the night of the Monday and throughout the following day and night, and possibly, in her then disabled condition, would have been lost, together with her cargo and all on board; that she was taken instead to her port of destination by the said steam-tug "Thomas Petley," and was thereby saved to her owners, together with her cargo and freight.

On behalf of the "Batavier" this was denied, and it was alleged that had there been any necessity or danger, she could easily have been taken in the first instance into Ramsgate, or afterwards into either Harwich or Yarmouth; and that, in fact, with the wind as it was, without the assistance of the said tug, the "Batavier" would, by sailing, have arrived at her port of destination almost as early as she did, the "Batavier" having actually sailed during the greater part of the time faster than the tug could steam; that there was not anything whatever to have prevented the "Batavier" going with perfect safety over to the Dutch coast; and that had there not been passengers on board, who were anxious to arrive as soon as possible at Rotterdam, the services of the tug would not have been engaged.

Dr. Addams and Dr. Bayford argued the case for the salvors; Dr. Haggard and Dr. Twiss for the owners of the "Batavier."

*Dr. Lushington.* This is a suit for salvage, brought by the owners, master, and crew of a steam-tug called the "Thomas Petley," and it appears that she is of eighty horse-power, and is manned by the master and five hands. She is engaged, as I collect from a card annexed to one of the affidavits, in the regular occupation of a steam-tug, between London and the Downs. The action was entered in the sum of 1500l., but [171] bail has been taken to the extent of 1000l. The action having been entered on the 27th May, on the 30th the proctor for the owners of the "Batavier" tendered the sum of 175l., which has not been accepted.

The "Batavier" appears to be a vessel of 227 tons, and to have been engaged, for a great many years, between London and Rotterdam. A dispute was made as to her value, which was originally stated, by Mr. G. Bailey, to be 2000l. The salvors were not contented with that amount, and accordingly they took out a commission of appraisement. It now turns out that the value was 2800l. It was contended, in the course of the argument, that ex necessitate the tender must fail, because it was made upon the foundation of the value being 2000l., whereas it now turns out that it was little short of 3000l. I am not clear that that argument can altogether be pushed to that extent. It depends, in my judgment, on the circumstances of the whole case; upon the danger to the property, more than any other consideration, whether or not 175l. is an adequate compensation for the whole of the service rendered. Whether it was adequate in the opinion of the owners or the salvors, or not, signifies nothing; the question is, whether the Court considers it a sufficient tender. Whether or not the property has been in jeopardy, be the value more or less, is one of the questions to which the Court must particularly direct its attention. I now come to the circumstances of the case.

The "Batavier" was proceeding on one of her usual voyages on the morning of the 8th of May, and it is not unimportant to bear in mind the time of the year when she was prosecuting the voyage. It was at a season when, generally speaking, the weather is most favourable, and when the day is much longer than the night. She met with an accident by breaking her intermediate shaft, and was disabled from prosecuting her voyage, and prevented from moving by the medium of steam. The

question is, not whether she was in danger by breaking the shaft, or at a subsequent time, but whether she was in danger at the period when the "Thomas Petley" came up to render assistance.

Her antecedent dangers, whatever they were, cannot affect the case. As soon as the accident happened, it seems she set her sails, and proceeded for an hour and a half, in what direction is of no importance. She finally came to anchor in the neighbourhood of the Kentish Knock, and there remained. At that time the "Ravensbourne" was seen approaching, and a signal was made to her, which must be deemed a signal for assistance, and which the master of the "Ravensbourne" states he would **[172]** have made under similar circumstances. He comes down to her, takes her in tow, and, according to his evidence, continues to tow her for a period of three-quarters of an hour, for the purpose of drawing her towards land; of course, I understand from the expressions used, and from the whole tenor of his evidence, putting her in that situation that she would be in a place of perfect safety. Having placed her somewhere about eighteen miles on this side the North Foreland, he then quits her at the desire of the master himself, in consequence of damage being received by the "Batavier" from the straining of her machinery.

Now, let us see how the facts stand. It is by the desire of the master of the "Batavier" that the tow-rope is taken off; certainly he could not imagine himself to be in much danger if he permitted the "Ravensbourne" to leave him at that time. In the next place, the "Ravensbourne" did leave him; and the evidence of the master is, that he left her in perfect safety. Now, I do not rely upon this evidence, nor do I mean to give my assent to the statement that Mr. Bacon is peculiarly the witness of the salvors because he has been examined by them. I entertain no such idea. It was a very proper thing for the salvors to examine him, and it would have been proper if he had been examined on the other side. I take it that he is a witness who stands independent of both parties; whatever he states is not to be taken as the evidence of a witness for the salvors, but merely according to the rules of fair construction. I have no reason to think that he gave his evidence otherwise than fairly and truly, but possibly he might be under bias. I have no reason, however, to suspect it, except that he belongs to one steam company and the "Batavier" to another, and there may be something like a jealousy of those employed only as owners of tugs. It may be so, or it may not; but I can have no reason to doubt the evidence he has given, namely, that the vessel was in perfect safety at the time. The res gestæ prove the truth of what he has said. He would not have abandoned the "Batavier," nor would the master have allowed him, without remonstrance, nor would the passengers have allowed it, if there had been the least degree of peril. There was no danger at that time.

Now, let us follow up the case from the time of his quitting her to the period when the "Thomas Petley" comes up to render assistance. It has not been argued that anything took place in the meantime. The vessel continued in the same situation, or nearly so; the weather had not altered her condition. The weather had been, previously, perfectly calm. **[173]** Something of a breeze then sprung up, but it is not contended that the situation of the "Batavier" had undergone any deterioration between the time at which the "Ravensbourne" quitted her and the period when the "Thomas Petley" came up to render assistance. She comes up to render assistance in consequence of a message, conveyed with the consent of the master of the "Batavier," by the master of the "Ravensbourne." It does not appear from the evidence that any direct intimation was given by the master of the "Batavier" of the purpose for which the tug should come; he only desires him to send one. I apprehend I am correct in that statement. I know, in another part of the proceedings, it is stated that he intended to prosecute his voyage; but it is not so represented by Captain Bacon.

This being so, the tug comes up in the morning, a little before eight, and proposes to take him to Margate Roads or to Ramsgate. The master of the "Batavier" says, "No, that will be inconvenient to me; I am desirous of going over to Holland, for the sake of my passengers, as speedily as possible; therefore I will take your assistance to go to Holland; not for any other purpose." After some hesitation—at which I am not surprised—the master of the tug consents to it; I say I am not surprised, because it was a matter out of ordinary business. The master represents that he was ignorant of the coast of Holland and of the course to be pursued. He therefore stipulates

that some person should be put on board to navigate her, and that a competent person should return in her as soon as the "Batavier" had been conducted to port. He also stipulated that he should have a sufficient quantity of coal for the performance of the service which he undertook to discharge, and to come back to the original destination.

Now, was there any danger, on the present occasion, from the nature of the service to be performed? Danger, in the present sense of the term, there certainly was none. I am aware it is represented, in the act on petition, that the ship was in danger; but, from the state of the weather, and the season of the year, as described in the evidence, I think it is impossible for a single moment to maintain that this vessel was placed in the slightest degree of risk or danger. I come then to consider whether taking this vessel, disabled for the use of steam, to Helvoetsluys, and the time the steam-tug would be occupied in coming back, will be properly remunerated by the sum of 175l. or not.

A great deal has been said about the sailing qualities of this vessel; of course I can only take the facts of the case. If I **[174]** trust to the representation of Captain Bacon, this vessel possessed very good sailing qualities; but it has been contended that that cannot be the case, and for this reason: if she was capable of performing the voyage, with a favourable wind, according to Captain Bacon's statement, in fifteen or eighteen hours, she would never have gone to the expense of having a steam-tug to accommodate the passengers on board. But I am not prepared to accede to that argument. I apprehend it was not for the sake of particular individuals, but she was most desirous of performing her voyage, for the general credit of the service, and the benefit of the owners, with punctuality. He would adopt these means as a matter of prudence, if not of necessity; and therefore I see in it no argument against her being a good sailing-vessel; at the same time, looking at the description of the vessel, her age, and so forth, I do not apprehend that her sailing qualities were of the first character, taking it for granted that she was capable of sailing with favourable weather, and favourable weather she had the good fortune to enjoy.

She is taken in tow between nine and ten o'clock, and is conducted to the port of Helvoetsluys. According to one statement, she arrives at one o'clock in the morning; according to the other, she arrives at four o'clock. This appears a subject of little importance; the service was successfully and well performed by the tug. The next question is, whether the tug was delayed or not at the port of Helvoetsluys—that is of very little consequence. As to any damage done to her, I am of opinion that no such case is made out. When she comes to the neighbourhood of the North Foreland, the second mate of the "Batavier" leaves her, and she has plenty of coals on board, furnished at the expense of the "Batavier," to take a large vessel (the "Viceroy") in tow, for which she receives 18l.; a fact not so plainly stated in the early part of the proceedings as the Court would like to have seen. I may make the same observation with respect to other facts which are now cleared up.

The price paid for ordinary towage I disclaim as being a guide to the Court as to the sum which should be allotted to remunerate this service; yet, in one point of view, it may be useful. It appears, from the card before referred to, that to tow a vessel the size of the "Batavier" from London to the Downs, the charge would be 47l. The distance is 100 miles; but the tug only towed this vessel ninety miles; however, I disclaim that as a test. It is true that the tug was taken out of her ordinary occupation, and carried to a foreign port, where she was detained a certain length of time, and then came back in **[175]** safety, being provided, as I ought to remember, with coals by the owners of the "Batavier." The question is, whether 175l. is sufficient under these circumstances, the value of the property being nearly 3000l. The latter circumstance I hold to be of infinitely minor importance in a case of this description. I do not hold that the steamer was in danger or disabled; the service consisted in towing a dull sailing-vessel for the distance in question, and no more; and, taking all the facts into consideration, I must pronounce the tender sufficient, and I think it my duty to condemn the salvors in costs.(*a*)

---

(*a*) The rule respecting costs in such cases is stated in *The "Emu"* (1 W. Rob. 16); and in the case of *The "Queen"* (Nov. 16, 1853), the Court upheld the tender of 50l., but gave no costs; observing, "The rule I have endeavoured to follow is not to bind myself in all salvage cases to give costs against salvors, unless I think the tender was

Dr. Addams: We are entitled to the costs of the appraisement.
The Court: Yes, that follows as a matter of course.(*b*)
Proctor for the salvors, Rothery; for the owners of the "Batavier," F. Clarkson.

**[176]** THE "ACTÆON." High Court of Admiralty, Dec. 5, 1853.—The declarations of the master are, of the mate and seamen are not, admissible evidence against the owners of a vessel.—It is open to either party to proceed by plea and proof, though the proceeding by act on petition is generally more convenient.

This was a cause of damage by collision promoted by the "Orbona" against this vessel.

An act on petition and the answer thereto having been given in on behalf of the respective parties, objection was taken to the answer that it pleaded declarations and admissions of the master, the mate, and the pilot of the "Orbona," which could not be received as evidence against her owners.

Dr. Addams and Dr. Twiss appeared in objection to the answer; Dr. Bayford and Dr. Deane contrà.

*Dr. Lushington.* The first point for my consideration is, by what principle I ought to be governed in my decision respecting the present objection. This is a cause of damage; the proceeding is not by plea and proof, but by act on petition; and as it is in the power of either party to proceed, or to compel the proceedings, by plea and proof, it must be taken for granted that both parties acquiesced in the course which has been adopted; and they must, therefore, take any consequences which necessarily follow.

Proceeding by act on petition is always esteemed a very convenient mode in those cases which generally come under the determination of the Court, inasmuch as it affords greater facility for the production of the witnesses whose evidence is required.

An objection has now been taken against a part of the answer to the original act on petition. Though this is certainly not very common, and ordinarily speaking the

---

so large that the salvors in the exercise of a sound discretion could not do otherwise than accept it. Here I think the tender is sufficient, but is not so much as to lead me to blame the salvors for not accepting it. I therefore pronounce for the tender, but without costs."

In the case of *The "Albatross"* (Jan. 25, 1853), salvors had made an agreement for 60l., which the owners actually paid, but took it back again because they were not satisfied with the terms of the receipt, and wanted a clause inserted therein to the effect that the 60l. included the service of a tug, whose assistance the salvors had taken. The Court said it would have condemned the owners in the costs of the suit, if it had not appeared that, immediately after the service, the salvors had refused to accept the 60l. unless a further sum was paid for the services of the tug, in which they were wrong. The Court decreed the 60l. to be paid, and condemned the owners in half costs.

In the case of *The "Chancellor"* (April 4, 1853), the Court upheld the tender of six guineas for towage service as under an agreement, and condemned the salvors generally in costs, but condemned the owners in all the costs incurred by their charges of bribery and perjury, and by their insinuations against the salvors, that they had maliciously broken the hawser by which the vessel was being towed.

(*b*) The rule as to costs of appraisement is, that the salvors are entitled thereto when the value stated by the owners is wholly below the real value, and not otherwise. In *The "Commodore"* (Feb. 15, 1853), the owners stated the value to be 865l.; the salvors took out a commission of appraisement, upon which the value proved to be about 880l. The Court condemned the salvors in the costs of the appraisement, and said, "I think without any reason whatever a commission of appraisement is taken out, which ought never to be done except on good grounds, namely, that the value stated by the owners is wholly below the real value. It is not enough to say that a few pounds more are obtained by the appraisement. It is obvious that the decision never can turn on a sum of 10l. or 20l. where the value admitted is 865l." And in the case of *The "Felix"* (April 4, 1853), the Court condemned the salvors not only in the costs of the appraisement, but all the costs that related to the value, expressing an opinion that the proceedings which had been adopted at Hull for obtaining the value of the ship and cargo were most unjustifiable and unheard of.

Court would be desirous of discouraging it, yet there may be cases in which it may be expedient that such objections should be taken; and, according to the circumstances of the case, sustained by the Court.

Now, with respect to the objections taken in the present case, I have to determine, as it appears to me, this question, whether the facts stated in this answer, if proved by the evidence produced in the cause, would be admissible evidence or not. If it be admissible evidence, I must consider whether or not I am at liberty to reject it—the weight to be attributed to it not being the subject for my present deliberation. I take it to be essentially important in all these cases to bear in mind this distinction, whether there are certain facts admissible in evidence, and if there are, what weight is to be attached to them.

**[177]** It is my opinion that whatever may be admissible in evidence the Court has no right to reject; if it would be admissible at the hearing, the Court has no right to say "this will be of no importance." I may have a strong moral conviction that such is the fact, but, as a Judge, I have no right to act upon it. I remember, on former occasions, having to consider this question, not only in this Court but in the Prerogative and Consistory Courts, and I came to the conclusion in my own mind, though I do not say it was universally acknowledged and adopted by all who have occupied this chair, that it was not competent to a Judge to exclude that which was admissible, and to say, "I will not allow it to be pleaded because it is not important." In my opinion no Judge has a right to make that statement; but he has a right at the final hearing to attribute that weight to it which he thinks should be attached to it. Such a course would be dangerous, because, in the first place, it would be considering what weight was to be given to a fact taken specifically; and, secondly, because I consider it to be contrary to the opinion of other Courts. For I apprehend it to be settled by the House of Lords that, if a Judge has taken upon himself to reject admissible evidence, however unimportant, there must be a new trial. I consider that an authority of great weight; and, though it may not be strictly binding on this Court, yet the principle ought to be followed.

Now, with respect to the declarations pleaded in this answer, they may be classed under two heads: the declarations made by the master, either immediately after the transaction or in subsequent conversations; and the declarations of other persons, whether of the second mate, of the pilot, or of one of the crew of the ship, the owners of which are proceeding in the cause. After careful consideration, on a former occasion, I came to the conclusion I was bound to admit the evidence of the declarations of the master, because he was invested with authority by the owners, and, therefore, his declarations would be evidence against them.(*a*) I am not prepared to think, as at present advised, that such conclusion was erroneous.

With respect to the sailors and other persons on board, I come to a different conclusion. I am not inclined to consider them agents in the proper sense of the word, so as to bring them within the principle that the declarations of an agent are evidence against his principal.

I have, therefore, to see by whom the declarations objected to were made, and at what period.

With respect to the first, it is alleged "that when the captain **[178]** of the 'Orbona' and the captain of the 'Actæon' were taking coffee together, shortly after the collision, the captain of the 'Orbona,' referring to the said collision, said it was a bad job, but that it could not be helped, as he was too close to the 'Actæon' before he could see her; or to that effect."

Here I stop: this is a declaration made by the master of the vessel "Orbona"; and, according to the principle I have traced out, I apprehend, unless there be something peculiar attaching to it, it is admissible, whatever may be its value.

Now, the objection taken to it was, that this man was not on the deck at the time of the collision, consequently it would be nothing that the declaration emanated from hearsay, and it was communicated to him. I am of opinion that I cannot take into consideration the fact that he was not on deck; and I cannot look into the facts pleaded in the proceedings in order to understand the peculiar weight attached to them. I am not prepared to say it would not be evidence if he only knew it from hearsay; it is the declaration of an agent, and I do not know any principle of law by

(*a*) *The "Manchester,"* 1 W. Rob. 62.

which a declaration, because it might by possibility have been communicated by another party, is, therefore, prevented from being admissible evidence. I think, according to the principle I have stated, I am bound to admit it; the weight to be attached to it is a totally different consideration. We must ever bear in mind the distinction between the admissibility of evidence and its weight.

It has been said that the evidence, if inadmissible, will make an impression on the minds of the Trinity Masters; and, if it is inadmissible, it ought not to be there. The course I adopt is this, to tell the Trinity Masters, when they are considering the advice which is to be given to the Court, that if evidence is inadmissible it must be left out of the case; and, if I saw an instance in which, notwithstanding what was said by the Court, the inadmissible evidence had any operation on their minds, and they advised me on that evidence, I should not adopt their advice, but proceed on that only which was clear evidence. I know from experience how little weight these declarations have when the cause is heard, but, on principle, I cannot reject them.

I must now come to the second declaration: "That the said William Benson thereupon asked the second mate why he did not put his helm to starboard." This appears to stand in a different predicament; this is a declaration coming from one of the seamen. I mean to adhere to the rule I have laid down, that the declarations of seamen shall not be taken. If I did not adhere to it I should have them pleaded in all these cases months and weeks after the accident took place; that would increase the expense, and not facilitate justice to the parties.

**[179]** Dr. Bayford. This ship was in charge of the second mate.

The Court. That did not escape me. I do not mean to take the evidence because the chief officer or the second mate was in charge; if I did, I should extend the principle unduly. The principle is, that the master must be the agent of the owners.(*a*) But it has been ingeniously argued by the learned counsel that it might be evidence to discredit the mate, if he makes an affidavit in opposition to it. That is perfectly true; it would be evidence to that effect if it were legitimately imported into the case; but I take it to be an inevitable consequence that where parties proceed on an act on petition they agree to forego the advantage of plea and proof; because, if not, and I were to allow this argument to prevail, they would put in the declarations of the master, and mate, and all the seamen; and, when it should be objected to as not admissible evidence, it would be said, we do not know what evidence may come from the mate and seamen, and, therefore, though it is not direct evidence, it may have the effect of discrediting some witnesses of whom I know nothing. It would lengthen our proceedings, and enhance the expense if I were to allow the statement to be received on that ground, and that ground only. I apprehend the party, in acceding to proceed by act on petition, has precluded himself from introducing it. Therefore that must be expunged.

With regard to the other declarations I need not make any observations. It is true they are conversations at a distant period, and they may have little effect on the case, but they fall within the principle of law which I have already stated, and I am not at liberty, however much I may be of opinion that they are of no value, to reject them. I must follow the principles of law, and admit what is admissible, and reject what is not.

Proctors for the "Orbona," F. Clarkson; for the "Actæon," Jennings.

THE "COSMOPOLITAN." The High Court of Admiralty, Dec. 5, 1853.

This was a cause of damage by plea and proof, brought by the "Princess Royal." A libel was given in on her behalf, pleading, inter alia, to the effect, "that half an hour previous to the collision in question the 'Cosmopolitan' had run foul of a barge opposite Barking Creek, and that, on being threatened with legal proceedings, her owners had paid the damage."

Objection being taken to the article the Court directed it to be struck out.

**[180]** THE "HARRIET." The High Court of Admiralty, Dec. 5, 1853.—A schooner, considerably damaged, her master being also confined to his bed, ill, was towed by a brig for fifteen or sixteen days, a distance of nearly 1000 miles. The property salved being about 3800l., the Court awarded 800l.

(*a*) Declarations of the pilot in charge rejected in *The "Lord Seaton,"* 9 Jur. 603.

Salvage suit. On the 3rd of May, 1853, the brig, "Sheraton Grange," in her voyage from Bahia to Falmouth, fell in with the schooner "Harriet," which, in her homeward voyage, had met with tempestuous weather, and sustained considerable damage, took her in tow for fourteen or fifteen days, and conducted her in safety to Plymouth, a distance, it was said, of about 1000 miles. During the time the master of the schooner was confined to his bed by illness.

Dr. Addams and Dr. Twiss appeared for the salvors; Dr. Haggard and Dr. Platt for the owners.

*Dr. Lushington.* I am of opinion that a very valuable service has been rendered to the ship and cargo; that she was in great distress, both in consequence of the tempestuous weather, which had dismasted her, and of the illness of her master. The vessel was taken in tow, and towed for fifteen or sixteen days; besides which the "Sheraton Grange" had been in attendance upon her three or four days more. I can hardly conceive that more essential service could be rendered by one vessel to another. I think the owners of the "Harriet" are indebted to the energy of the master of the "Sheraton Grange" for having performed this service.

The only question is, looking at the value of the ship and cargo, 3800l., what is an adequate reward. I do not rely upon the affidavit made in the case as to all sorts of contingent profits and losses, but I give what I consider a fair and just remuneration, namely, the sum of 800l.

Proctors for the salvors, Addams; for the "Harriet," F. Clarkson.

THE "EARL GREY." The High Court of Admiralty, Dec. 5, 1853.—Proctors are not justified in entering actions and requiring bail to an amount quite disproportioned to the service.

This was a salvage suit, in which, upon a value of 13,100l., the Court allotted the sum of 100l., and made the following remarks upon entering actions, and taking bail in too large an amount:—

Dr. Lushington said: The Court is desirous of entertaining a hope that the proctor who conducted this case on behalf of the salvors must have been greatly misled by his party in the course of these proceedings; for I find there is first an action entered in the sum of 2000l. against the ship and freight, **[181]** and bail to answer it was given to that amount. Another action was then entered against the cargo in the sum of 2000l.

Now, it does appear to me that it is exceedingly unjustifiable that, in a suit of this description, actions should be entered at such enormous sums, and that such large bail should be required; because, though it may happen in this individual case, and in many others, that the bail is given with great facility, yet it may arise in other cases, and especially where foreigners are concerned, that the demand for such bail is attended with great inconvenience, and often with great expense to those who give it. I think the Court is bound to mark its disapprobation of proceedings so recklessly conducted.

THE "JAN HENDRIK." The High Court of Admiralty, Dec. 7, 1853.—A Dutch ship, valued with her cargo at 13,400l., having struck on the Goodwin Sands, but got off into deep water with the loss of her rudder and other damage, was taken by two luggers to the North Foreland, where steamers were engaged to tow her to Sheerness; fourteen of the luggers' crews remaining on board to pump her. The Court awarded 400l. besides the hire of the steamers.

This was a cause of salvage, promoted by the owners and crews of two luggers, to obtain compensation for services rendered to the Dutch ship "Jan Hendrik," in the month of June, 1853.

She was on a voyage from the Island of Java to Amsterdam, laden with a cargo of coffee, sugar, rattans, &c., when she got upon the Goodwin Sands on the 28th June. She suffered considerable damage; and then came off into deep water. The two luggers, "Stornaway" and "England's Glory," came to her assistance, and brought her in safety to the North Foreland, where they engaged two steamers to tow her to Sheerness. The value of the ship and cargo was about 13,400l.

Dr. Addams and Dr. Twiss appeared for the salvors; Dr. Haggard and Dr. Robinson, for the owners.

*Dr. Lushington.* If the defence of the owners was to be received, as to an alleged

agreement, which is said to have been made, and which has been partly brought under the notice of the Court, in an act on petition, but which has been more particularly introduced in evidence, it would be no defence at all. I thought the principle was so well established, and had been so regularly acted upon from the time of my predecessors, that I should not at this day have heard an argument as to a professed agreement, which agreement was not carried into effect between the parties. The principle has always been this: if there has been an agreement made between the salvors and the owners, whatever may be the consequence, whether the service is attended with great risk and danger or not, both parties must **[182]** be bound to abide by it. But if an agreement is not made, or if, after it is made, it is repudiated by the owners, then it is always considered as if no agreement at all had been entered into, and as if the proposition made by the salvors, or which originated with the owners, had never been proposed at all. It has never been considered, in this Court, that a proposition so made was any guide for its judgment, because it is one thing to take a lump sum when the labour and the risk are uncertain, and another thing when such proposition has been rejected, to argue that it ought to have an effect on the judgment of the Court.

Now, what are the circumstances of this case? for it is by the circumstances now given in evidence that my judgment and discretion must be governed in the amount of remuneration. Here is a large vessel, of the burthen of 614 tons, laden with a valuable cargo of sugar, and the whole of the property alleged to have been salved amounts altogether to 13,000l. On the morning of the 28th of June—the precise moment does not appear to be of any importance, and if it were, it is not easy to fix it—this vessel, with the wind from the W.S.W., in consequence, as it is stated, of an unusually powerful current, the weather being, according to the representation of the owners, hazy and misty—for both these statements are made—comes to the ground on the Goodwin Sands. According to the same representation, she at times strikes heavily; but the extent of damage which was done it was utterly impossible for those on board to know; but after having so struck for the period of an hour, according to her own representation also, she comes off.

Now, what was her state and condition after she came off, and when the "Stornaway" came to her assistance? It is said that there was no signal of distress, and that is perfectly true; but whether, looking at the representation made as to the haziness and mistiness of the weather, that arose from its being supposed that it would be impossible that a signal could be seen or not, in point of fact, no signal was made. But, now, what was her condition? According to her statement, the rudder was gone, part of the sails were gone, one of the boats was gone, one appears to have been damaged, and two of the crew were gone. It is alleged that at this time she might have protected herself, and secured her own safety; that by the aid of the sails the ship could have been steered. Now, I take it to be true that in fine weather, with the wind behind a vessel, it is possible to steer her for a certain given length of time with the aid and assistance of her sails; but I take it not to be true that a vessel could be moved in one direction or another, or come **[183]** near the wind, when she is in that state; and I take it to be absolutely impossible that this vessel could have gone to Sheerness, or to any place of safety, north or south, by her own exertions alone; and I think so for an obvious reason, which I am presently about to state.

The services of a person of the name of Axon, who comes with the "Stornaway" about 4 o'clock in the morning, are accepted. Whatever might be his opinion as to the probability of saving the vessel, I take it that he was not capable of forming any distinct or clear opinion at all, because he must have been, like all the rest, in perfect ignorance of the damage done to her bottom. He comes up, and the master of the vessel, as it is admitted on all hands, puts him in charge to carry her to a port of safety. Before he has it in his power to do much, there comes up the other lugger, named the "England's Glory," and they contrive, as I think, with no small difficulty, to conduct this vessel to the North Foreland, and there they fall in with two steamers, of which I am about to speak. Whether it occupied three or four, or five or six hours, appears to me of very little importance; but I consider it to be a matter of the greatest importance that the vessel was so conducted to the place to which she was brought—a place where there was a chance of meeting with the effectual assistance rendered by a steam-vessel. Then there are three steam-vessels

make their appearance. It happens to be midsummer, undoubtedly a favourable period of the year to obtain assistance of that description. It is stated, I doubt not with perfect truth, that the "Copeland" and the "Britannia" accepted an offer of 35l. each for the purpose of conducting her to Sheerness, because they were afraid of the competition of another; and I take it to be, from my experience, equally true that if there had been only one steam-vessel, they would have found it difficult to make a bargain with the steamer at all. The probable consequence was, that no bargain would have been received, and the result would have been a suit in the Admiralty Court. Such is almost the universal course with which these matters have been conducted with reference to steamers rendering aid to vessels in distress.

However, by the aid of the steam-tugs she is carried to Sheerness, and when she arrives, having had fourteen of the crews of the two luggers on board assisting in pumping, and the hawsers having broken twice, she had nine feet of water in her. I should like to form a conjecture as to how many feet there would have been in her, if neither the "Stornaway" nor the "England's Glory" had come up, and she had gone into **[184]** the North Sea with two of her own crew deficient. I take it to be perfectly clear that she would have been in most imminent danger.

The service has been performed, and now the consideration is, what ought the Court to allow? It is admitted, as I have said, that the charge was given up to Axon, and to my astonishment it has been urged that because he made an agreement with the two steam-tugs, there must have been an agreement with him. It is every day's practice—perhaps not a wise one—that when salvors are put in charge of a vessel, or when they assert it, they are accustomed to pay auxiliary aid; and they do it for the very purpose of alleging that they had the charge and control of the whole matter. But here it is admitted that Axon had the control, and it was a part of his duty to make the best bargain he could for the owners. The Court has to consider what ought to be paid by the owners, or, in 99 cases out of 100, by the underwriters. The value of the property in the state in which it was found was 13,400l. I am of opinion that it is a very meritorious service, because of the danger to the ship and cargo. There was no risk of life to the salvors, but there was the exercise of skill, for which the Deal boatmen are so well known and celebrated. The service did not last many hours. I am of opinion that the underwriters ought to be thankful to pay the sum I am now about to allot, which is 400l., and they must also pay for the hire of the steamers.

Proctors for the salvors, Rothery; for the owners, Toller.

THE "NO." The High Court of Admiralty, Dec. 7, 1853.—The Court will not receive as evidence the affidavits of persons professing to be skilled in nautical affairs, as to their opinion upon any case.

Salvage suit. In the course of the judgment the Court (Dr. Lushington) thus remarked upon one of the affidavits: "The affidavit marked A. is not evidence in this case, and I am rather surprised to see it introduced. It is made by two persons, who state themselves to be well skilled in nautical matters, and they are pleased to condescend to favour the Court with their opinion of the facilities and difficulties of the case. It has been an universal rule not to receive these affidavits; for were they to be received, the inevitable consequence would be this: the Court would be inundated with the opinions of nautical men on the one side and opposite opinions on the other, to the great expense of suitors and great delay in the hearing of the cause, and with no benefit whatever. Therefore I disclaim paying any attention whatever to that affidavit."

**[185]** THE "NORDEN." The High Court of Admiralty, Dec. 13, 1853.—When smacksmen are employed in a salvage service, the owners of the smacks have a right to sue for remuneration for the detention, even when the service is not dangerous.

Salvage suit. The vessel got upon the Mouse Sand, from which position she was extricated by means of a steamer, four fishing-smacks, and two watermen, who instituted proceedings.

*Dr. Lushington*, in the course of the judgment of the Court, observed: "I entirely agree with the argument that the principal salvor is the steamer, but I disagree with the argument that the owners of the smacks had no right to sue; because I take it

that if you employ the masters of the smacks and part of the crews to perform salvage services, of necessity you take into your employ the vessels which brought them, and which remain to carry them back. I admit there is a distinction, when you employ a smack in a service which is dangerous to herself, and when the probability is that she may be stove in ; but as far as relates to her detention, and the right of the owner to be paid for the loss of her time, it is the same thing. The services of the smacksmen were short in their duration, but without them it is impossible to predicate that the vessel could have been got off the Sand."

THE "TOIVO." Motion. The High Court of Admiralty, Dec. 14, 1853.—A bottomry bond having been given, it is allowable to pay that, and to include the amount in a fresh bond during the same voyage, but not in a subsequent one.

While this vessel was lying at Malta, in the month of February, 1853, her master borrowed 900l., for which he gave a bottomry bond. In August she was at Uleaborg, in the prosecution of her voyage from Limerick to that port, and thence to Hull. While she was at Uleaborg proceedings were instituted for the recovery of the bond, but the then master, who had succeeded the master who gave the bond at Malta, himself requiring money for wages, necessaries, &c., borrowed an additional sum of 226l. 0s. 9d., and gave a new bond for the two sums together, with interest at 6 per cent. ; the holders being at the same time invested with power to insure the vessel and freight on account of the owners, and at their expense.

Dr. Addams, on a previous day, moved the Court to pronounce for the validity of the bond, when the Court desired to give the question some consideration.

*Dr. Lushington.* I have considered this case, and on the assumption of bona fides on the part of those who advanced **[186]** their money. I have had very great anxiety to uphold the bond ; at the same time it is quite obvious that it is my duty not to extend the jurisdiction which is conferred upon me, and not to give to a bond, which is not properly to be considered a bottomry bond, that denomination, or that effect.

On a former occasion I expressed an opinion, to which, upon consideration, I intend to adhere—that if a bottomry bond was given upon the same voyage it would be consistent with the law of bottomry to allow that to be paid, and a fresh bond to be given to the amount ; but I do not think that these Courts have ever gone the length of saying, that where a bottomry bond had been given on a previous voyage that could be done.

There are items, also, in this bond which are not properly the subjects of a bottomry bond, and which tend to shew that the transaction was one of mortgage and not bottomry. I regret to say that, having looked at the case carefully, it is not in my power to accede to the prayer, and to pronounce for the validity of the bond. I have no jurisdiction if it is a mortgage.

Proctor, Coote.

THE "SEA PARK." The High Court of Admiralty, Dec. 14, 1853.—A vessel, with the wind free, meeting another close hauled on the larboard tack, having ported her helm and come into collision : Held, to blame ; the Elder Brethren being of opinion that the captain gave the order heedlessly, and without looking at the position of the other vessel.

The "Hendrika," a barque of 678 tons, bound from London to Port Philip, and the "Sea Park," a vessel of 835 tons, proceeding from Ceylon to London, came into collision off Dungeness, about 12.30 A.M., on the 13th of September, 1853.

The respective cases are stated sufficiently in the judgment.

Dr. Addams and Dr. Twiss appeared for the "Hendrika"; Dr. Haggard and Dr. Bayford for the "Sea Park."

*Dr. Lushington*, addressing the Elder Brethren,(*a*) said—Gentlemen, it appears to me the "Hendrika" was bound from London to Australia ; that on the 13th of September she was in the neighbourhood of Dungeness ; the wind, as she represents, was S. by W.; she was on the larboard tack, close hauled. You, of course, are fully aware what would be her proper course.

The night appears to have been clear, although it is represented to a certain extent as hazy, but vessels could see each other at a reasonable distance. She says that

(*a*) Capt. Farquharson and Capt. Were.

she saw the "Sea Park" ported, and ran into her. I apprehend it is intended, on [187] the part of the "Hendrika," to attribute the blame to the "Sea Park" in one of these two particulars—either that she ought to have kept the course and done nothing; or, if she ported at all, she ought to have done so sooner, so as to have escaped the collision.

The case of the "Sea Park" is, that she was coming home from Ceylon to London, steering E.N.E. towards Dungeness to get a pilot; and she represents that the wind was S. by E., so that there is a difference of two points between the statement on the one side and on the other. I am not aware that that makes any difference. She says she saw the "Hendrika" a mile off; that she carried a light on the port cat-head; the "Hendrika" was seen a point on her lee bow, and that she immediately ported. It was said, by Dr. Bayford, that when the two vessels became visible to each other, they were in one and the same direction, but, I apprehend, that is not strictly correct. The "Sea Park" says, that in consequence of having so ported her helm, her head was brought to the E.S.E.; and then she alleges that the "Hendrika" suddenly starboarded her helm, and brought about the collision.

It has been observed, and I think with good reason, that it is somewhat singular this charge should not have been included in the protest: whether there is any importance in it I must leave to your determination.

The questions we shall have to determine are these: First, whether the "Sea Park" was right in porting her helm at all? Secondly, whether, if it was right, she should not have ported sooner? and whether, if there had been a good look-out, she would not have perceived the "Hendrika" in time to adopt those measures fitting to be adopted in order to avoid the collision, if possible? It is manifest that, if the "Hendrika" starboarded her helm, she was to blame; and you will take into consideration whether there is any evidence to establish the fact. It is sworn to by several persons on board the "Sea Park," and contradicted in positive terms by those on board the "Hendrika."

*Captain Farquharson.*—We are of opinion that the "Sea Park" was totally to blame. The captain, the moment he heard that there was a vessel a-head, without looking whether she was right a-head or on her bow, put the helm hard to port. Had the "Hendrika" starboarded her helm, her sails would have come aback, which does not appear to have been the case. She would have been rather paying off, and going on the other tack, if she had starboarded as soon as the "Sea Park" states [188] she did. Had the "Sea Park" kept her course she would have gone clear. The "Sea Park" was solely to blame.

The Court pronounced against her.

Proctors for the "Hendrika," Rothery; for the "Sea Park," Deacon.

THE "ROSALIE." The High Court of Admiralty, Dec. 20, 1853.—A vessel having taken fire from spontaneous combustion of the cargo, came to anchor, in a calm, about eight miles off Monte Video; at the request of her master, the commander of a Government steam-tug went to her assistance, and towed her to the harbour, at the entrance of which, however, both vessels grounded on a rock. She was got off by other assistance, and was then unladen by the crew of the steam-tug. The service continued about twenty days. Defence set up that, by the heedlessness of the salvors, the vessel grounded and suffered more harm than their services did good—not sustained. On the value of 8800l., the Court awarded 750l.

[S. C. 18 Jur. 337.]

This was a suit for salvage, brought by the commander, officers, and crew of her Majesty's steam-tug "Locust."

The "Rosalie," a barque of 230 tons burthen, left Monte Video bound for Liverpool, on the 20th March, with a cargo of tallow, hides, bones, &c., and was two days afterwards discovered to be on fire, as supposed, from spontaneous combustion. She put back, and on the 25th March came to anchor seven or eight miles from Monte Video. The master immediately made an application to the consul, and from him obtained an introduction to Lieutenant Day, the commander of the "Locust." It appears that Lieutenant Day at first declined proceeding to the barque without a pilot, as he considered the navigation too difficult for him to undertake upon his own responsibility; but he afterwards assented, went to her assistance, and took her in tow with the intention of putting her on shore at the fort of San José, but unfortunately

both vessels grounded on the rocks at the entrance of the harbour. A Brazilian steamer came to their assistance, and after some hours succeeded in getting them off. The crew of the "Locust," consisting of fifty-five men, including the officers, then assisted in extinguishing the fire and in removing the cargo, a service which they represented to be, from the nature of the materials, of the most difficult and repulsive character. They were occupied at various times for about twenty days between the 25th of March and the 30th of April. The value of the property saved was about 8800l., exclusive of some specie which had been removed, and could not be identified.

No tender being made, the action was brought against the owners, who defended it chiefly on the ground that whatever service may have been rendered, the parties proceeding had forfeited their title to remuneration, inasmuch as they had heedlessly drawn the barque upon the rocks, whereby she had sustained damage to the amount of 500l.

Dr. Addams and Dr. Bayford appeared for the salvors; Dr. Haggard and Dr. Twiss for the owners.

**[189]** *Dr. Lushington.*—This is a demand made by Lieutenant Day, on behalf of himself, the officers, and crew of her Majesty's vessel, the "Locust," consisting altogether of fifty-five persons, against this ship, the "Rosalie," for salvage reward for services alleged by him to have been rendered to her. Before I advert to the particular facts and circumstances of this case, I will observe that I do certainly rejoice the ancient law and practice of this Court has not been altered. Whatever may be the merits or demerits in this particular instance, I think that, continuing to allow her Majesty's officers and those under their command to obtain a reward where they do render beneficial services, frequently at great risk and peril, and sometimes where the commander incurs great responsibility, is not merely an act of justice, but most advantageous to the mercantile marine of this country. Say what you will, so long as human motives operate on conduct, unless you give a reward you must take away all incitement to service. It is all very well to talk of the abstract question of fulfilling duty and obeying commands; and I have no doubt that, so long as men can execute the duty and perform the commands entrusted to them, they will do so; but in cases of doubt and difficulty, and where great and extraordinary exertions have to be made, reward according to human exertions is the only great stimulus to their performance.

The parties promoting this suit are Lieutenant Day, and those on board the "Locust." Of course he could make no claim for the service of the steamer himself —she is the property of the Government; and though he would be responsible for any damage which improperly occurred, he would be answerable for nothing else. It is impossible for him to advance any demand at all like that of the owners of steam or other vessels who have risked their property in order to render assistance to others. I cannot take into account the specie that was on board the vessel, and which had been removed.

I will commence my observations first, from the "Locust" going out for the purpose of rendering assistance. It was in consequence of a letter which was produced to Lieutenant Day, coming from the British consul. That letter stated that the "Rosalie" was on fire, and was becalmed. On that representation Lieutenant Day was justified in acting without reference to the other circumstances of the case. This vessel left Monte Video on the 20th March, and when about 250 miles from land, the fire broke out, and every endeavour made to extinguish it failed. Preparations were made to leave the ship in case of absolute necessity. The course of the vessel was changed, and fortunately, the wind became favourable, which enabled her to **[190]** reach the land in a shorter time than she otherwise would have done. Captain May, finding the situation in which the ship was placed, took the wisest step he could adopt, namely, to proceed to Monte Video with the greatest possible expedition, for the purpose of obtaining assistance; that being the readiest means to bring her into a state of safety, to get the fire extinguished, and the cargo, so far as was necessary, unladen. On the afternoon of the 25th March, Lieutenant Day lent a favourable ear to the representation made by Captain May, and in the letter of the consul; he was ready to render assistance, but he felt one difficulty, namely, he did not know the navigation of the river sufficiently to enable him to do so, and he was satisfied there would be great difficulty in obtaining a pilot, because it was a festal

day. He says he was reluctant to go without a pilot, and I believe that for two reasons; first, he states to the admiral that its being a festal day was the reason why he ventured without one; and, secondly, I believe that officers in Her Majesty's service are so afraid of the responsibility imposed upon them, and to which they may be exposed, that they are always anxious to take a pilot whenever they can. However, there was no time to be lost; the exigency was great. We must recollect that, when the ship was on fire, no man could calculate whether it would continue in a smothered state, or whether it would break out, and compel the persons on board to quit for the protection of their lives.

Now commences the first charge against Lieutenant Day. It is sworn by Captain May, that he made an offer of a pilot to be put on board the steamer, to which the answer of Lieutenant Day was, that he was in charge of the barque and he wanted no pilot. This is denied on the part of Lieutenant Day. Am I to believe all that Captain May has sworn? I should be inclined to give him infinitely greater credit, if it had not been for the mode in which he has expressed himself throughout this affidavit. When I find a person swearing as he has done, not contenting himself with the contradiction of the parties, but imputing to others that they have been guilty of the grossest perjury, and using the expression, over and over again, of "pure invention," I must entirely agree with the ancient expression of Lord Stowell, "The very strength of the affidavit renders me less credulous of its contents." I cannot take the ipse dixit of Captain May, that such a proposition was made, nor am I prepared to say, if it had, what would have been the consequence of accepting it, or whether there was blame in refusing it. It appears to me that the proper place for the pilot is, where he is to navigate, and that it was not the **[191]** proper place to go on board the steamer. They then proceed towards the port of Monte Video, and it does not appear to me that the slightest objection was taken by any person on board the "Rosalie" to the course steered by Lieutenant Day. I cannot but think that, if there had been any glaringly wrong course pursued, it would have been natural for those on board the "Rosalie," particularly the pilot, to give some warning; but I do not rely on that circumstance. I now come to the fact that both these vessels got aground; and, first, with respect to the place itself; secondly, the degree of blame, if any, attaching to it; and, thirdly, the consequence. I cannot think it was a place of that safety which it is represented to be by Lieutenant Day and those who were with him; and for this reason: I find Admiral Henderson represents it to be a place of considerable danger, and I am bound to give him credit; first, because he is best acquainted with the locality; and, secondly, because he is disinterested. The barque remains aground for some time—no matter whether it is fourteen or sixteen hours. Does any blame attach to Lieutenant Day on that account? It is represented as having been a heedless act. Heedlessness must mean a want of care—a disregard to the circumstances of the case, so as not to have exercised sufficient caution when he could so have done. Now, I do not attribute to Lieutenant Day that there was anything heedless in his conduct, but I do apprehend that there was on his part a want of adequate knowledge of the entrance to the harbour; and, to a certain extent, he must be pecuniarly responsible for this matter, because it diminishes the success of the service he was performing. Accidentally coming on shore exposed the vessel and cargo to some risk. However good his intentions—however laudable his wishes, he certainly failed in the performance of that service which might have been performed with greater celerity had he been possessed of greater knowledge, or had he resorted to other assistance.

I next look to see how the vessel was rescued from her situation, and here I think neither account is consistent with the truth. Indeed, in nearly every case, it almost uniformly happens that the truth lies between the two statements. On the one hand, it is said that this was done exclusively by the aid received from a Brazilian steamer and from French and merchant vessels, without any reference to the "Locust"; on the other hand, it was said that it was done under the direction of Lieutenant Day; and he, in fact, was not only the principal actor, but he was the principal director of all that occurred. The truth lies between the two. I think some assistance was rendered by Lieutenant Day, but I think the greater part of the **[192]** exertions made to get her off are to be attributed to other assistance. However, the vessel is eventually got off, and conducted into the harbour, where her cargo is unladen.

And now has arisen, by the ingenuity of counsel, what I certainly did not expect to find on the present occasion—a new point of law. It is said that this was not continued assistance, but assistance rendered on shore, over which the Admiralty Court is not to exercise any control in the nature of salvage service. But the first question which I should naturally put to myself is—if this be so, if I am to acknowledge myself bound hand and foot, and totally helpless to do justice on the present occasion, who is to do it?

If I were in difficulty I should adopt the Common Law principle, and not throw off the jurisdiction, unless there was another to take cognizance of the case. But I am in no difficulty. I am of opinion that it was a continuous service, and, moreover, a salvage service. I think it was continuous for this reason: it was not broken off upon the vessel being aground for a certain period, because Lieut. Day still continued doing something; the vessel was in his charge, and he was responsible for every act done. I think it would be injurious to the course of justice, in these cases, if I were ever astute in severing services at sea and on land. When a vessel has been driven on shore, and part of the services were performed when the waves beat over her, and part when she was lying dry, it has been said that the latter was a land service, and the Court of Admiralty had nothing to do with it; but Lord Stowell would not submit to it: he said it was part of a whole.

With regard to the nature of the service performed, and the extinguishing of the fire, so far as the use of the pumps belonging to the "Locust," and instruments, is concerned, Lieutenant Day can demand nothing; but, so far as the labour of himself and his men extends, he is fully entitled to be compensated according to the degree of labour and of skill, if skill was used.

I next come to the unlading of the cargo; and here I think that very great hardships were endured by the persons who composed the crew of the "Locust." I think they did persevere, at the risk of their health and almost of their lives, to perform a service which—though I may be told that persons might have been hired at Monte Video to perform—I believe never would have been done with the expedition of British sailors. I think I am bound in law, as well as in justice, to reward them for the sufferings they underwent, and the damage they sustained in the loss of their clothes.

In estimating the salvage I am bound to bear in mind that, **[193]** when the barque was first taken in tow, she was in great peril. With regard to the extent of damage which occurred in consequence of the vessel taking the ground, I am of opinion that it is impossible, with the materials before me, to ascertain it with anything like accuracy. I think she touched the ground on the middle, and that a certain quantity of the keel received injury. I take that into consideration in the amount of salvage to be awarded. Considering what will be a just and proper reward according to all the circumstances, and knowing that quantum is a matter respecting which people will entertain different opinions, I think I shall not give too much when I allot the sum of 750l.

Proctors for the salvors, Rothery; for the owners, F. Clarkson, who asserted an appeal.

WEATHERLEY *against* WEATHERLEY. Consistory Court of London, March 9, 1854. —In a suit for divorce, on the ground of adultery, it is allowable to plead undue familiarity and illicit intercourse antecedent to marriage, when the adultery is charged to have been committed, with the same person as the ante-nuptial incontinence.

[S. C. 18 Jur. 882.]

On admission of the libel.

This was a suit for divorce by reason of adultery brought by the wife against the husband, a pauper.

The marriage took place on the 6th of March, 1853.

The libel on behalf of the wife pleaded in the

4th article. That some time in or about October, 1852, Charles Weatherley, the husband, took into his service as shopwoman, to assist him in his business of confectioner, a female named Elizabeth Eastey, with whom he soon afterwards commenced and thenceforward up to the period of the date of the libel, continued to carry on an illicit intercourse; that during such period great personal familiarities were frequently

observed to pass between them in his said house; that he was in the constant habit of kissing her, of placing his arms around her neck and waist, and of causing or allowing her to sit upon his knee, and take indecent liberties with his person; that they were in the habit, during the day, of passing much time together upstairs in her bedroom, and of sitting together to a late hour at night; and that at such times they had the repeated carnal use and knowledge of each other's bodies.

5th article. That upon an occasion happening towards the end of January, 1853, the said E. E., at a late hour of the night, ran upstairs into her bedroom, in which H. M. (a female in the service of the said C. W.) was then in bed, and was im-**[194]**-mediately followed by C. W., who placed his arms around her neck or waist; whereupon she remarked, that if he would not leave the room she should undress and go to bed; to which C. W. replied, "It would not be the first time I have seen you undressed;" and then left the room.

6th article. That on a day early in February, 1853, soon after the said H. M. had quitted the said bedroom in the morning, C. W. proceeded there, and lay for some time in one and the same bed with the said E. E., who was lying undressed therein, and had the carnal use and knowledge of her body.

7th article. That upon a Tuesday afternoon, about three weeks before the marriage of the parties in the cause, the said C. W., having directed the said H. M., who was at the time engaged in washing, to take charge of the shop, proceeded up stairs, in company with E. E., to her bedroom, and then and there lay with her for a considerable time on the bed, and had, &c.

8th article. That very shortly after the marriage of the parties in this cause C. W. evinced great coldness and indifference towards his wife; and, on several occasions during the second week, while they were in lodgings at Peckham, omitted to return to her at night; and passed such nights at his own house, in Bolingbroke Row, Walworth Road, where the said E. E. was still residing.

In other articles various acts of adultery were charged. The admission of the libel was opposed.

Dr. Dasent (counsel assigned) appeared in opposition to the libel; Dr. R. Phillimore in support of it.

March 9.—*Dr. Lushington.* The circumstances of this case are these: This is a suit for divorce, brought by the wife against the husband: the marriage took place in March, 1853. A libel is given in on behalf of the wife; in which she pleads a criminal connection with a person named Elizabeth Eastey, both before and after the marriage.

[The Court having stated the substance of the 4th, 5th, 6th, 7th, and 8th articles, then proceeded:—]

The objection has been, very properly, taken to the pleading incontinence previous to the marriage. No doubt, as a general rule, it is not competent to the husband or the wife to plead illicit intercourse prior to the marriage; because the doctrine universally maintained is, that marriage operates as an oblivion of all that has passed, and as oblivion of all that can possibly have occurred.

This is the rule; and it is set forth in a case quoted at the **[195]** bar, *Perrin* v. *Perrin*,(*a*) and enforced there with considerable strictness. I had occasion to refer to it, also, in the case of *Lord and Lady Graves* (3 Curt. 238).

But the question which I have now to decide is, whether the special facts of this case do not make it an exception to the rule. The first fact to be noticed is, that the woman, with whom connection is pleaded before marriage, is continued in the service of the husband after marriage. The next fact is, that the adultery is charged to have taken place with this very same person. It appears to me that this circumstance does

(*a*) 1 Add. 3, in which case Sir John Nicholl seems to recognise the distinction made in the present case. He says, "The objections to the admission of this libel are confined to the 4th article, which pleads the incontinence of the wife with two persons, neither of whom is an alleged adulterer in the cause, prior to the celebration of the marriage." And he further suggests that "if the wife should set up a case of desertion by the husband without any provocation on her part, her ante-nuptial misconduct might be fairly pleaded in his justification; and that possibly it might be fairly pleaded too by the husband, responsively to the wife's libel in a suit for restitution of conjugal rights."

form a necessary exception to the rule, and one which I am bound to engraft upon it, and for a very obvious reason; because circumstances, which may be proved subsequently to the marriage, will have a very different complexion, whether they are taken standing alone, without reference to preceding circumstances, or whether they are taken in conjunction with antecedent criminal connection itself. If I were to confine the wife in this case to pleading adultery simply after the marriage, it might appear in the evidence, that this was a woman in the employment of the husband, the party proceeded against, and on frequent occasions he necessarily would have to meet her in various parts of the house in discharge of her usual vocation; and many circumstances might occur which, if no explanation was given of them, might be construed to be circumstances imputing no guilt at all; but which, if taken in connection with former intimacy, and all that occurred on that occasion, would necessarily bear another and a very different construction.

It would follow, therefore, that acts, themselves of a doubtful character, might, according to other facts and other circumstances, bear a different construction and a different interpretation, if there was a connection before the marriage. The very fact, for instance, of the husband continuing this woman in his service, would put a very different complexion on the case from what it would if she had simply lived with him at their marriage, and after the marriage had continued to be in his service. It appears to me, therefore, that it would be contrary to all **[196]** proceedings of justice to exclude the wife from the benefit of the exception. But there is a case where this occurred which occupied the attention of the Court for a considerable time, and in which, I think, with great wisdom, the objection was not taken. I allude to the case of *Simmons* v. *Simmons:* it was expressly pleaded there, in the additional articles, that Mr. Simmons had had criminal connection with Lucy Peacock before the marriage; that he had had a child by her; that after the marriage he had corresponded with her father, and supplied him with money to pay for the child, and also visited her at her father's house, and met her by appointment at other places; and then the article went on to allege adultery.

Dr. Addams. I was counsel in that case, and I did not take the objection.

*Dr. Lushington.* Certainly not; but what would have been the position if the Court had excluded it? It was simply a question of whether he committed adultery with Lucy Peacock, and we should have had nothing to decide the case, but that this man saw this woman at her mother's house on certain occasions, and whether there was the least chance of a criminal communication between them would have been left in the dark. It appears to me that where the adultery is pleaded to have taken place with the same person with whom there was a criminal connection antecedently, and where marriage took place subsequently, it forms an exception to the general rule; and I shall, therefore, admit the libel as it stands.

Proctors for the wife, Currey; for the husband (assigned by the Court), Loveday.

CHESNUTT *against* CHESNUTT. Consistory Court of London, Jan. 25, 1854.—Various acts, not singly or by themselves amounting to acts of cruelty, to justify a sentence of divorce, taken together, and considered with reference to the proved habits of intoxication of the husband, held sufficient to justify such sentence. The wilful communication of a cutaneous disorder held to be an act of legal cruelty, though not by itself sufficient to found a sentence of separation.

[Referred to, *Browning* v. *Browning*, [1911] P. 166.]

This was a suit for restitution of conjugal rights, brought by the Rev. Gilbert Chesnutt against his wife, Elizabeth Chesnutt. She pleaded cruelty and adultery, in bar. The case was argued in 1849, but the Court purposely delayed giving judgment in the hope that it might never be called upon to do so. Both parties appeared in formâ pauperis, but Mrs. Chesnutt, as it was understood, having lately come into the possession of 5000l. under the will of her father, the Court was called upon to deliver judgment.

*Dr. Lushington.* This is a suit for the restitution of conjugal rights, brought by the Rev. Gilbert Chesnutt against his **[197]** wife, Elizabeth Chesnutt. The libel is in the usual form, and alleges a marriage between the parties on the 4th December, 1832. It appears from the allegation of faculties, and the answers thereto, that Mr. Chesnutt received with his wife a considerable fortune, but from causes which are not stated, and into which it is not necessary to inquire, he took the benefit of the Insolvent Act

in November, 1847. The parties separated on the 25th March, 1848, and since that time Mrs. Chesnutt has been maintained by her father.

A very long period of time has elapsed since the case was heard, and I certainly entertained hopes that the Court might not be called upon to deliver any judgment. Whatever motives might have led to the institution of the suit, I certainly did think that there were circumstances developed in its progress, which might induce both parties to avoid further publicity. What those circumstances are, will appear presently. However, I have lately been called upon to deliver judgment, and it, of course, becomes my duty to do so, and I have taken this the first opportunity which presented itself since the wish of one of the parties was intimated to me.

Mrs. Chesnutt refuses to return to cohabitation, and, as a bar to the prayer of her husband, has given in an allegation charging him with cruelty and adultery. There has been no responsive plea; the case, therefore, rests upon the evidence produced by Mrs. Chesnutt only, and I must say that the allegation ought not to have been admitted in the shape in which it now appears, and that evidence has been taken upon it which cannot be received.

At the time of the marriage in 1832, Mr. Chesnutt was a clergyman of the Church of England, and was curate of St Peter's Church, Walworth. Shortly afterwards he became minister of Trinity Church, Newington, and for fourteen years he so remained, residing at one or two places in the neighbourhood. There was issue of the marriage five or six children; four living at the commencement of this suit, three sons and one daughter.

The evidence affords very little, indeed I may say no information as to the terms on which these parties lived till shortly before the separation. No relations, who associated with them, are produced, no friends, and only one servant. The Court is deprived, in this case, of the advantage it sometimes possesses of tracing the course of connubial cohabitation, and so forming a more accurate judgment upon the evidence as to particular facts. The materials before me are both scanty **[198]** and unsatisfactory; I must, however, form the best conclusion in my power from an examination of the allegation and evidence.

The 3rd article of the allegation pleads that, from five years after the marriage, Mr. Chesnutt treated his wife with harshness and cruelty, and particularly during the last two or three years, whilst resident in Church Terrace, Waterloo Road; that he used obscene and blasphemous language, was constantly intoxicated, and thereby occasioned his wife great mental suffering and bodily ill health.

Here I must pause and express my doubt whether, if this article should be proved as laid, the case so stated, according to the legal interpretation of it, would amount to cruelty, upon proof of which the Court could decree a separation. Here is no charge either of bodily violence inflicted, or of threats of personal ill treatment. However disgusting the use of the language charged, if proved, may be—however degrading habits of intoxication—however annoying to a wife, especially the wife of a gentleman and a clergyman,—these facts, standing alone, do not constitute legal cruelty. If it be said that the consequences to the wife are mental suffering and bodily ill health, I do not think that the case would be carried further. The same might be said of other vices; of gaming for instance; of gross extravagance, to the ruin of a wife and family;—all these might occasion great mental suffering, and, consequent thereon, bodily ill health to the wife; but they do not constitute legal cruelty. Such consequences, to be the subject of legal redress, must emanate from bodily ill treatment, or threats of the same. Such I apprehend to be the clear line of distinction drawn by all the authorities.

This, however, it may be said, is merely an introductory article, and that may be true or partly so, but it differs from the usual article of this description, and it behoves me to notice it, not only on account of this cause, but lest it should be drawn into a precedent; for I should perhaps here observe, that the admission of this allegation was not opposed.

The next consideration is the proof, and I must say that it wholly fails, fails as to any important fact (for I lay out of consideration, for the present, the evidence of the children). Mr Saltiel, Mrs. Wright, and Mr Toussiant have been examined to prove this article. Mr. Wright deposes to intoxication, and negatives obscene language; so does Mr. Toussiant; on this article Mr. Saltiel proves nothing.

The 4th article is partly a repetition of the 3rd, but in the **[199]** concluding part, after

alleging intoxication and late hours, it charges acts of violence, at times not specified. There is ample evidence to establish the averment that Mr. C. constantly indulged in habits of gross intoxication, especially the evidence of Mr. Darvill, a medical gentleman, who attended the family for several years, and up to the year 1845; but there is no evidence at all as to any personal violence being inflicted or threatened.

Mr. Darvill's evidence, however, is important; he describes the consequences produced upon Mrs. C. by the differences between her and her husband. He describes the excitement, occasioned by the differences between Mr. and Mrs. C., to be an excitement almost bordering on insanity; but he does not know what those differences were, nor what was the treatment Mrs. C. experienced; besides, I must remember what the natural temperament of Mrs. C. was, as proved by her brother. He represents her, on the 5th interrogatory, to be a person of a very excitable disposition; so much so, that any trivial annoyance will put her, sometimes, in a very violent rage.

I can never deem this evidence proof of cruelty. First, because mental anxiety, excitement, bodily illness, though occasioned to the wife by the conduct of the husband, does not constitute cruelty, except such conduct was accompanied with violence, or threats of violence; secondly, because there is not only no evidence here to charge Mr. C. with cruelty, but not enough to say who was to blame.

Upon the fifth article, there is really no evidence whatever, save that of the children. Mr. Saltiel, Mr. Toussiant, and Ann Wright were examined on it, but they wholly fail to prove the contents of that article, viz. cursing and swearing before Mrs. C. and ridiculing religion. The evidence of the children I reserve.

The 6th article pleads that Mr. C. uttered threats in 1846, 1847, and 1848, that he would ruin his wife, and that on several occasions such threats were accompanied with blows. Mr. Saltiel is the first witness, but he can hardly be said to depose upon this article at all. The time he speaks to is after the separation, and the declarations in the absence of the wife; he says Mr. C. threatened that he would be the ruin of his wife and children, but he does not recollect his threatening any personal violence. Mr. Toussiant speaks to a similar declaration at a similar time.

I need not say how entirely this evidence falls short of the article, or of proof of a substantive act of cruelty. I do not [200] say that it is wholly without weight, it may have some operation in connection with other facts.

The 7th article charges an act of violence in November, 1847. Of this there is no evidence save from the children.

The 8th article charges that, in October, 1847, Mr. Chesnutt took lodgings for himself and two sons, at a house of ill fame in Allen Street, Hercules Buildings, and remained for three months. There is no averment that he resorted thither for adulterous purposes. In considering the evidence on this article, I think it necessary to observe that Mr. Saltiel's evidence is founded entirely upon certain declarations, which he deposes were made by Mr. and Mrs. Chesnutt. Of his own knowledge he knows nothing whatever. What Mrs. C. said is not evidence, but what Mr. C. said is evidence; but I regret to say that nothing of this kind is pleaded. The whole of the admissible evidence consists of declarations from Mr. Chesnutt, not one word of which is pleaded. I very much regret to see a case so conducted as this has been; it is, at least, doubtful whether all this evidence is not extra articulate, and even if it were otherwise, the opposing party has been unduly deprived of all opportunity of interrogating the witness.

But what does the evidence come to? Not that the house was a house of ill fame, in the sense in which that expression is commonly understood, but that, from Mr. Chesnutt's declaration, that his groom had had improper intercourse with the landlady, the inference is to be drawn. I must say that such a declaration, if true, though it might seriously affect the character of the landlady, will not justify such a conclusion. What is the further evidence? Sutton, the policeman, knows nothing of the matter. Underwood, another policeman, the same. The article is got up at random, and the witnesses examined at random.

Upon the 9th article, there is no proof whatever except the evidence of one of the children.

The 10th article will require more particular attention. It charges that, during the years 1847 and 1848, Mr. C. associated with men and women in the lowest grades; that he conversed familiarly with women of the town, in the public streets and elsewhere, became infected with the itch, and wilfully communicated that disease to his wife.

Assuming that this article was proved, the first inquiry must necessarily be, what effect it would have in law. I am not aware that any such question has ever been discussed; the communication of the venereal disease is another and a very different question; the communication of such disease, in almost every possible case, imports adultery, and the bare com-[201]-munication, without reference to the knowledge of the husband, or, rather, perhaps, on the presumption of knowledge, has been held to be legal cruelty. But the disease here mentioned is distinguished from the venereal disease in many respects. It may be contracted without any fault of the party who becomes subject to it, even without low associations of any kind. It may be communicated without previous knowledge that it was likely to exist.

I mark these distinctions, but at the same time, though I know of no authority to uphold the position, I am strongly inclined to hold that, if a husband in Mr. C.'s position in life especially, knowingly and wilfully communicated to his wife such disease, it would be an act of legal cruelty.

I will now consider the proof. There are two witnesses examined on this article, Mr. Saltiel, and Crump, a butcher. Crump does not depose to the substance of this article; he speaks to a transaction at Gravesend, not pleaded in the article at all. The proof depends upon the evidence of Mr. Saltiel alone; I mean so far as relates to the disease and the communication thereof to Mrs. Chesnutt. As for Mr. Chesnutt's habits of intoxication and resort to low company, there is other evidence.

Mr. Saltiel represents himself to be a surgeon; he became acquainted with the parties in 1847; he represents himself to have been a Jewish Rabbi at one time, but I know no reason why he should be discredited, unless his evidence be contradicted, or something appear in the statement he makes which should justly entitle the Court to doubt his veracity.

His evidence upon this article is as follows: "Very early in the year 1848 (but I am guessing at the date, I cannot rely upon my memory as to matters of time), it was most probably in February, 1848, as pleaded, the said Mr. Chesnutt came to me at my house and complained of a violent itching and eruption on the surface of the skin. I told him at the time that my impression was that it was the venereal itch, having in my own mind no doubt but that that was the disease which he had contracted. He said, 'Good God, you don't say so!' I answered that I considered that it was such. He then asked me if it was contagious, which I answered affirmatively. I distinctly cautioned him against giving it to any other person, and he perfectly understood me, for I have seen him avoid shaking hands with people for fear of infecting them. I told him to avoid his wife's bed, and to avoid contact with the children. However, I was applied to by the said Mrs. Chesnutt, his wife, very soon indeed afterwards, and found her infected with the [202] said venereal itch. I attended her for a short time and until she was cured of the same. She received it in a milder form, but she suffered much uneasiness."

If I am to believe this witness, this article is most clearly proved. He swears that Mr. C. had the disease; that he warned him that it was contagious, and that he ought to avoid his wife's bed; that very soon afterwards she was affected by the same disease.

The case, however, does not run quite so smoothly as I have now described it; for Mr. Saltiel's evidence goes to prove the existence of a disease not pleaded, viz. the venereal itch, a disease of which I never before heard. Of that disease Mr. C. cannot be convicted, because it was not pleaded; but I do not think that this essentially alters the case; for the charge in substance is, that Mr. C. had a contagious disorder of a cutaneous nature, and that he knowingly and wilfully communicated it to his wife, and I think that such charge cannot be rebutted by the circumstance of its being of a peculiar character, though from the absence of such charge in the pleading, it cannot be held to be of so aggravated a character.

I hold this to be an act of cruelty, but whether sufficient whereon to found a sentence must be considered presently; I must bear in mind that the gravamen of this charge is proved by one witness only.

The 11th article charges gross acts of cruelty alleged to have been committed on the 25th of March, 1848, the day on which the furniture in the house in Church Terrace was seized for rent.

All this is pleaded to have occurred in the presence of Mr. Saltiel; it turns out, however, that he saw but a very small part of the acts pleaded. When Mr. Saltiel arrived, Mrs. C. was standing at the door outside the house; Mr. C. declared that

she should not come in, using gross expressions of abuse; but the witness says, such expressions were not used in her presence; he was in a most violent rage. Mr. Saltiel, finding remonstrance vain, induced Mrs. Chesnutt to leave and come to his house.

Barnabas Jarvis, who was in the employ of Mr. Newton, a carman, went on this 25th of March to the house in Church Terrace, to remove the furniture, and he speaks to an earlier part of this occurrence. He saw Mr. C. pushing his wife along the passage; she resisted, but he pushed her out, saying, "Get along, get out!" He did not appear to use very great force; he got her to the door, and then slammed the door upon her. She complained of his having turned her out; he went to fetch Mr. Saltiel to attend Mrs. Chesnutt.

**[203]** On the 13th interrogatory, he says, "Mrs. C.'s conduct was not violent or provoking. Mr. Chesnutt's conduct was not to my knowledge more violent than was necessary to rid himself from the annoyance of his wife; he put her out of the door roughly; I do not think he used more force than was absolutely necessary to turn her out."

Poulter, a carman, also present, confirms this evidence; indeed, he deposes in stronger terms, but he admits he had forgotten nearly all about it.

The evidence to which I have now referred leaves a large part of this article wholly unproved. There is no evidence as to striking, nor to the crushing of the foot as pleaded; but Mr. Saltiel was the very person to speak to the latter—yea or nay—and his evidence ought to have been taken to that effect. At the same time there is proof, and satisfactory proof, too, of gross ill usage—of personal violence, though not in the shape of blows. What the effect will be on my judgment, I will state when I have gone through the remaining facts, and will take a view of all the circumstances combined.

I have now arrived at the 13th article, for I need not further notice the 12th. The 13th pleads a transaction which is alleged to have taken place six months after the separation, and it relates to the daughter of the parties in this cause, a child of about eight years of age. For obvious reasons I abstain from debating the allegations contained in this article. If they be true, no language that I could use would adequately characterise such disgusting and unnatural conduct; still, even then, I should entertain very great doubt whether such charges could properly be introduced into an allegation accusing a husband of cruelty to his wife. This is, however, beyond all doubt clear, that if the offence stated was perpetrated upon this child, it could not be imputed to the husband, unless knowledge thereof was brought home to him. True it is, also, that wholly independent of the offence itself, the treatment of this child, by and with the consent of Mr. Chesnutt, might be grossly indelicate and improper, but I could not say that such treatment, however destructive of the wife's happiness, was an act of legal cruelty.

The child herself has been examined on this article. She was examined on the 17th of March, 1849, being then only eight years of age. It is not very easy to say what degree of credit can be given to so young a witness, not produced or examined in Court; for when a witness of such tender years gives evidence, the conduct and demeanour is all in all; it is impossible to judge from a written deposition only. But be **[204]** this as it may, and supposing this evidence to be fully credible, it does not bring home to Mr. Chesnutt a knowledge of the offence said to have been committed; it does not prove on his part a guilty acquiescence in the wicked treatment his daughter is said to have been subjected to.

Moreover, it is my duty to be more cautious in this matter from the heinousness of the imputation itself; the conduct charged is so unnatural, that it ought to be proved by evidence fully sufficient to establish the fact, and I must add that, considering the child's age, only eight years old, she has sworn rather too confidently to matters occurring when she was only six.

It is right to observe that, though the fact of ill treatment by some one is spoken to by Mr. Saltiel, his evidence does not in the least degree tend to shew guilty knowledge on the part of Mr. Chesnutt. I must dismiss this part of the charge.

Something still remains behind—the fact of abduction, and the carrying this child to a house of ill fame. There is no evidence, save from the child herself, that she ever was carried to this house in King Street. I am not satisfied with this proof, nor does the evidence convince me that the house was properly to be called a house

of ill fame; indeed, had the fact been so, it might with the greatest facility have been proved by indisputable evidence, as it clearly ought to be.

With respect to other circumstances deposed to by this child, I do not feel justified in relying upon her evidence. I will now direct my attention to the evidence of the two brothers; and I must bear in mind that these children are separated from the father and under the control of the mother. I have to guard, therefore, against an almost unavoidable bias, and also against the liability to error incident to witnesses of so early an age.

Frederick Chesnutt was thirteen years of age when examined. His evidence amounts to little. He speaks to quarrels; to intoxication at various times; to the use of improper expressions, but not to violence or the threats of violence.

Robert John Chesnutt was only eleven when examined. His evidence is to the same general effect, save that he speaks more specifically to declarations, but not made in the presence of Mrs. Chesnutt. On the 7th article he deposes to an act of gross violence, to Mr. Chesnutt striking his wife on the breast with his fists; but when does he fix this occurrence? Why in the latter part of the year 1848, when it could not possibly have taken place, for the parties were separated. It is pleaded, too, **[205]** that this happened in 1847, and that she was seriously injured in her back; but there is no evidence of such effect from any medical man. It may be that the date is a clerical mistake, but this can hardly be. It is right to observe that this boy's testimony, save as to the date, is confirmed by his sister, and that, too, with only such variations as render the evidence more probable.

The evidence of this boy on the 9th article to prove adultery is unsupported. Alone it cannot sustain the charge.

On the 15th article this witness deposes to the transactions of March the 25th. He represents that Mr. Chesnutt struck his wife a violent blow on the back, turned her out of the house, and crushed her foot with the door. That any severe bodily hurt was occasioned I cannot believe, because Mr. Saltiel, who was sent for on that occasion, has been examined, and he is wholly silent as to any bodily mischief at all.

I have now gone through seriatim the whole of the charges to be found in this allegation, and I have considered and stated all the evidence which has been adduced to prove them. I must now declare my opinion upon a view of all the circumstances.

I am of opinion that the 10th article, which charges the wilful communication of a cutaneous complaint, is proved, and is an act of cruelty, but not such an act of cruelty as, if it stood alone, would require, or, perhaps, justify the Court in pronouncing a sentence of separation.

I am further of opinion that the 11th article is in part proved. That is the article which alleges that on the 25th of March, the day of separation, Mr. Chesnutt struck his wife, and violently and with force turned her out of doors. The blow is not proved to my satisfaction, nor that her foot was injured, but the forcible ejectment is established by competent proof; and I think such conduct falls within the limits which high authorities have laid down for the definition of legal cruelty.

It is, however, but just to Mr. Chesnutt to observe that this 25th of March, when his furniture was seized, was necessarily a day of great excitement, and I acquit him of all deliberate cruelty so far as relates to this transaction.

But, then, are not the whole circumstances to be taken into consideration? This act of violence was committed when Mr. Chesnutt was sober; he is proved to indulge in constant and most disgraceful habits of intoxication. If he could not restrain himself when sober from acts of violence, can the Court reasonably expect him to do so when under the influence of inebriety? **[206]** and is not the duty of the Court to guard the wife against all reasonable contingencies of similar ill usage?

To these considerations I must add that there is abundant proof that Mr. Chesnutt does still cherish against his wife feelings which may naturally lead to acts of violence. There is ample evidence of threats that he would be the ruin of his wife and children. These may not be threats of personal ill usage, but they demonstrate that temper of mind which, coupled with the preceding acts, would naturally lead to the repetition of them.

For all these reasons I pronounce for the separation.

THE "CLARENCE." The High Court of Admiralty, 1854.—In causes of collision, a verdict obtained at Common Law cannot be pleaded. A steam-ship held solely

to blame for not having given way to a sailing vessel close hauled on the larboard tack, although porting the helm would not have thrown the sailing vessel out of command.

This was a cause of damage by collision, promoted by the owner of the brig "Maria" against the "Clarence," a steamer belonging to the General Steam Navigation Company.

The collision occurred off the coast of Norfolk, between 10 and 11 o'clock P.M. of the 6th of March, 1853.

The libel stating the case of the "Maria" was admitted without opposition. It pleaded in substance that the look-out having reported the three lights of a steamer two miles distant, and about one point on the starboard bow of the brig which was then sailing close hauled on the larboard tack, a bright signal lanthorn, by order of the mate, was shewn over the starboard bow; that shortly afterwards the said light of the steamer disappeared, whence those on board the "Maria" concluded that she intended to pass to starboard of her, but that instead of so doing, the said steamer, when four or five points on the starboard bow of the said brig, and distant about a quarter of a mile, suddenly ported her helm, and notwithstanding she was hailed by the "Maria," came with unchecked speed right for the said brig; whereupon, in order, if possible, to ease the blow which was inevitable, the helm of the brig was ported, but before she had barely time in the least to answer it, the steamer ran athwart her hawse, &c. &c.

An allegation on behalf of the "Clarence" was given in, which pleaded in substance that a vessel was reported as broad upon the steam-ship's starboard bow with a light exhibited (as lights had also been by all the sailing craft running down with the wind abaft the beam, of which there was a considerable number previously met by the said steam-ship), and which vessel from its position did not require the steam-ship's course to be altered; that almost immediately afterwards another vessel, [207] to wit, the "Maria," was reported a little on the steam-ship's port bow, or nearly right ahead; that the "Maria" when so reported was running down upon the said steam-ship with all sails set, and, as expressly alleged, with no light exhibited, distant only about five or six ships' length from the said steam-ship, being as far as a vessel without a light would be then seen from her; that the helm of the said steam-ship was immediately put hard a-port; that at the same time the engines of the said steam-ship were eased; but that the commander, finding that the brig continued following her up, had them set on again, for the purpose, if possible, of running away from the said brig; that the said brig, notwithstanding, by continuing her course, with her helm to starboard, came stem on into the said steam-ship, &c. &c.

The 7th article pleaded, that subsequent to the collision in question in this cause, an action was brought in her Majesty's Court of Exchequer by the General Steam Navigation Company, the owners of the said steam-ship "Clarence," parties in this cause, against John Mann the younger, the sole owner of the said brig "Maria," also a party in this cause, to obtain compensation for the damage occasioned to their said steam-ship by the said brig, on the occasion of the collision in question in this cause, and which action was tried on or about the 2nd of August, 1853, at the assizes held at Croydon, in the County of Surrey, before the Lord Chief Baron and a special jury duly empannelled, and a verdict given by the said jury in favour of the General Steam Navigation Company for the amount sued for by them.

The admission of the allegation, as far as regarded this article, was opposed.

Nov. 17, 1853.—Dr. Haggard and Dr. Twiss appeared for the owners of the "Maria"; Dr. Addams and Dr. Robinson for the General Steam Navigation Company.

*Dr. Lushington.* I am now to decide what ought to be done in the High Court of Admiralty with respect to this article, which has been inserted in the responsive allegation, and which is opposed on behalf of those who have given in the libel.

It appears that it is an action brought against this vessel, the "Clarence," belonging to the Steam Navigation Company, on behalf of the owners of a vessel named the "Maria." There is no dispute as to the admissibility of any other part of the allegation than this article, which pleads, in substance, that the owners of this steam-vessel, which came into collision with the [208] "Maria" had brought her action against the "Maria" in the Court of Exchequer, and had recovered compensation by way of damages. The cause was tried on the 2nd of August, at

Croydon, before the Lord Chief Baron and a special jury. It is further prayed to introduce an addition to the former article, in order to explain that a rule for a new trial had been moved for in the Court of Exchequer,—I presume on the ground of the misdirection of the Lord Chief Baron,—and that the rule had been refused. Now the question is, whether I ought to allow the article to stand, or whether it ought to be struck out.

I consider it of no small importance in the cases of damage, now augmenting to twenty where there was only one thirty or forty years ago, that nothing should be allowed to stand in an allegation which can increase the bulk of the proceedings, adopted for the purpose of obtaining the opinion of the Court. If this article could have any effect on the determination which the Court ought to come to, when it sees the case in conjunction with Trinity Masters, then it ought to stand; but if, on the other hand, it is useless and informal, then it is my duty to reject it.

With respect to the effect it might produce on the mind of the Trinity Masters, the Court must be greatly on its guard. I should unquestionably direct the Trinity Masters not only that the verdict was not binding, but that they ought not to allow such verdict to have the slightest effect in advising the Court as to the steps which ought to be taken. In a former case I expressed myself, in substance, to that effect, though, perhaps, not in the strong language in which I think it necessary now to couch my opinion. I have a great respect for the decision of a jury, under certain circumstances; but I must candidly confess, that in running-down cases, especially where there are questions of navigation to be decided, looking at it intrinsically in itself, I can attribute very little weight to it.

When I consider that we do not, and cannot, know whether that verdict was founded on the same evidence which we have in this Court, then it appears to me, whatever importance may be attached to it, must fall to the ground; and it would, in my judgment, be exceedingly detrimental to the cause of justice if the Trinity Masters, notwithstanding the directions I might give, were in their own minds to attribute the slightest weight to the verdict.

There has been cited, for my information, what has been done in other Courts, namely, the Prerogative and the Consistory Courts. Now, I retain the opinion, as Judge, which I did not know until Dr. Haggard mentioned it, that I expressed **[209]** on a former occasion, as counsel (*Grindall* v. *Grindall*, 3 Hagg. Ec. 265), namely, that in a cause instituted for trying the validity of a will, a verdict obtained in the same cause at Common Law, ought not to be cited. Although I entertain great deference for the judgment of Sir John Nicholl, yet, in my mind, the reasons assigned by him are not satisfactory for the introduction of the verdict.

The Consistory Court is a different thing. Lord Stowell, in the case of *Elwes* v. *Elwes* (1 Hagg. Cons. 289), said, that he could not bring to his mind a distant recollection as to how this question of a verdict at Common Law came to be introduced in these Courts; that it had not been a part of the ancient practice; but whether he was strictly correct or not is matter which I need not enter upon on the present occasion. There is another reason why the verdict should be received in that Court; it shows that the husband is not afraid to have his conduct exposed to a strict examination, before a tribunal, where evidence may be produced in order to show how he has behaved during the whole time of his matrimonial cohabitation, and also, that he has been enabled to bring before that tribunal witnesses to be cross-examined vivâ voce, some of whom will, in all probability, be the same as are produced in the Consistory Court, though, of course, that does not follow as a matter of necessity. I think I may lay entirely out of mind what was said with respect to the Consistory and Prerogative Courts.

The only reason which I have heard for the admission of the article, was that stated by Dr. Addams just at the conclusion of his address to the Court, that it might have been urged at the hearing of the cause before the Trinity Masters, that his parties had not brought any cross-action, therefore there was a presumption to to be raised against them, that they would have come to a court of justice to assert their rights, if they supposed themselves right on that occasion. But I think this is an argument of little importance in cases of this description; and, if it were denied, the assertion would just as well come from counsel as from the plea. I confess I am not strongly impressed with the weight of that argument.

Considering, on the whole, the absolute necessity, according to my mind, of

contracting the proceedings within the narrowest possible space, and disposing of the question with the greatest celerity, that being for the good of the public and the advantage of the profession, I think it is not desirable that this article should stand, therefore I direct it to be expunged.(*c*)

**[210]** The 7th article having accordingly been expunged, witnesses were examined and the cause came on for hearing. It was argued by the same counsel as upon the admission of the allegation.

*Dr. Lushington*, addressing the Trinity Masters.(*a*) Gentlemen,—I apprehend that if we can satisfy our minds as to two points which have been contested in this case, we shall have no difficulty in coming to a satisfactory conclusion. One of these questions is, from what quarter the wind was blowing; the other question is, whether the "Maria" did or did not show a light.

I am under the necessity of briefly stating some of the circumstances to you, though, after the lengthened arguments to which you have so patiently listened, it will not be necessary to go into the details of the evidence.

The place where the accident occurred was some little distance to the north of Hasborough; the time was ten o'clock at night, on Sunday, March 6; the tide was somewhere about half ebb; the "Clarence" was bound to London, her course being S.E. by E. or thereabouts; the "Maria" was bound to the north, and her course was N.N.W. I apprehend these are undisputed facts in the case; but with respect to the disputed facts there are many.

Before I draw your attention to what are the disputed facts, you will allow me to bring to your notice the law bearing on the case; because it may so happen that we are bound by the Act of Parliament. Under certain circumstances we have no discretion, and we must see whether those circumstances arise in the present case. If they do occur, then our judgment must be bound by the Act of Parliament. The words of the Act are: "Whenever any vessel proceeding in one direction meets a vessel proceeding in another direction, and the master or other person having charge of either such vessel perceives that if both vessels continue their respective courses they will pass so near as to involve any risk of a collision, he shall put the helm of his vessel to port, so as to pass on the port side of the other vessel" (this is a general description, we will see how far it is qualified), "due regard being had to the tide and to the position of each vessel with respect to the dangers of the channel," (I have had occasion, I regret to say, to comment upon the misfortune of these provisoes being mixed up together, but I hope soon to see that removed), "and as regards sailing-vessels," (that is an important point), "to the keeping of each vessel under command."

**[211]** The question is, what is the meaning of this exception as regards sailing-vessels, "to the keeping of each vessel under command." The construction which I have been in the habit, subject to your better judgment, of putting upon it is this, that if a vessel be close hauled, and at the same time there is a vessel going free, that the vessel close hauled was not to throw herself into stays, because she would no longer be under command.

If this be the true construction, the question will arise, whether the "Maria" was close hauled on the larboard tack, or whether she was sailing free at the time when she saw the steamer approaching. If she was close hauled, I apprehend she would not be compelled, considering all the facts of the case and all the provisions of this Act of Parliament, to put her helm to port. If she was not close hauled, then I apprehend it would have been her duty to put her helm a-port on seeing the steamer in due time. Subject to your better judgment, this is the construction which I put on the Act of Parliament in relation to the facts such as they appear in the evidence.

Now with regard to the disputed facts; the first and most important is, from what quarter the wind was blowing, and whether the "Maria" was close hauled; secondly, what was the state of the weather; thirdly, whether the "Maria" showed a light; fourthly, as to the look-out of both vessels; fifthly, what was actually done, or what ought to have been done by each vessel.

---

(*c*) At the hearing before the Privy Council (April 4) Lord Justice Knight Bruce expressed surprise that the matter could be again litigated, and intimated his opinion that, if the judgment in the Court of Exchequer had been pleaded, it would have been res judicata.

(*a*) Captain Bax and Captain Pelly.

I will briefly advert to what appears to me to be the charges made by one vessel against the other. The "Maria" charges the blame of the collision on the "Clarence" for not porting, or rather porting her helm too late. The "Clarence" charges the blame of collision against the "Maria" (not in so many words, but in effect) for starboarding her helm. This is the charge against the "Maria," not in so many words it is true; but that is the tenor, the force of it, if we look at the truth and essence of this case as it stands.

There are other matters to which we must direct our attention, such as the rate of sailing of the two vessels, which, I apprehend, does not admit of much dispute, because I think that the best evidence which will be found in the case as to the rate of the sailing of the "Clarence" is the evidence of the engineer, which brings it to about nine, not ten, nor eight, but about nine knots an hour. He represents her as going at an average speed, and the average speed is nine knots an hour. Whether you think he is mistaken in this evidence or not, from other circumstances, I must leave to your judgment. No doubt the "Clarence" was going against wind and tide at the time.

**[212]** With regard to the "Maria" (speaking of the rate at which she was going through the water), she seems to have been going four knots and a half to five knots an hour.

There is another matter which I ought to bring to your notice, which is, the nature of the damage which occurred, and the inferences that may arise from it as to the manner in which the collision took place; and we shall also, as I have said, have to consider the case of the "Maria" with reference to the question whether she was sailing free or close hauled on the larboard tack.

Before I go into the case of the "Maria," I will say one word as to the weather. The weather on the present occasion is variously described, and Dr. Addams, I think, said about what was true when he observed, it was not a particularly fine night, neither was it a particularly dark or hazy night. It was a night, if I may use the expression, of rather a middle character; but the weather must be taken to be sufficiently clear to justify a steamer in going nine knots an hour, in a locality where she was likely to meet with other vessels, because if I am to suppose it was a darker night than that, then of course there will be blame imputable to the "Clarence" for going at such a rate as that which she is represented to have been going, because, in that case, it would be impossible to avoid any collision.

Now, gentlemen, the case of the "Maria," put very briefly, is this: she was on the larboard tack, close hauled, and the "Clarence" was seen one point on her starboard bow. Here I will observe that there is a difference between the two statements. The other evidence says, that the "Maria" was seen by the "Clarence" on her port bow, which was long after the "Maria" saw the "Clarence," and that she, the "Clarence," was one point on the "Maria's" larboard bow. That is the evidence which is to be found on behalf of the "Clarence"; but I do not dwell on these matters, because, according to any notion I can form on the subject, it is next to impossible to be able to say with certainty the precise point which a vessel bears when first seen, both vessels being in motion at the time. I take the real fact to be, that the two vessels were at one time approaching end on nearly right on. That does not militate in my judgment against what is stated by the "Maria," that as the two vessels were approaching they lost sight of the red light. Though the light might be seen at a considerable distance, the two vessels being nearly end on, yet, the two not being on strictly opposite courses, when the vessels were nearer, it is possible that the red light might be shut out. Therefore, **[213]** it does not appear to me that it is a matter of great importance to ascertain the precise bearing when first seen.

The "Maria" says, she showed a light over the starboard bow, and when the red light disappeared, she luffed up. She says, the "Clarence," when four or five points on her starboard bow, suddenly ported her helm, then the red light again became visible, and the green light disappeared. Then the "Maria" says, that at the last moment she ported. Of course she was justified in doing anything to avoid a collision at that time.

Now we come to parts of the evidence, upon which I have been strongly pressed by the learned counsel for the General Steam Navigation Company to come to the conclusion that either one or the other of the parties have been guilty of perjury. It is contrary to all principles that govern Courts: it is a universal rule in all cases,

except it cannot be avoided, never to attribute the intention to commit wilful and corrupt perjury. So far as you may be able to come to a safe conclusion without attributing an offence of that kind, it is the duty of the Court so to do. In this case, though there is a direct collision in one sense of the evidence, yet there is not in another, as I will point out.

With regard to a light being shown over the starboard bow of the "Maria," the evidence of four witnesses is direct to that effect. It is very circumstantial, and the fault represented as belonging to it is, that it is too circumstantial, and that the parties have concocted their story beforehand, and have come to give their evidence in the same terms. Now, had that observation, urged by Dr. Addams with great force, been strictly correct on an examination of the evidence, I undoubtedly should say to you, you must take care not to give credence to the evidence of four witnesses, where they come to describe in the same words facts which could not make the same impression on their minds. But it is not so in fact. I have looked through the answers to the 4th interrogatory, and though they are the same in substance, yet they are not so in minute particulars, or anything like it. The master, as might be expected, speaks with great minuteness of the lanthorn, and gives a particular description of it. It had eight squares, and plate-glass round it. He says, "The burner of the lamp is one inch wide, and a proportionate thickness." Now, I see nothing extraordinary in that evidence, because I take it that a signal lamp, which is now required by law, and which was not required until a short period ago, is a matter that would make an impression on the mind of the master. He knows what lamp he uses and sees constantly. The other witnesses do not swear to the plate-**[214]**-glass and the size of the burner. It was lighted, but the master said he did not see it at all in the forecastle. Therefore there is not that strict uniformity which would justify you in saying that the witnesses came deliberately to tell a preconcerted story in which there is no truth.

This statement is opposed on the other side by the suggestion that it being proved that there was a good look-out,—that is, a good look-out arranged on board the steamer,—and it being agreeable to all probability that a vessel of that value and burthen would have a good look-out, the persons on board the "Clarence" did not see the light; therefore this is a contradiction between the two statements which is not reconcileable with the notion of each party deposing truly. In my view of the matter, it appears that both statements may be true. It may be true that the light was exhibited, and that the persons on board the "Clarence" did not see it, and that from a variety of circumstances. It might be that their attention was directed to a vessel immediately before the "Clarence," and it appears from the evidence that it might be so; their attention might be drawn off, and the light was not seen. That cannot be put in the same point of view which it would be if two persons were present together, and one swore to a transaction which, if true, the other must have witnessed and yet denied.

Having made these observations as to the light, I shall leave it to your consideration to determine whether you are of opinion that the "Maria" had a light or not.

Now, with regard to the next question, which is the question as to the wind: here we have certainly a very great discrepancy on the subject, one on which we have constant discrepancy. It is almost a daily occurrence in these cases that we have very different accounts as to the quarter from which the wind blew. On the present occasion there is a very great difference, varying between W. and S.S.W. That is a great discrepancy. On that subject I cannot help you: I can only state that there are respectable witnesses on both sides, who have so sworn. I can only desire you to bear in mind that there are two persons from the "Hope," independent of the case, who have sworn to the affirmative of its being W.; but I must, at the same time, tell you that they came from the same place (from Colchester) as the owners of the "Maria" came from. Therefore, perhaps we must not ascribe to their evidence that same implicit unbounded credit as if they were distinct parties, being altogether unconnected by feeling or otherwise with the owners of the "Maria." The wind is a question which you will have to determine.

With respect to the sails. There is evidence that if the wind **[215]** had been from the S.S.W., then this light collier would have carried studding sails. I know nothing of that; you must judge whether she would or would not. I do not mean to meddle with it; I do not understand it; you must form your own judgment upon it. There

is evidence that the sails were kept out full; whether they were or were not, you must judge.

These are the important considerations to which I have to direct your attention.

There is another matter which I must very briefly allude to, and in order to do so I must refer to the case set up by the "Clarence." But before I do that, allow me to say this. I do not think that in the case set up by the "Maria," the "Clarence" is accused of starboarding her helm. I find nothing in the pleadings to say that the "Clarence" did starboard her helm; I find nothing of the kind. The gist of the charge is, not that the "Clarence" starboarded, and then ported, but that the "Clarence," seeing the "Maria" in time, ported, but too late. It was argued as if the charge had been made, but it is clear from the papers it is not. Dr. Addams's inference is, that it arises from the fact of the red light not being seen, but it does not appear to me that that fact would justify the inference that, ergo, she starboarded her helm. The courses were not precisely opposite.

Now, gentlemen, the case of the "Clarence" is this, to put it as short as I can: after stating her course to have been S.S.E., and that the wind was blowing fresh from the S.S.W., it states that having seen a vessel on the starboard bow, the "Maria" was reported a little on the steam-ship's port bow, distant five or six ships' length, and she could not be seen further off, that is, not be seen further off without a light, and considering what was the state of the weather. There is a variation as to the distance from which the ship was seen, the master stating it to be a much shorter distance; that he discovered her one or two ships' length off. When vessels are seen so much in haste as this was, and where evidence is afterwards taken, various opinions will be formed as to the exact distance of the vessel, and you must take it, I think, to be about four ships' length. They then say that the helm of the steam-ship was immediately put hard a-port, the second mate running to assist the man at the wheel in so doing, whereby her course was altered from two to two and a half points, at the least, by the order of the commander. That by the same order, at the same time, the engines of the steam-ship were eased, but the commander, finding that the brig continued following her up, had them set on again for the purpose, if possible, of running away from the **[216]** brig. That the brig however, notwithstanding, by continuing her course with her helm to starboard, came at the rate of from six to seven knots an hour, stem on, into the steamship, abreast of the mainmast. Here is a matter which I must entirely submit to you. Here is a steamer going at the rate of nine or ten knots an hour, and a brig proceeding at four and a half knots or five; the steamer's engines are set on again, and the steamer is, according to this, overtaken by the "Maria," and it may be so; that I know nothing about. It is clear that it could not be so if the wind was W., but if it was S.S.W. you will consider whether it is consistent with probability that the "Maria," then going at such a rate, would overtake the steamer. It is right that I should ask you to bear in mind that she had eased her engines, and that the engines having been eased, it is possible; but that is subject to your consideration.

I have been very anxious that in this case nothing should escape our attention. I certainly have set down other observations, but I doubt whether they are of sufficient importance at this hour of the day to detain you with further disquisition except that much has been said about the evidence of Mr. Bayley. There is no doubt that Mr. Bayley is an experienced surveyor of shipping; there is no doubt he is a gentleman of high character, and his name is well known. I entertain not a shadow of doubt that he has given an honest and true account, according to his judgment, of what he saw. I take it that is one thing; but the inferences to be drawn from that state of things are totally different matters. These inferences must rest on your nautical knowledge.

I have had occasion very many times to discuss at very great length the effect of evidence as to the damage which has been done to a vessel. I certainly am not in a condition to pronounce any satisfactory opinion thereon.

Now, gentlemen, I believe that I have brought under your attention all that I have to do. If you please we will adjourn, and then I shall have the benefit of your advice in coming to a decision.

On returning into Court, after consultation with the Trinity Masters,

*Dr. Lushington.* The gentlemen with whose assistance I am favoured, are of opinion that the "Maria" was close hauled at the time, and they have formed that

opinion from a consideration of the whole of the evidence in the case, and especially with reference to the evidence which has been given by the master of the steamer, that all the vessels which were going [217] north, had the wind about a-beam. Taking all these circumstances into their consideration, they have come to that conclusion; and that being so, it was the duty of the steamer to give way, and I must pronounce against the steamer.

Dr. Robinson. Will the Court allow me to say that I am asked by the Steam Navigation Company to request the Court to put to the Trinity Masters the following question: "Whether the 'Maria,' by porting her helm, would have thrown herself out of command, within the meaning of the Act of Parliament?"

The Court. I cannot put a question of law to the Trinity Masters.

Dr. Robinson. Will the Court then put to the Trinity Masters the simple question, "Whether the 'Maria,' by porting her helm, would necessarily have thrown herself out of command?"

The Court expressing its assent, and after a brief conference with the Elder Brethren, said—Certainly it would not; that is a question which, I think, no one can doubt about. There must be some misapprehension; you must have misapprehended me. If she had ported her helm, she certainly would not have thrown herself out of command. She was going, according to her statement, a N.N.W. course; therefore, if she ported her helm she would not have thrown herself out of command. She would if she had starboarded. I wish there may be no mistake. That question must have arisen from my using some term erroneously, when commenting on the Act of Parliament. I never supposed she would throw herself out of command by porting. She would go all the way to the N. She would recover her course again.(*a*)[1]

Proctors for the "Maria," F. Clarkson; for the steamer, Toller.

THE "TRIDENT." The High Court of Admiralty, Feb. 4, 1854.—A steam-ship proceeding down the Thames at night, meeting a sailing barge, close hauled on the starboard tack, nearly in mid-channel, in Bugsby's Reach, stopped her engines and ported her helm; but held to blame for not having reversed. Held, also, that the barge was not bound to go about.

This was a cause of damage promoted by the sailing barge "Southampton" against the steam-ship "Trident," belonging to the General Steam Navigation Company.

About 11.30 P.M. of the 7th of May, 1853, the barge was proceeding, laden with bricks, from Crayford, in Kent, to Pimlico. She was in Bugsby's Reach, crossing from the Essex to the Kentish shore, close hauled, on the starboard tack, when she [218] descried the steamer coming down the river at a distance of about 300 yards. She hailed the steamer to stop, and the steamer hailed her to port and go about. It seems the steamer did stop and port her helm, but did not reverse. They came into collision, and the barge was sunk.

Dr. Haggard and Dr. Twiss appeared for the "Southampton;" Dr. Addams and Dr. Robinson for the steamer.

*Dr. Lushington*, addressing the Elder Brethren,(*a*)[2] said: Gentlemen,—It is much to be lamented, that in many of the cases which come under the consideration of this Court, not only in cases of collision, but also in cases of salvage, very exaggerated statements are put forth both on the one side and on the other. I have frequently had occasion to comment upon such statements, and I have invariably felt it my duty to censure them.

I regret that, in the present instance, the statements which are set up in some parts of the case are infinitely stronger than the circumstances would justify; and, perhaps, in no respect more so than as regards the speed at which the steamer was going. It is next to impossible that the persons on board the barge, circumstanced as they were, could judge with any accuracy at what rate the steamer was going down the river; and, with a natural feeling for their own case, they put it at the highest rate.

It is still more to be lamented that any charge should have been made, notwithstanding the unfortunate accident which occurred, against those on board the steamer,

---

(*a*)[1] This case was appealed and argued before the Judicial Committee of the Privy Council, on the 4th and 5th of April, when their Lordships deferred judgment.

(*a*)[2] Captain Ellerby and Captain Shuttleworth.

of having been reckless of the lives of their fellow creatures. The only ground for that charge, as it has been preferred in this instance, is, that the persons on boarp the barge did not see any person coming to their assistance, and, consequently, without hesitation, they come to the conclusion that nothing was done. I must say, that charges of this description ought not to be made, founded on the mere absence of knowledge. They ought never to be brought forward, except the facts will justify them.

Having made these observations, I now proceed to direct your attention to the circumstances of this case, for the purpose of ascertaining who is to blame for the collision. It may be, as you well know, that both parties are to blame, or only one, or neither.

I think I cannot do better than state to you, in the first instance, the charge which is set up in the 5th article of the libel, and then point out to you the corresponding article of the alle-[219]-gation, because these will contain all the matter which, more especially, will require your consideration.

The persons on board the barge say, "That the aforesaid collision, and the damages consequent thereon, are imputable solely to those on board the said steamship 'Trident,' to wit, from the want of a good look-out on board that ship, and from the unjustifiable speed at which she was steaming, and from the improper navigation of her in not having kept clear of the said sailing barge, as she was bound to have done, and that the said collision was not owing to any misconduct on the part of the said sailing barge 'Southampton.'" Such, gentlemen, are the grounds on which the owner of the "Southampton" claims a decision at your hands.

On the other side, the 6th article of the allegation of the General Steam Navigation Company states, "That the collision in question in this cause was altogether imputable to those on board the said barge, and was occasioned by their not having, when they first saw the lights of the said steam-ship, and subsequently, when hailed so to do by those on board the said steam-ship, put their helm to port and gone about, as they could, and as it was their duty to have done, whereby no collision could have occurred between her and the said steam-ship; and that the said collision was in no way attributable to those on board the said steam-ship, who, on finding that the said barge made no alteration in her course, and was coming head on into the said steam-ship, by stopping the engines and putting the steam-ship's helm hard a-port, and thus bringing her as close to the tier of colliers on the south side of the river as she could be brought, did everything they could to prevent the said collision."

Having now, gentlemen, shortly put before you the charge which is made on the side of the barge, and the defence, and the counter charge which is preferred against the persons on board this barge on behalf of the General Steam Navigation Company, I will next advert generally to the facts in this case, some of which are matters of common admission between the parties, and not discussed. The steamer, it appears, was going down the river upon the night of the 7th of May, having quitted the Saint Katherine's Dock about ten o'clock; and having been detained in her progress in consequence of a collision with another vessel (*a*) (what was the cause of the detention is not of [220] the slightest consequence; it is not what took place before the steamer got to Blackwall, but afterwards, that we have to consider). We know nothing about the previous collision: it merely comes out, by interrogatory, that it was the cause of the delay, and that is all we know of it. The steamer then comes round Blackwall Reach, and it is stated that she keeps to the north; and I presume that she would do so, because it was necessary for her so to do for her own safety in rounding that point. It is also further stated that, after having so kept to the north, on coming into the Reach, she was kept as near to the south shore as she could be, consistent with her safety. This, gentlemen, is one of the matters in dispute; and the question which it will be for you to consider is, whether she kept as much as possible to the south, the Kentish shore, in conformity with the provisions of the Act of Parliament; because the Act of Parliament, you know, directs that all steam-vessels shall keep as

(*a*) The "William" sloop, of Grimsby, whose owner brought an action against the General Steam Navigation Company, and obtained a verdict with 85l. damages; but on the 6th of February, 1854, a rule for a new trial on the ground of the verdict being against the evidence, was made absolute.

far as is practicable to that side of the fair way or mid-channel which lies on the starboard side of such vessel.

With respect to this part of the case there is a great deal of contradictory evidence, and I am not surprised at it, and for various reasons. In the first place, I take it the channel there is exceedingly narrow, and a very little space makes a very great deal of difference, if I may so express myself; because, where the channel is considerably less than a quarter of a mile, of course twenty or thirty fathoms tell a great deal more than where the channel is wider. It is said by those on board the steamer that they got as close as they could to the south side of the channel, considering that there was a tier of colliers on the south side, and they were bound to take care not to run into the colliers. Their evidence is uniformly to that effect. The evidence on the other side, which has been much commented upon, does not go the length of saying they were not so close as they might have been; but the true effect of it is, that, in the opinion of the persons on board the barge, they were not so close as they might have been. Probably, if any judgment was to be formed at all, the persons on board the barge were not the best judges of the precise distance between the steamer and the colliers at that moment.

This being so, and the tide being little more than three-quarters' flood, the wind being N.N.W., and the night not particularly clear, it is perfectly manifest, in the first instance, that it was the duty of those on board the steamer to navigate with great care and great caution; to navigate, I repeat, with great care and great caution, because of the part of the river in which they were, and because, being a flood-tide, vessels **[221]** would be met. Therefore it was their duty to observe all the regulations for the purpose of passing with safety any vessel they met, and too great caution could not be employed.

The wind then at the time being from N.N.W., there is some discussion as to the extent of the breeze, upon which I cannot render you the slightest assistance, for I can form no opinion from the evidence, independently of nautical knowledge, as to what the extent of wind was at that time. However, be that as it may, it was sufficient to enable the schooner, of which so much has been said, and this barge, to come from the north to the south side together close hauled on the starboard tack That is what they were doing at the time.

Whilst in their progress from the north to the south shore, it appears that the persons on board the barge descried the steamer; and it seems to me that the evidence goes to the extent of saying they saw the green light. I cannot see how it is possible, when the steamer was rounding Blackwall Point, but what they must have seen the green light; but the argument goes to the extent that they did not perceive it till they were close by. What they swear to is an anterior period; and I apprehend it would be so. I see no discrepancy at all in the evidence in saying the green light was seen at one time on board the barge.

Now, the representation of those on board the barge is, that having seen the green light, they continued on their course—that is their statement—until they saw the steamer approaching their course; and then they hailed the steamer to stop, for the purpose of avoiding the collision. Then, they say, they were hailed by the steamer to port their helm, and to go about; that when the steamer so hailed them they did port their helm, but the steamer did not port her helm in time, or sufficiently, to avoid the accident, and the consequence was the collision took place.

Such is a general statement of the facts of the case, gentlemen, and I will only advert to one other fact, before I submit to you the points on which I shall more especially request your opinion. The fact to which I allude is, the place where this collision actually did occur. If we can fix the place of the collision, we shall have no difficulty in fixing which party is to blame. Now, if the diagram be correct, this vessel, the barge, was found, after she sank, to be a little to the northward, and very little to the northward, of the mid-channel. It must rest with you to decide this point, whether the place where the vessel was found sunk and the place of the collision are one and the same, or what difference there is between them; because the place of collision is very different from the place where the **[222]** vessel was found. It appears to me that when Dr. Addams said that the mode in which the steamer struck the "Southampton" would slew her head round, that is undoubtedly true; and I cannot entertain a shadow of doubt that her head must have been slewed round; but the question is, whether she sank immediately, or whether, if she did not sink there, which way the tide would drive

her. That is a point on which I do not mean to hazard an opinion. I do not mean to form a judgment as to that. The only judgment I could form is, that she must have gone in the direction of the tide, and no other. But that will only assist your judgment to the following effect: it will shew whether the averment is true, that the "Trident" was as near as possible to the Kentish shore at the time of the collision.

Now, the questions which occur to me are these:

With regard to the steamer, I shall request your opinion whether, considering that the channel was narrow and the tide about half-flood, and that vessels might be expected coming up the river, the "Trident" was going sufficiently slow, and took the proper measures to avoid the collision, remembering that she did port her helm, and did stop her engines, but did not attempt to reverse her engines till the collision had taken place.

In all these cases there are, if I may use the expression, double questions to be considered. The first question is, whether the measures were right; the second always is, whether the measures were taken in time; because if the measures were right and taken in time, there is no blame; if they were right, but not taken in time, then there is blame. So much relates to this vessel, the "Trident."

As regards the barge, I will put the question in the way in which the charge is preferred against her, which I think is the fairest way for all parties in which I can put it. It is alleged "that the collision arose from the people on board the barge not having, when they first saw the lights from on board the steamer, put their helm to port and gone about, as it was their duty to have done."

The first question, then, which I shall submit for your consideration will be a nautical question; viz. not whether the persons on board the barge were bound to put their helm to port; but, whether they ported their helm or not: they allege they did, and there is no direct contradiction. The next question is, whether they were bound to have gone about, remembering that this was a vessel close hauled on the starboard tack; and it is alleged by the steamer they were bound to go about. Now, it must always be recollected that I am putting the ques-**[223]**-tion whether it was their duty under the circumstances, because if the going about would have avoided the collision, we all know that a vessel would have been justified in so doing. That is quite a different thing. It is upon that ground we always hold persons entirely free from blame who starboard their helm at the last moment to stop the effect of a collision, though it might be erroneous at an earlier period.

With regard to themselves, those on board the steamer say they are not to blame; for as soon as they discovered that the barge did not make such alteration as they expected, they stopped the engines, put the helm hard to port, and brought her as close as they could to the tier of colliers. You will have to consider whether they did stop their engines and put their helm hard to port, and whether they ought not to have reversed the engines.

I have to suggest one other question, and one only, as relates to the barge; that is, whether the collision was occasioned by the barge not hoisting a light? There was no light on board the barge. The Act of Parliament directs that a light shall be hoisted, when it is necessary, on board sailing-vessels. The Act of Parliament states (I will not trouble you, for the twentieth time, to go over the express words of the Act) that the persons whose duty it was to hoist a light shall not recover if the collision was occasioned by omitting to hoist the light. If you are of opinion that the collision was occasioned by the omission to hoist a light, then it is evident, whatever may be the other merits of the case, the barge could not recover.

Now, gentlemen, these are the points on which I wish to have your opinion; and if you are desirous we will adjourn to the next room.

On returning into Court, after conference with the Trinity Masters, *Dr. Lushington* said:—

"The Trinity Masters are of opinion, and I agree with them in all the conclusions to which they have come, that this collision took place nearly in mid-channel; that the steamer ought to have eased, stopped, and reversed her engines so as to have avoided the collision. They are of opinion that the barge was not to blame for not having ported her helm sooner and for not going round, and they think the collision was not occasioned by the barge neglecting to hoist a light.

"I will mention for myself, not on the part of the Trinity Masters, but on my own part, that I have read this evidence with great attention, and I am not satisfied

that there was such a look-out kept on board this steamer as ought to have been [224] kept, considering all the circumstances of the case. I am not satisfied with the evidence of the master in that respect." (a)

Proctors, for the "Southampton," F. Clarkson; for the steamer, Toller.

THE "ARAMINTA." The High Court of Admiralty, 1854.—A vessel of 845 tons, with a regular crew of thirty hands, and ten extra, sailed with emigrants to Geelong, in Australia. On arriving the master proposed to the crew to proceed to the diggings, under certain arrangements for division of profits between the owners and the crew. The master went with them, and after some time found the men deserting; and therefore proposed the immediate return to the ship. Only fifteen returned; extra hands could be engaged only at an exorbitant rate. The master, therefore, proposed that if the crew would take the ship, so short-handed, to Bombay he would divide the amount of wages due to those who had deserted among those who remained. They assented, and each received his proportion. The vessel arrived in safety at Bombay, where the crew was completed. On arriving at Liverpool the owners deducted, as wages advanced, the sum paid to each out of such forfeited wages. Held, 1st. That a contract for reward beyond the wages under the mariner's contract is illegal and void.—2nd. That a payment made by the master under such contract is illegal, and might be recovered at law by the owner.—3rd. That instead of driving the owner to law for his remedy, the Court of Admiralty should give it him by allowing the deductions.

[S. C. 18 Jur. 793. See further, Swa. 81.]

This was a cause of subtraction of wages, by John Hart, carpenter, Henry Stafford and James Snelson, able seamen, against the owners of the ship "Araminta."

Their summary petition alleged that in the month of June, 1852, they were duly shipped and hired in Liverpool to serve on board the "Araminta," a ship of 845 tons burthen, for a voyage to Geelong in Australia; from thence to any place in the China or India seas; and back to any part of the United Kingdom; that she arrived at Geelong on the 3rd of October, 1852, and landed her passengers; that ten of her crew, having shipped at Liverpool under agreement to be discharged in Australia, then left her, whereby her crew was reduced to thirty hands; that on the ship's arrival in the Bay of Geelong, Thomas Feran, the master, of his own motion, mustered the crew, and addressing them, said that crews were deserting their ships to go to the diggings; and then freely and voluntarily proposed to the crew that they and he (the said master) should proceed together to the Bellarat diggings, near Victoria, to dig for gold, and that one-third of the produce earned should be assigned to the ship's owners, and that the remaining two-thirds should be apportioned among the crew according to the rates of the wages, one share and a half being first deducted for the said master; and that their wages should be stopped during their absence from the ship; that all the crew of thirty hands accepted the proposition; and accordingly, on the 18th of October, the master and twenty-seven of the crew (three being left in charge of the ship, under condition of sharing equally with the rest) proceeded to the Bellarat diggings, and were absent from the ship two months and twenty-eight days, at the expiration of which the parties proceeding in the cause, and some others, returned with the master to the ship. That the proportion of the proceeds of this expedition received by or on account of the owners of the ship amounted to about 400l.

[225] That while at the diggings, fifteen of the crew, including the mate, steward, cook, and six able seamen, declared to the master that they repudiated the aforesaid agreement, and should work on their own account, and should not return to the ship; that they accordingly deserted, so that only fifteen hands continued in the performance of their duty; that on the 18th of January, 1853, while the ship was still in Geelong, and bound to Bombay, the master voluntarily called together these hands, and then and there declared and admitted to them that it was very difficult to procure men in

(a) This case was appealed and argued before the Judicial Committee of the Privy Council on the 5th of April, when their Lordships affirmed the judgment with costs, but, to mark their disapproval of the charges of misconduct made by the "Southampton," directed a deduction of 10l. from the costs in each Court.

that port to supply the place of those who had deserted, and that a very high rate of wages was then demanded by seamen in the said port; that he then and there voluntarily and of his own accord offered and proposed to the said fourteen hands, that if they would navigate the said ship, so short-handed, to Bombay, he would, in consideration thereof, pay and divide among them the net amount of wages which would have been payable up to that time for the outward voyage among the rest of the crew who had deserted the ship if they had not so deserted her, but had continued at their duty on board her; and that such payment should be made in each case in addition to, and not in diminution of, the wages due to each of the said crew then on board under the ship's articles, and in addition to, and not in diminution of, the proceeds of their earnings at the diggings, under the aforesaid agreement; that each of the said fourteen hands thereupon assented and agreed to the said offer or proposal; that in pursuance of this arrangement the said master, having calculated the amount of the said forfeited wages, and deducted all charges thereupon, declared to the parties proceeding in the cause that the sum of 8l. 10s. was the share to which each of them was entitled under the said agreement; and the said master then and there freely and voluntarily, and in pursuance of the said agreement, paid over to each of them the sum of 8l. 10s., and declared at the same time to each of them, that he made such payment to them in addition to, and not in diminution of, the wages due to them under the ship's articles, and as a present for navigating the ship so short-handed from Geelong to Bombay.

That while the said ship was so lying at Geelong, seamen could only be procured with very great difficulty and at a very high rate; to wit, at the rate of 40l. for each man for the voyage from Geelong to Bombay. That the ship sailed from Geelong on the 22nd January with fifteen hands only, and therewith safely made the passage to Bombay with great labour to the said crew; arrived there on the 12th of April and discharged her cargo of coals, whereby her owners obtained great profits [226] which they would not otherwise have obtained. That while at Bombay the master shipped twenty-five additional hands; and the ship, having taken on board a cargo of cotton, gum, nuts, &c., sailed for Liverpool, where she arrived on the 11th of September, 1853, and there discharged her cargo; and on the 15th the parties proceeding were duly discharged from the service of the said ship.

That after the ship's arrival at Liverpool, to wit, on the 16th of September, the master delivered to each of the said parties an account, signed by himself, of the wages due to each of them, and of the deductions to be made therefrom, pursuant to the 95th section of the Mercantile Marine Act; but, notwithstanding the premises hereinbefore stated, the master included in the deductions set forth in each of the said accounts, under the head of cash received from the said master by the said seamen, the said sum of 8l. 10s., which had been paid to each of them, the said John Hart, Henry Stafford, and James Snelson, by the said master, as an addition to the wages due to each of them by virtue and in pursuance of the aforesaid agreement.

That the said ship, by her said voyages, earned very considerable freight; that during all the time the parties proceeding were in the service of the said ship, they each of them well and truly performed their duty, and were obedient to all the lawful commands of the said master and other inferior officers, and well deserved the wages schedulate; that so much or greater wages were then given to persons serving in the like capacity on board ships of the like burthens, and on like voyages; that the said John Hart, Henry Stafford, and James Snelson, have made repeated applications to the master and also to the owners of the said ship for the payment and satisfaction of the wages due to them for such their services, but without being able to obtain the same; that, &c.

This libel was opposed, but admitted; the three parties themselves were the only witnesses examined upon it; they were cross-examined, but no defensive plea was given in on behalf of the owners. The cause came on for hearing upon the evidence of the parties proceeding.

Feb. 3.—Sir J. D. Harding, Q. A., and Dr. Spinks appeared for the seamen; Dr. Addams and Dr. Twiss for the owners.

March 17.—*Dr. Lushington.* The present suit is brought for the subtraction of wages; and it is necessary, before I state the legal questions which have been discussed at the bar, to settle, so far as is practicable, what are the facts of the case. The Court, in so doing, must proceed according to its accustomed rule, accord-[227]-ing to

the allegata et probata, paying due consideration to what may come out upon interrogatory.

I have before me the libel, the depositions of three witnesses examined thereon, the mariners' contract, and the log-book.

The suit is brought by three seamen; there is no substantial difference in their cases. In June, 1852, they entered into articles, while the ship was at Birkenhead, to proceed on a voyage to Geelong, in Australia, and afterwards to any ports in the China or Indian Seas, and back to England—her whole voyage not to exceed three years.

The "Araminta" is of the burthen of 845 tons; she took out from 300 to 400 emigrants; the crew consisted of thirty hands, but there were ten supernumeraries in consequence of the number of emigrants. They were to be discharged at Geelong. The vessel reached Geelong on or about October 4, 1852; and, according to the evidence, somewhere about that time the master offered the crew either to pay them off in Geelong, and ship them again at the rate of wages usual at the port at the time, or that they might go with him to the diggings; an agreement was at last entered into, by which it was settled that the expenses should be paid on behalf of the ship, and that one-third of the gold should be appropriated for the benefit of the ship, and the rest should be shared amongst them according to a fixed scale; it was also agreed that the wages should be stopped from October 18, during the absence of the crew from the ship. The crew went accordingly, worked at the diggings, gold to the amount of 7 lbs. weight was received by the master for the benefit of the owners; nearly half the crew refused to return to the ship; about fifteen did return; the master proposed to the men who returned to navigate the ship to Bombay, and offered, if they consented to do so, to pay them the money amongst them that was due to the men who had deserted. It appears that a seaman for the run from Geelong to Bombay could not be got for less than 40l. each; the money that would have been due to the seamen that did desert was distributed amongst the crew; and it is sworn by the witnesses that it was paid in addition to the wages. The gold was distributed about the same time. The ship then sailed to Bombay, having left Geelong on January 22, the crew being fifteen hands only, including the master; that voyage lasted about eleven weeks, the cargo of coals was there discharged and sold, the cargo of cotton and other articles taken in, and with the addition of twenty-two Lascars and one Englishman, the voyage to Liverpool was accomplished, where the ship arrived on September 11, 1853. The men claimed their wages, the owners claimed to deduct two months and twenty-[228]-eight days at the diggings, and also the sum of 8l. 10s., which was the amount distributed by the master as the proportion due to each able seaman of the wages forfeited by those who deserted at Geelong.

The mariners assented to the account so made out by the master, with the exception of this 8l. 10s.; the only question, therefore, in the cause is, whether the owners are entitled to deduct this 8l. 10s. from the amount of wages. The Court is relieved from any consideration as to the diggings, for that arrangement has been assented to by the owners, who have taken their share of the gold, and have deducted their wages during the period the men were at the diggings.

There is a very material difference in fact (the effect will be considered presently) between this case and all those which have been cited at the bar, for this is not a suit to recover any amount stipulated to be paid in addition to wages; it is a question whether an amount actually paid in addition to wages can be the subject of deduction.

In proceeding to ascertain the exact state of the facts, I will notice, that questions have been put to the witnesses as to whether the master, in proposing to go to the diggings, and with respect to all the arrangements relative thereto, did not act under compulsion. All these interrogatories are negatived; the strong probability is, that he so acted under the apprehension that his crew would desert, either from the temptation to go to the diggings, or for the sake of the very high wages then given at Geelong for sailors to man ships proceeding therefrom.

But whatever may be the truth in that respect, it does not appear to me to have any direct bearing on the present question, and for many reasons: 1st. Because the owners have substantially affirmed that transaction; and, 2nd. Because the allotment of the forfeited wages is a distinct and separate matter. So far as the evidence extends, this was a voluntary offer of the master, and in consideration of the crew,

only fifteen in number, undertaking to navigate the vessel to Bombay without additional seamen — a proceeding which manifestly entailed extraordinary labours on them, and was productive of great saving to the owners, for the hire of seamen at Geelong was most exorbitant.

The only further evidence in this cause, if I may so denominate it, is the log; there is no plea, and consequently the master has not been examined.

With respect to this log I think it may be disposed of in a very few words. It is headed, "Official Log-Book, kept distinct from the ordinary ship's log," and purports to be made and kept **[229]** in pursuance of the Mercantile Marine Act of 1850. The special object is to record matters relating to the character and conduct of the crew. The first objection to this log is, that with regard to the transactions when the vessel arrived at Geelong it is wholly silent; there is an entry after the return of the crew to the ship, which date is under the entry of January 18, 1853. It refers to the return of the crew to the vessel, but is wholly unimportant as to the transaction of forfeited wages. There is a subsequent entry in October 13, 1852, which shews the gross irregularity of this log, nor in this nor in the subsequent entry of January 15, 1853, is there any matter of importance. Again, on January 23, 1853, it is stated that Henry Stafford refused to work; but this, too, has nothing to do with the present case, nor is there to be found one syllable of the remainder of the log that refers to it. I may further observe that, except in the cases of two deaths, the log is written by the master alone. This document appears to me to be wholly worthless and irrelevant, as relates to the present inquiry.

I must then take the state of facts to be, that the master voluntarily distributed the forfeited wages amongst the crew from Geelong to Bombay. I have used the expression voluntarily, because I think the effect of the evidence is, that the crew exercised no compulsion towards him, though, perhaps, in another sense of the word, such payment was not voluntary, and the more apt expression may be, and the one nearest the truth, that he was compelled by circumstances to make that payment; however, I have, perhaps, dwelt too long upon this point, because I strongly incline to the opinion that if this were a contract for any reward beyond the wages stipulated for in the mariners' contract, it would not matter whether the contract was compulsory or voluntary; it would in either case be illegal, and such is the effect of all the authorities cited.

In only one respect do I wish to guard myself, and that is, I do not wish it to be inferred from anything I now say that mariners, having completed the voyage outwards, are compellable to make the return voyage when the number of the crew is so small that risk of life may be incurred.

I agree, then, in thinking that, if this were a contract made during the voyage, it would be void for want of consideration, according to the expression of Lord Ellenborough in *Still* v. *Myrick* (2 Camp. 317), and in accordance with all the other cases.

I have now to decide how far this law, as to contracts, applies to deductions. Generally, the deductions claimed from **[230]** seamen's wages are, advance of money or slops, and justice clearly requires that they should be deducted. This is the practice, and I am not aware that it stands upon any authority or rule.

I have now to deal with a payment and not a contract, but I am of opinion that the payment itself was illegal, and I apprehend the money might be recovered by the owners by action, and for this position I refer to Smith's Mercantile Law (Ed. Dowdeswell, p. 145), and the cases there cited. "We have seen," he says, "that payment or delivery to an agent is payment or delivery to his principal; this holds good vice versâ,(*b*) and, therefore, where the agent has paid away or delivered over his master's property, on a consideration, which fails, or otherwise, under circumstances which would entitle him to recover it, the master may, if he please, maintain an action, in his own name, to be reimbursed,(*c*) which it will often be advisable to do, in order not to lose the agent's evidence, and in some cases the master may sue for this purpose where the agent could not; for instance, if the agent and a third person have joined in applying his property to an illegal purpose, as to the insurance of

(*b*) *Coare* v. *Giblett*, 4 East, 85.

(*c*) *Duke of Norfolk* v. *Worsley*, 1 Camp. 337; *Ancher* v. *Bank of England*, Doug. 637; *Stevenson* v. *Mortimer*, Cowp. 805.

lottery tickets, for though the agent, being particeps criminis, might not be able to recover on account of the rule pari delicto potior est conditio defendentis, yet that rule does not affect the master, who is guilty of no criminality.(*d*) And where the agent disposes of the master's property, without either an express or implied authority, as if he sells his master's goods on credit in a trade, the usual course of which is to sell for cash only, the master, though he may affirm the transaction, may, if he please, repudiate it, and recover the property thus tortiously disposed of from the disponee." (*e*)

Then, if the owners could recover this money by action, ought I to leave them to their action or to allow the deduction? I can perceive no satisfactory reason why I should put the owners to this inconvenience, nor why I should not allow a deduction of the moneys illegally advanced. I will further observe that I think it the duty of the Court to act up to the spirit of the law, which holds all such payments and contracts illegal, and I should, I think, fail in so doing if I, in effect, gave the mariners the money first, and left the owners to the empty remedy of an action.

**[231]** I have not thought it necessary to consider the provisions of the statute in this matter, but I may observe that this appropriation of the forfeited wages is clearly a violation of the statute 7 & 8 Vict. c. 112, s. 9.

I must pronounce for the deduction, but under all the circumstances of the case, and considering that the owners reaped the benefit of the crew's having taken the vessel short-handed, I shall not give any costs.

Proctors, for the seamen, Pritchard; for the owners, Rothery.

THE "SANTIPORE." The High Court of Admiralty, Feb. 7, 1854. A valuable vessel having got upon the Church Rocks, off Folkestone, received assistance from some small boats, which were unable to get her off. A tug steamer having also tried in vain to tow her off, a large passenger steamer was sent from Folkestone Harbour, and succeeded in moving her from the rocks and towing her for a few minutes, when the hawser having broken, she drifted ashore, and became a wreck. The cargo was saved to the value of 9657l. The defence that no salvage reward was due, as the service had been unsuccessful, not sustained. Award of 450l. to the smaller vessels, and 250l. to the steamer.

This was a suit for salvage brought by the master, crew, and owners of the lugger "William and Mary," the lugger "Four Brothers," and the galley "Ned," and by the master, crew, and owners of the steam-vessel "Princess Mary," against the "Santipore," a barque of 515 tons.

The facts of the case are fully stated in the judgment.

The owners in defence alleged that the services of the several crews ceased upon the barque striking the main, and that they afterwards became tide-workers, for which they had all been paid at the rate of 4s. each per day, and 5s. each per night tide; that it was not owing to any services rendered by them that the barque was kept afloat or enabled to be removed from the rocks, and run on the beach; they denied that in consequence of any assistance rendered by the "Princess Mary," or otherwise, the barque's cargo was preserved almost undamaged, and further alleged that the barque which, on her departure from London, was worth 8000l., became a total wreck, and was completely broken up; that the chief part of her hull has since been sold by auction, and realised the sum of 140l. and no more; that the rest of the wreck will not realise, after payment of all expenses, more than 160l.: that the cargo was damaged to the extent of nearly three-fourths its value; that for the reasons pre-alleged, the said steamer "Princess Mary" rendered no salvage service whatever to the said barque, as she was unable to prevent her driving on the main, which resulted in the almost entire destruction of the said barque and her cargo, &c.

Sir J. D. Harding, Q. A., and Dr. Jenner, argued the case for the luggers; Dr. Deane and Dr. Bayford for the steamer. Dr. Addams and Dr. Twiss appeared for the owners, and admitted that a salvage service had been performed, though not to the extent alleged by the salvors, and left it to the discretion of the Court to award the amount of remuneration.

**[232]** *Dr. Lushington* expressed his satisfaction at the candid manner in which

(*d*) *Clarke* v. *Shee*, Cowp. 197.

(*e*) 12 Mod. 514; *Wiltshire* v. *Sims*, 1 Camp. 258; *Guerriero* v. *Peile*, 3 B. & A. 616.

the case had been met by the owners, and deferred his judgment in order to give the case further consideration.

March 7.—*Dr. Lushington* delivered judgment. This is a case of salvage. The agreed value of the ship, freight, and cargo proceeded against is 9657l. There have been two actions brought; the first, on behalf of the owners, masters, and crews of two luggers and one galley; and a second, on behalf of the owners, masters, and crew of a steam-vessel called the "Princess Mary."

There was much contradiction in the statements of the parties to this suit, and a mass of evidence conflicting in so many important particulars that it would have been a matter of no small difficulty to have arrived at a satisfactory conclusion; to have ascertained the exact truth would have been a matter of impossibility. Among other questions not easy of solution would have been one arising from an alleged agreement; but from these difficulties I am happy to say the Court is relieved by the candid and liberal line of conduct pursued on behalf of the owners. The Court has, therefore, only to decide on the amount of salvage remuneration to which the respective parties may be justly entitled.

The ship proceeded against is of 515 tons burthen, and, on her voyage from London to Van Diemen's Land, met with adverse winds going down the Channel, and was forced to put back. On the morning of the 5th of October, about five o'clock, she struck on the Church Rocks, near Folkestone; and, according to the protest, struck very heavily. The port bower anchor was let go, and she was by her canvas forced on the rocks, and at six floated. The wind blew hard and the sea ran high. The ship occasionally struck hard; the rudder gear was broken and cut adrift. At half-past six o'clock the master sent ashore for a steamer, and employed twenty men to assist him. The port pump became useless, and though the others were constantly at work, there was four feet water in the hold. At noon the wind increased, and the sea ran tremendously, which caused the vessel to labour and strain violently. At a quarter past one two steamers arrived; the first got hold, but the hawser parted; so did the second steamer; and as a last resource they slipped from their anchors. The ship's head was canted to the eastward, and then the second hawser parted. In this critical position—I use the very words of the protest—they set the fore and aft sails; and a third steamer took hold, but **[233]** without effect—the steamer drifted. The ship took the ground, all the masts were cut away, and they commenced discharging the cargo, and, to steady the vessel, carried out a cable from the port quarter to the shore. Whilst the vessel lay in this position the cargo was discharged, the vessel herself was broken up and sold for 140l.

This statement is a faithful abstract of the protest. The protest very clearly and decisively describes the danger which the ship was in—danger, indeed, so great, it ultimately ended in the destruction of the ship altogether. But as to the services of the salvors, whether small or great, this protest affords not even the slightest information. I think I scarcely ever read a document of this description which left the Court so completely and entirely in the dark, in this important particular, as this protest does. I must look, therefore, to other sources of information to ascertain the services which the salvors really did perform.

The first set of salvors, the boatmen, represent that they experienced danger in going to and approaching the vessel, and they claim the merit of all that was done; but this I consider to be very doubtful. The nearest the truth, perhaps, is that they were very active in suggestion. The pumps were set to work, and at eight o'clock they send for a lugger. They state that they conveyed a passenger on shore with considerable property; this assertion is not well founded; and that they brought back the ship's agent, Mr. Sisto, and that great danger was incurred in so doing. At half-past ten the lugger "William and Mary" arrived and put more hands on board. Soon after this the ship's rudder was destroyed and the starboard anchor let go. The "William and Mary," with the "Bright Star," were employed to await the arrival of a steam-tug, and to steer the vessel if necessary; they again took the agent on shore. At two a steam-vessel arrived from Folkestone; great efforts were made to get a hawser on board, and this attempt, it was alleged, was attended with some danger. Who was employed in this the affidavit does not state; I think it is fair to presume that the salvors were engaged in some part of the service. The Dover steam-tug arrived, and the salvors threw a line over her, but she did nothing. They then allege that, with imminent peril, they got a line over the South Eastern boat.

Both anchors were let slip, and the steamer canted the ship's head round to the eastward, when the hawser broke. The jib was hoisted, and the ship run up as high as possible on the beach. The sails were cut away, and there ended the service of these salvors.

The only question which appears to me to require investiga-[234]-tion as to this part of the case is whether these services were attended with any, and what degree of danger; for, as we all know, that is a point of importance in every case of salvage. I am of opinion that it is proved from the evidence that these services were rendered at considerable risk to those concerned; at the same time, the risk has been portrayed in rather too glowing colours as to some parts of the case.

As to the claim of the steamer, Captain Hathorn, who is the superintendent of the steam-boats belonging to the South Eastern Company, very promptly and very properly took measures for affording assistance to this vessel. He telegraphed to Lloyd's, and took a message to Dover and Deal. He sent out the "Princess Mary," with twenty-seven men on board, as soon as the water in the harbour would allow; and according to his statement she was made fast to the "Santipore," and succeeded in getting her off the rocks, when, unfortunately, the tow-rope broke and she went on shore. The merit of this service consists in having got the ship off the rocks, and so having contributed to the saving of the cargo.

These being the outlines of the case, I have now to consider what remuneration should be awarded, not forgetting that the endeavours were only partly successful; the ship was destroyed, and parts of the cargo damaged or lost to the owners. The first claim is on behalf of three small vessels and twenty-one men, and some damage has been done to one of the vessels. The service was not long, nor in itself very successful in the issue, but they rendered all the assistance their means would allow; and, as I think, with risk and danger to themselves. I shall allot to them the sum of 450l.

With respect to the steamers, I think Captain Hathorn's conduct was very praiseworthy; and I deem it of great importance—indeed, of first-rate importance—that sufficient inducement should be held out for the employment of such powerful vessels in services of this description—vessels which can render assistance when no others can. I shall give, looking at the value of the service, 250l.

In considering the difference in point of amount that I have awarded to these two sets of salvors, I do not shut my eyes to the fact that it may be true that in moving the ship, the steamer, in reality, performed the more essential and important service; but it was not attended with risk or danger. All the hazard of life fell on the first set of salvors.

Proctors for the first set of salvors, Gostling; for the second, Lawrie; and for the owners, Deacon.

**[235]** RICHARDS *against* THE QUEEN'S PROCTOR. Prerogative Court of Canterbury, Jan. 14, 1854.—In questions of revocation of a testamentary paper by a subsequent instrument, the main thing to be looked at is the intention of the testator. If a testamentary instrument contain no express revocation of former ones, the Court will not infer such revocation from the mere appointment of an executor in the subsequent one.

[S. C. 18 Jur. 540.]

On admission of Allegation.

Elizabeth Mary Bell, spinster, the deceased in this cause, died on the 12th September, 1851, at the age of 82, leaving no known relation. Her property, entirely personal, amounted to about 1760l.

At her death three testamentary papers, all in her own handwriting, were found in a small box at her residence. They were to the following effect:—

No. 1. "To Thomas Vincent, Esq^re^, of No. 16 Quebec Street, Hyde Park, my Executor, I leave the arrears of my Annuities, the unexpired Term of my long Annuities, and the Annuity for a term of 20 years from 1846. Also a sum of Money in the St. Martin's Saving Bank, to Pay the following Legacies:—To the Hospital for Consumptive Patients at Brompton, the Charity for Diseases of the Eye, and the Charity for Prevention of Cruelty to Animals, the sum of 30l. each, to be paid out of the Money in the Saving Bank *—after all Expenses are paid. Debts I have none. I wish the Remainder to be divided Equally between the above Thomas Vincent,

Esq^re^, and his two Sisters, Eliza and Ann Vincent. And now my good and kind Friends, whose invariable kindness Has upheld me so many years, will Cause me to be Buried Respectable but Plain, and not Too soon. May the Almighty Bless you all. "ELIZABETH MARY BELL.

"July 8, 1848,* and any other Legacy
I may add Hereafter.
"No. 2. Lower Phillimore Place,
"Kensington.

"Elizabeth Benson.
"Jane Weller."

No. 2. "To my Executress, Eliza Richards, Wife of T. S. Richards, Esq^re^, of No. 16 Quebeck Street, Hyde Park. If at my Decease there should Remain any Unexpired Term of my Long Annuities, the Annuity for a Term of Years, Expirg. in the year 1866, and the arrears of my Life Annuities, according to the Bond executed at the Time of Purchase, I leave to my Dear Friends, the above named Eliza Richards, to Be Divided Equally with her Sister, Ann Vincent. The sum of money in the St. Martin's Saving Bank, to Be Disposed of as Follows: to the Society for the Prevention of Cruelty to Animals, to the Charity for the Eyes, and to the Hospital for **[236]** Consumptive Patients at Brompton, 30l. Pounds Each, and any Other Legacies I may wish to leave."

No. 3 (Paper A.). "To Smallwood Richards, Esq^re^, my Executor, I leave 50 Pounds. To Watkins, Esq^re^, of Sackville Street, Piccadilly, & Wilton Crescent, Knightsbridge, 50 Pounds. To Ann Vincent, Daughter of the late Thomas Vincent, Esq^re^, I leave One hundred pounds. To the Fund for Prevention of Cruelty to Animals, to the Hospital at Brompton for the Consumtive Patients, to the Charity for Diseases of the Eye, Forty pounds each. To Frances Bowler, Widow, 55 Grove Place, Brompton, 10l. 0s. 0d. To Mary Clarah Price, of Decripy Place, Denmark Hill, Surry, 10l. 0s. 0d. "ELIZ^TH^ MARY BELL.

"Witness,
"Jane Weller,
"2 Lower Phillimore Place,
"Kensington.

"Witness, Elizabeth Benson,
"2 Lower Phillimore Place,
"Kensington, Aug. 22, 1851."

Mr. Richards, finding these papers, assumed, as a matter of course, that the last operated as a revocation of that dated 8th July, 1848, and was alone the testatrix's will, and without mentioning, either to his solicitor or his proctor, that any other testamentary paper existed, on the 20th September, 1851, took probate of the latter paper only.

Miss Vincent, however, having been informed of the existence of the will of 8th July, 1848, under which she is named one of the residuary legatees, insisted that it ought to have been proved as the testatrix's will, and that the paper which had been proved as the will was only a codicil.

Mr. Richards, having taken counsel's opinion, brought the papers Nos. 1 and 2, and the probate of No. 3, into the Registry, with an affidavit of the circumstances; and, by his proctor, prayed the Court to revoke the probate already granted, and to grant probate of the two paper writings, dated respectively 8th July, 1848, and 22nd August, 1851, as the will and codicil of the deceased. The residue falling to the Crown under the last paper, the Queen's Proctor declared he opposed script No. 1, being the will dated the 8th July, 1848. Mr. Richards, therefore, propounded it in allegation, consisting of ten articles, which pleaded in substance as follows:—

First. That the deceased died a spinster, without any known relation, and possessed of property to the amount of about 1760l.

Second. That she had for forty years before her death been **[237]** on intimate terms with Thomas Vincent and his sisters, and always expressed great affection for them.

Third. That in July, 1848, she drew up, in her own handwriting, and on the 8th of the said month duly executed, the paper writing No. 1, whereby she bequeathed, &c.; that the words "and any other legacy I may add hereafter," written at the foot of the said will, and a cross or mark written against the same, and also a similar cross or mark appearing in the said will, referring to and showing where such words were to be inserted, were written by the testatrix prior to the execution of her said will.

Fourth. Capacity.

Fifth. That Thomas Vincent died 11th September, 1849; that Eliza Vincent married Thomas Smallwood Richards 20th July, 1849, and died 20th July, 1851, leaving her sister, Ann Vincent, who is still living.

Sixth. That sometime between the 11th September, 1849, and the 20th July, 1851, but when more particularly is unknown, the deceased drew up and wrote the paper marked No. 2, but did not afterwards sign the same.

Seventh. That in the month of August, 1851, the deceased, having a mind and intention to make and execute a codicil to her said last will and testament, and thereby to appoint an executor of her said will in the place of the said Thomas Vincent, then deceased, and also to bequeath certain further legacies, in pursuance of her aforesaid intention to that effect, expressed and contained in her said will, did, with her own hand, draw up and write the paper writing now remaining in the Registry of this Court (and of which probate has been inadvertently taken as the last will of the said deceased); and that on or about the 22nd August, 1851, she did duly execute the same as and for a codicil to her said will; that the deceased, in and by her said codicil, appointed the said T. S. Richards (therein called Smallwood Richards) her executor; and thereby gave and bequeathed certain pecuniary legacies, but did not otherwise revoke or vary the provisions or bequests contained in the said will.

Eighth, ninth, and tenth. The finding and plight of the papers, the handwriting of the deceased, and the usual conclusion.

The admission of this allegation was opposed on behalf of the Crown.

Sir J. D. Harding, Q. A., against its admission. This case may be decided, on the admission of the allegation, without the necessity of going to proof. It is purely a question of law, **[238]** which the Court may decide from the papers themselves. I contend that, if this allegation were proved, the paper No. 1 would not be entitled to probate, but has been revoked by the latter paper, dated 22nd August, 1851. I rely upon the cases of *Henfrey* v. *Henfrey* (2 Curt. 468) and *Plenty* v. *West* (1 Rob. 264). The appointment of Mr. Richards executor makes this a substantive will. In *Henfrey* v. *Henfrey* Sir H. J. Fust says, "I have always understood that the appointment of executors was considered a gift to them of all the testator's property; here, by the latter paper, all is given to the widow; there was, therefore, no necessity to appoint executors. There is no case in which it has been held that where there are two wills it is absolutely necessary that there should be a clause expressly revoking the appointment of executors, or that two substantive wills should be admitted to probate." That case was appealed and affirmed. On the appeal (4 Moo. P. C. 34), Dr. Lushington expressed himself to a similar effect. In *Plenty* v. *West* the learned Judge said, "There is no reference whatever to any earlier paper, nor did anything pass at the execution to shew that the testator intended to limit the effect of the paper of 1838. I find, too, in a codicil of the same date as the will, there is an appointment of executors, which has always been considered to effect a complete disposition" (1 Rob. 268). The present case is much stronger; there is no reference to a former paper, and there is an appointment of an executor. The appointment of executor is just as if the testatrix had said, "I hereby bequeath to him all I may die possessed of." This is the force of the word as known to the law; and if persons use expressions well known to the law, they must be bound by them. The testatrix has clearly made a new and substantive will inconsistent with the former.

Dr. Jenner on the same side. The argument of the other side will rest upon the disposition of the residue in the former paper. But that argument fails if we look more closely into the language of the paper. The residuary legatees are clearly tenants in common, so that by the death of two of them, in the lifetime of the testatrix, she is intestate as to two-thirds of the residue (2 Williams Executors, 1253-4; 2 Black. Com. 124).

Dr. Haggard, contrà. If Dr. Jenner's argument be correct, there is, in point of property, scarcely anything to contend for, as it is only one-third of the residue. That, however, is a question for a Court of Equity, not of Probate. The rule applied before the year 1838 will here apply. We cannot deal with an unexecuted paper, but we may with a paper which is **[239]** incomplete as to the disposition of the residue. The cases cited have been treated with this view. The question was in those cases, as in this, what the testator had himself recorded as his intention—what was the character which he intended to impress upon the paper. Those cases were very

different. In *Henfrey* v. *Henfrey* the latter paper gave the whole property to the wife, and, as the Judge said, there was no necessity to appoint executors. In *Plenty* v. *West* the testator described it as his "last will," both at the commencement and in the attestation clause. In the present case an executor is appointed, because the executor named in the former will was dead, but there is here no disposition of the residue. Testatrix's intention was, that the residue should go to Miss Vincent. It cannot be said that, because an executor is appointed, the whole of the residue is disposed of. He takes the legal, but not the beneficial, interest. No argument against the paper can be drawn from the legacies; some are cumulative (2 Williams Executors, 1106), and some are new legacies, according to the power which the testatrix intended to reserve to herself in the first paper. There is nothing whatever to shew any intention, on the part of the testatrix, that the last paper should revoke the former.

Dr. Twiss, on the same side. Even if the present case could not easily be distinguished from the cases cited, there is a later case of the highest authority, which clearly lays down the law as applicable to such papers as those before the Court: *Stoddart* v. *Grant and Others* (1 Macq. Scot. App. Cas. 163).

Sir J. D. Harding, Q. A., replied upon this case.

Judgment deferred.

Jan. 23.—*Sir John Dodson.* In this case, Miss Elizabeth Bell is the deceased. She died upon the 12th of December 1851, leaving personal property of the value of about 1752l., and was of the age of eighty-two. She had no known relations, but she had been very intimate for forty years at least with a family of the name of Vincent, consisting of a brother and two sisters. Mr. Thomas Vincent, the brother, died on the 11th of September, 1849. Upon the 7th of July, 1849, Miss Elizabeth Vincent, one of the sisters, married Mr. Richards, who is the present party in the cause, and she died on the 20th of July, 1851. Ann Vincent, the other sister, is still living.

Three testamentary papers have been found, all in the handwriting of the deceased; and they were discovered in her repositories, being altogether in a box belonging to her. One **[240]** of these papers, which is before the Court, marked No. 1, bears date on the 8th of July, 1848; and it appears to have been duly executed by the deceased, and attested by two witnesses. It appoints Mr. Thomas Vincent, the party whom I have before mentioned, executor. No. 2 is a paper that is not signed or dated in any way whatever. The third paper before the Court is marked with the letter A, and bears date on the 22nd of August, 1851. That is duly executed and attested, and it appoints Mr. Richards the executor.

Now probate of the last paper only was taken out by Mr. Richards; and it is said that this was done inadvertently; that he proved that as the only will of the deceased. It has since been brought in, and he now prays probate of paper No. 1, as containing the will, and this paper A. as a codicil thereto.

These several papers are before the Court; and the facts and circumstances to which I have just briefly adverted are set forth in an allegation, the admissibility of which is opposed by the Queen's Proctor. The party having died without any known relations, the Queen's Proctor has appeared, and opposed probate of this instrument.

The question for the consideration of the Court is, whether, from the appearance and contents of the papers themselves, coupled with the facts stated in the allegation, the script A. being the last in point of date, is to be deemed a substantive will, revoking the other paper, or whether it is codicillary, and they are to be taken in conjunction with one another; in short, whether the two papers together are to operate, or whether probate is to be granted, as originally taken, of one paper only.

Now this, I apprehend, must depend very much upon the intention of the testatrix. It is that to which the Court must look, to see whether it was really her intention that one of the papers only should operate as her last will, or whether it was her intention that the two papers should be taken conjointly as forming her will, or one being considered as the will, the other as a codicil to it.

The rule which is applicable to cases of this kind, I think, is laid down very clearly in the case cited by one of the learned counsel, namely, *Stoddart* v. *Grant and Others* (Ubi suprà). That was a decision given by Lord Truro; he appears to have considered the point fully. Though that is a judgment upon a case of Scotch law and Scotch testamentary papers, still the principle is the same, because he refers to the opinions expressed by Lord Moncrieff and Lord Murray, who represent it to be a well-**[241]**-

established principle of the laws of Scotland, that "where a deceased has left various writings, probative in themselves, for disposing of his property, they are to be understood as constituting one testamentary settlement, in so far as they have not been revoked, and are not inconsistent with each other" (p. 170). That is the rule of the law of Scotland; they are to prevail, if they are not revoked, or if they are not inconsistent with each other. He says, "Lord Moncrieff and Lord Murray assent to the doctrine laid down by Mr. Justice Williams, in his Law of Executors (1 Williams on Exrs. 116), 'that the mere fact of making a subsequent will does not work a total revocation of a prior one, unless the latter expressly revoke the former, or the two be incapable of standing together; for though it be a maxim that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be, so they be all testamentary, may be admitted to probate as together containing the last will of the deceased; and that, although one may be partially inconsistent with another of an earlier date, the latter instrument will revoke the former as to those parts only where they are inconsistent.'" The same learned Judges further observe, that "the main thing to be looked to is the intention of the testatrix."

Then Lord Truro goes on to say, "The general rule applicable to cases of this description is perfectly clear, and not subject, so far as I am aware, to any exception. It is this: that questions relating to wills should be decided by looking to the whole contents of the documents, with a view to discover what is fairly to be inferred as the intention of the testator."

Therefore, I now propose to look to these documents, to see whether I cannot infer from them what apparently and what really was the intention of the testatrix.

First, with regard to the paper marked No. 1, which is now propounded as the will, it is in these terms (vide ante, p. 235): "To Thomas Vincent," &c. So that it appears from the addition which the testatrix made—"and any other legacy I may add hereafter"—that at the time she was writing this instrument, she contemplated making some additional legacy—some additional appointment. The purport and tenor of that will is to give some legacy to three charities, which she mentions, namely, the hospital for consumptive patients, and another for the diseases of the eye, and the society for the prevention of cruelty to animals; reserving to herself the power of making any additional legacy which she may think proper; and then she disposes of [242] the residue of her property amongst the family of the Vincents, namely, Mr. Thomas Vincent and his two sisters, Elizabeth and Ann.

The next paper—at least, I presume the next, for there is no date to it, yet it is pretty clear from its contents that it is the next in order—is No. 2. That has neither date nor signature, and therefore cannot at all affect the present question, which relates to No. 1. What I have now stated tends to shew that it was an intermediate one; because I find it alleged in the allegation now offered, that Elizabeth Vincent, one of the residuary legatees named in the will, had, shortly after the making of that will, married Mr. Richards, and that then she died. It appears from the contents of this paper she was dead at the time it was written.

Now we come to the paper A., and it is in these terms: "To Smallwood Richards, my executor, I leave 50l. To Watkins, Esq., of Sackville Street, Piccadilly, 50l. To Ann Vincent, daughter of the late Thomas Vincent, Esq., I leave 100l." (That is one of the original residuary legatees; in the paper No. 1 she leaves her a legacy of 50l.) "To the fund for the prevention of cruelty to animals, to the hospital at Brompton for the consumptive patients, to the charity for diseases of the eye, 40l. each." It will be recollected that in the first will she had left these charities 30l.; she had reserved the right of giving additional legacies, and here she gives them 40l. each. Then it goes on to give a legacy of 10l. to Frances Bowler, widow, and also a legacy of 10l. to Mrs. Price. These are the contents of the instruments which are before the Court for its consideration.

Now it is to be observed, in the first place, that there is nothing revocatory in the last paper at all; there is nothing about revoking all former papers, neither is there anything inconsistent, as it appears to me, with the contents of the former instrument. By that former instrument she had reserved the right of giving additional legacies. There was no occasion for that reservation, but it shews her intention. By this paper she gives additional legacies, legacies of 10l. each to two widows, and additional legacies to each of the three charities. A legacy of 50l. to Mr. Richards, her executor, and of 100l. to Miss Ann Vincent.

It appears to me there is nothing whatever inconsistent in these dispositions. It is to be observed that the latter paper only gives these additional legacies, and there is no disposition of the residue beneficially for the interest of any person whatever. Looking, then, I think, to the intention of the testatrix, **[243]** it must be pretty clear that this was only following up her original intention, and she did not mean to revoke that first instrument. The residue of the property is still undisposed of altogether; for in consequence of the death of two of the residuary legatees out of three, two portions of the residue of the property of the deceased are undisposed of by either of the testamentary papers; and as there are no known relations who have been discovered, that will go for the benefit of the Crown.

Reference has been made by the learned counsel to two cases decided by the late Judge of the Prerogative Court, shewing that these papers ought not to be taken in conjunction; those are the cases of *Henfrey* v. *Henfrey* (2 Curt. 468), and *Plenty* v. *West* (1 Rob. 264); but it appears to me that there is a very wide distinction between those two cases and the present. In one of those cases the instrument was described as the last will. "This is my last will and testament"; that was set forth at the commencement of the will. In the attestation clause, again, it was spoken of as the last will and testament, and there was a disposition of the entire property of the deceased; and clearly where there is a will described as the last will by the testator, and disposing of the whole of the property, that must be revocatory of any former instrument. It is said that one of them was not an absolute disposal of the property, but that it was disposed of by the appointment of an executor; that the appointment of an executor would always be considered as a conversion of the property; therefore, in point of fact, the whole of the property was disposed of by the last will. Here, again, it is said there is an executor; Mr. Richards is named as executor in the last paper, and therefore it must be considered that the whole of the property is given to him; that that will operate as a conversion of the whole property, consequently the entire property is disposed of, and it will operate as a revocation of the first instrument. But I cannot think it will have that effect—that it will give him a legal interest by the lapse of a beneficial interest. What I have to look at is, the intention of the deceased. By appointing Mr. Richards executor, and giving him a legacy of 50l. for his trouble as executor, does she mean to confer upon him the whole of the property? Undoubtedly not; she never meant to take it away from parties who were beneficially interested under the other paper. True it is that two thirds have lapsed by the unfortunate death of the parties, but the great distinction adverted to between that case and the one now before the Court is, that it was described as the last will, and **[244]** operated upon the whole of the property. In this case neither of these instruments is described as the last will; the learned Judge seems to think it conclusive upon all points that the last will would operate as a revocation of all former papers, and undoubtedly, generally speaking, it must do so. He said he was not aware of any case in which it had been otherwise held; and perhaps, at that time, there had been no case in which it was otherwise held. Generally speaking, when anybody describes an instrument as his last will and so forth, and makes an appointment of executors, that would necessarily operate as a revocation of all former instruments. This, however, is not described as the last will, but merely confers additional legacies, as the deceased had reserved to herself the right of doing under the former instrument, and substitutes another executor in consequence of the death of the executor named in the first will. There is no intimation of revoking the rest of the will, but merely the supply of defects in the legacies which she intended to give, and the appointment of an executor to carry her intentions into execution.

With regard to there being no case in which such a testamentary instrument as this has been described as the last will, and was not intended to revoke all former wills, in the very case mentioned of *Stoddart* v. *Grant*, one of the instruments was described as the last will. There were no less than seven; that was the fourth in point of order, and the testatrix there, whose name happened to be the same as this, Bell, describes it as the last will and testament; but notwithstanding that it was held by Lord Truro and the House of Lords, that it only formed part of the will, the other instruments were entitled to be proved; it did not revoke all former instruments. But then it was because it was not the intention of the deceased. Generally speaking, when persons describe a will as the last will and testament, they intend to revoke all former instruments, and, primâ facie, that must be taken to be so;

but in this case of *Stoddart* v. *Grant*, that document, which was alone described as the last will, only gave a life interest in the household furniture to one of the servants, and nothing beyond it. Therefore, though she described it as the last will, it was only considered as part of the last will, and the three several papers prepared and signed by her before, as well as the three several papers afterwards prepared and executed by her, were all held entitled to probate.

Under these circumstances I can have no hesitation in admitting the allegation to proof. I am clearly of opinion that it was not the intention of the deceased to revoke the instru-[245]-ment, and that intention must be judged of, in cases of this kind, according to the rule laid down by Mr. Justice Williams. I am of opinion that the papers taken together are entitled to probate, that is, if the facts set forth in the allegation be proved. On that ground I admit the allegation.

Proctors, Nicholl, and the Queen's Proctor.

IN THE GOODS OF THE RT. HON. HENDRIK JACOB BARON VAN DROM, Deceased. Prerogative Court of Canterbury, Feb. 9, 1854.—Construction of an executory clause by the Dutch law adopted.

The Right Hon. Hendrik Jacob Baron van Drom, formerly of Middleburg, in Zeeland, but late of the Hague, died there on the 18th of January last, leaving a will duly executed according to the Dutch law.

The appointment of executors was in words to this effect: "I desire that, in case at the time of my death all the persons having claims upon my estate shall not be present, in the house, my said son, and in the event of his absence, my son-in-law, M. Aert Van der Goes, and should he also be absent, my son-in-law, M. William Quartes Van Liffard, shall immediately act as executor, which executorship shall, however, cease as soon as all the persons having interest in my estate shall be present."

It appears that the testator's said son and sons-in-law were all present at his death, and that, according to the interpretation put upon the above appointment of executors by the Dutch law, they are executors without limitation, and that they are conjointly and separately, according to such law, qualified to administer all effects and moneys belonging to the testator as general executors. An affidavit as to the law and as to the due registering and proving of the will at the Hague, was made by a notary public there.

The said son and sons-in-law had been sworn as executors under a commission issued from this Court.

Dr. Hughes now moved the Court to decree probate of the said will, to issue to them as general executors accordingly.

*Sir John Dodson.* There is no difficulty in the case. It is not necessary for me to put any construction upon the clause. It appears that, by the law of Holland, they are entitled to the administration of this estate, and the Court will adopt that construction.

Decree accordingly.

Proctor, Toller.

[246] IN THE GOODS OF THOMAS SHOOLBRAID, Deceased. Prerogative Court of Canterbury, Feb. 9, 1854.—By the law of Scotland a widow is not entitled to any share of the property of her husband, or to letters of administration, unless at the time of his death she has been married to him one year and a day. Following a decree of the Commissary Court of Perthshire, the Court granted letters of administration to the sister of the deceased in preference to the widow.

The deceased, a quartermaster, on half-pay, of her Majesty's 45th regiment of foot, born, and domiciled at the time of his death, in Scotland, died, on the 15th August, 1853, intestate, without a child, parent, or brother, leaving behind him Rachel Shoolbraid, otherwise Simpson (wife of John Simpson), his natural and lawful sister, and only next of kin, and also Mary Ann Miller, or Shoolbraid, his lawful widow and relict.

It appeared from affidavits brought in that the deceased had married on the 1st of August, only fourteen days before his death, and that by the law of Scotland, a widow is cut off from any interest or participation in the property of her deceased husband, unless, at the time of his death, she shall have been married a year and a day; that

the said Mary Ann Shoolbraid, the widow, had not alleged herself to be, and was believed not to be, enciente; that proceedings had been instituted before the Commissary Depute of the Commissariat of Perthshire, and that by his decree, bearing date the 16th November, 1853, he found that the said Rachel Shoolbraid, otherwise Simpson, as the next of kin of the said deceased, was entitled to be preferred to the office of executry, as executrix dative, qua, nearest in kin to the said defunct Thomas Shoolbraid, in preference to Mrs. Mary Ann Miller, or Shoolbraid, as widow.

Dr. Twiss now moved the Court to decree letters of administration of the goods of the deceased to be granted to the said Rachel Shoolbraid, otherwise Simpson (wife of John Simpson), the natural and lawful sister, and only next of kin, and the sole person entitled, by the law of Scotland, to the personal effects of the said deceased.

*Sir John Dodson.* I cannot understand why the Court should be asked to pronounce a decree so much more extensive than the decree of the Commissary Court of Scotland. That Court has decreed the administration to Mrs. Simpson as nearest of kin, or as next of kin; but I am asked to decree it to her as the only next of kin, and the sole person entitled to the personal effects of the deceased. Why should this Court take upon itself to do that which the Commissary Court has not done? The grant may pass to Mrs. Simpson, in this Court, under the same character and description as it passed in Scotland, but not otherwise.

Proctor, Tebbs.

**[247]** IN THE GOODS OF WILLIAM BENNETT, Deceased. Prerogative Court of Canterbury, Feb. 18, 1854.—W. B. wrote his will, signed it in the presence of C. B, who then subscribed. On a subsequent day W. B. acknowledged his signature in the presence of C. B. and H. C., and C. B. having also acknowledged her signature without resubscribing, H. C. subscribed his name. Will invalid, because C. B. did not sign again instead of acknowledging her signature.

The deceased, late of Enfield Highway, in the county of Middlesex, builder, died on the 23rd January last, leaving a will, all in his own handwriting, and signed by himself, and apparently attested by two witnesses.

The signature and attestation appeared in the following form:—

"Signed by Me WILLIAM BENNETT Testater this Day 5 of October 1853.

"Witnessed by me Caroline Bennett

"Witnessed by me Henry Chapman December 29, 1853."

The attestation being imperfect, an affidavit of execution was required from the witnesses. It was to the following effect:—"Caroline Bennett, for herself, made oath that on the 5th day of October last the deceased signed his name at the foot or end of the said paper-writing, as the same now appears, as and for his last will and testament, in the presence of this deponent, no other person being present; that this deponent thereupon, at the request, and in the presence only of the said deceased, subscribed her name thereto as the same now appears. And the said Caroline Bennett and Henry Chapman further jointly made oath that on the 29th day of December last the said deceased, in the presence of both these deponents, present at the same time, produced the said paper-writing, and, referring thereto, said to the deponent, Henry Chapman, 'This is my will'; and pointing to his said subscription, added, 'You see this is my writing; I want you to put your name at the bottom'; that the deponent Caroline Bennett thereupon pointed to her signature, and said, 'This is my signature'; that the deponent Henry Chapman, then, in the presence of the said Caroline Bennett and of the said deceased, subscribed his name, as the same now appears, adding the words and figures, December 29, 1853."

Counsel moved for probate.

*Sir John Dodson.* The motion must, of course, be rejected. The will is invalid, as the first witness did not sign her name again, instead of only acknowledging her signature.(*a*)

Proctor, Lochner.

---

(*a*) This case is reported in the hope that attention may be drawn to the hardship of the law. In the year 1842 it was decided (*Moore* v. *King*, 3 Curt. 243), that a

**[248]** B———N *against* B———N. Privy Council, 1854.—Nullity. Malformation. A husband having been about eighteen years married, and having constantly cohabited with his wife for several years, instituted a suit for nullity by reason of the incurable malformation of the wife. Held: 1st. That time alone will not, but, coupled with other facts proving insincerity, will operate as a bar to such a suit. 2nd. That lapse of time must be accounted for. 3rd. That the evidence in the present case did not sufficiently account for lapse of time, but shewed partial connection to have taken place between the parties, and that the suit was instituted alio intuitu. 4th. That, under the whole circumstances of the case, the husband was not entitled to a decree of nullity.

[S. C. in Court below, 2 Roberts Ecc. 580. Discussed, *M.* v. *D.*, 1885, 10 P. D. 77. Referred to, *Napier* v. *Napier*, [1915] P. 190.]

This was a cause or business of nullity of marriage, brought by A. B———, Esq., against L. H. W. M———e, falsely calling herself B———n, and pretending to be the wife of the said A. B———n, by reason of the natural and incurable malformation of the parts of generation of the said L. H. W. M———e.

The suit commenced in the Consistory Court of London, where a libel was brought in on the 3rd of September, 1852, which pleaded in substance:—

First and second Articles. The celebration of the marriage at Belgaum, in the East Indies, on the 26th of June, 1835.

Third and fourth. That the parties cohabited as husband and wife (save that the said marriage in fact was never consummated) till June, 1840, when the said L. H. W. M. came to England for the benefit of her health, under medical advice; that the said A. B. being in the civil service of the East India Company, continued resident in the East Indies until March, 1844, when he returned to England on leave, and arrived there May 31st, in that year; that he immediately rejoined the said **[249]** L. H. W. M., and cohabited with her at various places until the summer of the year 1845, when he finally separated himself from her.

Fifth and sixth. That the marriage was never consummated, by reason of the malformation of the lady, and that the same was incurable, and not to be remedied or removed by art.

Seventh. That the said A. B. soon became aware that the parts, &c., were in such a state as to prevent the consummation of their said marriage; but that he was not

---

testator may have acknowledged his signature in the joint presence of two witnesses, and these witnesses may have subscribed their names in the presence of the testator precisely as in the present case, and yet that the will is invalid under the statute because one of the witnesses signed his name in attestation of the testator's signature before the testator acknowledged such signature in the joint presence of the two witnesses, and that after such acknowledgment the first witness only acknowledged his signature instead of resubscribing the will. The will is invalid because the first witness did not sign her name to the will twice.

It may be doubted whether the wording of the law and not the intention of the Legislature has not excluded such wills from probate, because we find the recommendation of the Real Property Commissioners, upon which the law of execution was founded, to this effect: "We therefore propose that every will should be signed by the testator in the presence of, or the signature acknowledged to, two witnesses present at one time; and that they should subscribe their names in the presence of each other, or that one having signed first, should acknowledge his signature and be present when the attestation is signed by the other" (4 Rep. R. P. C. 18).

Here we have their object and intention plainly and fully expressed; but they seem to a certain extent to have defeated it by the conciseness with which they afterwards (p. 80) expressed their propositions for alterations of the law, viz. "that the signature shall be made or acknowledged by the testator in the presence of two or more credible witnesses present at one time, who subscribe their names to the will."

Now it is plain that the sole object of the Commissioners in the words "witnesses present at one time, who subscribe their names to the will" was a simultaneous acknowledgment to the witnesses, and not a simultaneous subscription of the witnesses, provided they acknowledged their signatures to each other; so that by the Commissioners such wills as King's and Bennett's would not have been invalidated.

aware, until he became so as and at the period hereinafter pleaded, that such the obstacle to its consummation was incurable or irremediable; that from the summer of 1845, until November, 1847, when his leave of absence expired, he was compelled to and did travel about in England, Scotland, and Ireland, for his own health; that in November, 1847, he quitted England for the East Indies, where he continued discharging his official duties until the beginning of the year 1852, when, having again obtained leave of absence, he arrived in England in the month of April; that it was only since such his return to England that he became aware, to wit, from the information of one or more medical practitioner or practitioners whom the said L. H. W. M. had consulted from time to time, and to whose inspection she had submitted her person, in respect to her aforesaid malformation and consequent impotency or incapability, that the same were not to be removed or remedied by art, but were absolutely incurable, and which information so obtained hath led to the institution of this suit.

Eighth. Pleaded confessions of the said L. H. W. M.

Ninth, tenth, and eleventh. Pleaded the jurisdiction, &c.

The admission of this libel was opposed upon the ground that the great lapse of time between the marriage, in 1835, and the institution of the suit, in 1852, itself constituted a bar to the suit.

Dr. Haggard and Dr. R. Phillimore, in opposition to the libel, cited *Norton* v. *Seton* (3 Phill. 158), *Mortimer* v. *Mortimer* (2 Hag. Cons. 312), *Guest* v. *Shipley* (ibid. p. 321), *Harris* v. *Ball* (3 Phill. 155), *Briggs* v. *Morgan* (ibid. p. 325).

Dr. Addams and Dr. Twiss, in support of the libel, cited *D————e* v. *A————g* (1 Robt. 279).

Dec. 16, 1852.—*Dr. Lushington* admitted the libel, and delivered the following judgment:—

This is a suit brought by the husband against the wife, seeking to have a fact of marriage, had in the year 1835, pronounced **[250]** null and void, by reason of a natural and incurable malformation of her sexual organs, which existed at the date of their marriage.

Almost all Judges have expressed their extreme annoyance in having had to deal with suits of this nature, and of all no one had so strong an aversion as the late Sir John Nicholl; still, when such suits were rightly brought, they have considered themselves bound to give them due attention.

It is a mistake to assert that Ecclesiastical Courts annul marriages in cases like the present, for these marriages are in themselves, ab initio, void. There is no injury to complain of when the marriage is pronounced null and void; the injury had been previously inflicted by one or other of the parties; sometimes, perhaps, knowingly; sometimes in utter ignorance of his or her state at the date of the marriage.

The objection raised against the admission of this libel has been confined to a single point, namely, the length of time which has elapsed between the marriage and the institution of this suit. The questions, however, which I must consider are: 1st. Whether delay is itself an absolute bar? And if not, 2nd. If a bar when not accounted for, whether circumstances are not alleged in this case so as to prevent time operating as a bar?

I confess, when I at first read over the papers, I felt some difficulty respecting time forming a bar to a suit of this nature. I must recollect, however, that the Consistorial Courts, as well as the Court of Arches, are Courts of Law, and not Courts of Equity, and that I nowhere find time prescribed, or rules laid down respecting lapse of time. No instance has been mentioned to me in which a Judge has said a particular number of years constitutes a bar; and I cannot discover that when a suit, like the present, has terminated unfavourably to the promoter, there were not other circumstances, besides the question of time, co-operating. It is manifest that the case of *Harris* v. *Ball*, much relied on in argument, was not decided on the question of time; the exact ground on which the Court of Delegates dismissed that suit appears in a note to *Norton* v. *Seton* (3 Phill. 156, note p.).

Having, then, no precise authority for my guide I am placed in some difficulty; still, I think I should be placing myself in much greater difficulty, and opening the door to uncertainty, if I attempted to define what would constitute a bar. Supposing I were to fix on seven years, why should not six and a half equally prevail? On the other hand, were I to say that seven were not a bar, why should eight constitute one?

I think it must be obvious that to introduce, as it were, a Statute of Limitations, where none exists, would be vain. It is not competent, [251] however, for me to say that, looking at certain dicta of Lord Stowell and Sir John Nicholl, time may not form an element in some cases; nevertheless, I repeat, there is no authority with which I am acquainted for saying that time alone will constitute a bar.

There is, undoubtedly, a wide distinction between a suit like the present and a suit for divorce by reason of adultery. In the latter, delay in instituting a suit after the ground of complaint has become known is an important ingredient; and, were it not so regarded, great injustice might accrue to the defendant by rendering that party incapable of disproving the charge, or of establishing that which would be in law a just defence—whether a counter charge of adultery, or of acquiescence in the offence committed. On the other hand, in suits of a like nature with the present, no such injury can result; the proofs are of a totally different character; they must be by ocular inspection. In short, there is no similarity between the two.

Assuming, however, that mere delay unaccounted for would be an obstacle, I proceed, in the second place, to consider whether any and what circumstances are alleged in this libel to account for delay in instituting this suit.

It appears that the marriage took place in India, where the parties cohabited for five years, namely, until June, 1840, and that there is nothing whatever in their respective ages at the date of the marriage to make the observations of Lord Stowell, in the case of *Briggs* v. *Morgan* (2 Hag. Cons. 330), here applicable. I never could hold five years to be a bar à fortiori, when the cohabitation has been in India, for there are not the same means in that country for making inquiry and of obtaining advice as exist in England. To proceed with the facts: it appears that the lady came to this country in 1840; that she was joined by her husband in 1844; that they cohabited at intervals in the course of a twelvemonth; that in 1847 he went back to India, leaving his wife in England, and, lastly, returned to this country in April, 1852. Taking this statement to be true, I must observe that it is to be lamented that the husband did not adopt some means in the interval, between 1844 and 1847, when he had full opportunity to ascertain the true condition of his wife; he was aware, at an early stage of their cohabitation, that there was something wrong; nevertheless, he did not satisfy himself of her alleged incurable condition until the present year. There is some blame for this delay, still I must recollect that when in India he was placed in difficulty; he had not the same facility for obtaining advice as he would have had in this [252] country. After a due consideration of the question raised on argument, and bearing in mind that I know of no authority for saying that delay alone in instituting such a suit would be a bar, though, if a bar, the lapse of time is partially accounted for, I have come to the conclusion that I should not be acting rightly were I to prevent the husband the opportunity of establishing his case. I therefore admit the libel.

Jan. 27, 1853.—From this decision an appeal was prosecuted in the Arches Court of Canterbury, where Sir John Dodson affirmed the judgment of the Consistory Court.

After stating the facts of the case the learned Judge proceeded. The objection taken to the admission of this libel was solely on the ground of delay on the husband's part in instituting the suit, but the learned Judge of the Court below overruled that objection; the question which I have to determine is, whether his decision is well founded.

I may observe, in the outset, I do not discover on the face of the libel any reason to suspect fraud or insincerity. The sole question is, whether, after such an interval as has occurred between the marriage and the separation, the husband is entitled to his prayer.

It was not pretended to be asserted at the bar that any statutable limitation on such a suit as the present exists. I was not referred to any authority, either from the general Canon Law or any text writer, to make good the assertion that delay, per se, will operate as a bar; in fact, it was admitted that the question is one primæ impressionis. However, certain cases were mentioned which were supposed to furnish some analogy; but, to my mind, I must confess they had little or no bearing, more especially those cited from the Admiralty Reports, inasmuch as the Judge of that Court has, by his commission, an equitable jurisdiction, which this Court does not possess. Some decisions in this and the Consistorial Court were referred to, which it is necessary for me to examine.

The case of *Harris* v. *Ball*, not reported, is thus mentioned and observed upon by Sir John Nicholl in his judgment in *Norton* v. *Seton* (3 Phil. 159): "The lapse of time may act as an absolute bar to the suit not brought by the party injured. In *Ball* v. *Ball* it was so held by the Delegates." This passage was cited by counsel to shew that delay is an ingredient in such a case as the present; but I confess I cannot understand the passage after looking at the facts of that case as stated; there must be some mistake in the report. It appears, at pp. 155, **[253]** 156, that, after a cohabitation of seven years, the suit was instituted by the wife, the party injured; that her libel was admitted by the delegates and evidence taken thereon; that the ground of their decision against the wife was not by reason of delay in instituting the suit, but from the circumstance of her having "totally failed in the proof of her libel." In fact, then, time—delay—was not the point, but defective proof. The case, therefore, of *Harris* v. *Ball* is not an authority for the present purpose.

The next case cited was *Guest* v. *Shipley* (2 Hag. Cons. 321). The parties were married in 1813, and the suit was instituted in 1820 on the part of the husband against the wife; but on a perusal of the judgment, it is evident the decision was not founded on delay. The principal feature of that case was that, in a suit for adultery brought by Mrs. Guest two years after her marriage, Mr. Guest had himself confessed the validity of the marriage. Lord Stowell dwelt on that admission, and took into account the conduct of the husband as established by his own letters. It appears that the wife was possessed of separate property, and that the husband's letters furnished proof of an attempt to extort money. Though in the course of the judgment his Lordship did say, "But the length of time which has elapsed, is in itself almost a bar," he did not go the length of saying that delay per se would constitute a bar. It is clear to me that, in the conclusion arrived at in that case by the Court, the question of delay did not form a feature. The sentence was given in favour of Mrs. Guest on the grounds that her husband had, on a previous occasion, admitted the validity of the marriage, and shewed, by his conduct, that the suit of nullity was instituted with the view to extort money.

I will now proceed to examine the main circumstances of the case of *Briggs* v. *Morgan* (2 Hag. Cons. 328), which was also cited. In the original libel given in sixteen months after the marriage, the ages of the parties were not stated, and that circumstance Lord Stowell considered, in such a suit, to be an important omission. Subsequently it turned out that in the year 1818, when the marriage took place, the woman was a widow of fifty years of age, and the man forty-two, and that she had been the wife of a former husband for eighteen years. His Lordship observed that "different considerations have been applied to persons of advanced age and to those of an earlier period of life with great reason and propriety. In the case of young persons, the injury is greater; in age more advanced, the mode of inquiry is less conclusive" . . . "the woman was fifty years of age at **[254]** the time of this marriage, rather beyond the crisis when the expectation of children can reasonably be entertained, and more particularly in the case of a woman who had been married many years before and had no children. The age of the man is not much a subject of observation, except that it is beyond the octavum lustrum, at which an experienced writer describes the passions to be in a state of greater composure; at any rate, it is an age at which the disappointment on that account may be presumed less grievous, especially in the case of a marriage to a woman older than himself. This is not the only symptom of insincerity in the present complaint. There is the delay of sixteen months, which is not easily accounted for, in a case in which the proof of continued cohabitation is not required; for in the case of actual malconformation no such proof is required. The party, according to his own description of the case, might have made his application at a much earlier period. The proofs of an effective cohabitation with the former husband are clear and strong, both by the affidavit of the laundress and of other persons; and if the Court is not deceived in the inferences to be drawn from them, it cannot be, as it is alleged, a case of natural malconformation." The learned Judge, after having observed on other features of insincerity in the case, then said, "Under such circumstances the Court will not think itself justified in exposing a woman of this advanced age to the only proofs, certainly of an offensive nature, by which the alleged defect can be satisfactorily established." It is clear from the report of the above case, that Lord Stowell did not consider the delay in instituting the suit an obstacle; he was at first disposed to admit the libel, but ultimately rejected it;

principally on account of the advanced age of the woman, and some features of insincerity manifested by the husband.

I do not consider it necessary to travel through the case of *Norton* v. *Seton* (3 Phil. 147). It is sufficient to say that it was a suit in which the husband, the party complaining, alleged his own impotency, though by the Canon Law that circumstance may not be an obstacle to the suit, provided the complaining party was at the date of the marriage ignorant of the defect; still if the marriage be contracted scienter, as Sir John Nicholl in *Norton* v. *Seton* considered to be the case, the party will not be permitted to take advantage of his own fraud.

In no one of the cases which I have examined do I find that the decision turned on the question of delay in instituting the suit, though in two of these cases there had been a cohabitation for seven years. In the present suit there was certainly a con-**[255]**-tinuous cohabitation for five years between 1835 and 1840; but it is to be observed that that occurred in a part of the world where, in all probability, satisfactory medical advice on such a case could not easily be had. The cohabitation was then interrupted till May, 1844, when it was renewed for a small period under the circumstances stated in the libel; the parties finally separated in 1845; the husband afterwards went back to India, and did not return to this country until early in the year 1852, when he, as he states, for the first time obtained information of the condition of his wife. If any fact set forth in the libel be misstated, it may be counterpleaded by the wife. In the present state of the law the truth of the facts may be easily ascertained, since, for anything that I know to the contrary, both husband and wife may be examined as witnesses in this case.

After a consideration of all the facts set forth, I am of opinion that, as no authority has been discovered for saying that lapse of time alone is a bar to such a suit, I cannot reject this libel. I will not, however, go the length of saying that in no case can delay operate as a bar; but I say that as there is no obstacle arising from the respective ages of the parties, and nothing in the conduct of the husband to lead me to question his sincerity, I should not be warranted, under all the circumstances stated in this case, in rejecting the libel.

April 13, 1853.—From this judgment an appeal was prosecuted to the Judicial Committee of the Privy Council, when their Lordships, after hearing counsel, were pleased to declare that they would not then express any opinion as to the very important point of law raised in the case; but, desiring to have the case more fully before them, they would admit the libel for that purpose only, retaining the cause, but reserving to the appellant at the future hearing the full benefit of the point of law.

The libel having been admitted, two witnesses were examined to prove the fact of marriage and cohabitation; and Dr. Lowch, Dr. Ferguson, and Mr. Partridge, having been appointed the medical inspectors, made their report, and were also examined upon the sixth article, and interrogatories were administered to them.

An allegation was then given in and admitted without opposition on behalf of Mrs. B. to the following effect:—

The first and second articles pleaded, actual consummation of the marriage and also conversation and correspondence between Mr. and Mrs. B. respecting her being or becoming in the family way.

**[256]** Third. Exhibited three letters from Mr. B. to his wife, dated respectively in 1837, 1839, and 1840.

Fourth. That Mrs. B. being disappointed at not becoming pregnant, with the consent of her husband consulted a surgeon in great practice in Belgaum; that Mr. B. never suggested that his wife was formed differently to other women, nor proposed that she should consult any medical man as to any possible malformation, nor himself made inquiry relative thereto, and that the said surgeon prescribed for Mrs. B., and held out expectations that she would become pregnant.

Fifth. That when Mrs. B. quitted India for England in 1840 for the benefit of her health, Mr. B. promised, and intended, to join her in England in the course of the ensuing year, but was subsequently induced, by the state of his own health, and by a new appointment in the service of the East India Company, to change his intentions in that respect; and in order to reconcile his wife to such change in his plans, wrote a letter, dated July 15, 1841, and that, accordingly, he did not rejoin her until May, 1844. That during the whole of such his separation from her, Mr. B. corres-

ponded with her, though after a time in terms of diminished affection, insomuch that he threatened not to live with her in England, on the ground of an alleged incompatibility in their tempers.

Sixth. Exhibited fifteen letters from Mr. B. to his wife, dated in the years 1837, 1840, 1841, 1842, 1843, and 1844.

Seventh. That a few months after Mr. B. had rejoined his wife in May or June, 1844, and renewed his cohabitation with her, he revived the suggestion that they should live separate, on the ground of incompatibility in their respective tempers; and he wrote certain letters to her, insisting that an arrangement should be entered into for that object, which was most reluctantly assented to by her. That in pursuance of such arrangement, Mr. B. made his wife a stipulated allowance for her maintenance, and paid her frequent visits for a few days at a time.

Eighth. Exhibited five letters from Mr. B. to his wife, written in the month of October, 1844.

Ninth. That the last occasion of Mr. B. so visiting his wife was in April, 1846, when he cohabited with her for a few days, promising to repeat the visit in a month's time, but that he never afterwards saw her, and from that time almost wholly ceased to write to her, or to have any communication with her, direct or indirect. That on the said last visit, and on all other occasions of his being with her after his return from India, he lived and cohabited with her as his wife, and constantly had **[257]** sexual intercourse with her, and never on any occasion complained to her that he was unable, &c.

Tenth. Exhibited six letters, dated about 1845 and 1846.

Eleventh. Counterpleaded the seventh article of the libel, and pleaded that some little while after Mrs. B.'s arrival in England in 1840, she consulted one or more medical practitioners as to the cause of her not bearing children, and then, for the first time, submitted her person to their examination; that the fact of her having so done was communicated by her to her husband in letters despatched to him in April and May, 1841, and duly received by him in India. That Mr. B. did not on any occasion during the time he was in England in 1844-7, nor on any other occasion, until the issue of the citation in this cause, suggest that Mrs. B. should consult medical men as to any possible malformation, or submit her person for such purpose to their examination; that since April, 1841, until after the issue of the citation, Mrs. B. never so submitted her person.

Twelfth. Pleads the exhibits to be in the handwriting of Mr. B.

Mr. B. having admitted the letters, no witnesses were examined on this allegation.

The report of the three medical inspectors was to the effect "that the external organs of generation of Mrs. B. are normal, but that the vagina is an imperforate canal, capacious in width, but only of about one-third of the ordinary length; that there is no uterus to be detected, and that the parts of generation are only capable of sexual intercourse to a limited and imperfect extent; also that this is a state of congenital sterility not removable by art."

Their evidence on the sixth article was to a similar effect, but "that Mrs. B. was capable of an imperfect sexual intercourse; that such had taken place to a considerable extent; and that she was consequently no longer a virgin, though she was irremediably incapable of conception."

Dec. 16 & 17.—The case was argued upon the evidence before the Judicial Committee by Dr. Addams and Dr. Twiss for the husband, and Dr. Haggard and Dr. R. Phillimore for the wife.

Their Lordships (*a*) reserved their judgment.

Feb. 25, 1854.—*Dr. Lushington* delivered the judgment of their Lordships. This suit commenced in the Consistory Court of Lon-**[258]**-don in the year 1852; it was brought by Mr. B——n against his wife, whose name before the marriage was L. H. W. M., and the object of the proceeding was to have the marriage solemnised between the parties in 1835 declared null and void, ab initio, by reason of the natural and incurable malformation of the parts of generation of the lady.

In the Consistory Court a libel according to the usual course was brought in on behalf of Mr. B., the admission of which was opposed.

---

(*a*) Lord Justice Knight Bruce, Lord Justice Turner, Sir John Patteson, Sir E. Ryan, Mr. Pemberton Leigh, Sir John Dodson, and Dr. Lushington.

The leading facts set forth in that libel must be stated. It appears that prior to the marriage the parties in this cause were resident in India, Mr. B. being in the civil service of the East India Company, and the lady being the daughter of a colonel in the Company's army.

The libel pleads that the fact of the marriage took place in June, 1835, at Balgaum, within the Presidency of Bombay; that the parties lived together at Balgaum till June, 1840, when Mrs. B. came to England for the benefit of her health; that Mr. B. remained in the East till March, 1844, when, having obtained leave of absence, he left India and reached England at the end of May in that year; during the remainder of that year and till the summer of 1845, the parties occasionally lived together, but it is pleaded that at the period last mentioned Mr. B. finally separated from his wife.

The fifth and sixth articles plead the malformation. The seventh alleges that though Mr. B. soon became aware that the malformation of his wife prevented consummation, yet that he did not know that such defect was incurable till the year 1852, when he was informed by medical practitioners who had been consulted by his wife and had inspected her person.

The admission of this libel was opposed, but after debate it was admitted by the Court on the 16th of December, 1852. The cause was then appealed to the Arches Court, where the judgment of the Court below was affirmed.

An appeal was afterwards brought before the Judicial Committee, when their Lordships thought fit to declare that they would not then express any opinion as to the very important point of law raised in the case, but would admit the libel and retain the cause, reserving to the appellant at the future hearing the full benefit of the point of law.

It may be convenient to refer to what is the usual rule and practice of the Ecclesiastical Courts in Doctors' Commons on the admission of libels in matrimonial causes. Such pleas always contain statements of law and of facts; and unless it be perfectly clear on the face of such plea that the party pro-**[259]**-ceeding cannot succeed, the Court admits the libel, but it does not, by so doing, bind itself in any way to pronounce finally in favour of the plaintiffs. All it decides is, that the case is a fit case for further consideration, and that the party ought not to be estopped in that stage. The Court reserves to itself to consider the whole case—both law and facts—when the evidence has been taken.

The cause having been retained, evidence was taken on the libel, and subsequently Mrs. B. gave in an allegation which was admitted without opposition. Mr. B.'s answers were taken to this allegation, and these answers admitted the letters annexed to it.

The cause, therefore, has been heard on the evidence taken upon the libel on Mr. B.'s answers, and the letters admitted by these answers.

Two questions arise for the consideration of their Lordships. 1st. Whether any circumstances are proved by the evidence, which ought, in justice and law, to estop Mr. B. from any remedy, even supposing his complaint to be well founded. And, 2ndly. Whether the main averments in the libel, with regard to Mrs. B., are established by competent proof.

We will address ourselves to the first question. It may be put in this form: whether a party proceeding in a suit to have a marriage declared null and void by reason of malconformation, may not be barred from succeeding in his suit, personali exceptione; that is, by his own condition independent of his own conduct, or by his own conduct.

This doctrine is familiar both to the Civil and Canon Law, more especially to the latter, in matrimonial causes, it being a received maxim in such causes, that the party seeking relief, however well founded his ground of complaint may be against his consort, must shew that, by his own conduct, by his own sense of injury, and his own vigilance, he is justly entitled to relief from the Court.

We will consider this subject both on principle and authority.

Without entering into any minute discussion as to all the purposes for which marriage was intended, it is obvious that the capacity for sexual intercourse is, in all cases, save when age may seem to preclude it, to be deemed a most important essential; essential, because the procreation of children is one of the chief objects of marriage; essential, because the lawful indulgence of the passions is the best protection against illicit intercourse; and to these considerations may be added the well-known fact that,

in most cases where the incapacity is on the [260] side of the husband, the health of the wife cannot escape serious injury.

When, therefore, a party is really aggrieved on account of those consequences, the law affords a remedy; a remedy according to the circumstances of the case. In the case of the husband, he is at liberty to resort to the Court as soon as he discovers that his wife, from malconformation, is incapable of sexual intercourse. In the case of the wife being the complainant, she has the same remedy in a similar case; if, indeed, the incapacity be propter frigiditatem, the law requires, before such a suit be commenced, a sufficient cohabitation to establish the fact.

The cases of malformation are so various in their circumstances, the degrees of malformation which prevent or impede sexual intercourse sometimes are so difficult of ascertainment, the proof that the impediment is incapable of removal occasionally so uncertain, that their Lordships would be unwilling to lay down any rule, as to the operation of time alone, as a bar to the commencement of a suit of this description. It might be that there was a difficulty in ascertaining the defect itself, in obtaining medical evidence that it was incurable; a fact sometimes not to be ascertained save by operation. Other circumstances, too, might concur to account for lapse of time, and to excuse a husband from apparent delay in the commencement of a suit; but lapse of time, coupled with other circumstances, is manifestly of great importance; that very lapse of time may be most injurious to the wife. The consequences of the dissolution of the marriage bond to the wife, unconscious of her own defect, as is most frequently the case, are necessarily most painful; a proclamation of that defect is made to the world, her status is destroyed, and should unnecessary delay occur, not only are these consequences aggravated, but parents and relations may have died in the interim, who, had the suit been brought earlier, would have sustained her in her trials and secured to her a home.

It is obvious, for these reasons, that time, though not in itself, under ordinary circumstances, a bar, yet, especially when the lapse has been very considerable, is not an unimportant matter in suits of this description, and more particularly as concerns the wife.

In other respects, too, as relates to the right of the husband to prosecute a suit of this description, time, with other facts, deserves great consideration. The law affords a remedy to those who are really aggrieved and sensible of the grievance, and then only vigilantibus non dormientibus. The remedy is given on account of the loss sustained and the evil felt, not to promote or assist other purposes having no relation to it. If the husband is silent for so long a period, unaccounted for, that [261] the presumption would necessarily arise that he acquiesced in the consequences which such an unfortunate connection entailed upon him, he could hardly be entitled to say, "Give me a remedy for a grievance I have not felt," and that to the detriment of another.

Their Lordships are all of opinion that cases might occur where long acquiescence with knowledge, or the means of procuring knowledge, would operate as a bar to the prosecution of such a suit, and more especially if the circumstances shewed that the suit was brought, not on account of the evils resulting from such imperfection, but for other and different reasons.

The authorities with regard to lapse of time and the effects thereof are few, and these suits, till of recent years, have been so rare, that it was highly improbable that much could be found on this head. As might be expected, these authorities do not specify any particular lapse of time since the marriage, as forming a bar to the institution of a suit of nullity, and for very obvious reasons. In almost every case falling within this category the circumstances differ; in some cases the delay may be satisfactorily accounted for, though apparently of long duration; in others, though the lapse of time may have been of briefer duration, no reasonable cause for not commencing the suit earlier may appear. The result of all the cases about to be cited will shew that great delay in the institution of a suit of this description by the husband has always been considered an objection to be accounted for.

In the case of *Guest* against *Guest* (2 Hag. Con. 323) Lord Stowell thus expressed his opinion: "The length of time which has elapsed is, in itself, almost a bar, for I do not remember any instance in which such a suit has been allowed to be instituted after such an interval. That a period of seven years should be allowed to elapse in a case, where even a very short cohabitation would have sufficed for the discovery, is not allowed by any principle of law with which I am acquainted."

It is true that in that case Lord Stowell held the suit to be barred on another and a totally different ground—namely, that in a previous suit for separation, on account of adultery, brought by the wife, the husband had admitted the marriage—still, though not a decision, it is the expression of an opinion from the highest authority, and is justly entitled to great weight.

Again, in the case of *Briggs* against *Morgan* (2 Hag. Con. 329), Lord Stowell, though the case was not decided on that ground, declared his opinion that a delay of even sixteen months, unaccounted for, was a proof of insincerity.

**[262]** From the passages above cited, it appears that it was clearly the opinion of that eminent Judge that delay in the commencement of a suit of this description required to be accounted for, and might, with other circumstances, constitute a bar. In those cases the Court abstained from giving any opinion as to the mere lapse of time, but held it to be an important ingredient.

The inquiry, therefore, in the present case will be, whether the lapse of time is accompanied with other facts which prove—to use Lord Stowell's expression—the insincerity of the suit; or, in other words, that whatever may be the defect of the wife, it was not a grievance to the husband, or the real cause why the suit was brought.

As regards the question of time and knowledge of the defect now complained of, it is pleaded by Mr. B. in the libel, and therefore, of course, admitted as against him, that very soon after the marriage he became aware that his wife was incapable of sexual intercourse, but he denies that he knew that the defect, whatever it might be, was incapable of cure. Now, during the cohabitation in India, which lasted from 1835 till 1840, there might have been more difficulty in obtaining adequate medical advice on such a matter; so far, however, as we have evidence, there does not appear any proof that Mr. B. was cognizant of that of which he now complains, and certainly made no attempt to ascertain the real state of the case. For this inertness there may be some cause; but when the parties were in England, and the cohabitation recommenced, in 1844, there no longer existed any reason why medical assistance was not resorted to, and the fact both of the impediment to consummation and the incapability of cure distinctly ascertained; but here again there is not the least evidence of any proceeding on the part of Mr. B. On the contrary, the cohabitation ceases, and a separation is agreed upon, for reasons wholly different. Mr. B. does not pretend that this separation was on account of the corporeal defect of his wife, nor could it be because he discovered it to be incurable, for that he says he did not discover till 1852.

In short, that so far as the lapse of time is an important consideration to these cases, Mr. B. has by no means satisfactorily accounted for the long delay in bringing this suit.

There are, however, other matters to which we must direct our attention: we refer to the correspondence, from which it clearly appears that a sexual intercourse of some kind had taken place between the parties, from which at one time Mr. B. even entertained the hope that his wife might become a mother; that throughout the whole of this long correspondence there is not the slightest allusion to any corporeal defect on the part of Mrs. B.; and, consequently, not the least complaint of **[263]** any deprivation or annoyance experienced by Mr. B.; on the contrary, that correspondence shews that the parties lived and cohabited together for many years with affection expressed on the part of the husband, though occasionally with complaints of the temper and conduct of Mrs. B. And, finally, after the lapse of ten years from the period of the marriage, a separation takes place, on the ground of disagreement, without the slightest reference to the subject matter of this suit.

After the separation, Mr. B. goes back to India; and in 1852 again returns to this country, and then brings the present suit, alleging that from the period of his marriage he knew that Mrs. B. was incapable, from personal defect, of sexual intercourse, but that he had only recently discovered that such defect was incurable.

Before expressing our opinion on this state of facts, we deem it right to advert very briefly to the medical evidence. We shall state merely the general effect of it, and it is this: that there does exist a malformation which is incurable, and that it is impossible that this lady should become a mother, but that sexual intercourse, limited in some particulars, is not only practicable, but has actually taken place; and two of the medical witnesses depose that the lady is not a virgin.

What would have been the effect of this state of things had the husband prosecuted his suit at an earlier period, or the wife had sued for a restitution of conjugal rights,

we do not feel ourselves called upon to say; (*a*) but taking into consideration the whole circumstances of the case, and founding our judgment on the whole, and not on part only, we are of opinion that Mr. B. is not entitled to a decree pronouncing this marriage to have been null and void, ab initio.

Proctors, for the husband, Rothery; for the wife, Bathurst.

THE "KINGALOCK." The High Court of Admiralty, Feb. 20, 1854.—The master of a brig, which had suffered considerable damage, without mentioning this fact, agreed with the master of a steam tug for ordinary towage to London for 40l. During the service the master of the tug discovered the fact of such previous damage, repudiated the agreement, and brought a suit for salvage. Held, 1st. That additional salvage cannot be engrafted on an agreement for extraordinary though it may upon one for ordinary towage. 2nd. That the mere concealment of a fact which might operate on the service and therefore on the agreement, vitiates it. 3rd. That in this case the facts concealed might operate on the service by rendering it longer and more arduous, and that the agreement was invalid. 150l. awarded.

[S. C. 18 Jur. 409.]

This was a suit for salvage brought by the owners and crew of the steam-tug "Friend of all Nations," against the "Kingalock," a brig of 143 tons burthen.

**[264]** On the 26th of August, 1853, the brig was near the mouth of the Thames, bound from Newfoundland to London, with a cargo of oil and seal skins. The steam-tug, observing an ensign flying at her gaff, came to her, and entered into an agreement to tow her to London for 40l. After a short time the hawser broke, and the master of the tug then discovered, for the first time, that the brig had previously encountered tempestuous weather, and suffered considerable damage. He immediately, according to his account, declared the agreement at an end, continued to tow the vessel as though no agreement had been made, and after great exertion and difficulty, brought her safely to the London Docks, on the evening of the 27th.

The owners contended that the original agreement for 40l. was binding and valid, though, to avoid litigation, they tendered 80l.

Dr. Addams and Dr. Twiss appeared for the salvors; Dr. Haggard and Dr. Deane for the owners.

*Dr. Lushington.* I have no intention of departing from the principle laid down in the case of *The "Kilby"* (Feb. 23, 1853); on the contrary, I am of opinion that the principle there laid down is well founded, and consistent with justice. The real question will be whether what I said in the case of *The "Kilby"* is applicable to the circumstances of the case now under consideration. The principle I there laid down is in these words: "Where there is an agreement to tow a disabled vessel from one port to another, it not being an ordinary towage service, I will not engraft upon it additional salvage for any little assistance rendered." I am exceedingly glad, though I confess I am somewhat surprised, that I should have expressed myself with so much caution on that occasion, because, when delivering a judgment, without its being previously written, it does not always happen that it is expressed in terms so guarded as these. I have made a distinction which I am about to explain, and I adhere to it. Now, let us consider these matters a little. It appears to me that there are two species of agreement which may be entered into by a vessel, whose usual occupation it is to tow vessels from one place to another. One is, where she meets with a vessel disabled, and where she undertakes, for any sum agreed upon between the parties, to perform the service of bringing the vessel from one port to another, or a place of safety. That may be called an extraordinary towage, because it is not in the ordinary occupation of the vessel, and not to be considered ordinary towage, which is of a different description. **[265]** Ordinary towage is that which takes place for the purpose of expediting a vessel on her voyage, either homeward or outward. Where a master of a towing-vessel, with his eyes open, sees another ship in any way disabled, and makes a bargain, cognizant of all the facts necessary to be known, he must be bound by that bargain; and any accident that may happen afterwards, any difficulty that may arise, any delay that may be interposed in the

(*a*) This appears to leave the decision in *D*——— against *A* ———, 1 Rob. 279, untouched.

performance of that service, he, of course, must put up with, because he takes the chances, and makes a bargain to cover all such risks as these. I therefore repeat, that wherever a bargain is made in good faith for the towing of a vessel, I will not engraft upon it, whatever may be the circumstances that subsequently occur, any additional reward beyond that compensation which is stipulated to be paid by the mutual agreement between the parties.

But, with respect to ordinary towage service the case is different. There all that is stipulated for on behalf of the vessel towing is, that she shall receive the ordinary reward which is paid in compensation for that towage service, and the reward is not apportioned to the performance of a salvage service that may become necessary afterwards; therefore, I think, there is a clear distinction between the two cases. Where a service has been commenced as an ordinary towage service—the vessel being in no distress—for the mere purpose of expediting the voyage, if it happens that a salvage service unexpectedly becomes engrafted upon it, the towing-vessel may not be bound to take the ordinary reward for a towing service.

So much for the distinction between the two species of towing service.

Let us next consider whether there is an agreement for matters of this kind.

An agreement to bind two parties must be made with a full knowledge of all the facts necessary to be known by both parties; and if any fact which, if known, could have any operation on the agreement about to be entered into is kept back, or not disclosed to either of the contracting parties, that would vitiate the agreement itself. It is not necessary, in order to vitiate an agreement, that there should be moral fraud; it is not necessary, in order to make it not binding, that one of the parties should keep back any fact or circumstance of importance, if there should be misapprehension, accidentally or by carelessness; we all know that there may be what, in the eye of the law, is termed equitable fraud.

What I have to do on the present occasion is, a tender having been made of 80l., which more than covers the agreement itself, **[266]** to see whether there ever was a subsisting agreement; and, if so, to see whether it has been invalidated by any circumstances that have occurred subsequently to the agreement.

It appears that this was a valuable vessel, coming from Newfoundland, of the burthen of 143 tons. At the entrance of the river Thames she met, on the 26th of August, with extreme bad weather; she was compelled to slip from one anchor and cable, the foresail was split, and a new one was about to be bent when the steamer came up. It appears, on all hands, that these two circumstances were not disclosed to the master of the steamer, and the question therefore is, whether the omission to disclose these two facts would or would not have an operation on the agreement which was afterwards made between the parties. The agreement was for a sum of 40l., and no doubt it was up to the port of London, as sworn on the part of the salvors. I apprehend that the agreement may be said to be somewhat of a mixed nature at that time; it is hardly to be considered an ordinary towage, not on account of the state and condition of the ship, but on account of the state and condition of the weather, which happened to be exceedingly tempestuous. I think whether the omission to state these facts would vitiate this agreement or not, will depend upon whether they could, with any reasonable probability, affect the service about to be performed. I am of opinion that they might have an effect on that service, because I apprehend that coming up the river Thames, particularly during weather so tempestuous as this is represented to have been, the services might have been delayed and rendered much more arduous, much more difficult in consequence of the want of ground tackle, which might be of the last importance to the saving of the vessel, and which might, to a certain extent, have governed the manœuvres of the steamer. I therefore come to the conclusion that, as it might affect the performance of the service, the agreement was null and void, ab initio. Having come to that conclusion, it is not necessary to follow the remaining facts, and I have only to ascertain what ought to be the reward, in the nature of salvage; because I agree with the argument addressed to me by Dr. Jenner, in entire accordance with what I said in the case of *The* "*Kilby*," and which I now repeat, that if there be an agreement for extraordinary towage, with a full knowledge of the state of the vessel, in that case no addition to the reward ought to be made, whatever might be the circumstances. It seems, in the present case, that the hawser broke, a second anchor and cable were slipped from, and it clearly appears to me that the vessel at this time was in very

considerable danger of going on what is [267] called the Shingle Sand. The windlass at that time had also become disabled, and altogether it appears to me that the vessel was in a very dangerous position when she was taken in tow.

It is clear, from the evidence, that the steamer did sustain considerable damage and straining in the performance of the service, but upon this I place very little reliance, because, whether it is a case of ordinary towage or extraordinary towage, the Court must be on its guard in considering any accident which may happen to a steamer as a good ground for augmenting the rate of towage. I am of opinion that the vessel was rescued from considerable danger by this steamer. The principle I have always endeavoured to follow is this, that when steamers render salvage service they are entitled to a greater reward than any other set of salvors who render the same service; and for this plain and obvious reason: in consequence of the power they possess, they can perform such services with infinitely greater celerity than other vessels, with infinitely greater safety to the vessel in danger, and frequently under circumstances in which no other assistance could by possibility prevail.

I think I may exemplify that upon the present occasion. When the vessel was lying off Sheerness, it is quite clear that no power short of that of a steamer could have prevented this vessel, in human probability, from being lost. In the present case I must overrule the tender, and give the sum of 160l. When I see the value of the property saved is 6000l., whether it is the owners or the underwriters who have this sum to pay, I think they ought to be well satisfied.

Proctors for the salvors, Deacon; for the owners, Middleton.

THE "ROSEHAUGH." The High Court of Admiralty, March 23, 1854.—Pilotage service in a place where there are no licensed pilots. A service which would be pilotage in the case of a duly licensed pilot becomes salvage, as regards the reward, when voluntarily performed by others.

This vessel was proceeding, with a cargo of wheat, from Leith to Stockton, when she was driven by stress of weather, off Flamborough Head, forty or fifty miles south of her port of destination. Two cobles went out to her assistance, and conducted her into Bridlington Harbour, for which service they claimed salvage remuneration. This the owners refused, on the ground that the service was pilotage only.

Dr. Jenner appeared for the salvors; Dr. R. Phillimore for the owners.

*Dr. Lushington.*—I will, in the first place, advert to the [268] point alluded to by the learned counsel who has just sat down.

It appears that this is a harbour to which no regular pilots are appointed by law; and difficulties have arisen, not only in this, but in other cases, as to the state and condition of persons represented as performing the duties of pilots there, and occasionally the duties of salvors, as the case may be. Pilots unquestionably do not stand on the same footing as these persons; and for this reason—in the first place, they are under no obligation to go out to vessels at all; the pilotage remuneration is fixed on the ground of its being a monopoly, and the persons so engaged being employed in preference to any one else, and consequently an obligation is imposed upon them of always going out—unless it be at the risk of their lives—and performing their duty, whatever may be the other circumstances.

It is the supposition of the law—I presume a well-founded supposition—that the rate of pilotage service, taking one case with another, is an ample remuneration for the services performed; but there is a striking difference between a person possessed of such monopoly, and entitled to charge a given sum, and a person voluntarily performing a duty, whether a pilotage or a salvage service, because the latter has a right to exercise his own judgment as to whether he will go out on the service or not, and may then demand a fair remuneration for whatever he does. It might happen that mere pilotage pay would be no reward at all to a person who goes out under these circumstances. I will take a case resting on the strongest grounds. Suppose there was no such danger as to prevent a pilot going out for the ordinary rate of pilotage, it would not follow that individuals who voluntarily perform that duty would be entitled to no more pay, because the grounds are totally different. It may be a misfortune, but it is one that cannot be helped; and what the Court must do is to give the person who performs the service the sum which, according to its judgment, is actually deserved.

The learned Judge, after stating the circumstances of the case, said—It is a service

that must be compensated; nothing has been offered, and it has been treated as if these people were regular pilots, and as if, by offering them pilotage, you could get rid of the case. That, however, is not so; and I shall give them 15l. I wish that such cases as these should be settled on the spot, and not brought here.

The Proctor for the salvors said—Every endeavour was made to settle it on the spot, but the owners refused.

[269] The Court. Then the owners must pay for that refusal in the costs.

Proctors, for the salvors, Jenner; for the owners, F. Robarts.

THE "WANSFELL." The High Court of Admiralty, March 24, 1854.—Two vessels, the one A. close hauled on the port tack, the other B. on the starboard tack, sailing free, meet each other under circumstances of probable collision; A. luffed twice. Held that she was to blame for not having ported, that the collision was principally occasioned by her non-obedience to the rule, and that by the statute she would not recover. B. also luffed up three times; held to blame for not having ported in time. Neither vessel can recover.

The "Wansfell" and the "Edward Johnston," two vessels of nearly 1000 tons burthen, came into collision near the Skerries Lights, about two A.M. of the 1st December, 1853.

Cross-actions were entered. The respective cases are stated in the judgment.

Dr. Bayford and Dr. Twiss appeared for the "Edward Johnston," Dr. Addams and Dr. Curteis for the "Wansfell."

*Dr. Lushington*, addressing the Trinity Masters.(*a*) Gentlemen, this collision took place on the morning of the 1st of December, in the Irish Channel. The weather, as it appears to me, though rather hazy and rainy, was not such that the collision could be the result of inevitable accident. There is some discrepancy in the evidence produced by these two vessels, especially respecting the quarter from which the wind was blowing. It is alleged by the "Edward Johnston" that the wind was south; by the "Wansfell," that it was south-east—a difference of four points. It is said, on the one hand, that the "Edward Johnston" was close hauled; upon the other, that the "Wansfell" was close hauled. It is impossible for me, and I should think somewhat difficult for you, to state from which quarter the wind blew. If, however, the wind was between the two statements, then it might be that neither vessel was close hauled, looking at the course which they pursued.

The representation of the "Edward Johnston" is, that she was close hauled on the port tack when she saw the "Wansfell"; that as soon as she saw the light of that vessel, she luffed; and it is alleged that she luffed again upon her nearer approach. We will admit, for the purpose of the questions which I am about to put to you, the statement made on behalf of the "Edward Johnston," and will consider the "Wansfell" to have been on the starboard tack, sailing free.

Now, the questions on which I shall have to request your opinion are of considerable importance to the result of this case; the first is, whether the "Edward Johnston" was to blame for having luffed, and for not having ported; the second, whether, [270] supposing her to blame, the collision was occasioned by the not porting her helm.

It is your duty always to bear in mind the Act of Parliament which was passed for the government of cases of this description. Whether that Act was right or wrong, it is your duty and mine to carry it into execution to the best of our judgment. The words are these:—"Whenever any vessel proceeding in one direction meets a vessel proceeding in another direction, and the master or other person having charge of either such vessel perceives that if both vessels continue their respective courses they will pass so near as to involve any risk of a collision, he" (that must be the master of the vessel) "shall put the helm of his vessel to port, so as to pass on the port side of the other vessel" (14 & 15 Vict. c. 79, s. 27).

Now, we have nothing in the nature of a channel to impede the operation of this rule. I, therefore, leave that entirely out of consideration, and simply put the question to you, whether the two vessels were not approaching each other in such a course that if they continued there was clearly a risk of collision, and whether, under these circumstances, it was not the bounden duty of the "Edward Johnston" to port

(*a*) Captain Pixley and Captain Weare.

instead of starboarding her helm? If you should be of that opinion, the next question will be one of considerable importance, namely, whether the collision was occasioned by the non-observance of this rule?

It appears to me, looking at the facts of this case, that the collision may have been occasioned either by the non-observance of this rule, or by the misconduct or neglect of those on board the "Wansfell."

I now come to the case of the "Wansfell." She represents herself to have been on the starboard tack, close hauled, and that the wind was north-east, inclining to west. She says her own course was south-east by east, so that you have seven points between the wind and her course. Looking at the representation of the "Wansfell," I cannot satisfy myself that she was so close hauled on the starboard tack as she represents herself to have been. The next question is, whether, under the circumstances I have stated, it was not her duty to have ported, and to have ported in time. I think the evidence in this case clearly shews that if each vessel had discharged her respective duties, no collision would have taken place; therefore the question will not only be, whether she was bound to port, but to port in time. It is not my intention to occupy your time in going through it, but there is important evidence in the case, and, according to her statement, she luffed up no less than three times.

**[271]** *Dr. Lushington*, having retired with the Trinity Masters for consultation said, on their return,

The gentlemen by whom I am assisted are of opinion that the "Edward Johnston" was clearly to blame, and this is also my opinion. She is not only to blame, but the collision was occasioned principally by her conduct. It is clear, therefore, whatever may be the conduct of the "Wansfell," the "Edward Johnston" cannot recover; because, where the collision has occurred by the non-obedience to the rule of porting the helm, it is directed by the Act of Parliament that the vessel should not recover in that action.

There is a cross-action brought by the "Wansfell" against the "Edward Johnston," and the gentlemen are of opinion that the "Wansfell" is to blame also; for she was, in fact, sailing free, and she did not do her duty, which was to port her helm in time.

Therefore the result is that, neither succeeding in the action, each must pay their own costs (*a*).

Proctors, for the "Edward Johnston," Tebbs; for the "Wansfell," F. Clarkson.

THE "MINERVA." The High Court of Admiralty, March 27, 1854.—Where the value of the property saved was 2320l., the Court, under the circumstances, and considering the case one of great merit, awarded the salvors the sum of 600l.

This was a cause of salvage brought by the "Pilot," a steam-tug, manned with seven hands, against the "Minerva," a schooner, of the burthen 98 tons, laden with a general cargo.

The whole circumstances are stated in the judgment.

Dr. Haggard and Dr. R. Phillimore appeared for the salvors; Dr. Addams and Dr. Twiss for the owners.

*Dr. Lushington.* This is a claim for salvage preferred by eleven persons, of whom nine, at least, were pilots, who went out from the harbour of Shields to perform the service on the 6th of January, 1854. They succeeded in saving property which, including the ship and cargo, amounts to the value of 2320l.

I will first address my attention to the danger to which the ship and cargo were exposed, if any, at the time they went out to render assistance. It appears that she was a vessel of 98 **[272]** tons, and sailed from Newcastle on the 2nd of January, laden with a general cargo, bound to London. The statement on behalf of the owners is to the following effect:—"On the night of January 5, she was brought to anchor about three quarters of a mile from the shore off Limekiln, a point about a mile and a half from Whitburn, in the county of Durham, and that on the following morning a signal

(*a*) Upon this decision a question is likely to arise, whether the "Wansfell," though to blame for not porting in time, is barred of recovery by statute, or whether the general Admiralty law in cases where both vessels are to blame is to be applied to her cross-action. In the latter case it would seem that the "Edward Johnston" would have to pay a moiety of the "Wansfell's damage, though she could recover nothing on account of her own damage.

for assistance was hoisted on board the said schooner, as it continued to blow hard, although as the day advanced the wind considerably abated."

As the master and the whole of the crew were lost, we are unable to obtain, from the most general source of information, what was the real state and condition of the vessel at the time, what were the dangers which were apprehended, what were the perils which induced them to abandon the vessel, though at the risk of their lives. However, it is clear, from the signal of assistance being hoisted, that they apprehended some assistance was necessary, and that the vessel was in some degree of peril.

Now, without adverting to the affidavits produced on behalf of the salvors, I shall first direct my attention to the evidence of a person who ought to have been able to contribute to the knowledge of the Court upon this subject, I mean the affidavit of Mr. Hutchinson, who represents himself as a fisherman, a deputy at Whitburn to Lloyd's agent, and receiver of droits for the port of Sunderland. He states: "About half-past three o'clock in the morning this deponent saw the "Minerva," distant fully one-half, if not three-quarters of a mile from the shore; that she was riding at anchor as easily as any vessel could well ride." Now, when I read this affidavit, of course I endeavoured to tax my ingenuity as to why it was that a vessel in this quiet state should have been abandoned, which abandonment led to the loss of the master and crew.

With extraordinary simplicity he proceeds to state: "That the crew of the said vessel were drowned about one o'clock in the afternoon, and almost immediately afterwards the sea and weather became quite calm; that he verily believes that there was no risk in a boat going from a steamer to the 'Minerva' at the time the 'Pilot' steam-tug came alongside of her." It is somewhat singular that no boat had ventnred out, notwithstanding the signal of distress, though the life-boat was in the neighbourhood where the signal was seen. "That the fishermen belonging to Whitburn would have gone off in their life-boat to the 'Minerva' if they had thought she was in danger." At least they might have supposed there was some degree of **[273]** danger when they saw the flag of distress. When I see the contradiction between this affidavit and the other evidence in the case, I am somewhat surprised at the conclusion he draws: "But seeing there was no danger, they thought it useless going to her with the lifeboat."

How comes it about, if all this be true, that the unfortunate persons on board this vessel risked their lives in the hope of saving them? What motive could they have had for leaving the vessel, except that of the imminent peril they were in? They must have thought that the only chance of saving their lives was by taking to their boat. I must confess that this affidavit, coming from a gentleman aged eighty-three, did surprise me. The search that must have been made for evidence does infinite credit to those who act on the part of the owners. However, so it was; the crew thought it for their advantage to run this risk; and, unfortunately, they were all drowned. I can come to no other legitimate conclusion than that they thought the ship was in imminent danger, and that their lives were exposed to peril.

A question has been raised as to whether this vessel was a derelict or not, in the legal sense of the term. It is impossible for us to ascertain whether the crew of the vessel had a spes recuperandi or not; but, be that as it may, the vessel was quitted; and, whatever spes recuperandi they might have had, it unfortunately was terminated by their deaths. I cannot doubt that in every sense, legal or otherwise, this was to be considered a derelict.

Having disposed of that part of the case, I now come to the question, was there any danger in crossing the bar? I have affidavits from persons entirely disinterested, eye witnesses of the transaction, perfectly cognizant of the state of the coast, and seeing everything that occurred, speaking in the most positive terms to the great risk incurred by the pilots in performing the enterprise they undertook. I have, also, the instance of another vessel which attempted to make the schooner, but was deterred in consequence of the danger, and went back.

All these facts are proved—if anything can be proved in a salvage case—which some, who have great experience, may doubt. They are contradicted by nothing worth consideration, with the single exception of *The "Tam o' Shanter."* I will suppose that the case of *The "Tam o' Shanter"* was identical with this in the enterprise, and then I think the answer is, that those people were not paid as they ought to have been; and it is my duty to pay no regard to it at all. If they did

encounter this risk, and perform a service at all like this, it is a matter of [274] astonishment to me that they should be contented with the remuneration they received. Supposing the fact to be so, it would make no difference whatever in my mind.

But it is said there could not have been the same danger, or *The "Tam o' Shanter"* would not have gone out. In the first place there was a difference in the tide. The one went out when the tide was ebb; the other, when it was approaching flood. Any one conversant with what is seen on the coast must be well aware that there is no danger at one time, and great danger at another. The places in which the two vessels were, at the time the services were rendered, are totally different.

Looking at the whole of the facts, and being of opinion that there are great ingredients of merit to constitute a claim for a high rate of salvage, but, at the same time, remembering that the judgment of the Court must be guided by justice, I lay out of consideration old rules; I never think of a moiety or any other such sum; I endeavour to give a reward proportionate to the service. I think this was a great enterprise, and I will add to this, though it has been very ingeniously argued that the salvors might and must have known that the crew had left the vessel, yet there is no evidence of that fact. These persons commenced the enterprise long before the crew quitted the vessel; but had they been told that the crew had quitted for the shore, it was impossible for them to know that no part of the crew had been left on board. Had this unfortunate crew exhibited a little more patience, the going out of the steamer might have been the means of saving their lives.

Looking at the whole case I am of opinion that 600l. is a proper reward to give the salvors.

Proctor, for the salvors, Stokes; for the owners, F. Clarkson.

LAKIN *against* LAKIN. Arches Court of Canterbury, Feb. 14, 1854.—In a suit for restitution of conjugal rights carried on in pœnam, the husband was imprisoned under a writ de contumace capiendo, for not obeying the order of the Court to take his wife home, &c. After three years' imprisonment, he applied for his discharge. The Court, under the peculiar circumstances of the case, discharged him on his professing obedience for the future, and without enforcing the order for the contempt of which he was imprisoned.

[Referred to, *Weldon* v. *Weldon*, 1883, L. R. 9 P. D. 55.]

This was a cause of restitution of conjugal rights, promoted by virtue of letters of request from the Consistory Court of Lichfield, by Caroline Lakin, against her husband Abraham Lakin.

The suit commenced in December, 1849; and, no appearance having been given for Mr. Lakin, the proceedings against him were carried on in pœnam. On the third sess. Easter Term, 1850, the Judge, Sir Herbert Jenner Fust, by interlocutory decree, pronounced the libel proved, and assigned Mr. Lakin to take his wife home and treat her with conjugal affection. Of this decree, which was personally served upon him, he took no [275] notice. On the second sess. of Trinity Term, the Judge, at the petition of Mrs. Lakin's proctor, pronounced Mr. Lakin contumacious and in contempt, and directed his contempt to be signified according to the statute.

A writ de contumace capiendo was thereupon extracted from the Court of Chancery against Mr. Lakin, under which he was, on the 12th of June, 1850, arrested and imprisoned in the county gaol of Salop, where he has ever since remained.

It appeared, from affidavits now brought in, that in the month of September 1849, Mrs. Lakin had eloped from her husband's house at Whitchurch, in the county of Salop, with a man named John Dale, and that she had ever since been living in adultery with him at Liverpool; that her husband, who was a journeyman cabinet-maker, on wages of 25s. a-week, and had four children to support, was prevented by want of means from taking any proceedings against her; that Mr. Lakin, on being served with the decree returned in this cause, thought his wife could not seriously intend to prosecute such proceedings, and, from fear of incurring expenses, abstained from seeking legal advice thereon; that, having been improperly advised by his friends, he neglected to attend to the instruments served upon him, and was on that account ultimately imprisoned; that he has now remained in prison three years and a half; that he has recently obtained information of his wife's having been delivered

of a child, which child was registered at the office of the registrar of births and deaths as the "child of John Dale and Caroline Dale, late Lakin," and that Mrs. Lakin had acknowledged the said child to be hers.

Mr. Lakin's affidavit also stated that he was willing and desirous to obey the orders and commands of this Court in all things lawful for the future. It further appeared that Mrs. Lakin had been informed that an application would be made to the Court for Mr. Lakin's release, and that she replied thereto that she should have or make no objection thereto.

Notice had also been given to Mrs. Lakin's proctor.

Sir J. D. Harding, Q. A., now moved the Court to absolve Mr. Lakin from his contempt and contumacy, and to direct an order to be made upon the sheriff of the County of Salop for discharging him from custody, and said the Court was empowered to do so either under 53 Geo. 3, c. 127, or under 3 & 4 Vict. c. 93. The latter required the consent of the opposing party in the suit, but did not require the submission of the party imprisoned for contempt; the former required the submission of the party in contempt, but did not require the consent of the other party to the suit. In the present case, the party in con-**[276]**-tempt had originally a good ground of defence to the suit, but being badly advised, had neglected to obey the orders of the Court. He now submitted himself, and professed his willingness to obey the lawful commands of the Court for the future. The Court could, therefore, order his discharge under the statute of 53 Geo. 3, c. 127. The statute of 3 & 4 Vict. c. 93 was only auxiliary to that statute, and did not repeal it. But if the Court had any doubt upon that point, it was competent to the Court to discharge the prisoner under the later statute, for the affidavits shewed sufficient consent on the part of Mrs. Lakin, the opposing party in the suit. She was informed of this application, and expressed her intention not to oppose it. Notice has also been given to her proctor, and his non-appearance is a constructive consent. As Mrs. Lakin might, perhaps, give further trouble by denying her consent at some future time, it would be preferred to have the discharge under 53 Geo. 3, c. 127, if the Court thought it could, under the peculiar circumstances of the case, order his discharge upon his profession of obedience for the future, without requiring him to obey the particular order for the disobedience to which he was imprisoned.

*Sir John Dodson.* This is certainly a very hard case. This person has suffered a long imprisonment through the ill advice of friends, for there seems but little doubt that he would have had a good answer to the suit if he had thought proper to appear. I do not know that I am bound to enforce the order upon him to take his wife home and treat her with conjugal affection, for that order would certainly never have been made if the facts now brought to the knowledge of the Court had been made known at the proper time. He now submits himself, and professes his willingness to obey all the lawful commands of the Court. I think that is sufficient, and I will sign the writ of deliverance annexed to statute 53 Geo. 3, c. 127.

Proctor for the applicant, Pritchard.

CUTTO *against* GILBERT. Prerogative Court of Canterbury, Nov. 23, 1853; March 8, 1854. A. C. made a will in 1825, and in 1852 duly executed another testamentary paper, the contents of which were unknown, beyond the fact of its beginning and ending with the words "last will." At his death the later instrument was not forthcoming, but there was no evidence of its destruction. Held, that the former will, though existing uncancelled, was revoked, and that the deceased died intestate.

[S. C. 18 Jur. 560. Reversed p. 417, post; 9 Moore P. C. 131: 14 E. R. 247 (with note).]

This was a business of granting probate of the last will and testament, bearing date August 11, 1825, of Abraham Cutto, late of Granda Place, Old Kent Road, promoted by Ann Cutto, widow, the relict of the deceased, and sole executrix named in the said will, against Elizabeth Gilbert, widow, the natural and lawful sister, and only next of kin of the deceased.

The proctor for Mrs. Gilbert admitted the said instrument **[277]** to be a duly executed will of the deceased, but alleged that the same had been revoked, and that the deceased was dead intestate, and brought in an allegation to the following effect:—

First and second articles pleaded, the history of the deceased, and his death on the 16th of July 1853.

Third. That on the 11th of August 1825, the deceased (whose property at such time was of very small amount) duly executed the will, &c., and thereby bequeathed all the estate and effects which he then possessed to the said Ann Cutto, and appointed her sole executrix.

Fourth. That upon an occasion happening four years or thereabouts before the death of the deceased, the said Ann Cutto inquired of him whether, from the lapse of time since the date of the said will, any confirmation or re-execution thereof was necessary, whereupon the deceased replied that the said will was perfectly valid and did not require any confirmation, or in words to that effect.

Fifth. That the said Ann Cutto saved, out of the allowances paid to her by the deceased for household purposes, a sum of money amounting in the whole to 5000l. or thereabouts, and invested the same for her own use and benefit in the purchase of Government stock; that some time shortly before the year 1852, the deceased became aware of such investment, and although he expressed himself displeased thereat, he did not deprive her thereof, nor in any way interfere with the same.

Sixth. That the deceased entertained and expressed great regard for his said sister, Elizabeth Gilbert, and her family, corresponded with her, and occasionally visited her at Spalding, in the county of Lincoln; that the deceased and his said sister were on terms of intimacy with Ashley Maples, who also resided at Spalding, and was trustee of deceased's father's will; that in the summer of 1852, during two visits to his said sister, the deceased, in reference to the contents of the will of his said sister, which he had recently perused, and the state of her family, held several confidential communications with the said Ashley Maples, and then intimated to him his intention of benefiting his said sister and her daughters by his own will.

Seventh. That the deceased returned from the second of his visits to his sister in August 1852, and very shortly thereafter, being of sound mind, and having an intention to make his last will in writing, and thereby to revoke his said will bearing date the 11th August 1825, and to make (amongst others) a provision in favour of his said sister and her daughters, did, with his own hand, draw up and reduce the same into writing, and did, on the day of the date thereof, produce at the office of John [278] White, a solicitor, to two of his clerks, a paper writing, being the very last will and testament so drawn up by the said deceased; and did declare the same to be his last will and testament, and did then and there set and subscribe his name at the foot or end thereof, and affix his seal thereto (though informed that it was unnecessary), in the presence of the said two clerks, who thereupon attested and subscribed the same, as witnesses in the presence of the deceased, and of each other; that the said will was not supplemental or codicillary, but was a substantive will, and that from and after the execution thereof his said former will was revoked; that the deceased was of perfectly sound mind, &c.

Eighth. That the deceased on leaving the office of the said John White with the said will in his possession, immediately after the execution thereof, met the said John White, and declared to him that he had just executed his will in the presence of his clerks, and that he had wished him to attest his said will for him.

Ninth. Deceased's illness and death.

Tenth. That the said will, which cannot now be found, was in the handwriting of the deceased, and commenced with the words "This is the last will and testament of"; that the same was described in the attestation clause thereof as "the last will and testament" of the deceased.

The admission of this allegation was opposed.

Nov. 23, 1853.—Sir J. D. Harding, Q. A., against its admission. In order to revoke a first will by a later there must be either a distinct clause of revocation, or the later must be inconsistent with and substantially different from the former. The law has not said that under all circumstances a later will must revoke a prior instrument: *Goodright* v. *Glazier* (4 Burr. 2512), *Harwood* v. *Goodright.*(*b*) The law, in that respect, has not been altered by the statute. It is clear on the face of this allegation, that the contents of the later will are not known. It is not even alleged that the

(*b*) Cowp. 92; S. C. 3 Wils. 497; 2 Black. 937; 7 Bro. P. C. 344; 1 Saund. 279 h.

later was substantially different from the former; nor that the whole property was thereby disposed of. The mere declaration that an instrument is a last will and testament is not sufficient to make it revocatory of all former instruments.

Dr. Deane, on the same side, cited 11 Jarman's Conveyancing (P. 119; 429 n. *b*), *Re Lewis* (14 Jur. 514), 1 Wms. Executors, 134.

Dr. Haggard, contrà. These Courts are governed by the Civil [279] Law, and have always adopted the principle, posteriore testamento superius rumpitur (Inst. ii. 17). There is no necessity to shew an inconsistency with the former will. The rule of Common Law may be different—for there may be there two substantive wills, and therefore, in order to establish revocation, it may be necessary to prove repugnancy. That doctrine has never been imported into the Court of Probate; yet the whole argument on the other side proceeded on its assumption. The doctrine of the Court of Probate was recognised by Lord Mansfield in the case cited on the other side: *Harwood* v. *Goodright*. He says: "Though as to personal estate the law of England has adopted the rules of the Roman testament; yet a devise of Lands in England is considered in a different light from a Roman will. For a will in the Civil Law was an institution of the heir; but a devise in England is an appointment of particular lands to a particular devisee," &c. (Cowp. 90).

*Helyar's Case* (3 Atk. 798; 1 Cas. temp. Lee, 472) shews the law of these Courts, and that case was noticed both by Lord Mansfield and Mr. Justice Yates, in *Goodright* v. *Glazier* (4 Burr. 2512). The doctrine has been followed in later years in *Henfrey* v. *Henfrey* (2 Curt. 468; 4 Moo. P. C. 33), which was affirmed by the Privy Council, and again in *Plenty* v. *West* (1 Robert. 264).

The circumstances pleaded are quite sufficient to shew that the later instrument was a substantive will and, therefore, that the former was revoked.

Dr. R. Phillimore followed on the same side.

Sir J. D. Harding, Q. A., and Dr. Deane replied upon the cases.

In *Helyar* v. *Helyar* the contents were known. The executrix was different. So in *Plenty* v. *West*. In fact, the Court is asked to decide this case, not so much upon any case in point, but upon an obiter dictum of the learned Judge. *Plenty* v. *West* was cited in the Common Pleas, where it was not considered authority (6 M. G. & S. 216).

Per Curiam. Was there any evidence in the case of *Helyar* of a different disposition?

Sir J. D. Harding. Yes; there was a difference both in the executrix and the residuary legatee.

Sir John Dodson. There is certainly some difference between the case of *Helyar* v. *Helyar* (1 Lee, 472) and the case I am now called upon to determine. But it is pleaded, and I must take it [280] to be true, at least for the present, that the later instrument in this suit commenced with the words, "This is the last will and testament of," &c., and that the attestation clause also described the instrument as "the last will and testament" of the deceased.

In the case of *Helyar* v. *Helyar* there were, however, different executors, and a different disposition of the residue appointed under the two wills (1 Lee, 472, 475); therefore, the case was stronger than the present. All the information which I can collect from the allegation before me is, that the lost instrument was described in the commencement, and in the attestation clause, as "the last will and testament"; there is also a general averment that it was substantive, not codicillary.

The case of *Plenty* v. *West* (1 Rob. 264), also cited at the bar, seems to me to come very much nearer to the point than the former case; still there is certainly a distinction which was pointed out by the learned counsel.

In that case both instruments were before the Court; in this the later is not forthcoming. In that case it was contended by one of the parties that the two instruments were not wholly inconsistent, and on that ground probate of both, as together containing the will, was prayed; but the learned Judge was of opinion that he could not grant that prayer for the reason he assigned, namely, that he knew of no case in which a former paper has been allowed to operate and form part of the probate, when there is a later instrument described as "the last will." It is true some comment was made by the Judges in the Common Pleas on the doctrine laid down by my learned predecessor, but I do not find that they denied it to be law, when applied to personalty. Since then it is the law of this Court (which, until

overruled, I am bound to follow), and as we have the authority of the two cases cited, particularly *Plenty* v. *West*, I think I shall only do what is consistent with the laws of the Ecclesiastical Courts in admitting the present allegation to proof.

The cases cited by the Queen's Advocate as to the law of real property are certainly very important, but they do not seem to me to bear on the question I have to decide.

The Queen's Advocate. I submit that if *Plenty* v. *West* is strictly law, there is a complete variance between Common Law and the law of these Courts.

The Court. It is the Civil Law on which this Court proceeds, and there the doctrine respecting the question before me is laid down in the strongest terms, without any exception whatever, posteriore testamento prius ipso jure rumpitur. There may [281] be an irreconcileable difference between these Courts and the Courts of Common Law, but that will not justify me in deviating from what I apprehend to be the law here until I am so instructed by a higher authority.

The allegation having been admitted, and witnesses examined, the case was argued by the same counsel on the evidence. In addition to the former cases cited, *Stoddart* v. *Grant* (1 Macq. H. L. 163) was referred to.

*Sir John Dodson.* Mr. Abraham Cutto, the deceased in this cause, died on the 16th of July last, possessed of personal property of the value of upwards of 5000l., leaving a widow, Ann Cutto, and a sister, Elizabeth Gilbert, his only next of kin, the respective parties in the suit.

It appears that the deceased made and duly executed a will, bearing date the 11th of August, 1825, and therein appointed his said wife executrix and universal legatee. It is not denied that this will was duly executed, and was to all intents and purposes a valid instrument; but it is alleged that it has been revoked by a subsequent instrument, duly executed by the deceased for that purpose; that this latter instrument has been destroyed by the deceased, or at least is not now forthcoming; and that, therefore, the deceased is dead intestate.

The allegation given in on the part of Mrs. Gilbert was opposed, but after hearing the arguments of counsel the Court admitted it, being of opinion that if the facts therein alleged were fully proved the will of 1825 was revoked, inasmuch as by the law of these Courts the execution of a will relating to personal property amounts to a revocation of a former will, whether the contents of the later instrument are known or not, provided there be in substance or effect revocatory words. Under the statute there can be no revival of the former from mere presumption of intention.

By the admission of that allegation the question of law was settled, so far as this Court is concerned. If that decision was erroneous it is a satisfaction to the Court to know that its error may be rectified by an appeal to a superior tribunal.

The point of law being settled to the best of my judgment, the only question for the present consideration of the Court is whether there is sufficient proof that the later instrument was duly executed, and that it was a bonâ fide substantive will, and was not merely codicillary. Now, when an instrument has been destroyed it frequently happens that its contents may be proved by a draft which has been preserved, by the [282] memory of the witnesses, by the deposition of persons who were privy to its contents, or by some other means; and then the character of the instrument can be accurately ascertained without much difficulty; but in the present case there are no written instructions produced, no draft, no fair copy. The instrument was in the deceased's own handwriting, and the contents were known to no one. The Court is, therefore, under the necessity of forming its judgment from a review of the whole circumstances of the case.

The deceased was a solicitor, and for thirty-six years held an appointment as clerk in the Receiver-General's department of the General Post Office, which he resigned in the year 1851. About the same time he also retired from professional practice, and confined himself to the transaction of some business relating to some trust property in which he was concerned in the office of his friend, Mr. White, also a solicitor, in Barge Yard, in the city of London. In the summer of 1852, being on a visit to Mrs. Gilbert, his sister, at Spalding in Lincolnshire, he, in a conversation with Mr. Maples, intimated his intention of benefiting his sister and her family by his will. The evidence of Mr. Maples upon this point is in these words: "The tenor of his conversations on those occasions was such as to impress me with the belief that he was going to make some provision by his own will in favour of the daughters of his

said sister; it was of them more particularly he spoke; . . . my impression is that he made use of the word 'will,' in reference to himself and such his intentions in their favour, but I cannot speak to his exact expressions. He did not tell me in distinct terms what he was going to do, but he so expressed himself as to convey to me the impression that his intentions were as I have now expressed." Beyond that Mr. Maples is unable to carry his testimony.

But it appears that after this visit to Lincolnshire he drew up with his own hand an instrument which he executed in Barge Yard Chambers, London, at the office of Mr. White. It appears that this instrument, whatever may have been its nature or its purport, was duly executed according to the requirements of the statute.

I must resort to the evidence of the witnesses to see, if possible, what was the character of this instrument. The first witness is Thomas Watkins, a clerk of Mr. White's. He says, "I remember witnessing a paper for the said Mr. Cutto at Mr. White's office. I cannot recollect the date accurately, but my impression is that it was about a twelvemonth before his death. . . . He came into the clerks' office, where I and my **[283]** fellow witness, William Ward Floyd, were, and he said to us he wanted us to witness something; whether he said witness this, or witness my will, or what other expression he used, I do not clearly recollect. . . . I certainly was under the impression that it was his will; and though I do not actually recollect it as a fact, I think he must have spoken of it as such, or else I should not, I think, have made the remark I did in reference to the seal; I knew nothing whatever of the contents of the paper we so signed. I took so little notice of it that I do not know if it was in Mr. Cutto's handwriting or not; I do not know if it had an attestation clause to which we put our names; I only know that it was a paper with writing upon it. Probably knowing Mr. Cutto to be an attorney, I was induced to take less notice than I otherwise might. I have not the slightest recollection of the form or contents of the paper beyond its having the seal, &c."

So that from Mr. Watkins we get very little information indeed as to the nature of this instrument. The deceased did go to Mr. White's office about a year before his death, and ask this witness to attest an instrument or paper, but whether it was a will, or what it was, he does not know. He really knows nothing that throws any light upon the subject. From the circumstance that Mr. Cutto was an attorney, he took the less notice of it.

The next witness is John Ward Floyd, another clerk of Mr. White's, and he fortunately gives us some more precise information. He says, "I remember witnessing a paper for the said Mr. Cutto in Mr. White's office. I should think it must have been about eighteen months ago; I have, however, nothing to guide me as to the time. . . . Mr. Cutto came into the office and said to me, 'John, I wish you to witness my will;' and seeing Mr. Watkins there, he asked him to step in also, and he and Mr. Watkins and I accordingly went into Mr. White's room; Mr. White was out at the time. Mr. Cutto then took a paper out of his pocket, and opened it on the desk, and proceeded to sign it: Mr. Watkins noticed that there was a seal on the paper, and he observed to Mr. Cutto that a seal was unnecessary to a will now. This was said on the supposition that the paper was a will, Mr. Cutto having so spoken of it in asking us to witness his will."

That this conversation passed, I think there can be no doubt, and I would here remark, that looking back to Mr. Cutto's will of 1825, I find that he there made use of a seal at its execution. In reply to Mr. Watkin's remark about the seal, Mr. Cutto replied, "Yes, I know, but it don't matter;" or words to that effect.

**[284]** On the tenth article this witness deposes, "My impression is, that it was a short will, being written three parts down a side of paper, but I did not know what its contents were. . . . I cannot, from positive recollection, say what were the commencing words of the said paper; but my impression is, that as the paper lay open before me, I saw that it commenced with the words 'This is the last will and testament of,' or some similar words, denoting the paper to be the last will and testament of Mr. Cutto. We knew the paper to be Mr. Cutto's will, and my impression is, and I have no doubt that I saw and read so much of it as shewed it to be so, though on that point I am not able to speak from positive recollection." So that the impression upon this witness's mind is, that he saw the words "The last will and testament," and connecting that with the circumstance of Mr. Cutto asking him to witness his will, he seems to entertain very little doubt that he read so much of the

paper which he attested as satisfied him that it was the last will and testament of the deceased; and this opinion seems to me to be confirmed by the testimony of Mr. White, to whom the deceased, on meeting him when leaving the office, mentioned that he had been making his will, and that it was a short will, "just like your father's."

Under all these circumstances, it appears to me that there is pretty clear proof that the paper executed by the deceased in the year 1852 was not a mere codicil to the will of 1825, but a bonâ fide substantive will, and as such would revoke that instrument.

I would guard myself against laying it down as an invariable principle, that the fact of a testator's calling an instrument his last will, is of itself sufficient to invest it with the character of a substantive will, so as to revoke all former instruments; undoubtedly instances have occurred in which persons have described an instrument as a "last will," and have merely given one legacy additional to a former instrument; but primâ facie an instrument so described must be taken as a will; and, under the circumstances of this case, this gentleman, having prepared an instrument, called on two persons to witness his will, and having made a declaration subsequently that he had made his will, I think I must consider this as a regular bonâ fide will, which must operate as a revocation of the former instrument.

The deceased must, therefore, be considered to have died intestate, for under the present statute (*a*) the former will cannot **[285]** be revived by the destruction of the later, whatever may have been the intention of the deceased.

With regard to costs, I am of opinion that through the act of the testator himself this inquiry was absolutely necessary, and that it is a proper case for the costs of both parties to be paid out of the estate.

Proctors: for the widow, Nicholson; for the next of kin, Currey.

THE "BLENHEIM." The High Court of Admiralty, April 27, 1854.—A vessel is not relieved of her obligation to make way for another close hauled on the starboard tack by reason of her crew being engaged in reefing her topsails. A vessel to which the blame of a collision is attributed is liable, not only for the immediate damage, but for the consequential loss arising from the abandonment of the injured vessel by her crew, under reasonable apprehension of danger.

This was a cause of damage (by plea and proof), promoted by the brig "Unition" against the brig "Blenheim."

On the night of the 15th of December, 1852, the "Unition" was off Flamborough Head, on her voyage from Newcastle to Jersey, laden with a cargo of coals, when she came into collision with the "Blenheim," which was proceeding in ballast from London to Middlesborough, in the county of York.

The "Unition" alleged that she was proceeding close hauled on the starboard tack to get into smoother water; that whilst so proceeding, a vessel (the "Blenheim,") was descried about two points on her lee bow, approaching on the larboard tack; that a light was then immediately exhibited from the lee bow of the "Unition," which continued on her then course; that no notice was taken thereof on board the "Blenheim," and no alteration made in her course; that the light was again exhibited and left for some time on the brig's lee bow, and the approaching vessel was loudly hailed to port her helm; that no light was shewn on board the approaching vessel, and no alteration made in her course; that she thereby rendered a collision inevitable; that immediately before the collision, and in order to avert the same, if possible, the helm of the "Unition" was put hard to port, and she was brought aback with her head to the westward, but the "Blenheim," which was on the larboard tack, with the wind free, and proceeding very fast, improperly continued her course and ran with a heavy crash into the said brig, striking her in her gangway on the larboard

---

(*a*) This case fully illustrates the remark of the Real Property Commissioners: "The only exception we think necessary to this rule (non-revival) is, where a will which has been wholly or partially revoked by a subsequent will or codicil, is left perfect, and the subsequent will or codicil is cancelled or otherwise destroyed. If this exception were not allowed, wills might be defeated by parole evidence that subsequent wills had been made and destroyed." (4th Rep. R. P. C. p. 34).

In the present case no evidence whatever was given as to the destruction of the later instruments.

side; that it being im-[286]-possible to ascertain what damage the brig had sustained whilst the two vessels were rolling together in the heavy sea, and there being reason to apprehend that the brig would go down from the injuries received, the crew, for the preservation of their lives, jumped on board the "Blenheim;" that after some time the vessels separated, and it being impossible for the said brig's crew to return to her in safety, the "Blenheim" took them to the port of Middlesborough, and landed them there; that the said brig, after being so abandoned, was fallen in with by the crew of another vessel, and navigated by them to the port of Great Grimsby, where she has since been given up to her owners, upon payment being made by them of the claims for salvage, amounting to 420l.; that the institution of the present suit was delayed by reason of the "Blenheim" having been out of the jurisdiction of this Court, &c.

The defence on the part of the "Blenheim" was, that in consequence of the violence of the wind, the master gave orders to close reef his topsails; that she was laid to for that purpose, with her head N.½W., and all her crew, but the master and man at the helm, went aloft; that her helm was kept hard a-starboard, and she had scarcely any way on her; that, under these circumstances, the light of the "Unition" was observed about three points on the "Blenheim's" lee bow, distant about half a mile; that as the "Unition" approached without giving way as she was bound to have done, inasmuch as she had the wind free, and the "Blenheim" was laying to, as aforesaid, the said brig was loudly hailed to bear away, but that no attention was paid to such hailing; that the foreyard of the "Blenheim" was then thrown aback, and the helm of the "Unition" was ported, but too late, &c. &c. That after the collision the vessels separated, neither vessel having sustained any damage but of the most trifling character; that the collision and its consequences were attributable to those on board the "Unition" for not giving way and keeping clear of the "Blenheim" when that vessel was laying to, reefing, and quite unmanageable.

Sir J. D. Harding, Q. A., and Dr. Deane appeared for the "Unition;" Dr. Addams and Dr. Twiss appeared for the "Blenheim," and contended that she was not to blame, and that if she had been to blame, her owners were not fairly responsible for the consequential expenses, as the "Unition" was but slightly damaged by the collision, but had been abandoned by her crew without just and sufficient cause.

[287] *Dr. Lushington*, addressing the Trinity Masters.(*a*) Gentlemen, there has been one question which has been agitated on the present occasion to which I do not intend to call your attention: I mean the question whether the "Unition" was properly abandoned on behalf of her master and crew after the collision, or whether the crew precipitately left her. This is not a matter on which I feel authorized in asking your opinion. It does not depend on nice nautical points, but on considerations which those sitting in this chair are supposed capable of giving it. However glad I should be of your assistance, I must adhere to the law, and not improperly put questions to you.

There are, however, two questions which I must request you to consider, the first of which relates to the conduct of the "Unition," and the second to the conduct of the "Blenheim."

You must allow me very briefly to recapitulate the facts of the case. It appears the "Unition" was of the burthen of 150 tons, and was bound (laden with coals) to Jersey. The collision took place on the 15th of December, a few miles from Flamborough Head; and the weather at that time, as appears from all the evidence, was not, perhaps, to be called tempestuous, but was of a threatening character. I make that observation, because it is not only stated in the evidence on behalf of the "Unition," but by that on the part of the "Blenheim," that the wind was W. by N., blowing heavily; that, at this time, in consequence of the violence of the wind, so and so was done. It was evident, therefore, that the weather was rather to be considered as threatening. It appears that the wind having blown S. for some time before, the master of the "Unition," instead of keeping his proper course to Jersey, thought it right to seek shelter by keeping close to land. This appears to me to dispose of a question much discussed at the bar, namely, whether the "Unition" was, at the time she met the other vessel, close hauled. I think if the wind was W. by N. and the proper course to Jersey was S. by E., she was not close hauled. If, on the

(*a*) Captain Farquharson and Captain Pitcairn.

other hand, she was keeping as close as she could to the shore, she was close hauled for the purpose of going to the Humber. Therefore, I think the only question that can arise is, whether the vessel was justified in abandoning her direct course and seeking the land.

Another question, much discussed, was the quarter from which the wind blew. So far as I can form any opinion, it was varying from W.S.W. to W. by N., but upon the precise quarter from which the wind blew at the moment of the collision the [288] evidence does not enable me to form an opinion. Under these circumstances, the "Unition," according to her statement, first saw the "Blenheim" two points on her lee bow, and, as soon as she perceives her, it is not disputed, she acted very properly in exhibiting a light. Finding that the other vessel does not change her course, she ports her helm, as I understand, at the moment, and then puts it hard to port, so as to bring her sails to shiver in the wind. However, it so happens that the other vessel came on, right or wrong, and struck her on the starboard side. It appears to me that there can be but one question arising on this point. Was there any undue delay on the part of the "Unition" in porting the helm? I cannot represent the "Unition" to be blameable in any other respect than by possibility in the one I am now suggesting for your consideration.

Now, with respect to the "Blenheim," she was a vessel of the burthen of 225 tons, and was bound in ballast from London to the North. According to her representation she was laid to, and reefing her topsails, with her head N. by W., and had her helm hard a-starboard. The master in his evidence states, that it was hard a-starboard at the time when the light was shewn by the "Unition;" it was seen by the "Blenheim," but she takes no notice of it. Though it so happened, that the omission to shew a light on the part of the "Blenheim" may not have been the cause of the collision, yet I must say it was exceedingly erroneous conduct on the part of her master not to have shewn a light to point out the place and position of his vessel. The "Blenheim" represents that she was in an unmanageable state: what ought to have been her conduct? According to the evidence of the master of the "Blenheim," it appears she did nothing.

[The Court, having read a portion of the master's evidence, continued.] It will be for you to determine whether she ought to have done anything, or whether there was any sufficient reason for not doing that which the Act of Parliament prescribes, namely, porting her helm. If you are of opinion that she could not do it, then the maxim of law prevails, Nemo cogitur ad impossibilia. If you are of opinion that she might have ported her helm, then she is to blame for the collision. You will have the kindness to give me your opinion on that point.

Captain Farquharson. We are of opinion that the "Blenheim" might have ported her helm, and we think the "Unition" acted rightly in the course she pursued; that she was not to blame. The Trinity Masters having withdrawn,

[289] *Dr. Lushington* continued. Now with respect to the question of the abandonment of this vessel by the master and crew, it having been determined, in consequence of the opinion of the Trinity Masters, that the "Blenheim" was to blame for this collision, I must determine whether the usual consequences which would result on such a decree ought not to take place on the present occasion, because blame is attributed to the master and crew of the "Unition" in abandoning her. The principle to which I have always adhered, and to which I shall adhere, until otherwise instructed by superior authority, is, that when a collision takes place on a dark night, particularly at a tempestuous period of the year, and when the vessel producing the collision is of greater burthen than the one struck, I cannot possibly settle with satisfaction to my mind, or security to justice, what ought to be the reasonable extent of fear and apprehension to the crew of the vessel so struck. It is impossible for any court of justice to say with any degree of certainty what are the precise circumstances that would justify the abandonment of a vessel. If there be any reasonable prospect that the lives of the crew are endangered, I have determined, and I will do so until I am overruled, that they are justified in quitting the vessel, and the consequences must fall on the wrongdoer. On the present occasion the vessel was off Flamborough Head, and it is manifest from the evidence on both sides, that though there cannot be said to be a gale of wind or a storm, yet the weather was approaching to tempestuous, and the wind was blowing violently. The occurrence took place on the 15th of December, at night, when it was impossible for them to know the weight of the

vessel that had struck them or the extent of damage that was done, and I therefore cannot think that they were bound to remain on board. The delay of two minutes might have risked valuable life, and I never will put life in competition with property. In the present case, there is nothing to induce me to depart from the ordinary rule of condemning the "Blenheim" in the damage done.

Proctors: for the "Unition," Bathurst; for the "Blenheim," F. Clarkson.

THE "PARIS." The High Court of Admiralty. April 21, 1854.—A steamer bound from the East to Southampton, meets another, disabled in her machinery, in the Bay of Biscay, and tows her to Plymouth Sound. The service lasted about forty-eight hours, and the value of the property salved was 4060l. A tender of 800l. was upheld, and the salvors condemned in costs.

This was a salvage suit promoted by the steam-vessel "Douro" against the steam-ship "Paris."

The "Douro," a steam-vessel, on her voyage from Constantinople to Southampton, fell in with the "Paris" in the [290] Bay of Biscay on the 1st of December 1853. The "Paris" was proceeding in ballast from Havre de Grace to Marseilles, when her machinery sustained such injury that she was quite disabled. She hoisted a signal of distress, which brought the "Douro" to her assistance. The "Douro" took her in tow, and brought her safely to Plymouth Sound, where she arrived on the 3rd of December. The value of the property salved was 4060l. The owners tendered 800l., which was rejected.

Dr. R. Phillimore and Dr. Twiss appeared for the salvors; Sir J. D. Harding, Q. A., and Dr. Deane for the owners.

*Dr. Lushington.* As my judgment will not be influenced by any of those matters which have been so much controverted, it is not my intention to enter minutely into their consideration, because I intend to determine this case on the great features of it. The question is this, bearing in mind always the value of the property which has been salved, namely, 4060l., and the amount which has been tendered, namely, 800l., or one-fifth of that sum, whether, looking at the general facts of the case, that is a sufficient and competent reward for the services which have been rendered.

Now, what are the ingredients in this case so often described in this Court, which appear to render it incumbent on the Court to pronounce for a large rate of salvage? Certainly, the vessel which performed the service is one of considerable power, one fully competent to perform the duty she undertook with rapidity and efficiency.

The "Paris" is represented to be of the burthen of 200 or 230 tons, and she, I must think from the whole evidence in the case, was in a state of considerable peril; but the degree of peril, it would, in my judgment, be impossible to ascertain with anything like satisfaction to my own mind. True it is that the engines were disabled, and that her canvas was insufficient to carry her to a French port; but we must all feel this, that the incapacity to reach a French port must depend on circumstances which it was so impossible to know beforehand, that no great reliance could be placed on it. I mean this: assuming it were to continue calm, and presuming the wind to be favourable, then much less canvas might render it safe to navigate the ocean than under other circumstances, and there would be a probability of reaching the French coast.

But be that as it may, there is no doubt that she was in a state of danger, and she considered herself so to be, because she made a signal of distress, and asked to be taken in tow, thereby shewing that she doubted her own capacity to reach [291] a place of safety. She is accordingly taken in tow, and it does not appear to me that, after she was taken in tow, the "Douro" underwent any peculiar hardship in the performance of the service, or that there was any great degree of danger occurring to the "Douro" herself, and I am not satisfied that there was danger of any kind whatever incurred by any one in performing the service.

With regard to the repair of the machinery, and other services rendered, the Court takes it into consideration. Yet it is a matter which occurs every day, that the vessel salving assists the vessel salved, not in repairing machinery, because that is not a frequent occurrence, but putting her in that state and condition in which she is enabled to proceed from one port to another. The vessel taken in tow is conducted to Plymouth, which was in the course of the "Douro," though she would not have stopped there, but have gone on to Southampton. According to the repre-

sentation, forty-eight hours are lost, and one-fifth of the value is offered for these services.

I must say, I think the salvors have seen the whole case through a magnifying glass. They magnify the value, the size of the vessel, and their own services, and, though I act upon the principle that where efficient services have been performed by a steamer of great value and great power, with alacrity, she ought to be encouraged to embark in such undertakings, yet I think there is a line which, if there be an attempt to overstep, it is the duty of the Court to interpose.

Now, in my judgment, one-fifth of the property is an ample reward. If the vessel had been derelict, I certainly know no instance in which where the value was so great, more would have been given; but a derelict she was not. I consider it my duty to pronounce for the tender; and, I am sorry to say, to condemn the parties in the costs. That is a measure which I am reluctant to pursue, though, according to the practice in other Courts, where the tender is considered sufficient they uniformly follow that course. I have considered myself justified in some cases in not proceeding to that extremity, on grounds of public policy,(*a*) but in this case I see no sufficient grounds for departing from the rule.

Dr. R. Phillimore. Will the Court kindly apportion the salvage?

*Dr. Lushington.* I think a fair apportionment will be 200l. to the owners, 120l. to the master, and the rest to be divided among the crew according to their rating in the articles.

**[292]** Dr. R. Phillimore. One difficulty about receiving the tender was that of making an apportionment of it.

Proctors: for the salvors, Middleton; for the owners, Nicholson.

IN THE GOODS OF HENRY CORBY, Deceased. Consistory Court of London, April 22, 1854.—A vessel was lying at Melbourne in Australia, when H. C., who had been some time resident there, shipped on board as an able seaman to return to England. The vessel did not sail for some days after. Irregular papers of H. C., dated the very day on which he shipped, not entitled to probate as a mariner's will under sect. 11 of the statute.

[S. C. 18 Jur. 634. Distinguished, *In the Goods of M'Murdo*, 1867, L. R. 1 P. & D. 541. Referred to, *In the Estate of Anderson*, [1916] P. 51.]

Henry Corby, late a seaman on board the merchant ship "James Alexander," died on the 24th of June 1853, at sea.

He left England, in October, 1850, for New Zealand, whence he afterwards, in May, 1852, went to Australia. He there acquired property amounting in value to 250l.

On the 15th of March, 1853, he was shipped as an able seaman on board the above vessel, which was then lying at Melbourne, in Australia, to work his passage home, and he remained on board that vessel until his death.

On the 1st of August, 1853, Mr. Thomas Corby, a brother of the deceased, received a letter from him, dated 15th of March, 1853 (being the day on which he shipped on board the "James Alexander"), in which he mentions that he is in that ship, and he concludes the letter thus:—"You can draw it (meaning his money) if I never reach home. Should anything happen to prevent, I leave it all to do as I say, on inquiring of the Shipping List, and my last letter is, what to do with what I owne as my own." On the 20th of the same month, Mr. T. Corby received another letter from the deceased, dated Melbourne, March 6, 1853, in which he mentions his intention to leave Australia on his return to London, on the 15th of March, and adds, "It is understood that all I possess will belong to my nepheys and neices, should I not reach home in safety," and he then specifies what his property consists of. It appears that no other letter, bearing date between the 6th and 15th of March, was received from him.

On the 1st of August, 1853, Mr. Rogers, the brother-in-law of the deceased, also received from him a letter, bearing date 15th of March, 1853, and in which he states that he is shipped in the "James Alexander," and that should he not reach home in safety, he, Mr. Rogers, is to see the deceased's brother Thomas, and he adds, "You and he can receive the money, and afterwards, if anything should happen to me, you

(*a*) Vide note, p. 175.

must then make inquiries about me, and you will find what property I am possessed of to my nepheys and neices." And the following addition is written across the page, "My brothers William and Thomas will arrange all business, and share and share alike."

**[293]** These three letters were all in the handwriting of the deceased, but the first was not signed.

On intelligence of his death being received, search was made among his boxes and effects for some more formal testamentary instrument, but without success.

Dr. Middleton moved the Court to decree probate of the will of the deceased, as contained in the three paper writings, &c., to Mr. Thomas Corby, as the surviving executor, according to the tenor, and submitted that the circumstances of the case entitled the deceased to the privilege of the exception of the 11th section of the Wills Act, as a "mariner or seaman being at sea," citing the case of *Lay* (2 Curt. 375).

Per Curiam. You ask for probate of these papers as a seaman's will, but have you any evidence that he was on board ship at the time he wrote them?

Dr. Middleton. The evidence is to the effect that he was shipped, as a mariner, on board this vessel on the day when the papers bear date.

Per Curiam. It seems to me running it rather close to say that he was a mariner when he made his will only on the very day when he was shipped, and when the vessel was in a British port. It is a very nice question, which the Court must take time to consider.

On a subsequent day *Dr. Lushington* rejected the motion, and said—This case I have taken time to consider, as the question involved appeared to me of considerable importance, and it was my anxious wish to grant the motion for probate of these papers, if I thought I could do so consistently with my apprehension of the law. These papers are not executed according to the requirements of the statute, and the application is for probate of them as privileged under the 11th section. That section, however, applies only to wills made at sea. Now, in the present case, there is no evidence whatever where these papers were written, nor whether the deceased was even on board the ship at the time. It appears that the deceased had not originally sailed to Australia in this vessel, but that he had been residing there for nearly a twelvemonth before he shipped as a mariner to return in her to England, and that he so shipped on the 15th of March. Now the paper marked A., bearing date the 6th of March, I think, must be put out of consideration altogether, as being clearly not entitled to the privilege. But with respect to the other two papers, it is a **[294]** different question. They both bear date the 15th of March, on which day, it appears in evidence, the deceased shipped on board this vessel, as a mariner, to return to England. But, assuming that these papers were actually written on board this ship, I am not prepared to say they would be entitled to probate as a mariner's will, for it must be borne in mind that the statute says, "mariner or seaman being at sea," and it appears that this vessel did not sail till the 30th of March, fifteen days afterwards. Can it then be said that these papers were written at sea, within the true meaning of the statute? I think not.

I am aware of the case of *Lay* (2 Curt. 375), but the circumstances of that case appear to me totally distinguished from the present. I must reject this motion.

Proctor: Middleton.

BOWLES *against* JACKSON. Prerogative Court of Canterbury, April 28, 1854.—A soldier under orders to proceed from his station in one Indian presidency to take part in the war going on in another, and making his will only two days before he commenced the march, is not entitled to the privilege of a military testament.

[Followed, *In the Goods of Hiscock*, [1901] P. 81.]

On admission of the allegation propounding the will.

The will of the deceased was propounded on behalf of the widow and universal legatee.

The second article, which pleaded the execution, was to the following effect: that Alfred Jackson, the deceased, in the year 1839 was a captain in the 30th regiment of Bengal Native Infantry, and in the month of August, in that year, was stationed with his regiment at Neemuch, in Bombay, in the East Indies; that on the 14th of that month orders were received by the commanding officers of the regiment to march on the 22nd of the said month to attack the citadel of Joadhpore, a fort belonging to

an independent prince of that country; that on the 20th of the said month the said testator, &c., did, with his own hand, draw up, and write his last will and testament, of which the paper exhibited, and remaining in the registry of this Court, is an authentic copy, and signed the same on the said day, and acknowledged the same as his last will and testament, in the presence of Hercules Ross, who, at the request, and in the presence of the deceased, set and subscribed his name as a witness thereto; that the said deceased afterwards took the said will to the house of T. Morrison, and in like manner acknowledged the same to be his will, in the presence of the said T. Morrison, who then, in the presence, and at the request of the said deceased, signed and attested the said will as a witness thereto, &c..

The third pleaded: That on the 22nd of the said month of August, in the said year 1839, the said deceased, agreeably to **[295]** the said orders so received on the 14th, as mentioned in the preceding article, marched with his said regiment, in order to attack the said citadel of Joadhpore, and whilst on the said march was seized with illness, and sent back to Musseerabad, where he died on the 13th of October following.

The fifth article pleaded the 11th section (*a*) of the Wills Act.

Dr. Jenner, on behalf of the next of kin, opposed the admission of this allegation. This is an amicable suit for the purpose of obtaining the opinion of the Court as to whether the circumstances pleaded are sufficient to entitle the deceased to the privileges of a soldier in "actual military service." The facts are stated in the 2nd article. The fact relied on to distinguish this case from the various cases already decided is, that at the time of the execution of the will the deceased was under orders to march to battle. But is being under orders to march and engage in actual military service precisely the same thing as being in actual military service? If so, the argument must go to this length, that every soldier under orders to march for any purpose whatever is privileged. At the present moment this would embrace a very large class. Many are now under orders to proceed to Constantinople. The words of the Act do not seem to allow such an extension of the privilege. Being a privilege and an exception from the general operations of the law, it must be construed strictly, and must not be unduly extended. The time can have no bearing on the case. The fact of the deceased's marching two days after the execution of the will cannot stamp the character of actual military service upon him at the time of execution. The case which has the nearest resemblance to the present is that of *James Norris* (3 Notes of Cases, 197), who, at the time of making his will was under orders to proceed from Malta to the West Indies.

Per Curiam. He was under orders to proceed to the West Indies, but was he going to attack any place? That would seem to make a great difference in the nature of the orders.

Dr. Jenner. No; his orders were not to that effect. In that respect, certainly, the case differs from the present.

Dr. R. Phillimore, contrà. The decisions already given in this Court render any elaborate argument unnecessary. We must shew that, under the circum-**[296]**-stances, the deceased is to be considered either in castris, in expeditione, or in actual battle field. The cases of *Drummond* v. *Parish* (3 Curt. 522; 2 Notes of Cases, 318), *White* v. *Repton* (3 Curt. 818; 3 Notes of Cases, 97), of *Major-General Clement Hill* (1 Robert. 276; 4 Notes of Cases, 174), and of *John Vaux Leese* (17 Jur. 216), are all cases which shew what is not actual military service; but there is a circumstance in the present case which distinguishes it from them. The deceased was under orders to march and engage in immediate hostilities.

There appears to be a difference between India and the Colonies, from the fact of our Indian possessions being surrounded by independent powers, which renders the principle of the Digest respecting the vicinity of the danger more applicable.

The inclination of the Court will be to sustain this will, if it can possibly do so, as these wills are always favourably received in these Courts. Sir Leoline Jenkins originally obtained the privilege for the British soldier and sailor, that their position might not be inferior to the soldier and sailor among the Romans.

---

(*a*) Provided always and be it further enacted, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.

The doctrine of the Roman Law as stated by Ulpian is: "Ex eo tempore quis jure militari incipit posse testari, ex quo in numeros relatus est; antè non: proinde qui nondum in numeris sunt, licet etiam lecti tirones sint et publicis expensis iter faciunt, nondum milites sunt, debent enim in numeros referri (Dig. 29 1, 42).

Per Curiam. But I apprehend that only makes the difference between soldiers and mere recruits, without touching the question of actual service.

Dr. R. Phillimore. Yes; but he says the privilege began to run from that time; and it is so explained by Calvin (*f*) in the word "Numeri." But Calvin's definitions of the words expeditio and expediti milites are more important, and seemed to have been regarded with great attention by the learned Judge in the case of *Drummond* v. *Parish* (3 Curt. 535). He says: "Expediti milites vel in expeditionibus existentes dicuntur, quicunque sunt in ipso exercitu aut castris, id est, eo loci, quo Reipublicæ causa est belli apparatus, seu in statione illi sint, seu in hibernis seu aliubi pro finibus Imperii tuendis; imo quocunque in loco sint militiæ causa, ut si Romæ sint ad defensionem urbis collocati ac dispositi. Falsum ergo, stationarios ac limenarchas non recte testaturos jure militari quia non sint in expeditionibus."

This definition may fairly be applied to the circumstances of the present case. Captain Jackson was stationed with his regi-**[297]**-ment where he was pro finibus Imperii tuendis, and he was certainly eo loci quo Reipublicæ causa est belli apparatus. He was, in fact, on the point of war, being under immediate orders to advance to the attack of a fortress. If he had made his will two days later—at any time on the 22nd, no one could have contended that it was not valid.

Looking at all the circumstances of this case, that there is no decided case against the validity of this will, that the officer was ordered out of his own presidency into another where the war was going on, and that he actually set out within forty-eight hours of the date of the will in obedience to orders received several days before, the Court will see that the reason of the privilege being granted to soldiers is brought out very strongly by the facts which shew emergency and impending danger.

*Sir John Dodson.* To a certain extent that may be true; but it does not appear to me that the circumstances of this case are such as to shew this soldier to have been inops consilii. In point of fact he was at home—in a different presidency, in different British territory from the seat of war, and had as full opportunity of making a will as any other person. The orders to march were not immediate; he had full time to make, and he did make a will; but, unfortunately, not in accordance with the requisites of the law. The signature was not made in the simultaneous presence of the witnesses.

I am of opinion that in this case the military privilege does not apply. It cannot be said that at the time this will was made this gentleman was in expeditione. What might have been the case if he had actually set off, it is not necessary for the Court to consider. The cases cited, though none of them precisely to the point, shew that the soldiers stationed in the colonies, even under orders of removal, are not privileged. Here is certainly a distinction, inasmuch as the party was under orders to proceed to the immediate scene of hostilities; but I do not think it sufficient. The irregularity of this will is not founded on the want of opportunity to make it in a regular form, and I cannot hold it entitled to the privilege.

I shall reject this allegation, and thereby give the parties the opportunity of appealing to the Superior Court in order to get this point decided.

Proctors: for the widow, Townsend; for the next of kin, Tatham.

**[298]** THE "FAIRY." The High Court of Admiralty, May 7 & 8, 1854.—A brig proceeding in a cause of damage barred of recovery by reason of her non-observance of the Admiralty regulation respecting lights having occasioned the collision.

This was an action brought by the brig "Kirtons" against the brig "Fairy," for damage sustained by an alleged collision between them off Cromer, about 8 o'clock P.M. on the 26th of February 1853.

The proceeding was by plea and proof. The point principally in dispute was the identity of the vessel proceeded against, for the "Fairy," though she admitted that she had been in collision with a vessel that evening, denied that it was the

(*f*) Calvin's Lex. Jur. vv. "Numeri," "expeditio," "expediti milites."

"Kirtons." The evidence and argument upon this point ran to a considerable length, but the case was decided upon entirely different grounds.

Sir J. D. Harding, Q. A., and Dr. R. Phillimore appeared for the "Kirtons," Dr. Addams and Dr. Twiss for the "Fairy."

*Dr. Lushington* having summed up fully, and having put certain nautical questions to the Trinity Masters (*a*) upon the question of identity, said: There is another point not touched upon by the counsel, either upon the one side or on the other, to which it is my duty to call your attention. It does not appear that a light was hoisted or shewn at all on board either vessel. You know perfectly well that I have to carry out the provisions of an Act of Parliament with reference to that matter. The question then arises, whether, under the circumstances, the "Kirtons" ought not to have hoisted a light as soon as she descried the vessel approaching on the starboard tack. I do not know that you will have much difficulty in solving that question.

The next question is, however, one of great difficulty; because, according to the 28th section of the Act of Parliament, we must see whether the not exhibiting a light was the cause of the collision. I shall be under the necessity of asking you whether the collision was occasioned by the non-observance of the rule of hoisting a light. If the collision was occasioned by that neglect, then it will be for the Court to determine the case according to the true construction of the statute.

The Court and Trinity Masters retired for consultation; and, on their return, *Dr. Lushington*, after stating the opinions of the Trinity Masters upon the questions respecting the identity of the "Fairy," continued:—

With regard to the next part of the case, it appears that neither ship shewed a light. The Trinity Masters are of **[299]** opinion that it was the duty of both ships to shew a light. They are further of opinion that if the duty had been complied with, there would have been no collision; consequently, they are of opinion that the neglect to shew a light was the occasion of the collision. I concur in these opinions. Under these circumstances, the "Kirtons" cannot recover.

If it should be the desire of the parties that I should give my opinion on the question of identity, I will do so on some future day; but the evidence upon the point is so circumstantial that I must take time to consider it.

Sir J. D. Harding, Q. A. If the Court thinks that its decision upon the identity would affect the question of costs, we should like to have its opinion.

The Court. No; I cannot think it would in any way affect the costs.

Proctors: for the "Kirtons," Loveday; for the "Fairy," F. Clarkson.

THE "AFRICA." The High Court of Admiralty, April 29, 1854.—An agreement for the services of a steamer to assist a vessel which was aground having been made, and the services completed under that agreement, it was subsequently cancelled by the mutual consent of the masters of the two vessels. The owners cannot set up such agreement as a bar to a suit for salvage,—In foreign countries, where the custom prevails of rendering mutual assistance without claiming salvage reward, steamers would not be bound by the custom as regards sailing-vessels, there being no mutuality between them.

This was a suit for salvage, promoted by the steamer "Dumbarton Youth" against the "Africa." This vessel, laden with a general cargo, having taken the ground in the Old Calabar river, the steamer was engaged four days, from the 26th to the 29th of December, 1851, in lightening and towing her off.

In the first instance, the captain of the steamer proposed to give her services in consideration of receiving merely her daily expenses, and the services were performed. The sum of 132l., the amount to be received by the steamer according to this agreement, was tendered and rejected. The salvors alleged that after the service was completed this agreement was by mutual consent cancelled. The circumstances of the cancellation are fully detailed in the judgment. The value of the property salved was about 30,000l.

Dr. Jenner and Dr. R. Phillimore appeared for the salvors; Dr. Bayford and Dr. Twiss for the owners.

*Dr. Lushington.* The original service which was performed in this case is not denied to have been a salvage service. With respect to the merits of the service, that

(*a*) Captain Farrer and Captain Pelley.

may be a [300] matter of consideration presently; but having been in itself a rendering of assistance to a ship which had become fast on the ground, the steamer herself partly unlading the cargo, it follows as a matter of course, that it is the duty of the Court to give such compensation as it may think fit, under all the circumstances, unless it is barred by any valid agreement made between the parties, and which is a subsisting agreement.

I address myself, therefore, at once to the question, whether there is any valid agreement subsisting which justifies the owners in saying, "We abide by the agreement, and have made a tender in its terms, consequently we are entitled to have it accepted, and to be dismissed with our costs." It so happens that on the present occasion the Court has no evidence on the part of the salvors with respect to this agreement. It has been truly stated, therefore, that I must take the representation which is to be found on the part of the owners to see, not only whether there was originally a valid agreement, but whether it has been in any way cancelled.

The facts stated in the act on petition on behalf of the owners are as follows:— It is alleged, "That on Captain Kirby coming on board the 'Africa,' he volunteered to stay by the ship until the following flood and try to tow her off, saying, that if she came off that evening's tide he would not make any charge." Now she did not come off that evening's tide, therefore nothing further arises with respect to that part of the averment. "That, on the flood, the steamer was lashed alongside the ship, and so attempted to tow her off the bank, but without success. That Captain Cuthbertson, therefore, determined to lighten his vessel, and Captain Kirby agreed to give the services of his steamer, on payment of her actual daily expenses, which Captain Cuthbertson agreed to pay."

Now, this is the averment of an agreement between the parties, and, assuming it to be true, which I am bound to do under the circumstances of this case, it binds Captain Cuthbertson, the agent of the owners of the vessel of which he was master, to cause payment to be made of the actual daily expenses, whatever they might be, and it binds Captain Kirby and his owners, he being their agent, to accept the sum. Respecting that sum there can be no doubt. It was a mere verbal agreement. The act on petition goes on to say, "A conversation afterwards ensued, as to the remuneration to be paid for the services of the steamer, and on such occasion Captain Kirby again repeated that all he wanted was her actual daily expenses, and he named each item separately." Now, it is rather singular that after this agreement was stated to have taken place in the [301] direct terms in which it has been in the act on petition, there should be any further discussion on the agreement, except for the purpose of ascertaining what was the amount of expense; however, I do not rely on this. The agreement was considered to be a continued subsisting agreement until the transaction occurred, to which I am now about to advert.

On the morning of the 31st of December, Captain Kirby came on board the "Africa," and in the cabin of that vessel wrote out an order on Messrs. Wilson and Dawson, of Liverpool, the owners of the ship "Africa," in favour of Messrs. Charles Horsfall & Son, the owners of the steamer, for the sum of 132l.; namely, for four days' expenses, at the rate of 33l. a day, such being the rate agreed upon as pre-alleged in the words, or to the effect following. This appears to me to have been at that time a carrying on of the original agreement which was entered into; and following it up by a species of payment therein set forth.

It appears that Captain Kirby then requested Captain Cuthbertson to sign the paper, which he did, and returned it to him; that very shortly afterwards, and before he left the cabin, he observed to Captain Cuthbertson that on consideration it would perhaps be better if the owners themselves were to arrange the payment; that is, in other words, a proposition on the part of Captain Kirby that the agreement should be put an end to, because it was inconsistent with the agreement that the matter should be left to further arrangement. It is said, "He put him off his guard by adding that perhaps Messrs. Horsfall might not take so much, and that Captain Cuthbertson then remarked to him that it was not unlikely that Messrs. Horsfall would think the sum too much for friends to pay; and thereupon Captain Kirby tore up the aforesaid original order in the cabin of the 'Africa,' in the presence of Captain Cuthbertson."

Now, if any representation had taken place on behalf of Captain Kirby, which at all savoured of fraud, undoubtedly, whatever occurred on this occasion would be entirely vitiated, and the agreement remain in force. But it is impossible that I can

so construe this representation because in the opinion of Captain Cuthbertson, it was a favourable result on that occasion. This document is then torn up; and it does not appear that any objection was raised on the part of Captain Cuthbertson, or that there was any remonstrance whatever; on the contrary, he proceeds to write the letter to which I must here refer:—"I do hereby certify that the steamer 'Dumbarton Youth' has lightened the ship 'Africa,' also has towed the said ship to Calabar, occupying four days, and that Captain Kirby, with his **[302]** crew, have rendered me every assistance, for which services and expenses you will arrange with Messrs. Charles Horsfall & Sons, 1 Exchange Buildings, Liverpool.

"CHARLES CUTHBERTSON."

Does this or does it not amount to a cancellation of the verbal agreement which had been entered into three or four days before? Now, what is the representation which is made on behalf of the owners on the present occasion?

It is said that Captain Cuthbertson never intended to cancel the agreement at all, and was actuated by no such motive; on the contrary, what he intended to do was to keep it a valid agreement, so that his owners never should be compelled to pay more than 132l., but might take the chance of its being less. But Captain Kirby could not mean to say, when he took part in this transaction, "I am content to vary that agreement at my own instigation for the purpose of giving my owners an opportunity of accepting less than the sum stated in the agreement." It appears to me that the document is wholly inconsistent with the view the owners took of it. It is a clear cancellation by both the contracting parties, and it was intended to leave it to the owners at Liverpool to settle for these services. It is contrary to all principles of justice that the one party should be bound not to receive more than 132l., with the probability of having it reduced, but no chance of its being increased. I am bound to consider the case as if no agreement had ever taken place.

In looking at the tender of 132l., it is clear to my mind that I must increase it; and for this obvious reason, it is merely a payment for expenses without any reward for services rendered. It has been contended that it is customary for vessels in that part of the world to render assistance without compensation, and no doubt the custom, to a certain extent, is proved by the evidence. It is consistent with all probability, that vessels in that country, where it is difficult to procure assistance, should render salvage services on different terms from those which prevail in this country. But, assuming the custom to be so, I should have considerable difficulty in extending it to the case of a steamer, because there is no mutuality in the case of steamers and sailing-vessels. The case then comes simply to quantum. Looking at all the circumstances, I shall allot the sum of 400l.

Proctors: for the salvors, Jennings; for the owners, Tebbs.

**[303]** "NOSTRA SENORA DEL CARMINE." The High Court of Admiralty, April 27, May 8, 1854.—A bottomry bondholder entered an action against the ship, cargo, and freight. The owners of the cargo appeared, and gave bail in the sum of 350l. The proceedings were in pœnam. The bond was pronounced for, the ship sold, the proceeds of sale and the freight were brought into the registry. The claims for wages, which proved unexpectedly heavy, having been settled, the deficiency on the ship's account for the bond and proctor's costs amounted to 409l. 9s. 2d., which the owners of the cargo were called upon to pay. They tendered 350l., the amount of their bail. Motion for a monition against the owners of the cargo to pay the balance rejected. Held, that though the master may become ex necessitate agent of the owners of the cargo, he can render them liable only to the value of the cargo; that any liability beyond that can arise only from the conduct of such owners in contesting the validity of the bond; that they cannot be liable to costs not occasioned by their conduct; that the amount of their bail is the limit of their liability, as regards the bond; that the bail might have been taken to the full value of the cargo; and that its not having been so taken was the act of the bondholder himself, who must abide by the consequence.

[S. C. 18 Jur. 730.]

This was originally an action on a bottomry bond on the ship, cargo, and freight, for the sum of 390l. 12s. 6d. The action was entered for 500l. Bail was given for the owners of the cargo in the sum of 350l. to answer the action so far as regarded

the cargo. On the 7th of December last the Court pronounced for the validity of the bond, and decreed the sale of the ship.

The sum of 129l. 0s. 5d., the amount of freight and primage due for the transportation of the cargo, and the sum of 190l., the proceeds of the sale of the ship, were brought into Court.

An action having been entered on behalf of the seamen for wages, and their claim amounting to a very considerable sum, an application was made to the Court on behalf of the bondholders to be allowed to settle such claims, and afterwards to receive the amount, out of the proceeds of the ship and freight. Notice of the application was given to the proctors of the owners of the cargo; and no opposition being offered, the Court directed the wages to be paid, referring the amount to the registrar. They amounted, with costs, to 244l. 19s. 11d. This sum was accordingly paid by the bondholders, who subsequently received the amount out of the registry on their giving the usual bail to answer latent demands.

The proctor then received the balance remaining in the registry, amounting to 74l. 0s. 6d., in part discharge of his bill, which had been taxed at 92l. 17s. 2d. The bond, amounting to 390l. 12s. 6d., being still unpaid, and a balance of 18l. 16s. 8d. being still due to the proctor for the bondholder, he wrote to the proctor for the owners of the cargo, informing him that in addition to the sum of 350l., the amount of their bail, a further sum of 59l. 9s. 2d. would be required. To this the proctor for the owners of the cargo replied by tendering a cheque for 350l., the amount of the bail given.

Dr. Deane, on behalf of the bondholder, now moved the Court for a monition against the owners of the cargo for payment of the sum of 390l. 12s. 6d. (the amount of the bottomry bond), together with current interest thereon at the rate of 4l. per cent. from the 8th of October last, when the same became **[304]** due; and also for payment of the sum of 18l. 16s. 8d., being the balance of the proctor's bill.

He said he could find no case precisely in point, but argued in favour of his motion from analogy, and referred to *The "Dundee"* (2 Hagg. Adm. 137), *The "Volant"* (1 W. Rob. 388), *The "Hope"* (1. W. Rob. 154), and *The "Kalamazoo"* (15 Jur. 885).

Dr. Addams, contrà. The Court took time to consider its decision.

May 8.—*Dr. Lushington*, having stated the circumstances under which the application was made, continued:—Thinking this was a question which deserved the attention of the Court, I accordingly took time to consider it, and applied my mind to it, to see whether there was any case to guide my course of proceeding, and next whether there was any principle.

It is a question which involves the liability of the owner of a cargo where the cargo is included in a bottomry bond. It appears to me clear that, in the first instance, the cargo itself, or its value, must be the limit of that liability. I think so for several reasons. It is and reasonably may be competent to the master of a ship to render the property liable to a bottomry bond; but the master is not the agent of the owner of the cargo generally; he may become so ex necessitate as to the cargo under his charge, but on no principle can the master, as I apprehend, impose upon the owners of the cargo a personal liability as to third parties; and liability to pay costs is a personal liability. Nor, indeed, do I know any case whatever in which this has been done under any circumstances, and I have searched for the purpose of discovering if any such existed.

Again, in the case of bottomry, when proceedings are taken against a ship and cargo, the owners of the cargo may oppose the validity of the bond or not, as they deem fit. They may leave the cargo under arrest, and allow it to be sold; they may not appear to the suit if they do not think it necessary. In such case it is clear that they cannot be made responsible for any costs, howsoever incurred.

The owners of the cargo may, however, as in this case, appear and give bail, and the bondholder is entitled to require bail to the full value of the cargo. If he does not do so, it is his own act, and he must abide by the consequences.

I am of opinion that the liability of the owner of the cargo to costs depends on what is done afterwards. The bail, it is **[305]** agreed on all hands, cannot be made liable beyond the amount for which bail was given.

If the owner of the cargo contests the suit, and fails, I should have no hesitation in condemning such owner in costs; the bail, to the extent for which it is given, might be also liable; but the owner would be liable beyond the amount of the bail, and for this reason—bail cannot be demanded beyond the value of the cargo, but the owner, by

contesting the suit, becomes liable, as every other suitor does, to costs, if unsuccessful. If the owner of the cargo was not liable for costs, he might give bail to the extent of the value, and then carry on an expensive litigation, free from liability to costs, and so diminish, if not annihilate, the value of the cargo.

It depends, therefore, upon the conduct of the owner of the cargo whether he becomes liable to costs or not.

Now, how are the costs in this case incurred? Solely and entirely on account of the ship. There are the costs of proceedings in pœnam, in no degree occasioned by the owners of the cargo, the costs of the action for wages, and the wages themselves. None of these costs have been occasioned by the owners of the cargo.

The cases cited, *The "Hope,"* and others, are entirely in accordance with the decision I am to pronounce. *The "Hope"* was a cause of damage, and I might find many differences between a cause of damage and one of bottomry, if necessary; but I do not think it necessary to do so. The owners gave bail; they contested the suit; the bail was insufficient to meet the damage, and the Court condemned the owners of the ship to pay the costs, and very properly condemned them.

In the present case, if there had been a contest by the owners of the cargo, I should have had no hesitation in condemning them in the costs; but as they have done nothing to occasion costs, they are free from the liability. With regard to the bond itself, they have given bail for the cargo to the amount required, and their liability is exhausted by the money paid. Consequently, I am of opinion that I must reject the motion, the owners of the cargo not being liable to make good the bond, nor liable to costs in this case.

Proctors: for the bondholders, Lawrie; for the owners of the cargo, F. Clarkson.

**[306]** "FENIX," otherwise "PHŒNIX," Silander. Admiralty Prize Court, June 21, 1854.—A vessel belonging to Bjorneborg, in Finland, sailed from Hartlepool to Copenhagen with a cargo of coals, which she there discharged, for the use of the British fleet, prior to the declaration of war, which took place on the 29th of March. She was unable to sail to Bjorneborg immediately after her cargo was discharged, by reason of the ice; but on the 10th of April she left Copenhagen, bound for that port, in ballast, and was captured on the 12th. Held, she was not protected by the Orders in Council.

[S. C. Sp. Pr. Cas. 1; 2 Eng. Pr. Cas. 238; 18 Jur. 656. Referred to, *The "Chile,"* [1914] P. 214; *The "Möwe,"* [1915] P. 5.]

This was the first prize cause in the present war. The circumstances of the capture were as follows:—

The "Fenix," otherwise "Phœnix," was a barque belonging to Anton Bjorneborg, Isaac Carstrom, and Carl Martin, of Bjorneborg, in the Grand Duchy of Finland. In December 1853 she was in London, and had an advantageous charter-party for Lisbon, but owing to the unsettled state of affairs between England and Russia she was ordered home to Bjorneborg. The charty-party to Lisbon was, therefore, given up at some sacrifice; and the London agent, in order, to some extent, to compensate the owners, directed the master to take a cargo of coals, and leave them at Copenhagen in passing, it being at such time impossible to enter Bjorneborg on account of the ice.

The "Phœnix" therefore left Gravesend for Hartlepool on the 31st December, 1853; took on board a cargo of coals, and sailed from Hartlepool on the 15th February 1854; put into Copenhagen on the 20th of the same month, and delivered her coals for the use of the English fleet. The discharge was completed on the 19th March, but at such time, the ice still preventing her entering Bjorneborg, she was compelled to remain at Copenhagen.

War was declared on the 29th of March, on which day also an Order in Council (vide Appendix, p. iii) was published, "allowing Russian merchant vessels, in any ports or places within Her Majesty's dominions, until the 10th of May, six weeks from the date thereof, for loading their cargoes, and departing from such ports or places." This order appears to have been misunderstood, for the opinion prevailed at Copenhagen that Finland ships might proceed to their own ports unmolested up to the 10th of May. Accordingly, as soon as information arrived that the ice was broken up sufficiently to allow a vessel to enter Bjorneborg the "Phœnix" prepared to sail, and the Russian consul, in his official capacity, sent fifty-seven sailors, the crews of vessels which had been sold, on board the "Phœnix," to be conveyed home to Bjorneborg.

She sailed from Copenhagen on the 10th of April in ballast, and, it appears, passed the English fleet unmolested; but upon the 12th she was captured, near Gothland, by Her Majesty's ship "Tribune," and sent to London for condemnation.

The master, mate, and an able seaman were examined upon the standing interrogatories (vide Appendix, p. xiii), and the case now came on for [307] hearing, upon their evidence and the ship's papers. A claim was made for the vessel by John Gabriel Alcenius, of St. Bennet's Place, Gracechurch Street, London, ship agent, who made an affidavit "That he was duly authorized to claim the vessel on behalf of Anton Bjorneborg, Isaac Carstrom, and Carl Martin, respectively residing at Bjorneborg, in the Grand Duchy of Finland, the true, lawful, and sole owners and proprietors thereof at the time when the same was taken and seized by Her Britannic Majesty's screw steam-frigate "Tribune," Carnegie, Esquire, commander, whilst in the prosecution of a voyage from Hartlepool, in the county of Durham, by way of Copenhagen, to Bjorneborg, and brought to the port of London; that the claim thereunto annexed was a just and true claim; and that he should be able to make due proof and specification."

The Queen's Advocate (Sir J. D. Harding) and Dr. Jenner appeared for the captors; Dr. Addams and Dr. Twiss for the claimants.

The Queen's Advocate took a preliminary objection to the form of the affidavit of claim. Though it might not be of any great importance in the present, it might be in future cases. Neither the affidavit nor the claim annexed stated any ground whatever upon which the claim was made. He certainly could not speak from any experience of his own, but he had availed himself of that of the learned Advocate of the Admiralty,(*a*) who informed him that when a claim was made by an enemy it was always necessary to set forth on what ground the claim was made, whether under a license, under an Order in Council, or on what other ground. Unless such course were adopted, it would be impossible for the counsel for the Crown to know against what they had to contend.

Dr. Addams contended it was quite unnecessary. There could be no doubt in the present case upon what ground the claim was made; but, if the Court thought it necessary, another affidavit could be brought in.

Per Curiam. In the last war the principle and practice was, that in the case of enemy claimants it was always necessary to state something to shew that they had a locus standi. The same course must be followed in the present war; but, in the present case, instead of having a further affidavit, setting forth the ground of claim, let us assume that it has been made, and proceed to the argument.

The Queen's Advocate, having stated the history of the ship's proceedings, submitted that it was clear from the ship's papers [308] and the evidence, that she was a Russian vessel, belonging to enemies; that having been captured after the declaration of war she was clearly, by the Law of Nations, lawful prize, unless she was in any way exempted from the operation of that law. It would, perhaps, be contended that her voyage was continuous from Hartlepool to Bjorneborg; if it were so, that would not protect her; but the evidence proves completion of voyage at Copenhagen. Her charter-party was for Copenhagen, and her cargo was destined for that place, and there discharged. From Copenhagen she sailed on a fresh voyage for Bjorneborg, after having received on board fifty-seven passengers. He could not conjecture on what ground, or under what Order in Council, the claim could be supported, until he had heard the counsel for the claimants, when he would reply.

Dr. Jenner followed on the same side.

Dr. Addams, contrà. It does not much affect the question, whether the voyage was continuous or not; but the tenor of the evidence on the interrogatories is, that it was a continuous voyage. The master was directed to take the vessel home to Finland, where her owners resided, by way of Copenhagen. She sails from Hartlepool and arrives at Copenhagen before war was declared. She was detained there until after the declaration of war, by the ice not permitting entrance into Bjorneborg. She sailed from Copenhagen on the 10th of April, and by the true construction of the Order in Council of the 29th of March, she should have been protected in her voyage home until the 10th of May.

The true construction of that Order is the question for the consideration of the Court. That document must be taken in connection with the others issued by the

(*a*) Dr. Phillimore.

same authority about the same time, and must be construed with the utmost liberality. The language of all the documents is so loose that no strict interpretation can fairly be put upon them. If this vessel is not protected by the strict letter of the Order in Council of the 29th of March, it is by its spirit. By its spirit it must be construed, otherwise this absurdity is the result—those Russian vessels which are in our ports, and therefore in our power, we are to let go; but those which are not, we are to search for and capture as lawful prize. By the strict letter of the Order, a vessel in Plymouth on the 29th of March, and sailing subsequently would be protected, while a vessel sailing from the same port on the 28th might be captured, and brought back into port as lawful prize on the 31st. Such an interpretation would make the Order in Council a mere trap for Russian merchant-vessels, for such a construction could never have been anticipated. **[309]** From whatever port they sailed they were entitled to protection until the 10th of May.

Dr. Twiss followed on the same side.

The Queen's Advocate, in reply. Liberality of construction cannot be carried to the length of considering vessels out of Her Majesty's dominions as in Her Majesty's dominions. The exemption specifies, "Russian merchant-vessels in any ports or places within Her Majesty's dominions," and the vessel now claimed was at such time in Copenhagen, and cannot by any liberality of construction be brought within that exemption.

*Dr. Lushington.*—It is very probable that this may not be the only case under similar circumstances brought under the cognizance of this Court; but whether it is the only case or not it is my duty, as it is the first brought under consideration, to state the grounds upon which my judgment will be founded.

I will first address myself to the facts of the case. It is admitted on both sides that this is a Russian vessel; that she was lying in the port of London for the purpose of taking a cargo for Lisbon, when, in consequence of the unsettled state of affairs, her destination was changed, and she sailed in December 1853 to Hartlepool, to take in a cargo of coals; that in the middle of February she sailed from Hartlepool to Copenhagen. All these facts took place prior to the declaration of hostilities to which I must presently advert. She discharged her cargo at Copenhagen about the middle of March, sailed from Copenhagen on the 10th of April, and was captured on the 12th on her voyage to the port of Bjorneborg, in Finland.

These being the facts of the case, two questions appear to have arisen with respect to the Order in Council, to which, of course, reference must be made; first, whether the "Phœnix" comes fairly within the meaning of that Order, and secondly, whether the voyage in which she was engaged was a continuous voyage or not.

Now, the Order for general reprisals having been issued on the 28th of March, and the declaration of war upon the day following, it is quite clear that unless something has passed under the authority of the Government to exempt any, all Russian vessels would be liable to detention on the high seas, and to condemnation in the Court of Admiralty. But it appears that Her Majesty's Government have thought it right to introduce certain modifications of the belligerent rights which Her Majesty is entitled to exercise. These modifications are to be found in the various Orders in Council, to which allusion has been made in argument.

**[310]** I agree in thinking that all these documents are to be construed fairly together—that if there be any doubt as to the interpretation to be put upon one, it must be construed with reference to others issued on the same subject, in order, if possible, to discover the true intention of the Government in issuing it; but I cannot agree with the argument, that in documents of this kind we should expect to find a statement of the reasons which actuated the Government in the modification of the belligerent rights to which it has seemed proper to resort. It is not according to the custom of former times to set forth the facts and circumstances which induced the Sovereign to adopt measures of this description. Indeed, very great inconvenience might arise from the adoption of such a course of proceeding. We must judge of the document by itself alone.

Much of the argument in the present case has turned upon that document which bears date the 29th of March last, and which immediately succeeds an Order in Council for preventing vessels clearing out for Russia, and ordering, as is customary in all wars, a general embargo or stoppage of enemies' vessels. Now, upon what principle am I to put a construction upon this document? I am perfectly free to

confess that I think it to be quite clear, that whenever the Government of Great Britain or of any other country by a public document in the nature of an Order in Council releases the severity of belligerent rights, it ought to be taken in favour of the party for whom it is intended, and that a liberal construction should be put upon it. If it were necessary to confirm my opinion by authority, I could resort without difficulty to that of Lord Stowell. However, it is perfectly clear that that is the true principle. When discussion arises with regard to the intention of those from whom the document emanates, we can only look for that intention to the words in which they express it. The principle being, to put upon the words the most extensive interpretation which is consistent with them, I take it for granted there must be words in the document sufficient to justify that interpretation. I am not at liberty to travel out of the document. If the words of the document are capable of two constructions, then I am clearly of opinion that the one most favourable to the belligerent party in whose favour the document is issued ought to be adopted; but the Court must bear in mind that its province is not jus dare, but jus dicere; and I must again refer to the principle which I have often enunciated in this Court verbis plane expressis omnino standum est.

I must now refer to the document in question; it is an Order in Council for exempting from capture enemies' vessels under **[311]** special circumstances; it is in these words: "Her Majesty being compelled to declare war against his Imperial Majesty the Emperor of All the Russias, and being desirous to lessen as much as possible the evils thereof;"—much might be said upon the precise meaning of these words, whether it was intended to lessen the evils suffered by British subjects engaged in commerce with Russia, or by the subjects of Russia; at all events, it appears to me that it would not be correct to take the words as only operating in favour of the latter, though no doubt one part of the document is intended to confer great favour upon them—"is pleased to order that Russian merchant-vessels in any ports or places within Her Majesty's dominions"—we must recollect that we are speaking of a matter over which the Queen of England is supreme; with the advice of her constitutional advisers she may make any relaxations she pleases of the rights of war against belligerents; and whatever she may declare becomes the law of these Courts, so far as relaxing belligerent rights, provided she does not go beyond them—"shall be allowed until the 10th day of May next, for loading their cargoes, and departing from such port or places."

Now, the first division I find is, that this Order applies to vessels in certain ports and places within Her Majesty's dominions. Then I am to consider whether I can by any latitude of construction apply this to a vessel which, on the 29th of March, was lying at Copenhagen. The only ground upon which that could be contended for would be either that the words had no real meaning, and were perfectly superfluous, or that it might be said that having been once in Her Majesty's dominions she was to be considered in the same position, with respect to the protection, as a vessel remaining there on the 29th of March. What would be the effect of either of these constructions? Take the first: it would have the effect of protecting the whole of the Russian merchant navy wherever they had sailed from all over the world at any period anterior to the 29th of March; and the argument, which was addressed to the Court, went the length of saying that I might put that construction on the words. Take the other construction, and see whether, by any latitude of interpretation, it can come within the meaning of the words. If I were to consider that a vessel which sailed from Hartlepool in February, and proceeded to Copenhagen, was included, then any Russian vessel that had taken a cargo out of Great Britain, or rather out of any of the dominions of Her Majesty, at any time prior to the Order in Council, would be entitled to protection. I cannot possibly give this effect to the words. I **[312]** confess I cannot get over the limitation of the time by reference to the words of this or of any other Order in Council.

But besides this limitation of the time of six weeks from the 29th of March, there is another, viz., the loading their cargoes. There is a limitation of six weeks for loading their cargoes, and not the least reference to a cargo taken on board in February. It goes on to say, "and that such Russian merchant-vessels,"—what is the meaning of "such"? It means Russian vessels which, having been in Her Majesty's dominions on the 29th of March, had loaded their cargoes and departed prior to the 10th of May; that is the meaning of the word "such"—it is a word of

limitation and qualification; and it is these vessels which shall be permitted to continue their voyage.

The Order in Council goes on to say: "And it is hereby further ordered by Her Majesty, &c., that any Russian merchant-vessel which, prior to the date of this Order, shall have sailed from any foreign port, bound for any port or place in Her Majesty's dominions, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith depart without molestation; and that any such vessel, if met at sea by any of Her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded." What is the meaning of this? It clearly has reference to trade with Her Majesty's dominions. The vessel, to be entitled to protection, must have sailed from some foreign port bound for a port in Her Majesty's dominions. It is there the trade is to be brought. If I were to put the construction on this Order in Council, which has been prayed, and apply it to all Russian vessels which sailed with cargoes antecedent to the 29th of March, must not the Order have been expressed in totally different words?

Then, again, with reference to the further Order, dated the 7th of April, respecting the East Indies and the Colonies, it is of precisely the same character. It allows Russian vessels which may be in any of the Indian or colonial ports, at the time of the publication of the Order there, thirty days for taking their cargoes on board and departing; and it further allows Russian vessels, which had sailed from any foreign port prior to the declaration of war, bound for any port or place in any of Her Majesty's Indian territories, or foreign or colonial possessions, to enter such port or place, and to discharge her cargo, and forthwith to depart without molestation.

For all these reasons, looking at the first head, the Court can have no hesitation in pronouncing this vessel liable to condemnation.

With regard to the second point, whether this was a con-**[313]**-tinuous voyage or not, I do not think the Court is called upon to decide it; I shall, therefore, give no opinion upon it, but leave it unprejudiced.

I am bound to condemn this vessel as being enemy's property, and as not being within those exceptions which Her Majesty has been pleased to make.

Proctors: for the captors, F. H. Dyke (Queen's Proctor); for the claimants, F. Clarkson.

THE "AINA," Nystrom. Admiralty Prize Court, June 21, 1854.—A claim for one third of the proceeds of the ship founded on a mortgage deed, on behalf of a citizen of Lubeck resident at Helsingfors, in Finland, as Consul of the King of the Netherlands, disallowed. A neutral, resident as merchant and consul in the enemy's country, loses his neutral character during such residence. Foreigners cannot set up a mortgage deed on the ship against captors, though, under certain circumstances, the lien of British merchants may be allowed.

[S. C. Sp. Pr. Cas. 8; 2 Eng. Pr. Cas. 247; 18 Jur. 681. Referred to, *The "Marie Glaeser,"* [1914] P. 227; *The "Tommi,"* [1914] P. 253; *The "Odessa,"* [1916] 1 A. C. 147; *Tingley* v. *Müller*, [1917] 2 Ch. 173.]

This was a Russian vessel captured by Her Majesty's steamship "Alban," on the 21st of April, in the Cattegat, sailing under Danish colours, on a voyage from Lisbon to Elsinore.

A claim was made by Messrs. Sieveking of Sise Lane, London, as the agents and on behalf of "Carl Frederic Degener, a citizen of the Free Hanse Town of Lubeck, and Consul of His Majesty the King of the Netherlands at Helsingfors, in Finland, the true, lawful, and sole mortgagee of one third part or share of the above-named vessel." In the affidavit of Mr. Sieveking, accompanying the claim, it was stated, that "by a certain instrument, bearing date the 2nd day of January, 1854, Eric Nils Sundman, the lawful owner of one third part of the said ship, mortgaged his said one third part thereof to the said C. F. Degener, as a security for repayment of 7200 silver roubles, lent by him to Eric Nils Sundman as therein mentioned; that at the time of the capture of the said ship, as he verily believed, no part of the said mortgage debt had been paid, but that the whole thereof was due and outstanding and unsatisfied; that the said C. F. Degener was, at the time of the said capture and now is, a citizen of the Free Hanse Town of Lubeck, and that no person being a subject or subjects of Russia, nor their factors or agents, nor any other enemies of the Crown of Great

Britain, had at the time of the said capture or now have, directly or indirectly, any right, title, or interest in the said mortgage debt, or any part thereof."

The case came on for hearing on the evidence upon the standing interrogatories and this affidavit.

The Queen's Advocate for the captor. The evidence leaves no doubt as to the ship being enemy's property, and no witness seems to know anything of this mortgage. There is nothing but the affidavit of Mr. Sieveking. That is a singular one. It states that the claimant is residing in the **[314]** enemy's country, and does not say he is not a Russian subject. He is clearly adhering to the enemy, and therefore cannot sustain this claim.

But if there were no objection to the claimant, the claim could not be sustained. Captors take without reference to such lien, supposing this mortgage was perfectly regular and duly executed, of which not a syllable appears in the evidence or the ship's papers.

Dr. Deane on the same side. It appears that the claimant was residing in the enemy's country for the purposes of trade, and though born in a country now neutral, he has lost his neutral character. His being consul for the Netherlands does not protect him. In *The "Indian Chief"* (3 C. Rob. 27), Lord Stowell said, it was a point fully established in these Courts, that the character of consul does not protect that of merchant united in the same person.

Dr. Addams for the claimant. It is objected that there is no evidence of this mortgage, and that we have withheld information we might have given. That was not the practice of the Court. At the present stage we have no right to give evidence; we can only state what we can prove, if allowed further proof. We can prove the due execution of this mortgaged deed, and on that we claim one third of the proceeds of this ship. The principle adopted by the Court respecting these liens is laid down by Lord Stowell in *The "Belvidere"* (1 Dods. 356); it rejects the claim on secret liens, but admits them where the claimant has some specific security. Here the claimant is in possession of such specific security, and is entitled to the third part of this vessel.

Dr. Twiss on the same side. The Court may have discouraged secret liens, but there are many cases where bonâ fide claims of this nature have been admitted. [Per Curiam. Were not all those cases where the claimants were British subjects, and the vessel had been seized in a British port? Can you shew me any case at all similar to the present where the claim has been allowed?] The principle of those cases may be extended. Lord Stowell regarded bottomree-bonds with favour: *"Constantia Harlessen"* (Edw. 234). A mortgage may be put at least on an equal footing.

The Queen's Advocate in reply. No attempt has been made to answer the objection that the claimant does not state that he is not an enemy. He must know whether he is a Russian subject or not, and he has suppressed the information. This is no case **[315]** for further proof. The question of the lien seems disposed of by the judgment of Lord Stowell in *The "Marianna."*(*a*)

[Dr. Addams. The remarks of the Judge in that case were directed against secret liens.]

*Dr. Lushington.* Two questions have arisen with respect to the present claim; first, as to the national character of the claimant, whether he is to be considered an

(*a*) 6 C. Rob. 25. Lord Stowell says, "This ship appears to have been originally an American vessel, sold to a Spanish merchant at Buenos Ayres, and seized on a voyage to this country, documented as belonging to a Spanish merchant, and sailing under the flag and pass of Spain. A claim is given on behalf of the former American proprietor, in virtue of a lien, which he is said to have retained on the property for the payment of the purchase money; but such an interest cannot, I conceive, be deemed sufficient to support a claim of property in a Court of Prize. Captors are supposed to lay hands on the gross tangible property, on which there may be many just claims outstanding between other parties, which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them if such documents were liable to be overruled by liens which could not in any manner come to their knowledge. It would be equally impossible for the Court which has to decide upon the question of property to admit such considerations."

enemy or a neutral; and, secondly, whether supposing him to be neutral, he would be entitled to come to this Court, and claim one third of his ship by virtue of an alleged mortgage executed prior to the declaration of hostilities.

Now, with reference to the first question, it is stated that "he is a citizen of the Free Hanse Town of Lubeck, and Consul of His Majesty the King of the Netherlands at Helsingfors, in Finland." Upon this I can put but one construction, that he is resident in Finland, and carrying on his business there. I take it to be a point beyond controversy, that where a neutral, after the commencement of war, continues to reside in the enemy's country for the purposes of trade, he is considered as adhering to the enemy, and as disqualified for claiming as a neutral altogether.

But, with regard to the claim on the mortgage, I asked whether there was any case where such a claim had been allowed to any but British merchants, and counsel were unable to furnish me with any. The case of *The "Belvidere"* (1 Dods. 356) was of quite a different character. That was an American vessel which was seized in the river Thames under an embargo which preceded the declaration of hostilities between Great Britain and the United States. A claim was made by some British merchants for advances made by them for the use of the ship, and **[316]** it was alleged that the ship had been put into their hands as a security for the debt so contracted. In that case there was a bare claim without any evidence; the claim was not allowed, and it is only on certain words which fell from Lord Stowell, that any argument can be founded in support of the present claim. Alluding to certain cases where the claim of lien had been allowed, he says, "They had either a positive lien upon the ship, or were in possession of a bottomree-bond, or some specific security;" but it so happens that, on referring to the case, we find the distinction to which I alluded; for Lord Stowell there says, "It was thought by the Court and by the Government also, that it would be a harsh measure to make British merchants sustain the loss of money so expended" (1 Dods. 358).

But it is a very different question whether lenity should be shewn to British merchants when the captured vessel has been lying in a British port, where they have had transactions in the way of business with it; and whether, as in cases of this kind, the Court should allow an alien to put in a claim to defeat the right of the captors. If I am to do it in the present case, innumerable questions would arise, and the Court might be called upon to inquire into the validity of the mortgage, and be compelled to determine that validity, not by the law of England, but by the law of the country where it was executed. I accede to the argument of Dr. Addams, that in the first instance, they would only state the fact of the mortgage without entering into any particulars or proof. That would be done if further proof were admitted. But having no doubt whatever in my own mind that the case fails on both grounds, viz. the national character of the claimant and the nature of the claim, I cannot admit further proof. The vessel must be condemned.

Proctors: for the captors, The Queen's Proctor; for the claimant, Deacon.

THE "AINA." Admiralty Prize Court, 1854.—The Court cannot restore property to an enemy master without the consent of the captors.

[S. C. 2 Eng. Ex. Cas. 251.]

Dr. Addams moved the Court to decree the restoration to the master of two casks of red wine, and three smaller casks of white wine, together of the value of about 13l., which he had purchased at Lisbon on his own private adventure.

*Dr. Lushington.* No doubt the Court has power, and has continued to exercise it, of restoring property to neutral masters, **[317]** but I have no authority to restore to an enemy master except by consent of the captors.

The Queen's Advocate. We have no objection.

The Court. Well, then, it may be given up; but I wish it to be understood that I have no authority, as far as I can discover, to restore to an enemy master without consent.

Proctor for the master, Heales.

THE "JOHANNA EMILIE," otherwise "EMILIA," Ontjes. Admiralty Prize Court, June 29 & 30, 1854.—A vessel built in Hanover in 1853, sailed in ballast to Riga, with a crew of Hanoverians. She then sailed, under Russian colours, to Havre, thence to Newcastle, thence to Lisbon. There she took in a cargo,

and sailed for London on the 4th of April, under Hanoverian colours. Shortly after her arrival in the London Docks she was seized by a Custom House officer. She was claimed on the ground, that while lying at Newcastle she had been, under a power of attorney given by the owner to the master, sold, and transferred to an Hanoverian. Further proof allowed. The legal consequences of destruction or spoliation of papers depend for the most part upon the circumstances of each case.

[S. C. Sp. Pr. Cas. 12: 2 Eng. Pr. Cas. 252: 18 Jur. 703. Adopted, *The "Ophelia"* [1915] P. 180; affirmed, [1916] 2 A. C. 206.]

This schooner was seized in the London Docks early in May last by Mr. Cox, Acting Landing Surveyor of the Customs, who had received information that, though sailing under Hanoverian colours, she was really a Russian vessel.

The master, mate, and cook were examined on the interrogatories, and a claim was given in by Theodor Schlutow, of Mincing Lane, London, who made an affidavit that he was authorized to make the claim on behalf of Georg Schwers, of Leer, in the kingdom of Hanover, merchant and shipowner, a subject of the King of Hanover, sole owner and proprietor of the said schooner at the time of her seizure in the London Docks.

The facts of the case, as stated in the evidence, were these:—The schooner was built last year at Leer, in the kingdom of Hanover, and sailed thence on the 20th of October, entirely manned with Hanoverians. She first sailed to Riga in ballast, thence to Havre, and on the 3rd of January to Newcastle, where she took in a cargo of coals for Lisbon, where she arrived on the 16th of February; and having delivered her cargo, took in another for London. She sailed from Lisbon on the 4th of April, and arrived in the London Docks on the 1st of May. A few days afterwards she was seized. The master stated that for some reason or other which he could not set forth, the schooner, from first leaving Leer, until her arrival at Lisbon, was navigated under the Russian flag; that while at Newcastle he received a power of attorney from Mr. Rucker, her then owner, the Hanoverian Consul-General at Riga, authorizing him to sell her, in consequence of which he proceeded to Leer, and transferred her to Mr. Schwers, the present claimant; that on completing the transfer, he returned to Newcastle, and proceeded with her to Lisbon, where he received instructions from Mr. Schwers to give up the Russian papers **[318]** and colours, which he did to the Russian consul; after which she sailed under Hanoverian colours and papers. The purchase money was stated to have been 8000 dollars, which were received by a notary at Leer, and remitted to Mr. Rucker.

The Queen's Advocate and The Admiralty Advocate, for the Crown. The evidence shews the vessel to have been a Russian, not an Hanoverian. The alleged transfer from Mr. Rucker to Mr. Schwers was a sham sale, to defeat our belligerent rights. No money passed at the time of the alleged sale, and after that time the vessel sailed from Newcastle to Lisbon under Russian colours without any Hanoverian colours on board, and in the same trade as before. *The "Omnibus"* (6 C. Rob. 71).

There has been a distinct spoliation of papers by the master on the outward voyage to Lisbon, at Lisbon, and on the homeward voyage from Lisbon to London. That is a sufficient ground for condemnation, or at least a bar to restitution without further proof. *The "Hunter"* (1 Dods. 486), *"Two Brothers"* (1 C. Rob. 133), *"Rising Sun"* (2 C. Rob. 106), *"Polly"* (ibid. 366).

Dr. Addams and Dr. Twiss for the claimant. The seizure of this vessel was made in violation of the Orders in Council. Revenue officers have no right whatever to seize vessels and proceed against them as prizes. This schooner was built in Hanover, belonged to an Hanoverian subject, not a Russian. The transfer was a bonâ fide transaction between one Hanoverian and another, previous to a declaration of war. There is no law to prevent a neutral from purchasing a ship from an enemy. As to there being no entry of the sale in the log-book, that cannot affect the sale; there is a regular bill of sale transferring the vessel according to the forms used in Hanover.

There has been no spoliation of papers to affect this ship. When it is alleged to have taken place, the master could not have known that war had been declared; it was not therefore a spoliation in the proper sense of the term. There was no ground whatever for the seizure, and the Court must therefore not only restore the vessel, but condemn the seizor in costs.

The Queen's Advocate and Admiralty Advocate in reply. It is objected that the Custom House officers, having no commission, had no right to seize this vessel; and that this Court has no jurisdiction to try such a case. But in "*La Rosine*" (2 C. Rob. 373), seizure was made by an officer in the Fife Dragoons. It is common for captures to be made by non-commissioned persons. **[319]** The capture is equally good, but it belongs to the Queen in her office of Admiralty: *The* "*Rebeckah*" (1 C. Rob. 227).

*Dr. Lushington.* I will address myself, in the first instance, to the observations which have been made on behalf of the claimant with regard to the course of proceeding which has been adopted on the present occasion; and, perhaps, I ought to take some little blame to myself for having elicited some of those observations in consequence of what then dropped from me in reference to the embargo which is placed on Russian vessels—vessels bearing the Russian flag at the time they entered these ports. It had no reference to the case of vessels seized under other colours, but which subsequently turned out to be Russian. With regard to an enemy's property coming to any part of the kingdom, or being found there, being seizable, I confess I am astonished that a doubt could exist on the subject. I apprehend the law has been this, that it is competent for any person to take possession of such property, unless it had any protection by license, or some declaration emanating by the authority of the Crown, and to assist the Crown to proceed against it for adjudication. There are many instances in which a capture has been made in port by non-commissioned captors, and the usual form has been for the proceedings to be conducted under the authority of the Proctor for the Admiralty, and condemnation has passed to Her Majesty in her office of Admiralty. If the property was on land, according to the ancient law, it was also seizable; and certainly during the American war there were not wanting instances in which such property was seized and condemned by law—not by the authority of this Court, but of another. That rigour was afterwards relaxed. I believe no such instance has occurred from the time of the American war to the present day—no instance in which property inland was subject to search or seizure, but no doubt it would be competent to the authority of the Crown if it thought fit.

The Queen's Advocate. Recently, during the present war, ships on land have been seized, I believe.

The Court. That was under peculiar circumstances.

The Queen's Advocate. Not in this Court, but by inquisition in rem.

The Court. But that was property belonging to the Emperor of Russia, and not to a subject. The munitions of war fall under different rules. I am not aware that it has pleased Her Majesty to take measures to seize property which might be lying **[320]** in a merchant's hands in the city of London or elsewhere. I believe that the proceedings which you allude to are of a different character. I cannot entertain a doubt that these proceedings have been duly instituted, and they have been sanctioned by those who advise Her Majesty in her office of Admiralty, as well as by Her Majesty's Advocate.

Then the only question, or rather the great question which remains for me to decide is, whether the claim for the ship ought to be admitted, whether further proof is necessary, or whether it ought to be condemned. Now, the facts of this case are somewhat peculiar. The fact of the vessel having been seized while lying in the London Docks does to some extent account for her not having the usual papers on board, because it is customary for them, while the ship is lying in port, to be in the hands of the consul acting for the state to which the ship alleges itself to belong. Therefore I am not surprised myself that no further papers have been found than those attached to the affidavit of Mr. Cox, the seizing officer. There are papers to which I will presently advert, but these are not the papers of primary importance in this case. The general features of the case are as follows:—This vessel was built in the kingdom of Hanover in 1853; her master throughout the whole period was an Hanoverian, and so were the whole of the crew, and, as appears from certain parts of his evidence, the present claimant is the individual who, to a certain extent, had the direction of her commercial transactions. The claim on the present occasion is entirely founded on her transfer, and it is ludicrous to contend that the property of the ship was not, immediately after her building, in Mr. Rucker, who was resident at Riga, because the claim is founded on the ship having been bought of Mr. Rucker; therefore, so far as the interests of these Courts are concerned that must be taken

to be an admitted fact. She was the property of Mr. Rucker, and she sailed under Russian colours from the time she was built up to the period of sailing from the port of Lisbon.

Now, Mr. Rucker is a gentleman, who, according to the evidence, is an Hanoverian subject, acting as the Hanoverian Consul, resident at Riga, a Russian port. He has been domiciled there for many years, and must, therefore, in consequence of his domicile, in all that relates to his natural character, be taken to be a Russian, not an Hanoverian. There is no principle, I apprehend, so well laid down—no principle so generally followed as this, that whatever country a gentleman may belong to, if he is resident in and carries on trade for a period of time in another country, he must be taken, for the purposes of trade, to belong to that other country, and not to his original [321] domicile. With regard to the possibility of there being a locus penitentiæ, that argument might have been addressed to the Court, supposing the claim had been on behalf of Mr. Rucker, but it can have no bearing when the claim is on behalf of another person.

What I have to see, therefore, is, whether there is sufficient proof of a valid transfer from the Russian owner of the ship to the present claimant, who is an Hanoverian subject. That proof may be wholly insufficient, or, it may be sufficient, coupled with other evidence, to call on the Court for the admission of further proof, or it may be so mixed up with transactions reflecting on the bonâ fides of the proceeding, that the Court may be called upon to condemn the vessel. Looking at the state of public affairs at the latter end of 1853 and the beginning of 1854, it is perfectly consistent with probability that every person possessed of a Russian vessel would be desirous of selling it, though at a considerable sacrifice, and I have no doubt that many Russian vessels have been sold, or attempted to be sold, during that period. I say, such a sale is probable, but is also suspicious; it is suspicious for the obvious reason that a sale made under these circumstances—particularly to a person in the situation of the present claimant—is undoubtedly questionable, because it is well known that there is a mode of carrying on trade without being the actual owner of the vessel, namely, by transferring her to a pretended purchaser. Certainly, when a transaction of this kind is done under pressure, there always exists a certain degree of suspicion that it is not bonâ fide. With regard to the legality of the sale, assuming it to be bonâ fide, it is not denied that it is competent to neutrals to purchase the property of enemies to another country, whether consisting of ships or anything else: they have a perfect right to do so, and no belligerent right can override it. The present inquiry, therefore, is limited to whether there has been a bonâ fide transfer or not.

Looking at this case on legal principles, I must consider what is the evidence which has been given on deposition, and also what is to be found in the ship's papers; both those attached to Mr. Cox's affidavit and those subsequently brought in, at the end of the depositions, by Mr. Currey, the examiner on the present occasion. With regard to the facts of the case, the evidence of the master is by far the most important, and I must advert to that somewhat in detail. The account which, upon the third interrogatory, the master gives is, that "The schooner sailed on her voyage from Leer on the 20th of October 1853, under Russian colours,"—if I under-[322]-stand him rightly, this is the commencement of the only voyage he undertook—"Why she did so, is a thing belonging to the owners. I never knew, or asked to know. She had no other colours then on board." In my judgment, not the least suspicion arises from this evidence—none whatever. It was in October 1853 that these colours were hoisted, and undoubtedly Russian colours could not then have been hoisted to interfere with the rights of England and France. Russian colours might be used for the purpose of taking advantage of sailing into Russian ports, where Russian flags were entitled to enter; but supposing that was the case—supposing they were used for the purpose of practising fraud on Russian ports, that is a matter of which this Court can take no cognizance whatever, for there is no maxim better laid down than that the Court of Admiralty never takes any cognizance of any practices which ships may resort to to obtain advantage in other states. Then, assuming it to be true, it is consistent with probability that Russian colours were used for the purpose stated, and it does not in any degree derogate from the good faith of the present transaction. I must confess I was astonished at the argument of counsel on that point, for I cannot see how using Russian colours in October 1853 would possibly have any effect

on our belligerent rights at the present time. With regard to the subsequent change of colours, the facts of the case appear to have been these: that the master, when lying in the port of Newcastle, received a letter, according to his statement, from Mr. Rucker, in which was enclosed, as stated in answer to the 11th interrogatory, a power of attorney to sell the vessel. Of course, up to this time she had sailed under Russian colours, and his account is this: "When I was in Newcastle in January last, I received a power of attorney to sell the said ship from the said Mr. Rucker, referred to in my 8th answer. This power was sent from Riga, where Mr. Rucker lives, to my house at Leer, and was sent on thence to me at Newcastle by my wife. The said Mr. Rucker also sent me a letter to Newcastle desiring me to sell the schooner to whomsoever. Mr. Rucker is the Hanoverian consul" and so on. He says, "I believe Mr. Rucker is an Hanoverian subject. I have known him personally for ten years, and he has been consul-general as aforesaid all that time, and I know he is a German. I was thunderstruck to receive the said power, for I was always under the impression, up to that time, that the schooner belonged to the said George Schwers," *i.e.* to the present claimant. Now, this has been open to a great deal of observation, and, at first I confess, I was myself struck with this part of his evidence; but, upon **[323]** consideration, my surprise has ceased. It appears, from another part of his evidence, that he was appointed to the command of the schooner in 1853, by Mr. Schwers, and that he corresponded with this gentleman chiefly, though occasionally with Mr. Rucker; therefore I am not at all surprised that he laboured under the impression that, though sailing under Russian colours, the property was in reality Mr. Schwers'. I may observe that it is a matter at which no one ought to be much surprised, because it is perfectly notorious that the merchants of Great Britain have repeatedly, at various times, been owners of foreign vessels sailing under foreign flags—a privilege of which they would be very sorry to be deprived—a privilege which, though it may subject them to difficulty in case of war, they are entitled to exercise, except so far as the rights of war may interfere with it. He then goes on to say, "Mr. Rucker's name appeared on the Russian sea-pass"—now he is accounting for this—"which I then had (and of which I shall depose hereafter), but I thought that was only a pretext." He was under the impression, not an unnatural one, that it was for pretence that the name of Mr. Rucker was inserted in the sea-pass.

Then it appears that upon receiving this power of attorney he goes over immediately to Hanover for the purpose of acting upon it; and he says that, by virtue of the said power, he transferred the schooner to Mr. Schwers. It appears that he was there on the 22nd of January, that is the date of the sale, and he came back to Newcastle, having accomplished his voyage over with as much expedition as he could, and from thence sailed to Lisbon on the 28th. Now, with regard to the power of attorney under which he acted, no doubt it is not binding in the same manner in which such a document would be framed in England. It begins by appointing him master, he having stated that he derived his appointment before from the present claimant; it then requires him to keep an account, and to recompense himself for all the services he might perform; but the clear gist of the whole is, that it fully empowers him to sell the ship and receive the purchase money. Accordingly, this bill of sale is executed, and it fairly states that the vessel was at that time voyaging under Russian colours, and lying in the harbour of Newcastle-on-Tyne, with all her appurtenances. That appears a fact in favour of the present claimant; there was no concealment of the circumstance—none whatever—at the time the sale took place. The exhibition of this document, supposing it to be shewn to the captors, would undoubtedly have given information with regard to the proceedings of the **[324]** vessel herself. Now, in section 4 of the bill of sale is the following important statement: "The purchase money for the sold ship, with her appurtenances, is fixed at the sum of 8000 rix-dollars, which have already been carried into account between the contracting parties before the signing of these presents." Here I must say this is a very unsatisfactory mode of effecting a sale, though I do not mean to say it is unusual; I do not mean to say that it was not effectual, but the mode of payment by merely carrying the purchase money to an account, which of course is hidden from the view of any Court having to investigate the transaction, produces in a matter of this kind a considerable degree of doubt. The effect on my mind of this mode of paying the purchase money is not favourable to the proceeding with regard to the transfer of the ship.

The bill of sale bears date on the 23rd of January, and there has been a great

deal of conflict as to the master sailing from Newcastle under Russian colours after this date; and it does appear to me to be a fact requiring explanation why, after the transfer of this vessel on the 23rd of January, Hanoverian colours were not hoisted, and the Russian colours put on one side; why the vessel should not have sailed from the port of Newcastle under Hanoverian colours, having then become Hanoverian. I do not know that I have a satisfactory account of it, except in this way, by supposing that a certain time must elapse before it was possible for the master to acquire Hanoverian colours and papers, namely, the sea-pass, &c.; and, therefore, he was compelled for the present to continue his Russian colours. He does continue the Russian colours till he proceeds from the port of Lisbon.

An observation was made in argument with respect to the paper No. 2, which is the account of the master respecting the payment made to the Russian consul at Newcastle. I see little in that, inasmuch as the master stated that when they give up the Russian papers they make a payment as well as on receiving them. I see nothing of importance in that; besides, at that time the vessel continued under Russian colours.

Now, as to the sea-pass. I presume all the Russian papers were on board at the time; but the sea-pass is a very remarkable document. It bears date the 29th of November, 1853, and it is not to come into force till the 4th of February, 1854, and is to last till 1855. No explanation of this is given in the evidence. Undoubtedly, so it stands. Assuming it to be as it was argued on behalf of the captor, that the application was made on the 29th of November, 1853, it would be a circumstance tending very strongly to impeach the integrity of all **[325]** these proceedings, because the power of attorney is not dated till the 14th of December. But presuming this pass to have been utterly blank, and afterwards filled up—of the probability of which I say nothing—then the matter would be capable of some further explanation; for it would appear the pass was given to operate on the ship from a given time, namely, I presume, from about the time she would arrive at Aurich. It stands thus: the captain is bound to produce this sea-pass at every foreign port where a royal Hanoverian consul or vice-consul is appointed. Then it seems to be exhibited at Lisbon on the 3rd of April, and in London on the 29th of April, upon his return. It had been issued at Hanover on the 29th of November, 1853, and was delivered at Aurich on the 4th of February, 1854—that, I apprehend, is by the officer whose business and duty it was to have the care of matters of that kind—to come into force at that period.

Now, there are certainly circumstances attending this part of the transaction which are not altogether satisfactory on the face of the papers. I am not aware that there are any other papers to which it is necessary to advert. Upon the vessel arriving at Lisbon, I think it is of very little importance whether the papers were laid before the consul on one day or the other. Then on the return voyage the master sailed under Hanoverian colours; I apprehend for this reason—he sailed then, and not before, because he was not in possession of the sea-pass, and not in possession of the right to use Hanoverian colours at all. But several objections have been taken to the evidence in support of this claim. It has been said that the master is entirely discredited by various circumstances; and the fact principally relied upon is the circumstance of his having denied that there was any spoliation of papers. Now, in truth and verity, there was a spoliation of papers. I must say a word as to the spoliation of papers generally before I address myself to this fact. I do not know that there is to be found in any of Lord Stowell's judgments any direct definition of the word "spoliation." I am of opinion that the mere destruction of papers is not, under all circumstances, to be considered a spoliation; I say under all circumstances, because it might be carried to a very absurd length. I apprehend it might be said, if at any time during a long voyage the master destroyed papers that had no relevancy to it, relating to a former voyage, the matter would not be put in issue. To say that was a spoliation of papers would be going the length of saying that nothing in the nature even of a private letter was to be destroyed after the vessel had left her port. I am not, however, disposed to relax the practical effect **[326]** of the rules laid down by Lord Stowell, because they are consistent with good sense and with justice to all parties; but they must not be pressed beyond his true intention with reference to all the facts of the case, because there is not one of the cases cited to me yesterday, when I came to examine them, which I have done with a great deal of care, in which

I do not find that, to form an accurate judgment of them, you must be acquainted with the whole facts of the case. To pick out a single sentence would give no accurate idea of Lord Stowell's opinion on the rules which he intended to prescribe to himself in matters of that kind.

Now, the case of *The "Hunter"* (1 Dods. 480) was a case of a very peculiar kind. There the mate was caught in the act of spoliation after the voyage was begun. Neither the master nor the supercargo were produced, but they had been allowed by mutual consent to quit the vessel and go away, so that the best evidence, either for the captor or the claimant, was wholly wanting. But notwithstanding the fact of this spoliation of papers—and a grave spoliation it was, no doubt—further proof had been allowed in that case; and the question which was there discussed was, whether still further proof should be allowed, the further proof being insufficient. The spoliation of papers clearly appeared on the face of the depositions, and yet further proof was allowed under these circumstances; therefore it cannot be contended that the spoliation of papers uniformly and always shuts out a right to further proof. That proposition is negatived by the facts of this case, to which I have now adverted. That was a case under peculiar circumstances; I see, upon looking at my note-book, that it was appealed and afterwards compromised.

*The "Two Brothers"* (1 C. Rob. 131) is another case which has been cited. That has but a very slight bearing on the question of spoliation at all; because, on looking at the case, it will be seen that Lord Stowell thus expresses himself: he says that he decided it on the ground that the claimant did not appear to have any interest in the question. To be sure that was quite a sufficient ground, without resorting to what would be the effect of the spoliation of papers. Now, it is true, in that case the fact of destroying papers is commented upon by Lord Stowell, and he states the effect on his mind; but it does not appear how the spoliation took place, so as to form any direct guide to my judgment. It is stated that the master burnt some paper before the capture—when, how long before, or what, there is no information. But I need not rely on that case, or advert to it more, **[327]** because it is quite clear that it did not turn on the spoliation of papers, but a defect of proof on the part of the claimant.

In *The "Rising Sun"* (2 C. Rob. 104) Lord Stowell lays down the doctrine that spoliation does not inure to condemnation; with other suspicious circumstances it shuts the door against further proof. To that doctrine I entirely assent—where there has been spoliation, in some cases we may allow further proof, in other cases which you cannot describe, if the circumstances are full of strong suspicion, then, to use his own expression, the door is shut against further proof. In that case the spoliation was strong indeed, because the papers were destroyed on the appearance of the chasing vessel.

Now, let me say a word on this, as to the time at which the papers are destroyed. I pray that my meaning may not be understood beyond the words I use. I hold time to be of great importance. If papers are destroyed when the capturing vessel is in sight, or there is a chance of capture, it is the strongest proof that these papers contain some matter which would inure to condemnation; so it is if they are destroyed at the time of capture, and if they are destroyed clandestinely after capture; but if the papers are destroyed a long time antecedently, before there is any probability that they were destroyed for fraudulent purposes, and there is no evidence that it was for fraudulent purposes, then, though there is spoliation, and though, no doubt, the inference of law is against the act during war, yet the case is of a less stringent nature.

The case of *The "Polly"* was also cited (2 C. Rob. 361): that is a very important case. There it is said that the spoliation makes a case for further proof; not that the spoliation of papers is a reason why no further proof should be granted, but it makes a case for further proof.

The Queen's Advocate. It cannot be released without further proof.

The Court. Yes; it cannot be released without further proof.

The Queen's Advocate. Though the reason is clear.

The Court. That is the doctrine laid down there, and the doctrine is perfectly true. So far as appears, the spoliation in that case was at the time of capture or afterwards, but in that case the property was restored, as you see at the end of *The "Polly"*; so that spoliation, on that occasion, did not extend to inure to condemnation.

The Queen's Advocate. Upon further proof.

[328] Dr. Twiss. Lord Stowell says it is impossible for the Court to relax the rule; where there has been suppression of papers there must be further proof.

The Court. He uses the word "suppression"; these are the words I am using.

Now, to come to the fact of the suppression of papers in this case, and see to what extent it goes. An observation was made by Dr. Addams which induced me immediately to send for the standing interrogatories, and the 17th is in these words: "What papers, charter-parties, bills of lading, invoices, letters, or other writings were on board the ship at the time she took her departure from the last clearing port, before she was taken as prize? Were any, and if yea, which of them burned, torn, or thrown overboard." I apprehend Dr. Addams was right in his observation thus far; what may have taken place on a previous voyage does not directly come within the purport of that interrogatory. I in no degree blame the Examiner for taking down the evidence, for it is better that the Examiner should take it down, and that it should be expunged, than that it should be suppressed, and the Court know nothing about it. I apprehend, strictly speaking, that interrogatory is intended to apply to the destruction of papers after the last clearing port, the effect of which would be here that it would exclude that part of the evidence given by the mate as to the destruction of papers upon the voyage from Newcastle to Lisbon. The cook swears positively to the destruction of certain papers after the departure from Lisbon, and upon the way on the voyage home.

I must first see what is said by the mate. He states first, the papers which were destroyed on the passage from Newcastle, and which, he says, were papers obtained from Riga.

I leave that out of consideration. He states the nature of these papers, and then he goes on and says, "I also saw the captain burn some papers, I do not know what, whilst we were lying at Lisbon;" that would run very nearly, I should say, within the line, but what follows, it would be safer if I were not to consider it as evidence, because it does not appear to relate to the same transaction.

The cook says, in answer to the 17th interrogatory, "I know nothing whatever respecting any of the ship's papers, for I never saw any of them to read them. On one occasion during our last voyage from Lisbon to London, the captain brought to me when I was in my cooking place on the deck, a handful of papers, and directed me to burn them, which I did in my fire, being alone at the time. What they were, or what were their contents, or whether they were written or printed, I cannot [329] say, for I did not read or look at them." Now, this is positive evidence, in my judgment, as to the destruction of some papers on this voyage; and though I am of opinion that the destruction of papers antecedent to a known declaration of war does not operate with the same force and effect that it operates during the time of war, yet at the same time, I think that it is of very considerable importance; and the distinction I take is this: I do not think that the destruction of papers antecedent to war draws upon it the same penal consequences which it does during war, but I think it gives rise to very strong suspicion, which suspicion must be removed, or it will be fatal to the case. There are cases of destruction of papers, which in themselves draw immediate penal consequences, and call upon the Court for immediate condemnation.

The captain, on the 17th interrogatory, states, "There were on board," and so on. Then he says, "There were no papers or documents, relating to the said schooner or cargo in any way, burned, torn, thrown overboard, destroyed, altered, cancelled, concealed, or attempted to be concealed, either during her last or previous voyage, or at any time whatever."

Now, I conceive that with regard to the fact, I must rely upon the evidence of the cook, and that there were papers destroyed; but whether it follows from the fact being so, that this captain has wilfully perjured himself, is another and a very different consideration, for we know not what the nature of these papers was; and the answer is in these words: "No papers or documents relating to the said schooner or cargo were in any way burned, torn, thrown overboard, or destroyed." It may be—for it is a conjecture which I will not much rely upon—it may be, that the papers which were so destroyed were papers which had no reference to the schooner or cargo at all, and so far the captain may be relieved from the charge of having sworn falsely; and yet at the same time the Court must deal with the fact as a fact. With regard to its operation in this case, I am not under the necessity, from any consequences that will follow, of going the length of saying that the Master has been wilfully perjured.

Then this case, in my judgment, stands thus: there has been what the law terms the spoliation of papers, and in addition to that I am not satisfied on two points—I am not satisfied as to the payment for the ship, and I am not satisfied exactly as to the manner in which the sea-pass was obtained. It appears to me, under these circumstances, that it is a case for further proof. I do not think the spoliation of these papers connected with circumstances of such grave suspicion as would justify me [330] in condemnation. I think the party is entitled to the benefit of further proof; I shall, therefore, admit further proof.

Her Majesty's Advocate asked if I would direct evidence to be taken by plea and proof, and open the case of the captors. That is most unusual; so unusual, that in the course of my recollection I hardly remember its being done. I would rather refer to the memory of the learned Advocate for the Admiralty, and ask if he remembers that there were cases by plea and proof open to the captors?

Dr. Phillimore. No, Sir.

The Court. I cannot charge my memory with more than one or two. The effect of opening the case to further proof on the part of the claimants is not to open it to the captors. That is the case of *The "Magnus."* (*a*) All I shall do is, to require further proof, and to state of what that must, independently of other things, consist. I must be satisfied that the sum given for the vessel was an adequate amount under all the circumstances; I must be satisfied that that money was bonâ fide paid; I must have all the correspondence produced which passed between the master and the gentleman resident at Riga; and I must have evidence from the claimant himself of all the facts and circumstances within his knowledge. With less than that the Court will not feel itself satisfied, and at liberty to restore the ship.

The Queen's Advocate. We are not to bring in any further proof.

The Court. No, I follow the course of Lord Stowell.

The Queen's Advocate. I am instructed that we have it.

Proctors: for the Crown, the Admiralty Proctor; for the claimant, Rothery.

[331] THE "IDA," Steen. Admiralty Prize Court, June 29, 1854.—The claim of a neutral merchant for 2650 bags of coffee consigned to them on the credit of advances made by them, disallowed.—The claim is that of lien, which cannot be upheld against captors. Further proof cannot be allowed when there has been an attempt to deceive the Court by simulated papers.

[S. C. Sp. Pr. Cas. 26; 2 Eng. P. C. 268; 18 Jur. 752. Followed, *The "Odessa,"* [1915] P. 63; affirmed, [1916] 1 A. C. 145. Adopted, *The Miramichi,* [1915] P. 77.]

This vessel, a brig of 174 tons burthen, under Russian colours, sailed from Rio de Janeiro on the 15th of January, 1854, with a cargo of 2650 bags of coffee, bound to Helsingfors, in Finland, but on her voyage put into Elsinore, whence she sailed on the 11th of April. On the 17th she was captured off Dagerort, in the Gulf of Finland, by Her Majesty's ship "Gorgon."

The master and cook were examined in preparatory on the standing interrogatories; and a claim was given in by Mr. Henry Sharpe, of Broad Street Buildings, London, merchant, on behalf of Messrs. Behrens & Sons, of Hamburgh, of 2650 bags of coffee, laden on board this ship.

He made oath that he was duly authorized to make the claim for them, "the consignees, and as such the true and lawful owners and proprietors" of the said bags of coffee. And he further made oath that "he is informed, and believes, that the said

---

(*a*) 1 C. Rob. 31, where Lord Stowell observes, "Plea and proof is an awakening thing; it admonishes the parties of the difficulties of their situation, and calls for all the proof that their case can supply." In *The "Adriana"* (1 C. Rob. 313) on further proof being brought in, it was attempted to introduce affidavits on the part of the captors to contradict it, on a suggestion that further proof opened the case to both parties; on which Lord Stowell said, "With respect to plea and proof, this is true; but I do not know that in proof by affidavits, this Court or the Lords of Appeal have ever laid down such a rule. I understand the rule to be, that further proof by affidavits to be exhibited on the part of the captor is only admissible under the special direction of the Court. It is not to be exercised except on special grounds, and only with the leave of the Court.'

bags of coffee were so shipped in the month of January last past at Rio de Janeiro, and consigned to the said Messrs. L. Behrens & Sons, on the credit of advances made by them, and by means of their acceptances, to the amount of marks banco 102431.12, for the securing of the payment of which advances bills of lading of the said 2650 bags of coffee, whereof the exhibit hereto annexed, marked A., is a counterpart, were made to them or their assigns; and that the said advances have not been repaid to the said Messrs. Behrens, but that the said consignment remains their only security. That until the said Messrs Behrens shall be repaid, or otherwise indemnified for the said advances, neither the Emperor of Russia, nor any person being a subject of, or inhabiting within any of the dominions or territories of the Emperor of Russia, hath, directly or indirectly, any right, title to, or interest in the said goods."

Annexed to the affidavit and claim was a bill of lading for 2650 bags of coffee, stated to be shipped by G. & W. Heyman on board this vessel, and bound to Elsinore, for orders, to be delivered at such port of destination unto Messrs. Behrens & Sons, of Hamburg, or to their assigns, paying freight for the same as per charter-party, dated Rio de Janeiro, 14th of December, 1853, the bill of lading being dated 4th of January, 1854.

At the hearing a further affidavit of Mr. Sharpe was tendered and allowed by the Queen's Advocate to be received as evidence. He made oath that since filing the claim, Messrs. Behrens had **[332]** transmitted to him three original letters in the German language, marked A., B., and C., and six bills of lading, inclosed in the said letter, marked B.; that the said letters and enclosures were received by Messrs. Behrens, in due course of post, from Messrs. G. & W. Heyman, of Rio de Janeiro, merchants, the shippers of 2650 bags of coffee aforesaid, and are (save the bill of lading, No. 6) true and genuine, and in no manner false or colourable. That the said bill of lading, No. 6, is, as mentioned in the said letter marked B., a colourable bill of lading, but that the deponent, at the time of giving in the claim aforesaid, had no knowledge of the same, or the counterpart annexed by him to the said claim, being other than a true and genuine document, for the deponent at such time was not informed of, nor in possession of any other bill or bills of lading of a different term; and he verily believes that the bill of lading annexed to his said claim was sent to him for the mere purpose of specifying the property to be claimed. And he further made oath that the hereunto annexed bills of lading, marked 1, 2, 3, 4, and 5, transmitted to the said Messrs. Behrens as aforesaid, are indorsed according to the custom of merchants, and have the effect, until indorsed over by the aforesaid Messrs. Behrens, of constituting them, on their order, the lawful consignees of the several parcels of goods in the said bills of lading mentioned; and that the said bills of lading are still held by the said Messrs. Behrens as security for the advances made by them in respect of the said cargo, the whole of which advances is still due and owing to them save a very small sum, &c.

The contents of these exhibits are fully set forth in the judgment.

The Queen's Advocate, for the captors. This is a claim for a portion of the cargo. It seems to be a claim of lien for advances for this coffee. The whole transaction is a disgraceful fraud; but, if not, the Court would disregard such lien. In the case "*Aina*" (ante, p. 313) the Court held that a mortgage could not be sustained against captors. He should ask the Court to condemn the claimants in the costs for their fraud. An affidavit has been brought in this morning on behalf of Messrs. Behrens, with certain letters and documents annexed. From these it appears that by desire of the captain simulated papers were put on board this vessel. There has been clearly an attempt to impose upon the Court, and to defeat our belligerent rights. The legal consequence is condemnation without the privilege of further proof: *Oswell* v. *Vigne* (15 East, 75), *The* "*Eenrom*" (2 C. Rob. 15).

**[333]** It cannot be said that Messrs. Behrens are not responsible for the fraud. They are bound by the acts of their agents; *The* "*Eenrom*" (2 C. Rob. 8), *The* "*Calypso*" (ibid. 160). The present case is quite analogous; the Messrs. Heyman were the agents of the claimant, who must be bound by their acts. In such a case the Court must condemn the claimant in costs.

Dr. R. Phillimore, on the same side. Two questions arise respecting this cargo: 1st. The indorsement of the bills of lading; 2nd. The fraud respecting the papers. With regard to the first question, it is, in fact, a claim of lien, of which the Court will not take cognizance. This lien, too, would be revocable, and, therefore, least favourable.

Besides, the indorsement is not an indorsement over to Messrs. Behrens, for whom the claim is made. As to the second question, it is a direct instance of fraud, when compared with the evidence of the captain that no simulated papers were on board.

Dr. Deane, for the claimant. This is not a case of lien, but of ownership. Certain Finlanders sent a ship to Brazil for coffee, but, having no credit there, the coffee was shipped on account of Behrens & Company, neutrals, residing at Hamburg. On B. & Co. the shippers drew bills, and to them, by the bills of lading, consigned the property. B. & Co. are the consignees in Europe. The bills of lading found on board the ship, and annexed to the ship's papers, are not indorsed, and the master could not pass the property described in them; but the bills of lading sent to B. & Co. are indorsed, and thereby they become entitled as owners to the property. This is the true meaning and effect of the indorsed bills of lading: Smith's Mercantile Law (3rd edit. p. 272). Consequently the ultimate loss, if the property be condemned, will fall on B. & Co.; and the ultimate loss is the true test of ownership in the Court of Prize, according to Lord Stowell, in *The "Packet de Bilboa"* (2 C. Rob. 135).

It is said there was a fraudulent intention on the part of Messrs. Heyman & Company, the consignors in Brazil, to furnish the master with double sets of papers, the one true and the other colourable; the true, the charter-party, as well as bills of lading, in the names of several Finlanders; the simulated, or colourable, in the names of B. & Co. But there is no evidence of this, and the expression in the letter of Messrs. Heyman does not bear the argument out to that extent. At all events, it must have been a mere intention, never carried into effect; for only one set of papers in the name of B. & Co. were found on **[334]** board, and there is no charge against the master of spoliation of papers. There is no case of condemnation on the ground of an intention to sail under false papers. That would be carrying the case of *Oswell* v. *Vigne* (15 East, 75) to an extravagant length.

The Helsingfors charter-party will be brought in as soon as it can be procured, if the Court will allow further proof, to which the neutral owners of this cargo are, it is submitted, entitled. The property was made over to B. & Co. by the endorsed bills of lading; it remains in them until such time as they are paid the amount advanced. As to the alleged fraud, they must have been ignorant of that; or, if informed of it, they had no time to countermand the orders.

Dr. Twiss, on the same side. There is one question only, viz., in whom is the property? It is not in any way a question of simulated papers. It must be borne in mind that it was a neutral shipper, not an enemy shipper. The bills of lading on board not being indorsed convey no property: Abbot on Shipping (7th edit. p. 330). In this case the property remains in the neutral shipper. [The Queen's Advocate. There is no claim on his behalf; the claim is for the alleged consignee.] As to the indorsement, cases abound at Common Law; and the law of the Prize Court as to ownership is the same. [Per Curiam. If you can establish that the Common Law and the law of the Prize Court as to property or ownership are identical, you will prove wonders. If this were in the time of peace there would be no doubt whatever that the bill of lading indorsed by the consignors to the consignee would vest the property, but in the time of war the law is very different.] Mr. Justice Story seems to speak of the law being the same in these Courts as at Common Law, in *The "San Jose Indiano" and Cargo* (2 Gallison (Amer.), 225); and Lord Stowell states the principle of effectual transfer of property in *The "Cousine Marianne"* (Edwards, 347).

There is no ground for refusing the claimant the privilege of further proof. There was no fraudulent intention with regard to the ship's papers; besides, the whole of those circumstances were antecedent to the declaration of war.

The Queen's Advocate in reply. The principle is clearly laid down in *The "Jan Frederick"* (5 C. Rob. 140), that transactions in contemplation of war are judged by the same rules as during actual hostilities. These papers were simulated in the immediate contemplation of war, and for the express purpose of defeating the rights of one of the belligerents. The **[335]** property would be, therefore, liable to condemnation. But it is not a question of ownership but one of lien. These bills of lading were intended merely as securities for advances. The claim of lien will not avail in this Court.

Dr. R. Phillimore. In the case of *The "San Jose Indiano,"* whatever may appear to be the opinions of Mr. Justice Story, they are founded entirely on English cases to which he refers.

*Dr. Lushington.* There are three courses open to the Court on the present occasion, either to condemn the property, to restore it, or to direct further proof. The course which the Court will adopt must depend on a consideration of the facts of the case, and the law applicable to them.

In the first instance I look to what is found on board the ship, and to the examinations which have taken place upon the standing interrogatories. It is the cardinal rule of this Court that, primâ facie, the evidence upon which the Court must form its judgment is the ship's papers and the evidence of the master. It is very easy to set forth the contents of the examination of the master.

It appears that this was a Russian ship and that she sailed under a charter-party from Finland to Rio de Janeiro; that there was to be purchased a cargo of coffee, which was to be brought back and delivered in Finland, on account and at the risk of Finnish merchants. That is his representation. As far as he is concerned, he has no knowledge of the property now claimed belonging to neutrals; he believes it all to be Finnish property.

With regard to the papers found on board, there is neither a Finnish charter-party nor any other—a circumstance which appears to me a little surprising. But there are certain bills of lading to which it is necessary to advert. There are six of them, but it will be necessary to consider one only; it is as follows: "Shipped by G. & W. Heyman, in the ship 'Ida,' bound to Elsinore for orders;" then they state the quantity of coffee, the marks and numbers, to be delivered at the port of destination unto order or to assigns; nothing more being said, except that the freight is to be paid as per charter-party, which does not appear. This bill of lading is signed by the master, and I find in the margin the following words: "To be cleared at Elsinore, at Messrs. A. Geadman & Gloerfeldt." Now, the master, I apprehend, could have hardly had any alternative, but to have delivered these goods according to the bill of lading—to some order. What that order was intended to be is left in perfect obscurity. There is no indorsement on this bill of lading, so there is no information given to the master how **[336]** to act when he arrived at Elsinore. This being the state of things, there is no evidence whatever of any portion of the cargo belonging to a neutral.

I now come to the claim preferred for the purpose of considering whether the parties are entitled to immediate restitution, or to give in further proof.

The original claim is given in by Mr. Sharpe, a merchant of this town, who states that he is duly authorized to make the present claim on behalf of Behrens & Sons, who are neutral merchants; and he states them to be the consignees, and, as such, the true and lawful owners and proprietors of 2650 bags of coffee. Then he goes on to state, that they were shipped in the month of January last, and consigned to Behrens & Company, on the credit of advances made by them.

This appears to be a very clear statement with respect to this claim, which is founded on two things—on Behrens & Company being the consignees, and on the cargo having been purchased on the credit of advances made by them. He then states that the bills of lading were made for securing the payment of such advances, and the advances have not been repaid. He further says, that he verily believes that until Behrens & Company should be repaid, or otherwise indemnified for the advances, no subject of the Emperor of Russia is entitled to the property.

The bill of lading was annexed to the original claim, and is in these words:—"Shipped in good order, and well conditioned," and so on; it then states that the master was bound to Elsinore for orders—not bound, as is stated in the other bills of lading, to Helsingfors, but to Elsinore, for orders. There is a difference with regard to the destination. In some cases a difference of destination has been held to be of great importance; whether it is so in the present case we shall see when we have further examined it. It also states that the bags of coffee are to be delivered to Behrens & Co., of Hamburg, or to their assigns, he or they paying freight for the said goods, as per charter-party, dated Rio de Janeiro, 14th of December 1853, but which charter-party is not forthcoming. This bill of lading is signed by A. G. Steen.

On these papers the Court could certainly not have granted the claim: it could only have been asked to allow further proof; and whether it would have complied or not would have depended on the whole facts of the case, and whether there was any attempt to deceive the Court by the manufacture of papers which were not of a

true and genuine character. But Mr. Sharpe, on behalf of Behrens & Co., has offered an affidavit, with sundry documents annexed: and Her Majesty's Advocate, [337] on behalf of the Crown, has assented to their introduction as evidence. I may, therefore, address myself at once to these documents.

Mr. Sharpe states, that since he made this claim, Messrs. Behrens have transmitted to him three original letters in the German language, and six bills of lading. He states that these letters were received by them from the shippers of the coffee, and are, save the bill of lading No. 6, true and genuine, and in no manner false or colourable. With regard to No. 6 he says: "The said bill of lading, No. 6, is, as mentioned in the said letter marked B., a colourable bill of lading."

The question will be, colourable for what purpose? because there are circumstances in which a colourable bill of lading might be innocent, and circumstances in which it might draw after it legal consequences. Mr. Sharpe says, that at the time of giving in the claim he had no knowledge of the same, or the counterpart annexed to the same, being other than a true and genuine document. He says: "The five bills of lading are indorsed according to the custom of merchants, and have the effect, until indorsed over by Behrens & Company, of constituting them or their order the lawful consignees of the several parcels of goods." Upon that I apprehend there can be no dispute. Then he says the bills of lading are still held by Behrens & Company as security for the advances made by them in respect of the cargo, the whole of which are still due, save a very small sum. They appear to be all indorsed by G. & W. Heyman, except the last, for the genuineness of which he does not vouch.

I must now direct my attention to the three letters referred to, which certainly give the Court a considerable insight into the nature of these transactions. The first bears date the 14th of December 1853, and therein the Messrs. Heyman acknowledge themselves in receipt of letters of a certain date, and say they observe thereby the confirmation of the credit for sundry shipments to Finland by sundry ships, of which the "Ida" is one. Now, from this, we get at one fact, viz., that Behrens & Company had given them credit of themselves, and they confirmed that credit for the purpose of making that shipment by the "Ida." They say: "We request you to effect a provisional insurance." This insurance which is not undeserving of consideration is to be made on account of these persons, who are represented by the master to be the real owners of the property. At the end of this letter the following words are added: "By the desire of the captain we shall give to the 'Ida' double sets of papers." The captain, in his evidence, has not [338] mentioned that fact at all; he says he knows the papers are all true and genuine; therefore, either this letter, or the evidence of the captain, is false. If the captain's is false we all know the consequences, and there is no reason to suppose that Messrs. Heyman would assert a matter of this kind unless it were true. They go on to say:—"That is to say, bill of lading and manifest, the original whereof, filled up to orders for Helsingfors; on the other hand, the (simulated) duplicate relating to the before-mentioned coffee is made out in your names to Elsinore for orders." Now, that simulated bill of lading was certainly framed for some purpose or other by desire of the master. It is a well-known rule of this Court that where there are contradictory papers the burden of proof lies on the claimant to shew that the contradiction is not inconsistent with the rights of a belligerent power; and, I must say, I have not heard any satisfactory explanation of how or why these papers were framed, except it was for the purpose of deceiving those who might have to determine whether it was an enemy's property or not. The second letter seems a mere duplicate of the first. In the third, marked C., they say: "Enclosed we now have the satisfaction to hand you letter of advice, invoice, and bill of lading for 2650 sacks coffee per Russian brig 'Ida,' &c." This invoice, of course, the Court has not; but the bill of lading, I apprehend, can be no other than that now brought in by Mr. Sharpe. They then go on to say: "Agreeably to the credit opened for us with you, and confirmed by you, we have now taken the liberty to draw upon you for the account of the above-named friends;"—so that bills of exchange have been drawn, and placed to the debit account of the Russian merchants. Then we find these words: "We furthermore delivered to him," *i.e.* the captain, "a charter-party, which was made out for her pro formâ; and as he, by this proceeding, has no papers on board which would compromise the cargo, consequently we trust that, in case of a war, it will be an easy matter for you to reclaim the cargo."

This, of course, means, that, by their putting papers on board which do not say whose property the cargo is, in case of a war it will be no proof that the cargo belongs to a Finnish subject.

These being the facts of the case, I will now address myself to some of the law which has been quoted as applicable to them. The claim, I have said, is founded on two grounds: First, on Messrs. Behrens & Company being the consignees of the cargo; and, secondly, upon their having a lien on the property. It has been contended by counsel that the property is in Behrens & Company by virtue of the indorsement of the bills **[339]** of lading; and cases from Common Law have been cited in support of this. I believe that, under some circumstances, that would be the case. They would have a legal title to the property; but I have considerable doubt whether it is not the law of this Court that the claimant must shew that he has not only a legal, but an equitable title. If a mere legal title would justify the Court in restoring property the consequences would be most alarming; for nothing would be more easy than to cover enemies' property from one end of the kingdom to the other. I strongly object to the doctrine that if a legal title be shewn this Court is bound to restore; for I hold that an equitable title is also necessary to support a claim in this Court. With reference to the case (*a*) which was cited from the American Reports, it does not appear to me that the remarks of Mr. Justice Story have any applicability to the present case, or to the law which I am bound to administer. It appears that, in that case, an order had been given for certain goods to Messrs. Dyson & Company, merchants, in England, an enemy country, by Mr. J. Lizam, of ——, in Brazil; that they executed the order, but, not being willing altogether to trust Mr. Lizam, consigned the goods to Messrs. Dyson & Finney, of Rio Janeiro—a commercial house composed of the same partners, but trading in a neutral country. In fact the shippers in England consigned the goods to themselves in Rio; and the question being, whether, in transitu, the property was in Mr. Lizam or not, it was held that it was still in Messrs. Dyson, the shippers, who were also the consignees.

To the remarks of the learned Judge I fully subscribe; but I do not see their applicability to the present case.

It would perhaps be as well to notice, as I go on, the case of *The "Cousine Marianne"* (Edwards, 346), of which a sentence was cited. That was a question whether certain goods, which had been imported into England under a license, in which the words "to whomsoever the property may appear to belong" were omitted, and which were shipped by enemy merchants, had become the property of the British consignee, or whether they still remained in the enemy shipper. Lord Stowell there said: "It is a settled principle in this Court that in order to constitute an effectual transfer of the property there must be either an order for the goods or an acceptance of them by the consignee prior to the capture." In construing Lord Stowell's words we must always be careful to remember the facts of the case, for it is impossible to arrive at his opinion from an isolated sentence. He goes on **[340]** to say: "If the capture takes place where no order has been given, and before the goods have been accepted, they must be considered the property of the persons who have so consigned them." Who can possibly doubt that? If no order have been given, it would be contrary to common sense to say that a man should be bound to take and to pay for that which he had neither ordered nor subsequently accepted. He then says: "In this case, therefore, the Court has called for evidence to shew whether any order had been given by the British merchants, or any act done by them in the nature of an acceptance before the capture. It is not pretended by the claimants that any specific order was given for these goods, and so on." So that the circumstances of that case were very different from the present; and if it was at all applicable it would tend to shew that the property in the present case was in the shipper, for whom no claim whatever has been made.

There was a case cited the other day which appears to me to have much more bearing on the present question. I allude to *The "Marianna"* (6 C. Rob. 24). In that case the vessel had been sold at Buenos Ayres, by an American, to a Spanish merchant; the purchase money, however, had not been paid, but was to be satisfied out of the proceeds of a quantity of tallow consigned to England on board this

(*a*) *The "San Jose Indiano" and Cargo*, 2 Gallison, 267.

vessel for sale. The vessel was seized on her voyage to this country, documented as belonging to a Spanish merchant, and a claim was given on behalf of the former American proprietor, in virtue of the lien which he professed to have retained on the property for the payment of the purchase money. That case more closely resembled, in fact it is a much stronger case than, the present; it was a claim much more in the nature of a lien: but what does Lord Stowell say? does he admit this to be a claim which must be upheld? No; he says: "Such an interest cannot, I conceive, be deemed sufficient to support a claim of property in a Court of Prize. Captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding between other parties which can have no operation as to them." Yet a stronger case of lien could scarcely exist. Further on he says: "Then as to the title of property in the goods, which are said to have been going as the funds out of which the payment for the ship was to have been made. That they were going for the payment of a debt will not alter the property; there must be something more. Even if bills of lading are delivered, that circumstance will not be sufficient, unless accompanied with an **[341]** understanding that he who holds the bill of lading is to bear the risk of the goods as to the voyage, and as to the market to which they are consigned; otherwise, though the security may avail, pro tanto, it cannot be held to work any change in the property." It is not pretended, in the present case, that any such risk fell on Messrs. Behrens & Company. They may have held the bills of lading as a security; but if I wanted authority, I have that of Lord Stowell for saying that is not sufficient to convert the property so as to defeat the right of a captor.

But, wholly independent of authority, it is an established principle of this Court that no lien, however honest, affords sufficient ground for restitution. It was asserted to its fullest extent in *The "Tobago"* (5 C. Rob. 218), than which a harder case can scarcely be conceived. A British merchant had lent money to the master of a French vessel, on a bottomree-bond, previous to hostilities, but Lord Stowell refused to allow the claim as against the captors, and said there was no instance in which the Court had recognized bonds of this kind as titles of property; and that they were not entitled to be recognized as such in the Prize Courts.

Such is the law; but, looking at the facts of the present case, can I doubt where the property lies? I am clearly of opinion that the property belongs to an enemy, subject to Messrs. Behrens' charge.

The property was ordered from Finland, by persons whose names are set forth by the master, and Messrs. Heyman would not have given effect to those orders had it not been for the intervention of Messrs. Behrens & Company; the consignors were paid for the property, which became wholly divested; and the consignees were to indemnify themselves for the advances they had made. There is no case on record, that I am aware of, in which, when a lien existed even prior to the commencement of a war, the Court thought itself justified, on account of that lien, in making restitution. I cannot hold that the present claim stands in a more favourable light.

There is another point of law to which I must now refer. It is not possible to doubt for a single moment that there was an intention in this case, by means of colourable bills of lading and of this non-apparent charter-party, to deceive and defraud this country of its belligerent rights. Human ingenuity can discover no other reason for such a proceeding than to cover enemy's property as neutral. But it is said that Behrens and **[342]** Company cannot be affected by this, because it was not done under their authority. It appears, however, to have been the act of the master, who must be responsible, and the act of their own agents, Messrs. Heyman.

Looking, then, at the whole of the case, I entertain no doubt that I must condemn the property, because the claim, which is simply that of lien, is in no degree strengthened by the fact of Behrens & Company being consignees. I cannot see that further proof would alter the nature of this claim; besides, it is contrary to the rule of this Court to allow any further proof, where there has been an attempt to deceive the Court by the manufacture of false papers. I have been pressed by the Queen's Advocate to condemn the claimant in the present case in costs, but to that I cannot accede, as it has not been usual to condemn neutrals in costs, unless under very peculiar circumstances.

Proctors: for the captors, the Queen's Proctor; for the claimant, Poynter.

THE "TROIJA." Admiralty Prize Court, July 21, 1854.—The claim of an alien enemy directed to be amended, as not stating any matter to give him a persona standi in judicio.

[S. C. Sp. Pr. Cas. 37. Applied, *The Marie Glaeser*, [1914] P. 222.]

This was a case of claim by an alien enemy.

The Queen's Advocate, for the captors, again took the objection taken in *The "Phœnix"* (ante, p. 307), that the affidavit accompanying the claim does not state any matter which could give the enemy a persona standi in judicio. He thought that, after what fell from the Court in the case of *The "Phœnix,"* he should not have been compelled to raise the objection again. But he would not recede from the rights of the Crown, and he had a right to know, before the case came on for hearing, upon what ground the enemy claimed the restoration of the captured property. An enemy has no right to claim under his affidavit, simpliciter as an enemy, and then, at the hearing, to state for the first time by his counsel the grounds of his claim. He must shew some peculiar grounds to give him the privilege of suing in the Court of Justice. In the case of *The "Hoop,"* Lord Stowell says: (*b*)[1] "Our Courts of the Law of Nations are so far British Courts that no man can sue therein who is a subject of the enemy, unless under particular circumstances that, pro hâc vice, discharge him from the character of an enemy—such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority, that puts him in the King's peace pro hâc vice." So, **[343]** if the claimant in the present case claims under any of Her Majesty's Orders in Council, he is bound to allege that, before he can be heard in support of his claim.

The Admiralty Advocate. There are several cases similar to the present, and it was thought desirable to stop it at once, and bring the present practice to accord with that of former cases. The Court is not asked to reject the claim, but to compel the claimant to amend it: *The "Vrouw"* (1 C. Rob. 169).

Dr. Addams, contrà. He thought that, after what transpired in the case of *The "Phœnix,"* this objection would not have been raised. There could not possibly be any doubt that the claim was made under the Orders in Council; it could not be on any other ground. This claim was made, and the affidavit sworn, a fortnight before the hearing of *The "Phœnix,"* when the direction of the Court respecting such claims was given; it was, therefore, not thought necessary to have the claim amended. In fact, communications to that effect have taken place between the Admiralty Proctor and the Proctor for the claimant.

*Dr. Lushington.* I entertain no doubt as to the correct practice in such cases; it is, that when an enemy claims he must shew a persona standi in judicio, the law being that an alien enemy is not entitled in any way to sue in this or any other Court. It is clear that, with regard to these claims, an error has been committed. On a former occasion, I expressed my opinion upon the subject, but being desirous to throw no impediment in the way of any claimant, I directed the case to proceed without having the error rectified by the amendment of the claim. I intended what I then said, however, as a warning, and certainly did not expect to find the warning had been disregarded; and if I saw that in the present case the claim had been given, and the affidavit sworn, subsequent to the period when I made those observations, I should certainly have rejected the claim altogether; but as I find the claim was made previous to that time, I will give the party a locus pœnitentiæ, and allow him to amend his claim. The hearing must stand over till that is done; and if the party claims under the Orders in Council, I shall expect him to state the specific order by which he claims to be protected. I direct the claim to be amended.(*b*)[2]

Proctors: for the captors, The Admiralty Proctor; for the claimant, Deacon.

**[344]** THE "FIDENTIA," Serlachius. Admiralty Prize Court, July 21, 1854.—When the evidence of the master as to the ownership of the property claimed is deficient, it cannot be restored without further proof.

[S. C. Sp. Pr. Cas. 39; 2 Eng. Pr. Cas. 281. See further, Sp. Pr. Cas. 85.]

The Russian barque "Fidentia" sailed from Cadiz on the 9th of March, 1854,

(*b*)[1] 1 C. Rob. 201; Story's Prize Practice, by Dr. Pratt, p. 21.

(*b*)[2] In a subsequent part of the day, the counsel for the claimant having stated to the Court that the claim would not be amended, sentence of condemnation was passed; but the same day several other cases were deferred for the same purpose.

bound for Loviso, with a cargo of salt, wine, corks, and olive oil, and was captured by Her Majesty's ship of war "Tribune," upon the 9th of April.

A claim given for the ship by an enemy was directed to be amended, as in the previous case, but was afterwards abandoned. A claim for a portion of the cargo, specified in two bills of lading, was made by Elias Charles Unonius, of Winchester Street, London, on behalf of "John Duncan Shaw, of the City of Cadiz, a British subject, the sole owner and proprietor thereof."

These bills of lading, which were annexed to the affidavit of the claimant, were dated March the 7th, 1854, and stated the goods to have been "shipped by John Duncan Shaw, to be delivered to Elias Unonius & Son, Esqs., or to assigns; freight for the same goods paid in Cadiz." On each of these bills, and bearing the same date was a certificate of the British consul at Cadiz, to the effect that, "Enrique Campagne, pro John Duncan Shaw, a British merchant established in that city, personally appeared, and voluntarily declared upon oath that the goods described in the bill of lading were bonâ fide his own property, and had been shipped on that day by his sole account and risk to the consignment of El. Unonius & Son, Esqs."

The master, mate, and cook were examined on the interrogatories.

The Queen's Advocate and Dr. Robinson, for the captors. The claim for the ship must be amended. That for the cargo stands on a different footing. But there is a deficiency in the affidavit accompanying that claim sufficient to induce the Court to reject it. The agent does not swear to his belief that the property, if restored, will belong to his principal. The principal question will be, to whom will the property belong if restored. It might belong to him when it left Cadiz, but still might not belong to him if returned. That is the only principle on which it can be claimed in this Court. The affidavit is carefully drawn, yet that important point is omitted. The agent might easily have communicated with his principal at Cadiz. The omission, therefore, is a very suspicious circumstance.

The claim itself, as to the property of the cargo, fails on the evidence and the ship's papers. The master, on the eighth interrogatory, says: "Mr. Unonius is the corresponding owner, having the direction and management of the trade of the ship **[345]** and cargo, and with whom I corresponded thereon." Here he first touches on the cargo, and says nothing whatever of Mr. Shaw, but distinctly puts the enemy in as the owner. [Per Curiam. You must bear in mind, Queen's Advocate, the terms of the interrogatory: "With whom do you correspond on the concerns of the vessel or her cargo?"] Certainly; but this is the first time the cargo is mentioned; and he makes no allusion whatever to the claimant. And to the twenty-first interrogatory he gives a most prevaricating answer, and professes to know nothing about the matter. He cannot tell whether or not the cargo, if it had arrived at its destined port, would have been the property of the consignees or of Mr. Shaw, or whether it was then their property, or to be sold by them for Mr. Shaw. This is a most unsatisfactory answer. The answer to the thirty-third interrogatory is still more unsatisfactory, for it merely refers to what he has said before, without giving any information whatever. The object of such interrogatories is to test and compare the answers of a witness; and this object is defeated if the examiner does not require full answers to each interrogatory, but allows the witness merely to refer to a former answer. [Per Curiam. Certainly that is quite correct; full answers must be taken to every interrogatory. I regret to find frequently in these cases that the evidence is not sufficiently full. I wish it to be understood, that in every case the examiners are to take the evidence in full, and not to allow the witness under any circumstances to answer one interrogatory by a reference to his answer to another. Such a course defeats the object of the examination.]

Now, as to the papers, the bills of lading are dated March 7. At that time the Russian ambassador had withdrawn from England, and war was closely impending. The vessel sailed from Cadiz in immediate contemplation of war. This accounts for the state of the ship's papers, upon which nothing turns. But annexed to the affidavit of claims are two bills of lading, and a certificate that Mr. Shaw is a British subject. The bills of lading bear an indorsement to the effect that the property mentioned therein belongs to Mr. Shaw. But what is the law? It is stated by Pothier, in a passage cited in a note to *The "Anna Catharina"* (4 C. Rob. 113): "C'est aussi une chose qui est de la nature du contrat de vente, qu'aussitôt que ce contrat a reçu sa perfection par le consentement des parties, quoiqu'avant la tradition la chose vendue

soit aux risques de l'acheteur, et que si elle vient à perir sans la faute du vendeur, la perte doive [346] tomber sur l'acheteur, qui ne sara pour cela déchargé du prix; mais comme cela est de la nature seulement, et non de l'essence du contrat de vente, on peut en contractant convenir du contraire" (Pothier, Traitè des Obligation, part i. c. i. § 1, art. i. § 3). This is the general law, and in the time of war or in immediate contemplation of war, it is not competent to parties to make particular exceptions to shift the risk. In *The "Packet de Bilboa"* (2 C. Rob. 133) Lord Stowell says: "The ordinary state of commerce is, that goods ordered and delivered to the master are considered as delivered to the consignee, whose agent the master is in this respect;" —in this case the master swears he had consignees, "but that general contract of the law may be varied by special agreement, &c. In the time of peace they may divide their risk as they please, and nobody has a right to say they shall not; it would not be at all illegal, that goods not shipped in time of war, or in contemplation of war, should be at the risk of the shipper." Certainly not; but that would be done by special contract, and in this case they have not done so. Lord Stowell goes on to say: "In time of war this cannot be permitted, for it would at once put an end to all captures at sea; the risk would in all cases be laid on the consignor, where it suited the purpose of protection. On every contemplation of a war this contrivance would be practised in all consignments from neutral ports to the enemy's country, to the manifest defrauding of the rights of capture: it is, therefore, considered to be an invalid contract in the time of war, &c." Supposing this contract to have been made in this case, it must have been, on the 7th of March, made in immediate contemplation of war, and could not therefore be sustained. *The "Packet de Bilboa"* establishes this, that primâ facie goods shipped belong to the consignee. This is the doctrine laid down in Abbott on Shipping (9th edit. p. 269). In this case there is not the slightest evidence to rebut the presumption of law. The property must therefore be considered as belonging to the enemy consignee.

Dr. Addams for the claimant was stopped by the Court, and

*Dr. Lushington* said: I will hear you, Dr. Addams, if you think you can satisfy my mind that it is a case in which I can order immediate restitution. I am clearly of opinion that you are entitled in this case to give further proof; but I do not think I could possibly decree restitution without it, for unfortunately the evidence of the master is by no means satisfactory, and it is a rule of the Prize Court, that where the [347] evidence of the master fails as to the ownership of the property claimed, further proof is indispensable before restitution can be decreed.

The case stood over for further proof.

Proctors: for the captors, the Queen's Proctor; for the claimant, Rothery.

THE "ABO," G. A. Goös. Admiralty Prize Court, July 21, 1854. A Russian vessel sailed from Cadiz on the 27th February, bound to Abo with a cargo of salt, olive oil, &c. On the 2nd of March the shipper, a British subject, resident there, made an affidavit before the British consul that the olive oil was his property. The vessel was captured on the 15th of April. A claim was made on behalf of the shipper for this olive oil. Further proof allowed.

[S. C. Sp. Pr. Cas. 42; 2 Eng. Pr. Cas. 285; 18 Jur. 965. Referred to, *The "Odessa,"* [1915] P. 54; affirmed, [1916] 1 A. C. 145. Adopted, *The "Miramichi,"* [1915] P. 77.]

This vessel, a Russian, which sailed from Cadiz on the 27th February, 1854, was bound to Abo with a cargo of salt, olive oil, and other goods, and was captured on the 15th April by Her Majesty's ship "Tribune."

No claim was given for the ship, but Mr. Quincey Rew of Old Broad Street gave a claim for seven pipes, four hogsheads, and eight quarter casks of olive oil, and a box containing 1000 leeches, on behalf of Charles Younger, a merchant of the city of Cadiz, and a British subject, as the sole owner and proprietor thereof. Annexed to the affidavit and claim was a bill of lading, signed by the master, acknowledging the receipt on board his ship of the property claimed, and binding himself, on his safe arrival, to deliver the same to Messrs. E. Julin & Company or order, against a stipulated freight, &c. On this bill of lading was the following indorsement:—

"British Consulate, Cadiz, 2nd March, 1854.

"These are to certify that on this day personally appeared before me, Charles Younger, a British merchant and Swedish consul, residing in this city, and voluntarily

declared, upon oath, that the seven pipes, four hogsheads, and eight quarter casks of olive oil, and one box containing 1000 leeches, as described in the annexed bill of lading, are bonâ fide his own property, and have been shipped on his sole account and risk on board the Russian ship "Abo," G. A. Goös, bound for Abo.

"Given under my hand and seal of office, at Cadiz, on this 2nd day of March, in the year of our Lord 1854. "M. BRACHENBURG, Consul."

The master of the captured vessel, being extremely ill, was put ashore at Copenhagen by the commander of the "Tribune," and his examination on the standing interrogatories was, therefore, dispensed with. The mate, second mate, and one seaman were examined.

The Queen's Advocate, for the captors. [348] The affidavit of claim in this case is insufficient. It should state, not only that the claimant believes the property claimed belonged bonâ fide to Mr. Younger at the time of shipping and the time of capture, but that he believes that if restoration be decreed the property will then also belong to him. That is the proper form as given in Dr. Pratt's book of the practice of the Prize Court.(*a*) He submitted that from the evidence the property appeared to belong to Messrs. Julin & Company, the assignees, who were, as appeared from the certificate of the Burgomaster of Abo, part owners of the vessel. They were mainly interested. The bill of lading shews the goods were to be delivered to them. There is nothing to support the present claim but the indorsement made upon the bill of lading before the British consul at Cadiz by the claimant himself. That indorsement was made on the 2nd of March, five days after the ship had sailed. Such an act on the part of Mr. Younger cannot affect the property. The property must be judged at the time of shipping; and at that time the property being delivered to the master, as carrier, must be considered to have been parted with to the consignee.

Dr. Dasent, on the same side. It is a rule of law that goods shipped are the property of the consignee, unless the shipper in any way limits that right. This property was consigned, absolutely and without limitation, to Messrs. Julin & Company, the part owners of the ship. There is no evidence whatever of any limitation; the indorsement on the bill of lading before the British consul, being made after the sailing of the ship, and in immediate contemplation of war was, in all probability, merely colourable.

Dr. Addams and Dr. Twiss, for the claimant. The affidavit accompanying the claim is correct. It is quite sufficient for the agent to state his belief that, at the time of capture and of the claim, the property belonged to the party for whom he claimed. [Per Curiam. The objection in this case cannot be sustained. I think the affidavit sufficient; but, in order that the practice may be in all cases uniform, I will have the forms searched up, and adopt one regular mode of proceeding.] There is nothing whatever in the evidence to impeach the claim. The property remained in Mr. Younger the shipper, and had not been transferred to Messrs. Julin & Co. The indorsement on the bill of lading before the public notary is strong evidence of that; for unless it be true and made bonâ fide, it might as well have been made for the whole of the cargo, and not merely for a part. The whole transaction was antecedent to the war, and the circumstances resemble those of the [349] "*Packet de Bilboa*" (2 C. Rob. 133), in which Lord Stowell restored the property to the claimant shipper. If the Court should not hold the evidence sufficient at present for restitution, it will not in such a case refuse to allow further proof.

The Queen's Advocate, in reply. According to the ordinary course of trade the property vests in the consignee, and if the shipper or consignor desires to retain his right to the property, he names himself in the bill of lading as the consignee, and the engagement with the master of the vessel is expressly to deliver to him or his assigns: Abbot on Shipping (9th edit. p. 267). This might have, but has not, been done in the present case. Again, the same author says: "Where goods are sent by a vendor to a vendee, the delivery of them to the carrier usually vests the property in the latter, and he is the person to sue the carrier for the loss of them" (Abbott on Shipping, 9th edit., p. 269). So in this case Mr. Younger's property was divested on delivery to the master, and could not be revested by his declaration before the consul. [Dr. Twiss. There is an essential difference between vendee and consignee.] Unless the contrary be shewn, which has not been done, the presumption is that they are the same. To

(*a*) Story's Prize Practice, by Pratt, p. 211.

support the present claim there is nothing whatever but the solitary affidavit of the claimant made after he had parted with the property.

*Dr. Lushington.* I think it is expedient in this case to address myself first to the primary evidence, viz. the papers found on board the ship, to the examination on the interrogatories, and to the facts admitted. It is admitted that this is a Russian ship, and that part of the cargo is Russian property. There is no claim for that, which will therefore, of course, be condemned. A claim, however, has been set up on behalf of a gentleman stating himself to be a British subject resident at Cadiz; but, as far as any rule of law can be applied, this gentleman holds a Spanish national character, and not that of a British subject, because it is a very just principle that in time of war a person is considered as belonging to that nation where he is resident, and where he carries on his trade.

Now, with respect to the papers found on board the ship, independently of what I may more properly call the ship's papers, there is a bill of lading for a quantity of salt and other articles, which are admitted to be Russian property and liable to condemnation. There is also another bill of lading which contains an order to receive certain specified articles from Mr. **[350]** Younger, the gentleman on whose behalf this claim is made; but it is to be remarked that this bill does not state on whose account and risk this shipment was made, but it bears date on the 24th of February, three days before the vessel sailed.

The Court has heard much as to what was the state of things as regards persons carrying on trade at the period when this transaction took place. It has been contended that at that time the Russian ambassador had quitted Great Britain, and that a declaration of war might be considered as imminent; but it did not take place until the 29th of March following. I am, however, of opinion that in such a state of things the rights of neutral merchants to carry on their trade were in no degree altered. It would be utterly impossible to fix a period at which, in consequence of the probability of hostilities, they were to be deprived of their accustomed rights; but it is perfectly true that, if in so carrying on their trade shortly antecedent to the commencement of a war, and when it is known to be imminent, they resort to any practice which is not customary in a time of peace, their conduct lays them open to the suspicion of covering an enemy's property under the guise of their neutral character. If this cargo had been shipped, to use the expression of Lord Stowell, flagrante bello, the bill of lading ought, on the face of it, to have expressed for whose account and risk the property was shipped. On this point it is silent; but I know of no law that a neutral merchant may not, if he thinks fit, ship property without saying on whose account and risk it is so shipped; it is, I believe, customary not to state on whose account and risk the property is shipped, though sometimes it is done.

It has been contended that I ought to conclude the property to be in the consignee, and that therefore there is an end to the claim of the consignor. In support of this argument *The "Packet de Bilboa"* (2 C. Rob. 133) was cited, but on referring to that case, I cannot think it furnishes sufficient authority for what I am asked to do on the present occasion, viz. merely attend to the bill of lading. The heading of that case is this: "Shipment at the risk of consignor till delivery; allowed as being made before the war. Particular mode of Spanish trade." So that, primâ facie, it does not appear to be an authority for the captors; but some remarks of Lord Stowell in the course of his judgment have been relied on, and I must say that more important words could scarcely be found in any documents. What Lord Stowell said was this, that where goods had been ordered **[351]** by the consignee and delivered to the master, they were to be considered as delivered to the consignee. To this proposition I fully accede; but I apprehend that when the goods have not been ordered a very different state of things exists; it is a most important ingredient, in considering the question of the property, that the order should have been given by the consignee. Throughout the whole of that case the remarks of Lord Stowell have reference to such a state of circumstances, and I give unqualified assent to them; but I do not consider them any authority to govern my decision in the present case, in which the circumstances are different.

I was also referred to Abbot on Shipping, and I would here observe that it is always important to bear in mind that there is a totally different question arising in the Prize Court from that which arises in a Court of Common Law. At Common Law it may be very true that, by a bill of lading, property may be so vested in the

consignee that he may be capable of selling it, though he would be responsible to the consignor. It may be true that, between the consignor and third parties, he would have a good title to sell, but that is not the question which the Court looks to here. This Court inquires in whom the property is vested, and not merely at what is called a legal title at Common Law. Lord Tenterden says: "Where goods are sent by a vendor to a vendee the delivery of them to the carrier usually vests the property in the latter" (Abbott on Shipping, 9th edit. p. 269). Usually, but not always; there are excepted cases. To this proposition I also assent; but it must be remembered that it refers to a question between a vendor and vendee, and that the question now to be considered is between a consignor and consignee, and I know of no principle laid down in the Prize Court, by which I am bound to hold that under such circumstances as the present, the consignor has divested himself of his right and title. There are innumerable cases in which a merchant may send property to some agent—some consignee, and yet retain a right and control over it. There are innumerable instances where goods are sent to a consignee without previous order or direction, and in a great many cases without previous communication with the consignee himself. I cannot think that the hands of the Court are tied in this case by anything decided by any of the authorities to which I have referred.

How stands the case now? I have the bill of lading and nothing else. Unfortunately I have not the benefit of the master's evidence; no blame attaches to any party for the absence of his examination, for it was a matter of necessity and **[352]** humanity, and it may be said to be a common loss to both parties. It might be that the master would prove it to be enemy's property, and condemnation would follow; on the other hand, he might prove it to belong to a neutral, and restitution would be decreed. It is impossible to conjecture what evidence he might have given.

How, then, is the Court to deal with the case in the unavoidable absence of the evidence of the master? I apprehend that, according to ordinary usage, that circumstance opens the door to further proof, supposing the other circumstances of the case are such as to justify such a course.

I now come to the affidavit of claim; and I will here observe that the Court, with great reluctance, looks beyond the mere affidavit of claim. I apprehend the course of the Court to be this: in the first instance the Court considers the evidence, whether found on board the ship or taken on the preparatory examination, and the fact of the claim only. In perfect strictness, the Court ought to attribute no weight to any document brought in and annexed to the affidavit of claim. Such documents are altogether exparte, and entitled to but little weight.

In the present case there is annexed to the affidavit a bill of lading of the property claimed, with an indorsement made by the British consul at Cadiz, after the ship had sailed, to the effect that the property belonged to Mr. Shaw. The Court must be destitute of common sense, if it did not see for what purpose this indorsement was made. It was clearly made for the express purpose of doing that which he had previously omitted, in order to give the appearance at least of its being the property of the claimant. It is manifest that no great reliance can be placed upon a document so framed. I may observe that, in the present state of the world, and the present state of commerce, one cannot expect to find such lengthened correspondence as in former times. Then there were a variety of documents on board ship relating both to ship and cargo, which now, from the great change of circumstances, we can hardly expect to find on board a vessel at the commencement of a war.

Looking at the whole of the case I entertain no doubt whatever that it is the duty of the Court to order further proof.

Proctors: for the captors, the Queen's Proctor; for the claimant, Rothery.

**[353]** THE "PRIMUS," Müller. Admiralty Prize Court, July 21, 1854.—A neutral's share in a ship sailing under the flag and pass of an enemy is liable to condemnation.—The cargo shipped under a charter-party restored to the neutral charterers.

[S. C. Sp. Pr. Cas. 48; 2 Eng. P. C. 290; 18 Jur. 934. Applied, *The Marie Glaeser*, [1914] P. 238. See further as to costs of owners of cargo, 2 Sp. Ecc. & Ad. 1.]

This vessel sailed under a charter-party early in the month of March last, under Russian colours, and with a Russian pass, from St. Ubes, with a cargo of salt bound to Elsinóre for orders. At Elsinore she received orders to proceed to any Russian or

Finnish port, and accordingly put into Maarsund, a port in the island of Aland, where she delivered half of the salt into small boats to be sent to Abo, then sailed on the 7th of May with the remainder of the cargo, and was captured on the following day by Her Majesty's ships "Valourous" and "Vulture."

Four claims were given in: one for 2-8ths shares of the vessel, another for 3-8ths, both on behalf of Russian subjects; a third for 3-8ths, as the property of Johan Gustaf Bergborn, of Altona, a subject of the King of Denmark; and a fourth for the cargo of salt, as the property of Messrs. Banck & Durkoop, citizens and burghers of the Free Hanseatic town of Hamburg. The first two claims having been abandoned, the argument was confined to the third and fourth.

The Queen's Advocate and Dr. Haggard, for the captors. The claim of Mr. Bergborn cannot be supported. If he be a neutral, his shares in this vessel are liable to condemnation, for the law clearly laid down by Lord Stowell in *The "Vrow Elizabeth"* (*a*) is, that neutrals cannot claim on the ground of their neutrality, a vessel sailing under the colours and pass of the enemy. It is, as far as the belligerents are concerned, enemy's property. Besides, it is very doubtful from the evidence whether this gentleman is a neutral. He has been living in Russia all his life, and only removed to Denmark in the year 1852. There is no proof of his title to these shares. The only bill of sale among the papers is for 3-4ths of the vessel, which does not correspond with the present claim, which is for 3-8ths. The bill of sale under which he claims is not forthcoming.

As to the cargo, it is claimed by a Hamburg merchant under a charter-party; but, looking at the ship's papers, there are various suspicious circumstances. In the bill of lading the **[354]** destination is, "for Baltic or orders." Nothing could be more vague. In the certificate of the Russian consul there is the same vagueness as to the destination, and it is silent as to the charter-party, and as to the interest of the claimant. The charter-party, too, speaks of the vessel being chartered for a voyage from St. Ubes to a port in the Baltic, calling at Elsinore for orders; but, in article 9, speaks of the captain's arrival at Hamburg or Altona. There is a discrepancy between this and the bill of lading, for certainly Hamburg is not in the Baltic. The conduct of the master throws further suspicion on the case; he breaks bulk, and sells a part of the cargo either without or against orders. Under these circumstances the claim cannot be sustained.

Dr. Addams and Dr. Twiss, for the claimants. The doctrine that neutrals sailing under the flag and pass of the enemy are liable to have their ships condemned, does not apply to such circumstances as the present—just in the very commencement of a war. Under such circumstances the neutral cannot be precluded from his claim. No case whatever has been produced to that effect.

As to the cargo, the case is clear: the charter-party is perfectly regular, and there is nothing in the ship's papers or the evidence to impeach it. The Court must, therefore, restore this cargo without requiring any further proof.

*Dr. Lushington.* There are two questions to be disposed of in this case; the one regarding certain claims for a share in the ship, and the other relating to the cargo. The first is a pure question of law, whether the persons who now claim and who are admitted, for the purpose of argument, to be neutral subjects, are entitled to have the ship restored. On the part of the Crown it has been contended that the flag and pass are binding upon all persons having property or shares in the ship. In support of this principle, authorities have been brought before the Court which must govern it in this and all similar cases. The only distinction attempted to be established in the present case is, that this is property in the vessel belonging to neutral subjects, which existed antecedent to the breaking out of the war. It has been argued that I ought to take notice of that distinction, but I apprehend that not only the authority

(*a*) 5 C. Rob. 4. To which case a note is appended, to the effect that in the case of *The "Vreede Sholtys,"* the Court observed, "A great distinction has been always made by the nations of Europe between ships and goods. Some countries have gone so far as to make the flag and pass of the ship conclusive on the cargo also; but this country has never carried the principles to that extent. It holds the ship bound by the character imposed upon it by the authority of the Government from which all the documents issue. But goods which have no such dependence upon the authority of the State may be differently considered."

of Lord Stowell, but every argument he used, go the whole length of saying, that whoever embarks his property in shares of a ship, is bound by the character of that ship, whatever it may happen to be. If he reap the benefit accruing during peace, he must also take the consequence of war. Unless this were so, it [355] would be very difficult to find out the time when neutrals would cease to have an interest in an enemy's ship. I am of opinion that this great principle is one that ought not to be infringed.

Another argument has been addressed to the Court, which, if valid, would place the Judge of this Court in such a predicament as no Judge was ever placed in before. It arises from the terms of Her Majesty's Order in Council (*a*) of the 29th of March, which requires me to take cognizance of, and judicially proceed upon, all and all manner of captures, seizures, prizes, and reprisals of all ships, vessels, and goods, that are or shall be taken, and to hear and determine the same; and, according to the course of Admiralty and the law of nations, to adjudge and condemn all such ships, vessels, and goods as shall belong to the Emperor of all the Russias, or his subjects, or to any others inhabiting within any of his countries, territories, or dominions. It is contended that it is not within the terms of my commission to condemn this vessel, and that I am restricted to the condemnation of ships exclusively belonging to Russians. If this were the true construction of the Order in Council it would go to shew that the Court has no power to condemn neutral vessels committing a breach of blockade, or carrying articles contraband of war, because they did not belong to subjects of the Emperor of Russia. Certainly no Judge who ever occupied this chair before was so tied, nor have I any intention to place such manacles upon my own hands. I must remind the learned counsel that the principle which governs the proceedings in this Court is to condemn as enemy's property all which is not entitled to be restored by the Law of Nations. To establish a title to restitution, it ought to be perfectly clear that the property does not belong to an enemy; and where the claimant fails to establish that, the property is condemned as enemy's property.

Without further adverting to the general law or the terms of the commission I now hold, I have no doubt that I ought to condemn the 3-8ths of this ship, which have been claimed on behalf of a neutral.

I now come to consider the claim for the cargo. The transaction was this:—This was a Russian vessel, and in the early part of the present year she was lying at Ardrossan, in Scotland. She was at that time engaged in peaceable commerce with Great Britain. A charter-party was entered into early in January by certain merchants at Hamburg, under which she was to sail to St. Ubes for a cargo of salt to be conveyed to the [356] Baltic. I must here observe that this was a transaction of trade consistent with ordinary probability, and I think it fair to presume that it was done bonâ fide, because, at the period when it took place, it was scarcely possible that there could have been a fraudulent intention. Neither do I see anything in the terms of the charter-party to excite my suspicion. Exceptions have been taken to an alleged discrepancy in the documents; but to my mind it is perfectly clear what the intention was. The vessel was chartered to carry the cargo to the Baltic to be sold for the benefit of the freighters, who were resident at Hamburg. I see no illegality in this; and it appears to me that a fair foundation is laid for this claim.

What are the other facts of the case? The master distinctly swears that the property does belong to the claimants; I have also the bill of lading; but it is said the bill of lading does not mention at whose risk the cargo is shipped; but I think that at the commencement of a war it would be too much to assume that every omission of a wise precaution is an evidence of a fraudulent intention.

As to the objection that the master has broken bulk, it appears that a part of the cargo was unladen by order of the Government of Russia, and I do not think I should be justified in visiting on the claimants any order so made.

An objection has also been raised by the counsel for the Crown, that the log of the captured vessel is not in evidence, and the Court has been asked to delay the conclusion of the cause for the purpose of having it brought in and translated. I must say that is an objection which is not open to the captors to take. All the documents should be laid before the counsel for the captors, and it would be strange indeed if I should be asked to delay the conclusion of the cause because they had not put the

(*a*) Appendix, p. 2.

necessary documents before the Court. I will not do so for two reasons; first, because the defect, if any, might have been discovered earlier; and, secondly, because there is, in fact, no such defect, as the original log is before me.

I am of opinion that this claim is established, and I decree the restitution of the cargo as claimed.

Proctors: for the captors, the Queen's Proctor; for the claimants, Rothery.

**[357]** AUSTEN *against* GRAHAM. Privy Council, Feb. 21 and 22, March 31, 1854.—The will of an eccentric person, strongly imbued with Eastern notions, and attached to Eastern customs, in which money was left for the erection in Constantinople of a cenotaph, with a light burning therein, and with the name and description of the testator engraved thereon, and in which the residue was left to the poor of Constantinople—Held, in the Prerogative Court, partly from its sounding to folly, and partly from the evidence of the drawer and one of the attesting witnesses, to be invalid; but pronounced by the Court of Appeal, reversing the judgment of the Court below, to be the act of a capable testator, and, therefore, valid.

[S. C. 8 Moore, P. C. 493; 14 E. R. 188.]

Before the Rt. Hon. the Lord Justice Knight Bruce, the Rt. Hon. Dr. Lushington, the Rt. Hon. T. Pemberton Leigh, and the Rt. Hon. Sir E. Ryan.

This was a suit instituted in the Prerogative Court of Canterbury, respecting the validity of the will of Mr. James William Graham, late of Grange Street, in the Hampstead Road, who died on the 20th of June 1849, of the age of sixty-six years, leaving personal property of the value of between 4000l. and 5000l.

The testator died a widower, without child or parent, leaving Robert Hay Graham, M.D., his natural and lawful brother and only next of kin, and the only person entitled in distribution to his personal estate and effects in case he died intestate.

On the 12th of June 1849 the deceased duly executed his last will and testament, and thereof appointed his brother, R. H. Graham, together with Henry Browne, executors, with legacies of 100l. each, and therein named Sarah Gear, spinster, Sarah Nix, widow, Henry Austen and his wife and children, Robert Graham and Margaret his wife, Henry Harris, and Alfred Curzon, legatees. The concluding clause was as follows: "After payment of these legacies I desire that my said executors shall hand over the balance remaining to the Turkish ambassador, or the person for the time being representing the same, such balance to be divided in such proportions as such ambassador or person aforesaid shall think fit amongst poor persons of the city of Constantinople; and also in the erection of a cenotaph, with a light burning therein, at Constantinople aforesaid, on which cenotaph my name and description may be engraved; but I hereby declare my executors shall not be bound to see to the execution of this my wish, any further than by handing over whatever balance may remain after such payments as aforesaid to the Turkish ambassador for the time being, or the person representing him as aforesaid. And I hereby revoke all former wills by me made; and I desire that I may be buried in St. Alban's churchyard, in the same tomb with my mother, and that the body of my son James shall be exhumed and buried with me; and it is my will that the said Sarah Gear shall follow me as chief mourner."

With regard to his brother there was the following clause: "Inasmuch as many years ago I gave up my share of the property of my late father to my dear brother, Robert Hay Graham, M.D., who has since that time been in the enjoyment **[358]** of it, I do not think it necessary to make any bequest, except as hereafter appears, seeing that he has already been largely benefited by me."

This will was duly attested by Mr. Fisher and by Mr. William Francis Ellaby, a solicitor.

The cause was originally promoted and the will propounded by Mr. Henry Browne, one of the executors, but subsequently he declared that he proceeded no further. Whereupon a decree was extracted, citing the several legatees to appear and propound the will, or shew cause why letters of administration of the goods of the deceased, as dead intestate, should not be granted to Dr. Graham as the only next of kin. Mr. Henry Austen, one of the legatees, appeared, and propounded the will.

Besides the instrument propounded there were other papers of a testamentary character before the Court. On the night of the 7th of June 1849 the deceased was taken very ill, and two medical gentlemen of the name of Browne, father and son, were sent for and remained with him during the night. At his request, and from his dictation, one of them took down the heads of, or instructions for, a will, which was signed by him, item by item, and attested. By these instructions marked C. and D., and dated June 8, 1849, legacies were left to Sarah Gear, to Mr. Henry Austen, to Mrs. Gear, the mother of Sarah Gear, to his cousin Robert Graham, to Mrs. Austen, and to Mr. Henry Harris; and Dr. Graham, the brother of the deceased, and Mr. Henry Browne, were appointed executors. The residue was not disposed of. He also dictated the several items of his property in the paper marked E.

In consequence of the informal state of these papers, Mr. Browne, two or three days afterwards, suggested to the deceased that it was desirable that his wishes should be carried out in a more formal manner, and at the request of the deceased, sent Mr. Ellaby, a solicitor, to him for that purpose. On the 11th of June Mr. Ellaby drew a will for the deceased from the instructions above mentioned, but finding the residue undisposed of, mentioned the circumstance to the deceased. The conversation which ensued, and the consequent disposition of the residue, were fully detailed in the judgment. This will, the paper marked B., was duly executed on the 11th of June, in the presence of Mr. Ellaby and Mr. Macdonald. In consequence, however, of Mr. Ellaby having some doubt of the validity of the residuary bequest, inquiries were made, and on the following day that will was cancelled by Mr. Ellaby, at the request of the deceased, and the will propounded in this cause was executed in the presence of Mr. Ellaby and Mr. Fisher. It is **[359]** almost identical with that of the 11th of June, except that in the concluding clause, after the words "on which cenotaph my name and description may be engraved," the words "and where prayers may constantly be offered for me," were omitted.

The will was propounded by Mr. Browne in a common condidit, in which the deceased was described as "formerly a major in the East India Company's service, who had passed much of his life in Eastern countries, and was for many years, and to the time of his decease, a professor of the Mahometan religion."

A special allegation was afterwards given in by Mr. Austen, pleading the history of the deceased, his proficiency in several Eastern languages, his familiarity with the mythologies and religions of several Eastern nations, and with their opinions, customs, and habits, many of which he liked and adopted, and that in consequence he was generally called and known as "Hindu Graham;" that he openly favoured and approved of the Mahometan and Hindu religions, and occasionally professed his belief therein and practised some of their forms and ceremonies; that he frequently corresponded, conversed, and associated with natives of India and other Mahometans when opportunities occurred until the period of his death; that he strongly espoused the cause of the Rajah of Sattarah, and was for several years, and up to within a fortnight of his death, employed as interpreter and translator by his representative in this country; that principally by reason of his Eastern habits and of his cohabitation with Sarah Gear he lived in seclusion, and did not associate much with his equals.

It also pleaded that the deceased was a man of sound mind, and was at all times treated as such by his brother Dr. Graham, who often remonstrated with him on his habits, opinions, and manner of life; that after the execution of the will propounded, his said brother endeavoured to persuade him to revoke or alter it, and also requested Mr. Curzon, a friend of the deceased's, to get him to make a codicil in his (Dr. Graham's) favour.

A responsive allegation, given in on bebalf of Dr. Graham, pleaded in substance, that in May 1849, the deceased became very unwell, suffered much from asthma and suffusion of water on the chest, and in consequence thereof became very weak and exhausted; that at such time, and until his death on the 22nd of June, the deceased laboured under a chronic disease of the brain; that his appearance, manners, and language were strange and wild; that he was passionate in his temper, and inadequately and irrationally excited from trivial causes; that he frequently continued talking incessantly for hours together, in a wild, rambling, and incoherent manner, and until he became quite **[360]** exhausted; that he wandered in talking from one subject to another without connection; that his attention could not be kept to one subject for any length of time, and that when asked about his health he gave absurd

and irrational answers; that he bandaged and covered his face with handkerchiefs, and objected or refused to allow them to be removed, and declared that he did so "to prevent false impressions being made upon his mind;" that he sometimes refused to take any food whatever, or to take the necessary medicines, and declared that "it was contrary to his religious principles and to the will of God to do so," and that "all depended on the will of God;" that he also declared that "God and he were one," and that "he was next to God," and was "a second prophet," and that "he knew he should not die," or expressed himself in an irrational and insane manner to that or the like effect; that during the latter part of May 1849, and thenceforth down to the day of his death, the deceased was insane and of unsound mind, and incapable of making his will. It then pleaded, that whilst of sound mind the deceased always entertained and expressed great affection for his brother, Dr. Graham, the party in the cause.

A counter-plea was given in on behalf of Mr. Austen, to the effect that the only diseases under which the deceased then suffered, and of which he died, were bronchitis and organic affection of the heart; that he never suffered under, nor exhibited any symptoms of any disease of the brain, either acute or chronic; that he exhibited no illusion whatever, &c.

The cause was delayed for some time in consequence of the illness of the late Sir Herbert Jenner Fust, but was heard by the present learned Judge of the Prerogative Court on the 16th of March, and 20th and 28th of April 1852, and on the 26th of July following he delivered his judgment, and stated that if further evidence had been before him he should have been inclined to pronounce for the papers executed on the 8th of June; but that as to the will of the 12th, his opinion was that the deceased was of unsound mind when he executed it, and therefore pronounced against it.

The present was an appeal from that judgment.

The Queen's Advocate and Dr. R. Phillimore argued on behalf of the appellant; Mr. Rolt and Dr. Twiss on behalf of the respondent.

March 31.—The judgment of their Lordships was delivered by the Rt. Hon. T. Pemberton Leigh.

This is an appeal from a sentence of the Prerogative Court of Canterbury, pronouncing against the validity of an instrument **[361]** bearing date the 12th of June 1849, purporting to be the will of James William Graham.

It was not disputed that the instrument was properly executed and attested, and that its contents were in conformity with the intentions of the deceased so far as he was legally capable of forming any; but it was contended that the deceased was of unsound mind when the alleged will was made, and of that opinion was the learned Judge in the Court below.

The judgment appears to have been founded partly upon the inference to be drawn from an extraordinary bequest in the will, by which the residue of the deceased's property is given, after erecting a cenotaph to him in Constantinople, to the poor of that city, and partly upon parol evidence of wild and extravagant language and behaviour of the deceased about the time when the instrument was signed, and particularly upon the testimony of a gentleman of the name of Ellaby, a solicitor, who prepared and attested the instrument.

The deceased died on the 22nd of June 1849; he left neither wife nor child surviving him: his sole next of kin was his brother, the respondent, Dr. Graham, who was named as one of the executors in the alleged will, a Mr. Browne being the other.

The will was propounded by Mr. Browne, but Dr. Graham disputing it, Browne, on the 18th of April 1850, withdrew from the suit, and the parties interested under the will being cited, Mr Austen, one of the legatees, on the 13th of June 1850 took up the proceedings, and filed a special allegation.

On the 13th of December, 1850, Dr. Graham put in his answers to the allegation, denying the sanity of the deceased when the will was made; and on the 4th March, 1850, he filed an allegation on his own behalf.

It is important to attend to this statement because it shews the nature of the mental disorder attributed to the deceased, and at what time and under what circumstances it is supposed to have commenced.

By the 1st article it is alleged that in the month of May, 1849, the deceased became very unwell, and that during the latter part of that month, and thenceforth

continually to the day of his death, to wit, on the 22nd day of June following, he was confined to his room, and principally to his sofa and bed. It then goes on to describe his sufferings from asthma, and suffusion of water on the chest, and alleges that in consequence he became weak and exhausted. The 2nd article alleges "that during the period in the next preceding article mentioned, the deceased was labouring under a chronic disease of the brain—that his appearance, manners, and language were strange and wild."

**[362]** The 3rd article alleges, "that in and during the latter part of the month of May 1849, and thenceforth down to the day of his death, the said deceased was, and continued to be, insane and of unsound mind, and incapable of making his will." The insanity, therefore, here attributed to the deceased is not monomania, or madness confined to a particular subject, but a general mental derangement, appearing for the first time while he was labouring under the sickness which a few weeks afterwards terminated his life.

With reference to this allegation and the evidence adduced in support of it, we must examine into the life, habits, and opinions of this gentleman previously to the time when his insanity is alleged to have commenced; for the same behaviour, language, and testamentary dispositions, which would be absurd and irrational in a native of England, living according to English habits, and entertaining or professing a belief in Christianity, might not necessarily bear the same character when proceeding from a native of India, or from one who from an early period had adopted its manners and modes of life, and who entertained or professed a belief in Mahometanism.

It appears that the deceased in very early youth, at the age of fifteen, and before, probably, religious principles had taken any deep root in his mind, was sent to India.

When there he associated principally with natives of the country; he devoted himself to the study of Oriental languages, and acquired an extraordinary proficiency in them, being familiar, as it appears, with the Hindustani, the Sanscrit, the modern Persian, and the Arabic. By these means he obtained and held for some time the appointment of interpreter to the Supreme Court of Judicature at Bombay.

In 1817, after a residence of nearly twenty years, as it appears, in India, he returned to England, when he contracted a marriage with a lady of the name of Austen, by whom he had one son, who died in his infancy; in 1821, he returned to India with his wife, who died there; and in 1832, he himself having lost a situation which he held in the East India Company, finally returned to England, and remained there till his death.

During his residence in England, between 1817 and 1821, it appears that he relinquished in favour of his brother, Dr. Graham, all the expectations which he might reasonably entertain to share in the property of his father (who was then living) at his death; and his father accordingly on the 20th of March 1821, by his will, devised the bulk of his estate to his younger son, Dr. Graham, assigning as a reason for it, "that his eldest son, Captain T. W. Graham (the deceased) was already pro-**[363]**-vided for by his own talents and industry, and had voluntarily relinquished all expectations from him."

This circumstance becomes very important in more than one view, with respect to what afterwards took place.

Of the opinions which this gentleman had formed, and the habits he contracted in India, Dr. Graham, in his answer to the 3rd article of the appellant's allegation, gives the following account:—

He says "that his brother associated much with the natives of India, and was familiar with the mythologies and religions of several Eastern nations, and with their opinions, customs, and habits, many of which he liked and adopted; and that, in consequence thereof, and also, as respondent believes, of his strange and extraordinary conduct and behaviour, he was generally called and known as 'Hindu Graham,' and also as 'Mad Graham,' and that he openly favoured and approved of the Mahometan and Hindu religions, and occasionally expressed his belief therein, and practised some of their forms and ceremonies."

Now, this is the description given of this gentleman at a time when, however eccentric his conduct might be, no question was raised as to his perfect competency to manage himself and his affairs.

He continued to entertain, or at least to profess these opinions, and to practise these customs, after his return to England in 1832; he had no settled religious belief,

affecting to take what he considered good of all religions; he studied the Koran and commentaries upon it, in Arabic, and other books in different Eastern languages, shunned the company of Europeans, and lived in a very small house in great seclusion, with a young woman of the name of Gear, who seems to have been his mistress when she was only sixteen years of age. All that we hear of his proceedings is connected with the East; the only employment of which we are told is that of translator of documents in the office of an envoy, whom the Rajah of Sattarah had sent over to this country, an employment in which he seems to have been engaged for more than two years before his death; and the only public matter in which we hear of his taking part is the advocacy of the Rajah's claims at the India House, and the promotion of the return to Parliament of a gentleman who it was understood was to advocate them in the House of Commons. In all money matters he was precise and exact, and lived with great economy on a very small income.

In the midst of these engagements, and in the month of May, 1849, he was attacked by the illness of which in the following **[364]** month he died. He consulted in the first instance Dr. Riding, a physician who attended him till the 8th of June, when, being dissatisfied with the effect of the remedies which had been prescribed for him, he determined to resort to other advice.

The complaint under which he was labouring was of a very alarming character, and was attended, as Dr. Riding describes it, with paroxysms or fits of difficulty in breathing.

On the night between the 7th and 8th of June, when he was suffering from these paroxysms, which he thought (very probably erroneously) had been aggravated by the medicines prescribed for him, he determined to send for the apothecaries who had attended him on some former occasions—two gentlemen, a father and a son, of the name of Browne, who carried on business as surgeons and apothecaries in the neighbourhood of his residence.

He was immediately visited by Mr. Browne, junior, and what then took place is stated in that gentleman's answer to the 9th interrogatory.

Upon carefully comparing this gentleman's evidence with the documents to which it refers, there is a discrepancy between the evidence and the instruments, which was not observed upon, either in the Court below, as it should seem, or before us at the Bar, but which serves to remove one difficulty which had occurred to us, in comparing the will of the 8th of June with that which is now in question. By the first, the four Great North of England Railway shares are given absolutely to Sarah Gear; by the latter they are given to her only for life; but by Mr. Browne's testimony it appears that the latter bequest was what the testator really meant, for the words attributed to him are: "I have four North of England shares, which I should wish to be held in trust; the interest to be for the benefit of Sarah Gear."

Some hours after this transaction had taken place, Dr. Riding called to see his patient, who mentioned the fact of his having made his will, and his satisfaction at having done so.

It is impossible, we think, for any will made in the extremity of bodily sickness to be more free from suspicion, or to shew more power of thought, judgment, and reflection, than that of which an account is thus given by Mr. Browne. The proposal to make it originates with the testator; the urgent reasons for making it are stated by him; he enumerates carefully and accurately the different items of which his property consists; he dictates every bequest; he assigns the reasons for those which he makes, and for omitting one which might naturally have been expected to be found there; and, considering the little affection **[365]** which subsisted between himself and his brother (a fact which is fully established by the evidence), and what he had already done for him, the will seems as reasonable in all its provisions as any which could be suggested. We collect it to have been the opinion of the learned Judge in the Court below, that if this will had been propounded, it must undoubtedly have been admitted to probate, and if nothing further had been done by the testator, we should entirely have concurred in that opinion.

It occurred, however, unfortunately, to Mr. Browne, senior, a day or two after this will had been made, that it would be better that the testator's intentions should be carried out in a more formal manner, and he made this suggestion to the testator—a tolerably strong proof that he at least had no doubt of the testator's capacity at this time. The testator adopted the suggestion, and Mr. Ellaby, a solicitor (an acquaintance of Mr. Browne's), was called in.

On the 4th of June, about three o'clock in the afternoon, this gentleman attended with Mr. Browne, senior, at the house of the deceased, and his evidence throughout is very remarkable. The two papers containing the existing will which had been written by Mr. Browne, junior, were shewn to him, and he says "that he was asked if they were a legal or valid will;" he told them, "No," adding, "that they would do for instructions, but that he had better draw up a proper will." The statement that these papers did not contain a valid will seems very extraordinary from a professional man.

He took these papers, however, as instructions, together with a copy of the list of the testator's property, which had been made out by Mr. Browne, junior, and from these materials he tells us, that before he saw the testator, he prepared the draft of a will; that he was afterwards shewn into the testator's bedroom, where the testator was lying, to whom he read over the draft. After a great deal of conversation, he says he called the testator's attention to the fact that the residue of his property was undisposed of. After some consideration the testator stated that he had been thinking of an eleemosynary bequest; and as he had been talking much about the Turks and Constantinople, and had told Mr. Ellaby that he was a Mussulman, Mr. Ellaby says he suggested that perhaps he would like to leave the residue to the poor of that city. He approved of this suggestion, and said that he would adopt it, and would have a cenotaph erected to himself at Constantinople, where a light might be kept constantly burning, and prayers be said for his soul.

A will was finally prepared containing a bequest to this [366] effect, dated and executed on the 11th June, and attested by Mr. Ellaby, who had prepared it, and by Mr. M'Donald, an assistant of Mr. Browne, senior, and who was in the house as the medical attendant of the deceased. Before Mr. Ellaby retired the testator expressed a wish to communicate to the Turkish ambassador the bequest which he had thus made, and as Mr. Ellaby suggested some doubts about the validity of the bequest of the residue, it was arranged that he should call again on the following day, and see the testator on the subject.

Mr. Ellaby's doubts at this time were confined to the validity of the bequest of the residue, and were founded on its extraordinary character; doubts as to the testator's capacity to make any bequest he appears to have entertained none.

The result of Mr. Ellaby's further consideration was, that it would be better to omit the direction in the will of the 11th, that prayers should be offered for the testator at the cenotaph, in Constantinople; and he therefore had the will re-copied, with that alteration, in order that in its altered form it might be re-executed—an alteration hardly, under any circumstances, of sufficient importance to make it worth while to have a new will, but which it is utterly impossible to suppose that Mr. Ellaby would for one moment have contemplated carrying into execution if he had found the testator on the 12th in his opinion less capable of testamentary disposition than he had been on the 11th; or if he (Ellaby) had then conceived doubts as to the testator's sanity, which certainly had not entered his mind on the preceding day.

He went again to the testator's house on the 12th, about three o'clock, with the copy of the new will, and he found there two gentlemen from the Turkish ambassador's office, who had been sent there in consequence of the testator's wish to explain what he had done by his will for the poor of Constantinople. The gentlemen, natives of Turkey, were at that time in conversation with the testator; one of them, Mr. Zohrab, has been examined as a witness; he speaks to the conversation which he had with the testator, which lasted about half an hour, and in which the testator professed himself to be a Mahomedan, and he concludes his testimony with these words:—

"The said deceased was very ill at the time, but he was perfectly sensible, and was perfectly conscious that his dissolution was approaching; his bodily strength was prostrated by illness, but he had a great deal of energy of mind about him, and he was, in my opinion, when I then saw him, of sound and perfect mind, memory, and understanding, and fully capable of making his will, and of doing any other act of business of that or the [367] like nature, requiring thought, judgment, and reflection. I am a Christian myself, and the only peculiarity I remarked in the deceased was his being, or professing to be, a firm believer in Mahometanism in a Christian country, and having been brought up a Christian. He appeared to have studied the Koran a great deal, and he quoted from commentaries upon it."

Is it possible to have more exclusive or more unexceptionable testimony than this as to the testator's state of mind, or applying more directly to the time of the execution of the will in question. Immediately after these gentlemen had left the room the new will is executed, and attested by Mr. Ellaby and Mr. Fisher, a neighbour of the testator, who was sent for to be a witness.

Mr. Fisher in his evidence says: I conversed with the testator, both before and after the signing of the said will; he did not seem to be in any pain; he was lying on the bed, quite airy and comfortable. I said to him, "I am sorry to see you so ill, Mr. Graham;" and he answered, "Oh, I am not so ill; my lungs and my constitution are good, but I am troubled with this phlegm;" and he patted his chest in a manner which I considered as indicating the soundness of his chest and lungs. The deceased and I then kept on conversing, while the other gentleman was doing some writing to the will; what that conversation was I do not remember. Then came the signing of the will, and when that was finished I wished the testator good-bye. This is what I recollect took place. The deceased was upwards of sixty years of age, I imagine. He did not seem to me to be very ill at the time—he spoke cheerfully; he was reclining on the bed when I first saw him, but he got up in his bed to sign the will. I believe the deceased to have been, on the occasion to which I have now deposed, perfectly sane, of perfectly sound mind, memory, and understanding; perfectly capable of making his will, and perfectly capable of doing any serious or rational act of that or the like nature, requiring thought, judgment, and reflection.

Surely this is evidence entitled to very great weight. This is no stranger called in to witness the mere formal act of signing a paper, but a person who had a previous acquaintance with the testator, who could judge whether there was anything unusual in his language and demeanour, who holds a conversation with him for some time, and states some of its particulars, and who speaks in the most unhesitating terms to his perfect sanity.

Zohrab's evidence extends to the moment before the will is executed. Fisher speaks to the moment of execution; the evi-[368]-dence of both is in perfect consistency, and that evidence is confirmed by the solemn attestation of Mr. Ellaby himself, who procures and witnesses the signature of the testator to the instrument, not under any urgent pressure lest the sick man should die intestate if he hesitated, but for no more serious reason than that the testator might not direct prayers to be offered up for him in Constantinople after his death. It is plain, from this gentleman's conduct, that he could not at this time have entertained any doubts as to the testator's capacity, and it is but justice to him to observe that he tells us in his evidence that he did not entertain any.

He says: "I did not at the time think him to be at all of unsound mind;" and such doubts about it as he now entertains appear from a subsequent part of his evidence to be the result of what he has since heard, and the inquiries he has made. To such doubts no attention can, of course, be paid.

What passed after the execution of the will is of much less importance. Mr. Ellaby remained a considerable time after this with the testator, and had a long conversation with him, in which he says the testator expressed a belief in astrology and necromancy, and spoke of having told fortunes, and called up and seen a spirit, and other extravagant talk of the same description; but this was after the will had been executed; the arts in which he professed to believe were such as were once believed and professed by some of the most learned men in Europe, and are still believed and professed by many of the Eastern nations to which this gentleman was so strongly attached. If more weight could be attributed to particular expressions, separate from the context of the conversation, than we think can be properly given to them, we should consider them, under the circumstances, rather as the effect of that temporary delirium which is a frequent attendant in severe illness, and great weakness and exhaustion, than of settled mental disorder. From any delusions of this kind the testator is, in our judgment, clearly shewn to have been free at the time when the will was executed.

What passed when the will of the 8th was prepared affords, as we have already observed, the most conclusive proof of the testator's capacity at that time. What passed when the will of the 11th was prepared we are unable to collect with much distinctness from Mr. Ellaby's testimony; we are unwilling to make any unnecessary remarks upon his evidence, particularly as the points to which we are about to advert

were not the subject of observation at the Bar, and possibly some explanation might be offered which does not occur to us.

[369] But it is plain that much must have passed of which no account is given by that gentleman, and he must be mistaken in some part of what he says did pass.

He states that the only instructions which he received for the new will before he prepared the draft, were the papers already written by Mr. Browne, junior: but on comparing these instruments it is clear that this cannot be so.

We have, in the Appendix, copies of these documents. The draft which he says he drew from the original instructions and read over to the testator, instead of being a draft will, is a collection of confused memoranda of different bequests jotted down upon several loose sheets of paper, which could not have been read over, in the form in which they stand, so as to be intelligible to anybody.

Again, the bequests, in the form in which they are there could not have been taken merely from the former will.

By that will, as we have already observed, the four railway shares are given absolutely to Sarah Gear; but by this draft and the subsequent will they are given in trust to her for life, free from the control of any husband whom she might marry.

We had at one time feared that in establishing the will now propounded, we should have defeated what was probably the real intention of the testator, by diminishing the benefit given to Sarah Gear; but on a closer examination of Mr. Browne's evidence, to which we have already adverted, we find that this limited bequest was what he really intended. Is it possible to have stronger evidence that this bequest was not taken from the alleged instructions, but procured from the testator himself, who had his real intentions thus carried into effect?

Again, in the draft and the will of the 11th we find these important words: "And inasmuch as many years ago I gave up my share of the property of my late father to my dear brother, Robert Hay Graham, M.D., who has since that time been in enjoyment of it, I do not therefore think it necessary to make him any bequest, except as hereinafter appears, seeing that he has already been largely benefited by me."

Now, of this fact there is not the slightest mention in the former will; nor does it appear even to have been communicated to Mr. Browne. It must therefore have been communicated by the testator to Mr. Ellaby verbally. It shews that much discussion must have taken place as to this will between him and the testator; it shews the testator's memory and judgment at the time, and yet not one syllable is found respecting it in Mr. Ellaby's deposition.

There are many other circumstances in this draft which shew [370] that the particulars were taken not merely from what are called the written instructions, but from the testator himself.

In these instructions—or, as we should rather call them, will—two notes of the East India Company are disposed of, but without mentioning either their dates or numbers. In this draft and subsequent will both the dates and numbers are mentioned. Can it be doubted that the notes themselves were referred to and produced by the testator?

The same observation may be made with respect to the Indian brooch with nine gems, and the two Korans, of which there is no mention in the former will; and the introduction of the name of Nix instead of Gear, in describing the mother of Sarah Gear. This minute examination of the evidence satisfies us that the instrument now in question contains the clear, deliberate intentions of the testator expressed on the 8th, at a time when there is no question of his sanity, corrected in one particular, in which they had been mistaken, on the 11th, and on that day with this correction, and some additions confirmed by the testator, under circumstances which shew that he perfectly understood what he was doing, and again confirmed by him with respect to the only bequest open to any remark—the bequest of the residue on the 12th, and embodied in the will of that date. The evidence should be very conclusive indeed, which is to overturn such an instrument.

It is true that there may be cases of the class so elaborately discussed in the judgment, *Waring* v. *Waring* (5 Notes of Cases, 226; 6 Notes of Cases, 388), in which a man may be clearly insane upon one particular subject, and one only—in which a permanent delusion rooted in the mind, and irremovable in sickness or in health, may create unsoundness, and yet may not shew itself in any of the ordinary transactions of life. In such cases the reasonableness of the will or the rational conduct of the individual who makes it may be no proof of sanity; but this is not a case of that

description. The insanity attributed to the testator is a general derangement of the intellect, shewing itself in wild and maniacal demeanour and incoherent and irrational language. That this gentleman's mind ultimately sank under his disorder, and was destroyed before life was extinct (as is not unfrequently the case) seems proved by the evidence of Dr. Marsden, who saw him on the 19th June, three days before he died; but the question is, what was his state on the 12th, and on this the evidentia rei is most important. It is completely confirmed by the evidence of Dr. Walshe, who saw him on the 11th, 12th, 13th, and 14th, who **[371]** examined the state of his intellectual faculties, and states that they did not appear to be affected by his bodily ailments; that, on the contrary, they appeared to be clear above the average. He says that he did not from his examination detect the slightest evidence of any organic disease of the brain, acute or chronic; that in his opinion, the deceased, when he saw him, was of sound mind, memory, and understanding, and was capable of making his will, and of doing any other serious or rational act of that nature.

In this opinion, after much and anxious consideration, we are obliged to concur. We feel the utmost respect for the opinion from which we are compelled to differ; but the subject is one upon which, more than perhaps any other, different minds are likely to come to different conclusions on the same evidence; and we most humbly advise Her Majesty to reverse the judgment complained of, and to admit the disputed instrument to probate.

Practically, perhaps, the result will not be very different from that which would have attended the establishment of the will of the 8th; for as we shall advise that the cost of all parties, both in the Court below and in this Court, should be paid out of the estate, it is to be feared that there will be very little residue left to provide for the objects either of the testator's vanity or of his benevolence.

Judgment of the Court below reversed, and the costs of all parties to be paid out of the estate.

Proctors: for Mr. Austen, Edwards; for the next of kin, Nicholl.

TOOTH *against* BARROW, FALSELY CALLING HERSELF TOOTH. Arches Court of Canterbury, May 11, 1854.—The illegitimate daughter of a woman who had lost her original name and acquired another was married by banns published in her original name, not as being the daughter of such mother, but of the mother's brother, who, at the marriage, also represented himself as her father—Held, under the circumstances, which were surrounded with fraud, that the marriage was had without due publication of banns, and, both parties being cognizant thereof, was null and void.

This was a suit of nullity of marriage by reason of undue publication of banns. It was brought by virtue of letters of request from the Commissary-general of the city and diocese of Canterbury, by Charles Tooth, of Cranbrook, in the county of Kent, and diocese of Canterbury, against Elizabeth Barrow, spinster, falsely calling herself Tooth, and pretending to be the wife of the said Charles Tooth.

The circumstances of the case were these. In the year 1847, Mr. Robert Tooth, a gentleman residing at Cranbrook, and the **[372]** father of Charles Tooth, the party proceeding, articled his son, then sixteen years of age, to Mr. J. E. Wilson, of Cranbrook, a solicitor, and arranged for his residence in Mr. Wilson's house. Mr. Wilson was clerk to the guardians of the Cranbrook Union, and about the 15th or 16th of the month of March, 1848, a young person named Elizabeth Barrow called at his office to make application for the situation of schoolmistress to the workhouse, which was then vacant. Mr. Charles Tooth saw her, appears to have been struck with her, followed her when she left the office, and made an appointment to meet her in the course of the same day. In a very short time she persuaded him to marry her, but he, well knowing he should be unable to obtain his father's consent, arranged with her to be married clandestinely, and immediately to take their departure for Australia. Accordingly, on the 8th of April following he ran away from Mr. Wilson's house, came to London, and for some days eluded the vigilance of the police, who had been employed by Mr. Wilson and Mr. Tooth to discover him. On the 14th of April he was married by banns to Elizabeth Barrow, at the parish church of St. Olave, Southwark, and on the 17th was discovered by the police, was separated from her, and conveyed to the residence of his father, after which time he never saw her again; for on the 23rd of the same month his father sent him away to Sydney.

Subsequently circumstances came to the knowledge of Mr. Tooth's family which induced them to take steps towards his obtaining a divorce a mensâ et thoro from his wife; but in the course of the inquiries that were then instituted, certain facts transpired that led to the institution of the present suit for nullity, on the ground of undue publication of banns.

Elizabeth Barrow was the illegitimate daughter of a person named Sarah Tooth (not a relation of the party proceeding), who, when her daughter was about four years old, married a man named George Barrow. After their marriage Elizabeth constantly lived with them, and seems to have been always called and known by the name of Barrow, from the time she was five or six years old; so much so that it was generally supposed in Cranbrook that she was the legitimate daughter of George and Sarah Barrow.

A libel, consisting of nineteen articles, was given in on behalf of Mr. Charles Tooth. No appearance having been given for the wife, the proceedings were carried on in pœnam.

The above facts having been stated at length in the former articles, it was pleaded in the eleventh,—

That Charles Tooth became fondly attached to Elizabeth **[373]** Barrow, who induced and prevailed upon him to agree to be married to her; whereupon it was arranged between him and the said E. B. to procure the publication of banns of marriage between himself and her in the parish church of St. Olave, in the borough of Southwark; and as the said C. T. well knew, and represented to the said E. B., that his father would not consent to their said intended marriage, it was at the same time knowingly and wilfully arranged between them, with a view to effectual concealment, that the said E. B. should, in the said banns, be described by the names of Elizabeth Tooth, and not by her names of use and reputation. That the said E. B., with the privity of the said C. T., thereupon communicated the said arrangement to Sarah Dungey, and told her that as the family of the said C. T. had friends residing in the parish of St. Olave, the names of Elizabeth Tooth would be less likely to attract their attention than the names of Elizabeth Barrow, as they would be considered those of a relation; and thereupon requested her to procure the publication of banns of marriage in the names of Charles Tooth and Elizabeth Tooth in the said church. That the said Sarah Dungey accordingly proceeded to the said church, and procured the publication of such banns; that such banns were published accordingly in the said church on Sunday, the 29th of March, and the next two following Sundays.

The twelfth article pleaded, that in pursuance of the banns of marriage, so unduly published, a pretended marriage was in fact solemnized on the 14th of April, 1848, in the said church, between the said Charles Tooth and Elizabeth Barrow, and that an entry thereof was made in the register book, under the names and by the description of Charles Tooth, bachelor, son of Robert Tooth, merchant, and Elizabeth Tooth, spinster, daughter of Edward Tooth, shoemaker, and both as of full age, and as residing at No. 168 Tooley Street, in the said parish. That on such occasion Elizabeth Barrow, in the presence and with the knowledge of the said Charles Tooth, subscribed to the said entry of marriage, the names of Elizabeth Tooth; that on such occasion the said E. Barrow was accompanied by Edward Tooth, the brother of the said Sarah Barrow; that the said Edward Tooth, by previous agreement with the said E. Barrow and the said C. Tooth, falsely represented himself as her father, and in such character subscribed his name to the said entry of marriage; that the said Edward Tooth never had a daughter; that the said marriage was solemnized without any license having been obtained, and that therefore the marriage, so knowingly and wilfully had, without due publication of banns, **[374]** was and is null and void to all intents and purposes in the law whatsoever, &c.

Upon this libel nineteen witnesses were examined (*a*), who fully proved its contents.

Dr. Twiss and Dr. Spinks appeared for Mr. Charles Tooth; but,

*Sir John Dodson* said—I do not think I need trouble you to argue the case. As the proceedings have been carried on in pœnam, I considered it my duty more narrowly to watch the case, and when I admitted the libel, I did so conditionally, and reserved my decision as to the effect of the circumstances pleaded until I saw

(*a*) The whole of the evidence in this case was taken within five days at Cranbrook and Tunbridge Wells, under a commission from the Court.

the evidence to prove them. I have now read that evidence, and I think it clearly proved that this young girl was universally known by the name of Elizabeth Barrow, and that, in fact, no one in Cranbrook knew her at all by the name of Tooth. It is also clearly proved that both the parties were cognizant of the fact that the banns were not published in the name of Barrow, but in the name of Tooth, and yet knowingly and wilfully intermarried.

When I admitted the libel I entertained some doubt whether, in the case of an illegitimate child, the publication of the banns in the name of its mother, instead of the name of notoriety and repute, would necessarily be such an undue publication as would nullify the marriage. No doubt the name which a person under such circumstances has fully acquired, is that in which the publication of banns should take place; but I apprehend there might be a case in which, without any fraudulent intent, and from an innocent misapprehension of what was correct, the name of the mother might be used instead of that subsequently acquired, and under such circumstances the Court might hesitate to pronounce the marriage a nullity.

The evidence, however, in this case, has removed any difficulty which the Court might otherwise have felt. The witness, Sarah Dungey, clearly proves that the publication of the banns in the name of Tooth was made with a fraudulent intent, and not by innocent mistake; and that it was in fact the assumption by Elizabeth Barrow of the name of Tooth, as the pretended daughter of Edward Tooth, and not the resumption of the name as the illegitimate daughter of Sarah Tooth. In her deposition on the 11th article she says: "The said Elizabeth Barrow thereupon gave me a paper with the names of the said Mr. Charles Tooth and herself written on it for the purpose of my getting such banns published, and the name of the church **[375]** where they were to be so published was written upon the said paper as well. As soon as she gave me the said paper I perceived that she had written her name upon it as Elizabeth Tooth, and I thereupon said to her, 'What! is your name Tooth? I always understood your name was Barrow.' And she replied, 'Oh, no; my proper name is Tooth.'" The witness then goes on to say, "I had always heard the said Elizabeth Barrow called and spoken of by the name of Barrow, and never by the name of Tooth; and so when she told me that her proper name was Tooth, I looked very much puzzled, and she therefore added, "Mr. Edward Tooth of Tunbridge is my father; he is in good circumstances; if we can but accomplish our marriage, he will do something for me." Such is Sarah Dungey's evidence upon the point, and there is nothing whatever to discredit her. She is, moreover, fully corroborated by the fact that on the occasion of the marriage Mr. Edward Tooth was present, and represented himself as the father of Elizabeth Barrow.

Looking, therefore, at the whole of the circumstances of this case, I am of opinion that the parties knowingly and wilfully intermarried without such a publication of the banns as the law requires, and that consequently the marriage is null and void.

Proctor for Mr. Charles Tooth, Tebbs.

THE "ARGO," Stenman. Admiralty Prize Court, August 4 and 15, 1854.—The Order in Council of 29th March, 1853, exempts from capture Russian vessels which, prior to the 29th of March, shall have sailed from any foreign port bound for any port in Her Majesty's dominions.—A vessel under a charter-party for a voyage from Havannah or Matanzas to Cork, sailed from Havannah in ballast prior to such date, took in her cargo at Matanzas, and sailed thence subsequent thereto.—Held that it was a continuous voyage; that it commenced at Havannah, where the charter-party was entered into, and that the ship must be restored under the Order in Council.

[S. C. Sp. Pr. Cas. 52; 2 Eng. Pr. Cas. 294; 18 Jur. 986.]

This vessel, belonging to a Russian owner, and sailing under Russian colours, bound on a voyage from Havannah and Matanzas to Cork for orders, was captured on the 6th of May last off Cork Harbour by Her Majesty's revenue cruizer "Eliza."

By permission of the Lords of the Admiralty, she subsequently proceeded from Cork to Liverpool, where she discharged her cargo.

A claim was made by Mr. Henry Sharpe, of 26 Broad Street Buildings, London, merchant, on behalf of Gustaf Bergborn, of Uleaborg, in the Grand Duchy of Finland, the sole owner of the vessel. This claim was ordered to be amended; and Mr. Sharpe made a further affidavit, "That he is advised and believes that the ship 'Argo,' although

the property of a Russian subject, was at the time, and under the circumstances of her seizure by Her Majesty's revenue cutter 'Eliza,' on the 5th day of May last, within the protection of Her Majesty's Order [376] in Council (issued expressly for the purpose of lessening the evils of war) of the 29th of March last, exempting from capture or detention Russian vessels under special circumstances, and as so being, ought to be restored to her Russian owner."

The special circumstances are stated in the judgment.

The Queen's Advocate and the Admiralty Advocate appeared for the captor.

Dr. Addams and Dr. Twiss, for the claimant.

Aug. 15.—*Dr. Lushington.* This is a Russian vessel, captured on May 6. She left Cuba on April 2 with a cargo belonging to Kirkland & Company, Glasgow, she reached Queenstown on May 6, and was there seized by a revenue cutter. The cargo was restored, and a claim is now made for the ship and freight. The ship, being enemy's property, must be condemned unless she is protected by some Act of the British Government; and it is alleged that she is so protected by the Order in Council of March 29.

With regard to the construction of that Order, I have already stated in a former case the principles which will guide my judgment,(*a*) and to which I intend to adhere till better informed by a higher tribunal.

I am of opinion that all relaxation of belligerent rights emanating from the Government of this country, and declared in authentic documents, should receive a liberal construction—as liberal a construction as the terms of those documents will admit of; but in so doing I must be governed and restricted by the words which are used, and abstain from giving an interpretation which cannot be borne out by the instrument to be construed.

First, then, what are the facts of the case? In the month of February this vessel was lying in the port of Havannah, whence she had come from the port of Antwerp with a cargo landed at Havannah; whilst at Havannah she took in ballast, then sailed for Matanzas, and there shipped her cargo. Matanzas was the last clearing port, and she left it on April 2. According to the evidence of the master, on the 9th interrogatory the cargo was begun to be put on board on February 28, and completed on March 30.

This vessel sailed under a charter-party bearing date February the 7th, at the Havannah, and by the charter-party it was stipulated that the vessel should load at Havannah *and or* (*b*) Matanzas; forty-two running days were to be allowed; at the end of which demurrage was to be paid. Should the vessel be [377] ordered to Matanzas, sufficient cargo or ballast should be given at Havannah to keep her safe.

I must here observe that the contract, beyond all doubt, was made at the Havannah, and, as I understand it, the charterers had the option to load at the Havannah or at Matanzas, or partly at one or partly at the other; and not only was the contract entered into at the Havannah, but began to be executed there, first, by taking in the ballast as mentioned in the charter-party, and secondly, by the running of the lay days as appears by the indorsement of the charter-party itself.

Such being the facts, I now turn to the Order in Council. It has been contended that this vessel ought to be released within the terms of the first part of the Order, which directs that Russian vessels within Her Majesty's dominions shall be allowed till May 10 for loading and departing. Now this vessel, at the date of that Order, was clearly not within Her Majesty's dominions, and in my judgment was neither within the words nor the spirit of the first part of this Order.

The next branch of this Order directs that any Russian merchant vessel, which prior to this Order shall have sailed from any foreign port, bound for any port or place in the Queen's dominions shall be permitted to enter and depart without molestation. This vessel did sail from the Havannah prior to the date of the Order; she sailed from Matanzas subsequently to the date of the Order. When she left Havannah she was in ballast, bound for Cork, according to the charter-party.

It has been contended that this Order in Council contemplated that the Russian vessel should have been laden at the date of the Order; but I find no words in the Order that would justify my putting so strict a construction upon it; neither do I

(*a*) *The "Phœnix,"* ante, p. 309.

(*b*) In the charter-party it was so expressed: "and—or Matanzas."

think that there are any words which impose the necessity of not touching at or taking a cargo at some other port than that where the voyage commenced. For instance, I apprehend that a vessel might have taken in a part of her cargo from one foreign port, having left that port prior to the 29th of March, and taken in another part of the cargo at another foreign port subsequently.

The real meaning of the Order in Council, according to my view of it, is that the vessel shall have sailed prior to the 29th of March, on a voyage to end in Great Britain, and I am clearly of opinion that this was one continuous voyage, the commencement of which was at the Havannah, and that the sailing from the Havannah prior to March the 29th is a substantial compliance with the terms of the Order. I must therefore restore this vessel.

Proctors: for the seizor, the Admiralty Proctor; for the claimant, Rothery.

**[378]** THE "BATAVIER." The High Court of Admiralty, May 20, 1854.—A steamer in charge of a duly licensed pilot proceeding up the river caused such a swell that a barge laden with coals was thereby sunk.—Held that the steamer was to blame, for she ought to have seen the swell and the barge, and to have stopped in time to avoid the accident; and that though the pilot was to blame for not checking or stopping the steamer, yet that the owners were liable, because it appeared in evidence that neither the swell nor the barge was seen from the steamer, and that therefore there was not a good look-out.

[Affirmed, 9 Moore, P. C. 286; 14 E. R. 305.]

This was a cause promoted by the owner of the barge "Ann," against the Netherlands Steam-ship Company, the owners of the steamer "Batavier," for damage caused by the sinking of the barge with a cargo of forty-nine tons of coals, on the afternoon of the 5th of October last.

The libel on behalf of the "Ann" pleaded, in effect, that after having taken her cargo on board from a collier brig moored off Wapping, she cast off from and quitted the said collier on her return to Long Ditton, in the county of Surrey, at about half-past three P.M. of the 5th of October, at which time it was nearly high water, and the tide was flowing. That the barge was navigated with her head to the tide, and was floating with the tide up the river stern foremost, in charge of Thomas Gildon and George Lee. That a few minutes after she had quitted the collier the steam-ship "Batavier" passed her at the distance of about fifty yards, proceeding with tide and steam at the rate of nine or ten miles in an hour, the pool at such time being clear. That from the great rate at which the steamer was proceeding, her paddle wheels caused the river to rise and swell so much, that in consequence thereof the water flowed entirely over and filled the barge "Ann," which thereby immediately sank and went down. That by the rules and bye-laws made by the Court of Mayor and Aldermen of the City of London, in pursuance of an Act of Parliament passed in the 7th and 8th years of the reign of his late Majesty George IV., intituled "An Act for the better Regulation of the Watermen and Lightermen on the river Thames, between Yantlet Creek and Windsor," it is provided, "That no steam-boat or vessel of 200 tons burthen or upwards, registered tonnage, shall be navigated upon the river Thames, westward of St. George's Stairs, Deptford, at a greater speed than at the rate of six miles in an hour with the tide, nor more than four miles in an hour against the tide;" that the "Batavier" is of the burthen of 227 tons registered tonnage, and her engines of 140 horse-power; that previously to and at the time of her psssing and sinking the barge "Ann," by the swell of the water caused by her paddle-wheels, she was being navigated at the rate of nine or ten miles in an hour; that the sinking of the barge "Ann," and the damage consequent thereon are imputable solely to the master and crew of the "Batavier," to wit, from the dangerous and illegal speed at which she was then being navigated, and that the same were not caused by or attributable in **[379]** any manner to any misconduct or unskilfulness on the part of those on board the barge, &c.

An allegation given in on behalf of the "Batavier," pleaded in effect, that the "Batavier," in the prosecution of her voyage from Rotterdam to London with a general cargo and passengers, arrived at Gravesend shortly after noon on 5th of October, when and where the charge and command of her was given up by the master to a pilot, duly licensed by the corporation of the Trinity House, to take charge of vessels of all burthens from Gravesend to London. That the said pilot continued in

such the charge and command of her from such time, until her arrival, at her moorings, off St. Katherine's Docks, at about half-past three P.M., and, that all his orders and directions for the navigation and management of the vessel whilst so under his charge were promptly and implicitly obeyed and carried into effect by her master and crew. That the said pilot, on the arrival of the "Batavier" off Greenwich, slackened her speed to five knots an hour, and thence gradually to three knots an hour, in order that she should not arrive at her moorings before the turn of the tide, and so to avoid the necessity of swinging her with the tide. That the "Batavier" passed the Stone Stairs, Wapping, at a speed of three knots an hour only, or thereabouts; that the pilot, master, and crew were stationed, &c.; that the "Batavier," in passing the Stone Stairs, so little disturbed the smoothness of the water that a common wherry put off from the said stairs, and pulled alongside and spoke her as she passed; that neither the barge "Ann," nor any other barge, was then being navigated with her head to the tide (or being floated with the tide) up the river stern foremost or otherwise within (at least) five times the distance of fifty yards from or at all within sight of the said steam-ship. That several steam-ships passed the Stone Stairs, going up and down the river, between the time when the "Batavier" passed those stairs, and that at which the barge "Ann" was sunk opposite thereto. That the sinking of the barge and the damage consequent thereon were occasioned either by the mismanagement of those in charge of the barge, or by the swell produced by some one or more steam-vessel or steam-vessels passing the barge at the time other than and divers from the said steam-ship "Batavier." That at the time of the sinking of the "Ann," the "Batavier" was in charge of, and was being navigated by, a duly licensed pilot, all whose orders and directions in respect whereto were duly and promptly obeyed and carried into effect; that it is to the want of care or skill of the said duly licensed pilot, that the sinking of the said barge "Ann," and the consequent damage, must be imputed, if, **[380]** notwithstanding the premises, it is held that they are imputable at all to the said steam-ship "Batavier," or to any one on board her, &c.

The Queen's Advocate and Dr. Jenner appeared for the owner of the "Ann"; Dr. Addams and Dr. Twiss for the "Batavier."

*Dr. Lushington*, addressing the Trinity Masters (Captain Weller and Captain Redman):—Gentlemen, before I proceed to address you on the particular facts of this case, I am desirous to dispose of much of the discussion which has taken place at the Bar with respect to certain particular circumstances.

In the course of the argument much has been said respecting the discrepancy between the evidence of the witnesses as to the time the steamer, the vessel proceeded against, arrived at the docks, and as to the rate of her steaming. The discrepancy as to the latter has certainly been great, indeed, for it varies from ten or eleven knots an hour to one knot and a half. With regard to the former, we have it positively averred by the mate of the steamer, that the hour of arrival at the docks was four o'clock; whereas it is sworn by the pilot who conducted her, that she was in at three o'clock. Again, we have other evidence, stating that the steamers that passed by shortly before this vessel came up were two Margate vessels; and we have another witness who swears that they were not Margate vessels, but two foreign seagoing vessels.

Now, gentlemen, all persons who are accustomed to sift the evidence of facts and circumstances know that great variations constantly take place; but that is no reason why we should impute perjury to the witnesses. The great object in view is, if possible, to come to such a decision as shall be consistent with the evidence, without attributing perjury to the one side or the other. We are not hastily to impute perjury, or to discard the testimony of witnesses, on account of the great variations in their testimony.

Again, it often happens that both affirmative and negative evidence is produced; some witnesses saying they clearly saw a certain thing, others saying they did not see it. I will here observe, that when comparing one set of witnesses with the other, the affirmative witnesses, in my opinion, are those to whom greater credit is due, than the negative witnesses, because it is quite possible the latter may not have seen it. A man not on the look-out may not see what another man who is looking out may see; and though he swears he does not see it, it does not **[381]** follow that his evidence is not correct, or that it is in opposition to one who saw the transaction with his own eyes.

Having mentioned these circumstances, we now come to the facts of the case, and

we will proceed step by step, first taking the uncontested facts, and then adverting to the contested ones.

The uncontested facts are,—that the accident occurred on the 5th of October, during daylight; that the barge had just taken on board a cargo of coals from Coal Stairs, improperly pleaded Stone Stairs (but as nothing turns upon that, we will dismiss it from our consideration in this case), and that just as the tide was within a quarter of an hour from ceasing to flow, she quitted the ship, and proceeded up the river towards the place of her destination. Now, we must recollect that the river at the particular place where the occurrence in question happened is exceedingly narrow. You will, therefore, have to consider whether or not any blame was attachable to the barge at all for casting off from the ship as she did. You have evidence to show that the barge would carry fifty-six or sixty-three tons, and she had only forty-nine on board. You will say, therefore, whether you are of opinion that it was improper for her to have quitted it, and in such a state of the tide. With regard to the fact of her having fastened to another vessel, you have heard the evidence stated by the counsel on behalf of the "Batavier," and you will have the kindness not to overlook it in the opinion which you give me. The next fact in the case, which is perfectly indisputable, is, that the barge sank. The question is, to what cause are we to attribute that sinking? I apprehend there can be no doubt whatever that we must attribute it to the swell that took place in the river at the time; whether such swell was caused by the two steamers that previously passed, or was occasioned by the "Batavier" coming up, or by the conjoint swell arising from the two steamers and the "Batavier," are matters which must be determined by yourselves in conjunction with me, on the present occasion. Another question which I shall have to put to you will be, whether you are of opinion that such swell was caused by the "Batavier" augmenting the swell previously occasioned by the two steamers. In considering that question, there are certain facts in the case which must be brought to your attention.

It is not the rate of sailing alone that causes the swell made by a steamer; it is also caused by the peculiar form of the vessel, and the manner in which she steers upon the occasion. In respect to the "Batavier," we have it in evidence, that she is a vessel of a peculiar kind; she is an old Dutch vessel. The [382] words of one witness are these: "She is a remarkable boat, built like no other; she is a straight-sheered boat; she is a Dutch vessel." It may be,—I give no opinion upon it,—that a greater swell would be occasioned by a boat of this formation than would be made by another vessel of a different construction. If that be so, we shall then have to inquire whether the "Batavier" was to blame; whether she might or ought to have seen the swell, and have stopped and missed the barge, whatever was her rate of steaming.

With regard to her rate of steaming, I agree with the observation of counsel, that we have not to determine, on the present occasion, what was the precise rate of steaming; because, assuming it to be, that the city regulations do not allow vessels to go at more than six miles an hour, that is simply a prohibition that a vessel, under any circumstances, shall not exceed that rate; but we shall have to determine whether, under the circumstances, she was going at a rate which, considering the place she was in, was compatible with safety to other vessels which she was likely to meet. The buestion is, whether she ought to have gone at any rate at all.

A steamer going at a slow rate, even at one knot and a half an hour, if she sees anything in her way which, if she prosecutes her voyage without stopping, she will be likely to destroy or to put life in danger, is bound, not merely to diminish her rate of steaming, but to stop altogether.

This being so, another question arises that is of very considerable importance, and perhaps the very greatest, in my view of the case, though it has not been argued; that is, whether there was a good look-out on board this vessel; because if there was a good look-out on board the steamer, the next question is, whether the look-out ought not to have seen the barge,—ought not to have seen the swell, and to have given notice to the pilot that there was such a swell, and such a barge, and that to proceed on the voyage without taking measures to avoid coming into contact with the barge, or to avoid increasing the swell, would be dangerous.

Now, how does the question stand with respect to the look-out? It stands in a very peculiar position on the present occasion. There are three witnesses examined from on board the "Batavier" who might have given evidence on the subject; William Smith, the master, John Webb, the waterman, and Martin Van t'Hoff, the

mate. These were all persons whose duty it was to keep or assist in keeping a good look-out; but none of them, according to their own statement, saw the barge at all. Now, if the barge was visible, why did they not see it? [383] I shall not advert to the evidence of the sea-pilot, it was not his duty to have kept a look-out, therefore there can be no omission ascribable to him whatsoever, because he had not duty to perform in the vessel. I shall also forbear from referring you to the evidence of the engineer, because he could not see; so also with respect to the evidence of Visser and Pieter Van t'Hoff; it was their duty to attend the wheel; it was not their duty to keep a look-out; but it was sworn, in the evidence of the mate, that there was a look-out, and that such look-out was kept by the boatswain and two persons in the ship. Neither of these persons nor the boatswain have been examined on the present occasion. It appears to me to be an important consideration for you to determine whether there was a proper look-out; and if a proper look-out had been kept, whether the swell, if any, must not have been perceived; and as all the facts show that the barge was there, whether notice should not have been given to the pilot, so that the pilot might adopt proper measures to avoid accident.

With regard to the pilot, it is alleged on behalf of the owners of the "Batavier," that the vessel being in his charge, it was his duty to take care that she went at a proper rate; it was his duty to navigate the vessel. It is said that his orders were strictly obeyed, consequently, that under the provisions of the Act of Parliament the owners are relieved from all responsibility. Now, I entertain no doubt that if the pilot was alone to blame, the owners are not liable, because the words of the Act of Parliament are, that they shall not be liable where there is a duly licensed pilot in charge of the vessel within his proper ground. I am also inclined to think, subject to your better judgment, that this is not a case where the master ought to interfere with the orders of the pilot. There are many cases in which I should hold that, notwithstanding the pilot has charge, it is the duty of the master to prevent accident, and not to abandon the vessel entirely to the pilot: but that there are certain duties he has to discharge (notwithstanding there is a pilot on board) for the benefit of the owners.

But with regard to the rate at which the vessel was going, it appears to me that the pilot would be the only person to blame; if, however, there was a want of good look-out, and the accident occurred in consequence of notice not being given to the pilot, it is a defect of the crew of the vessel.

Now, these are the questions I intend to put to you. The learned counsel on behalf the "Batavier" has requested me to put another question, which I will do. I am very desirous, that on all these occasions the parties may be satisfied that jus-[384]-tice has been done, and put every question counsel may suggest. The question is in these words, "The barge was with her head to the tide, stern foremost, the water smooth"—this is on the supposition that the evidence of the first witness is correct—"had the 'Batavier' passed at too great a speed under these circumstances, would the water have rolled over her head and not her stern? would the next swell have put the barge's head right under water? and would the barge have gone down head foremost?"

After consultation with the Trinity Masters,

*Dr. Lushington* said: We all concur in the opinion which I am now about to state. As to the first question, we think that the barge was sunk without any fault or defect attributable to her. We have taken into consideration what was urged by counsel as to the evidence of one of the witnesses. As to the second question, whether the swell which sank the barge was attributable to the swell of the "Batavier," or the two steamers, we think it was caused by the "Batavier." Thirdly, the "Batavier" was to blame, for she might and ought to have seen the swell and the barge, and ought to have stopped in time to avoid the accident. This was her duty, however slow her actual rate of sailing might have been. Fourthly, we think that the pilot is to blame for not checking the speed or stopping the steamer; and he is solely to blame in that respect. Fifthly, we think there was not a good look-out on board this vessel; for it appears from the evidence that neither the swell nor the barge was seen from the "Batavier." We are of opinion that if there had been a good look-out, the barge and the swell must have been seen. Then, with respect to the question proposed by Dr. Addams, which I put to the Trinity Masters in the words given to me, their answer is—a subject on which I myself can give no opinion—that the sinking of the

barge would most probably take place in the manner it is stated to have done in the evidence. The consequence is, I pronounce against the "Batavier."

Proctors: for the "Ann," Nicholl; for the "Batavier," F. Clarkson.

**[385]** WESTERTON *against* DAVIDSON. Archdeaconry Court of Middlesex, May 30, 1854.—Election of churchwarden. After a show of hands a poll was demanded, which by mutual agreement was commenced immediately. The chairman agreed with one of the candidates that the poll should close at seven o'clock, which was accordingly done, and thereby some qualified electors were prevented from recording their votes. Election void.

This was an application by Mr. Charles Westerton to be admitted one of the churchwardens of the district chapelry of St. Paul's, Brompton; and was opposed by Mr. Thomas Davidson.

An act on petition was given in by Mr. Davidson, alleging that a meeting of the resident householders of the district was held on the 18th of April last, for the purpose of electing churchwardens, over which the Hon. and Rev. R. Liddell presided; that Mr. Horne having been nominated and appointed as one of the churchwardens by the said Mr. Liddell, Mr. Westerton and Mr. Davidson were then proposed respectively by certain resident householders; that a show of hands was taken to determine which of the said gentlemen should be the second churchwarden, but that, by reason of the crowded state of the room, the chairman was unable to decide in whose favour there was a majority; that, in consequence thereof, a poll was demanded, and it was mutually agreed between the parties that it should be taken immediately, but that no hour was fixed for the closing thereof. That the chairman entered the votes, and inadvertently recorded the votes of some persons who were not qualified to vote by reason of their not at such time being resident householders; that the poll was closed at seven o'clock P.M. of the said day, at which time there were several duly qualified voters in the room, who were desirous of voting, and demanded to have their votes received, but that the chairman refused the same, and thereupon dissolved the meeting. The act then prayed that the election might be declared null and void, and a new election appointed.

The answer in behalf of Mr. Westerton alleged that the objections contained in the act on petition were vexatious and irrelevant, and all of them utterly without foundation in law; that the chairman did not himself declare the result of the show of hands, but that the vestry, without protest from him, decided that it was largely in favour of Mr. Westerton; that no poll could be demanded until the show of hands was declared; and that consequently, the poll which followed was illegal. It then prayed that Mr. Westerton might be admitted at once to the office of churchwarden.

The case was heard in the dining-room of the Hall in Doctors' Commons. At the hearing Mr. Westerton did not appear either personally or by counsel.

Dr. Deane appeared for Mr. Davidson, and said, it appeared **[386]** that three persons had voted who were not qualified. That was an irregularity. But the ground on which he relied for setting aside the election was, that the poll had been closed at seven o'clock, when there were several resident householders who demanded, but were not allowed, to exercise their right of voting. Mr. Westerton rested his case upon the alleged fact that he had been duly elected by a show of hands.

The chairman had no right to close the poll when there was any one ready to vote. This was the doctrine laid down in *Rex* v. *The Rector, Churchwardens, and Parishioners of St. Mary, Lambeth* (8 Ad. & E. 356). In the case of *Baker* v. *Wood* (1 Curt. 507), Sir Herbert Jenner Fust decided that a chairman was not bound to declare on which side a show of hands was. Lord Stowell came to the same conclusion in *Anthony* v. *Seager* (1 Hag. Cons. 10). He therefore prayed the Court to declare the election void, and to condemn Mr. Westerton in the costs of the proceedings.

*Dr. R. Phillimore*, Official of the Archdeacon.—This is a proceeding relating to the election of the churchwardens of the district chapelry of St. Paul, Wilton Place.

It appears that at the visitation of the Official of the Archdeaconry of Middlesex, Mr. J. T. Horne and Mr. Charles Westerton appeared and presented themselves as churchwardens duly elected for the present year, and prayed to be admitted accordingly; but as a caveat on behalf of a parishioner had been entered against their admission, the Court assigned the party entering the caveat to set forth his reasons for objecting to their admission in an act on petition. That has been replied to by

Mr. Westerton, who has appeared before the Court in person, but who does not appear or offer any opposition to-day.

Three questions arise upon the state of facts disclosed by the statement of the two parties. The first is a question as to the jurisdiction of the Court and its competency to entertain the objections which have been offered to the admissibility of the churchwardens. The second is a question as to the facts which are proved by the evidence and the pleadings. The third is a question of the law applicable to such facts.

First, with respect to the jurisdiction of this Court, I have to observe that both parties have appeared and joined issue before the Court, and that no mandamus has been applied for; perhaps I might further add that a careful review of all the cases on this subject and of the principle of law involved in them, leads me to doubt whether, if it had been applied for, it would [387] have been granted; for as I had occasion to observe in a former case (*Story* v. *Colk*, 6 Notes of Cases 33) of a like nature in the Court of Archdeaconry of London, whatever language some of the earlier cases at Common Law may speak, there is the high authority of Lord Stowell, in *Anthony* v. *Seager* (1 Hag. Cons. Rep. 10), in favour of the jurisdiction of the Court. Lord Stowell says, "Though it is the duty of the ordinary not to take slight objections, he is bound, I conceive, to take care that an election, in his opinion void in itself, should have no legal effect; and this is a duty which he owes to the parish and to the general law of the country." The authority of this case has been fully recognized by eminent Judges at Common Law, in the case of *Campbell* v. *Maund* (5 Ad. & E. 865); and in that of *Rex* v. *Williams* (8 B. & C. 681) in 1828, it was laid down by the Court of Queen's Bench that the commissary might inquire whether the party has been duly elected, otherwise he might be bound to admit any person who presents himself for admission, even if he knows the fact to be that such person was never elected.

I find, moreover, that the records of this Court prove that both Sir John Nicholl and others of my predecessors in this officialty, have heard and decided cases of this description.

The second question is with respect to the facts of the case. It appears that a meeting of the resident householders of the district was duly convened by a notice duly published on the 8th of April in this year; that on the 18th of the same month a meeting was held in pursuance of such notice; that the incumbent appointed Mr. Horne as his churchwarden for the ensuing year; that afterwards two resident householders proposed Mr. Westerton for re-election, he having been the churchwarden chosen by the parishioners for the past year; that two others proposed Mr. Davidson for re-election, he having been the churchwarden appointed by the incumbent for the past year; that a show of hands was taken, and (as alleged by Mr. Davidson) the incumbent, who was in the chair, was unable, owing to the crowd in the room, to determine in whose favour the majority of hands was held up; but, as alleged by Mr. Westerton, that majority was largely in his favour. This is, however, a matter of no consequence, for a poll was demanded, and of course granted, because it could not have been legally refused, and the polling was immediately proceeded with.

It is further alleged by Mr. Davidson, and it is not denied by Mr. Westerton, that an agreement was made between the in-[388]-cumbent and Mr. Westerton, during the course of the poll, that the same should be closed at seven o'clock on that evening. Now, I am clearly of opinion that no agreement between the incumbent and Mr. Westerton, even if confirmed by the majority of the electors present, could have legally so narrowed the period of voting as to exclude any qualified elector from a fair and reasonable opportunity of recording his vote. That seems to me to be the law clearly laid down by the Temporal and Ecclesiastical Courts; for instance, in the cases of *Rex* v. *The Commissary of the Bishop of Winchester* (7 East. 573), and *Baker and Downing* against *Wood* (1 Curt. 508), a case referred to by Dr. Deane.

This doctrine of the law is very important with reference to the next averment in the statements which I have to notice. It is distinctly stated by Mr. Davidson, and not denied by Mr. Westerton, that "there were several resident householders present who had not voted at the said election, but who, being properly qualified, and desirous of voting, demanded permission to record their votes, which was refused by the incumbent." This is proved by the oath of Mr. Davidson, and is not denied by Mr. Westerton, in the reply which he has given in, and to which he has affixed his signature. In that reply he traverses no material fact alleged on the other side: but

he says that "the objections are irrelevant, and void in law." It is quite competent to him to do so; the question is, whether his view of the law is correct.

To this state of things the language of the Court of Queen's Bench, in the case of *Rex* v. *Churchwardens and Parishioners of St. Mary, Lambeth* (8 Ad. & E. 356), seems directly applicable, and confirms the doctrine of the other cases which I have just mentioned. "There is no doubt," said Lord Denman, "of the law, that the ratepayers in vestry are to elect, and that if a poll be demanded, it should be kept open for all qualified persons. If any single person had been excluded in the present case, it might have been occasion for demanding that the election should be set aside; but I do not find by the affidavits that any person who would have voted was shut out; and if so, nothing has been done to render the case different from what it would have been if the election had been decided at once. If it had appeared that any one person had been excluded it might reasonably be inferred that the resolution had affected the result of the election."

Now, in the present case, it is an admitted fact that the majority of Mr. Westerton was only three—a fact which certainly **[389]** does not make the observations of Lord Denman the less applicable.

I think it unnecessary to notice any of the other averments. It is clear to me that it was not competent to the incumbent, with or without the consent of Mr. Westerton, to deprive the electors of their right to vote at the poll; and I must direct the parish to proceed to another election as soon as may be after regular notice, which was the course pursued by Lord Stowell in the case of *Anthony* v. *Seager*.

I have been pressed by the learned counsel for Mr. Davidson to condemn Mr. Westerton in the costs of this proceeding. A similar application was made to Lord Stowell in the case I have just mentioned: he refused it, and I shall certainly not accompany my sentence by any such order, because I think it clear that this misfortune, for such I must consider this kind of parochial dispute, is in a great measure owing to the incumbent's misapprehension of his duty as a chairman. He had no authority to enter into any agreement with Mr. Westerton, whereby the electors were to be deprived of their right to record their votes. He ought not to have excluded them, and his conduct in doing so has led to this suit.

Proctors for Mr. Davidson: Shepherd, Bedford, & Middleton.

G————S, FALSELY CALLED T————E, *against* T————E. Consistory Court of London, May 2, 1854.—Sentence of nullity of marriage by reason of impotence after a cohabitation of three months only.

This was a cause of nullity of marriage by reason of impotence, promoted by the wife against the husband.

They were married upon the 29th of June, 1852, and finally separated upon the 29th of September following.

The libel given in on behalf of the wife, after the usual plea of impotence and virginity, pleaded in the 11th article that shortly after the pretended marriage the husband became greatly changed in his general demeanour, and particularly in his conduct towards his wife; that he was low spirited and dejected; that when she endeavoured, as she constantly did, to cheer him up by kindness and attention, he morosely repulsed her, declared that she was loathsome to him, that he would spit upon her, and that he wished she was dead; that during the months of August and September, 1852, he constantly and habitually treated her, without any cause or provocation on her part, with great cruelty, &c.; and then in the 12th, 13th, and 14th articles pleaded various instances of cruelty.

The admission of the libel was opposed.

**[390]** The Queen's Advocate and Dr. Middleton opposed its admission.

Dr. Addams and Dr. Spinks, contrà.

*Dr. Lushington.* I shall admit this libel, but direct the whole of the articles respecting the cruelty to be struck out. I would here observe, that such a plea is not only unusual, but if the object of the plea be to account for the short period of the cohabitation, it is unnecessary as far as appears at present; for I find that the 9th article pleads an incurable defect on the part of the husband, which will be apparent on inspection, in which case there is no necessity for any cohabitation. Should it appear in evidence, which I cannot anticipate, that the defect is only latent, and not visible, it will be time enough then for the Court to consider whether it

should not, in aid of justice, allow a further plea to be given in. The libel must be reformed.

The libel was reformed; the wife and other witnesses examined upon it, and the husband's answers taken. Dr. Blundell and Dr. Waller were appointed inspectors. Their certificate as to the wife was to the effect that though there were no certain signs of virginity which could be relied on, yet that there was no evidence of perfect connection having ever taken place. As to the husband, their certificate was as follows:—"We find no anatomical malformation, but from oral information obtained, during a somewhat lengthened interview, we are decidedly of opinion that there is some physiological defect which has prevented him from completing the act of copulation. As we cannot discover any special cause to which a remedy can be applied, we fear this defect will be permanent."

When the case came on for hearing, the counsel for the husband said they should offer no opposition; upon which,

*Dr Lushington* pronounced for the nullity, and observed, that he could not think of sending the lady back to renew cohabitation, though he could have wished that it had been more distinctly stated that her health had suffered, and was liable to suffer, by such cohabitation.

Proctors: for the wife, Wills; for the husband, Middleton.

**[391]** DREWE AND OTHERS *against* LONG, and also *against* ROLF AND CAYFORD. Prerogative Court of Canterbury, May 24, June 6, 1854.—E. L. died intestate, leaving C. L., her husband, surviving. He became bankrupt (A., B., and C. being appointed his assignees), and then died without having administered to his wife. Some property subsequently accrued to his wife. J. L. then administered to his brother, C. L., and also to E. L., and having converted the property to his own use instead of paying it over to his brother's assignees, himself became insolvent. On application of the assignees, the sureties to the bond were cited to shew cause contrà, and the Court allowed the bond to be delivered out.

This was a cause or business of citing John Cayford and Mary Rolf, widow, the administratrix (with the will annexed) of George Rolf, deceased, to shew cause why the bond remaining in the registry of the Court, and entered into by the said George Rolf and John Cayford as sureties, together with John Long, the administrator, for his faithful administration of the goods of Eliza Long (wife of Charles Long) the deceased in this cause, should not be attended with and produced on the said bond being sued for at Common Law, promoted by Messrs. Drewe, Summers, and Acraman, the assignees of the said Charles Long.

Mrs. Eliza Long died on the 14th of October 1831, leaving her husband, Mr. Charles Long, surviving. He was adjudicated bankrupt at Bristol in July 1839, when Messrs. Drewe, Summers, and Acraman were chosen and appointed his assignees. He died on the 6th of January 1844, without having administered his wife's estate. In May 1850, by the death of Mrs. Eliza Long's mother, a sum of nearly 400l., to which Mrs. Long was entitled under the will of her father, accrued to her estate.

The assignees of Mr. Charles Long were desirous to take out letters of administration to his wife's estate, but were advised that, by the practice of the Court, his brother, Mr. John Long, was preferably entitled. On the 25th of January 1851, Mr. John Long took out letters of administration to the estate of Mr. Charles Long, as his brother and next of kin; and on the 13th of February 1851, letters of administration to the estate of Mrs. Eliza Long, as the brother and administrato. of Mr. Charles Long, whilst living, the lawful husband of the deceased; but the assignees of Mr. Charles Long being apprehensive that Mr. John Long would convert the property to his own use, obtained the direction of the Court that he should exhibit an inventory, and give justifying security on the leading grant to the estate.

Repeated applications were made to Mr. John Long, by the solicitor of the assignees, to make payment to them of the net assets of the deceased's estate, which he refused to do. Accordingly, the permission of the Bankruptcy Court at Bristol having been first obtained, a bill in Chancery was filed in December 1852, on behalf of the assignees against Mr. Long, which resulted in a decree against him, to pay into Court the **[392]** sum of 277l. 16s. 8d., the amount adjudged by that Court to be the

net assets of the estate of Mrs. Eliza Long, deceased, with costs [22 L. J. Ch. 717; 17 Jur. 173; 1 W. R. 318]. Mr. Long was duly served with a copy of that decree, and thereupon a notice, signed by his solicitor, was served on the solicitor of the assignees, to the effect that on the 3rd of June 1853 Mr. Long had executed an indenture of assignment of all his property for the benefit of his creditors. His assets were about 55l., and his debts and liabilities, exclusive of the assignees' costs, amounted to above 400l.

In consequence of the great insufficiency of assets, no further proceedings were taken in the Chancery suit, but proceedings were commenced in this Court against Mr. Long, calling upon him to exhibit an inventory and account, preparatory to an application to the Court to permit the administration bond to be attended with in an action at law against the sureties.

The sureties were subsequently cited to shew cause, &c.

They gave in an act on petition, stating the circumstances of the grant of the letters of administration, and alleging that John Long had appeared to the citation, and by virtue of his corporal oath brought in an inventory of the goods, chattels, and credits of the said Eliza Long which had come to his possession by virtue of the letters of administration, and an account of his administration thereof, which said inventory and account are now remaining in the registry of this Court; and further, that the said Aurelius John Drewe, George Summers, and Alfred John Acraman are respectively the trading and official assignees of, and represent the creditors of, the estate and effects of the said Charles Long," &c.

The answer on behalf of the assignees, after stating the facts of the case with respect to the administration, the Chancery suit, and Mr. John Long's insolvency, and assignment for the benefit of his creditors, alleged "that he, by his inventory and account, has admitted a balance of assets amounting to the sum of 287l. 7s. 5d. unaccounted for, and that he has devastated and unduly and illegally converted and applied the aforesaid balance of the estate and effects of the said Eliza Long, deceased, to his own use; and further, that the said A. J. Drewe, G. Summers, and A. J. Acraman are, as such assignees as aforesaid of the said Charles Long, the sole persons entitled to his estate and effects, and as such are entitled to the net assets of the estate and effects of the said Eliza Long, whilst living, the wife of the said Charles Long," &c.

On these pleadings the case came on for hearing, but by direction of the Court it was deferred, in order that the parties might write further to the act.

**[393]** Accordingly, a reply on behalf of the sureties was given in, alleging that the decree made upon the said John Long to give justifying security is contrary to the rule and practice of this Court, and that though such decree was formally made before, yet that the same was never brought to the notice of the Judge himself; and further, that the said A. J. D., G. S., and A. J. A., representing the creditors of the deceased, cannot in law assign for a breach of the bond the nonpayment of debts due to the said creditors, &c.

The rejoinder to this "denied the decree respecting the justifying security to be contrary to the practice of the Court, and alleged the same to be valid and sufficient in law; and further alleged that this Court had no power to decide what breaches may be assigned in an action at Common Law on the said bond, and that such a matter is wholly irrelevant to the application now made to the Court," &c.

Dr. Deane for the sureties. There are two questions in the case: one arising only incidentally as to the practice of the Court; the other, whether the Court has any discretion or not in giving out or withholding the bond. As to the first, it has been repeatedly decided that creditors have no right to justifying security. In *Hughes* v. *Cook* (1 Lee, 387) Sir George Lee said, that creditors were only entitled to a constat of the estate, but had no interest in the administration bond, and, therefore, had no right to litigate the quantum of security or to require the sureties to justify. So also in *Hackman* v. *Black* (2 Lee, 251).

The second point is one of law, raised in the reply and rejoinder. The sureties alleged that the assignees representing the creditors of the deceased cannot in law assign for a breach of the bond the nonpayment of debts due to the said creditors; to which the assignees rejoined, denying the power of this Court to decide what breaches may be assigned in an action at Common Law on the bond, and alleging such matter to be wholly irrelevant to the application before the Court.

It is impossible to conceive upon what the learned counsel on the other side can rely. On an application for the delivery of the bond to be sued for at Common Law, this Court always looks to the question as to whether there has been a breach of the bond, and if there has not been, refuses to allow the bond to be attended with: *Younge* v. *Skelton* (3 Hag. 780). So in a later case, more to the point, inasmuch as the application was made to the Court by a creditor who desired to put the bond in suit, and alleged that there had been a breach of the bond by **[394]** the nondelivery of an inventory: *Crowley and Sharman* v. *Chipp and Tubb* (1 Curt. 456).

In the present case there has been no breach of the bond; the inventory and account have been given in, and the cases already cited from Lee's Reports shewed that creditors are entitled to no more than a constat of the estate. To use the words of Lord Holt, in *The Archbishop of Canterbury* v. *Willis*, "The creditors of the deceased cannot in law assign, for a breach of the bond, the nonpayment of debts due to the said creditors" (1 Salk. 316). It will, perhaps, be argued, on the strength of *The Archbishop of Canterbury* v. *Robertson* (1 Cromp. & Mee. 690; 3 Tyrwh. 390), that in this case there had been a devastavit, and that on that account the creditors are entitled to sue upon the bond; but that case only goes the length of saying that under such circumstances the next of kin are entitled to recover on the bond. The doctrine that creditors cannot sue upon the bond for their debts was there recognized and affirmed: for Lord Lyndhurst cited the words of Lord Holt, "a creditor shall not take an assignment of the bond, and sue upon it, and assign for breach the nonpayment of a debt to him, or a devastavit committed by the administrator, for that would be needless and infinite;" and said, "What I understand to have been the meaning of Lord Chief Justice Holt upon this is, that a creditor shall not sue for his debt upon the bond, even if he suggests a devastavit" (1 Cromp. & Mee, 711). There is no doubt that is the correct report, through in Tyrwhitt's report of the same case the word "unless" is substituted for "even if" (Tyrwh. 416). The law upon the point is so clear that the Court will not only refuse the application, but condemn the assignees in the costs.

Dr. Spinks (the Queen's Advocate being absent) for the assignees. It seems quite immaterial, with regard to the application before the Court, whether it is, or is not, its practice to direct justifying security on the application of creditors: because, in the first place, the fact of the sureties to the bond having justified or not, cannot affect the rights of a party to sue upon it; their ability and their liability to pay are distinct questions; secondly, the question cannot arise in the present case, inasmuch as the sureties now cited did not justify when they joined in the bond now applied for, viz., the bond for the due administration of Eliza Long's estate. The sureties to the bond in the case of Charles Long's estate—the leading grant—justified. Their **[395]** being the same persons is an accident. However, the position of the learned counsel respecting the practice is not correct. The cases cited occurred nearly a century ago, since which the practice has been altered. In the case of *Catherine Noel* (4 Hagg. Ec. 207), the Court, on the application of creditors, directed her husband, resident abroad, to give justifying security. [Per Curiam. In that case the husband resided abroad, which would make a material difference.] With submission to the Court, the residence abroad could make no difference if the position were correct that creditors had no interest in the administration bond. What would it matter to them whether the sureties justified or not? Sir John Nicholl, by granting the application, seemed to shew the position to be questionable.

It has been argued, and cases have been cited to prove, that creditors cannot assign the nonpayment of their debts as a breach of the administration bond; but neither is that the question for the consideration of the Court in the present case; because, in the first place, the rights of creditors, with regard to the administration bond, cannot be made the measure or limit of the rights of assignees, who are to be regarded in a very different light; and because, in the second place, even supposing there was such an analogy between them that the rights of assignees were limited by those of creditors, they must, in order to make the cases cited applicable, be creditors of the estate for the due administration of which the bond applied for here, or sued upon elsewhere, has been given; whereas in the present case the bond applied for concerned Eliza Long's estate, of which there are no creditors, but the parties applying are the assignees of Charles Long's estate. It is necessary to bear in mind throughout the case that there are two estates, and two administration bonds.

The present is a case primæ impressionis, and no case cited has any bearing upon it. The assignees of Charles Long are not to be regarded simply as creditors, but as his representatives with respect to his estate. By stat. 1 & 2 Will. 4. c. 56, s. 25 and 6 Geo. 4, c. 16, s. 63, all the personal estate, present and future, of a bankrupt, vested in his assignees. On the death of Eliza Long, in 1831, her reversionary interest belonged to her husband, and upon his bankruptcy, in July 1839, it vested in his assignees. If the assignees might not, by the practice of the Court, administer the estate which by statute vested in them, the Court will not throw any obstacle in the way of their obtaining redress for the loss they have sustained through the mal-administration and conversion of the estate by the adminis-**[396]**-trator appointed by the Court. It is not for this Court to decide the liability of the bondsmen, but merely whether the applicants have made out such a primâ facie case as will induce the Court to allow them to try the question at law. They are advised that they have a remedy at law, and all they ask of the Court is to allow them to put the bond in suit to obtain it. If the Court refuse, the assignees are barred of their remedy, and injustice may be done; but if the Court grant the application no one can be injured, for if the bondsmen be not liable, the costs of trying the question will fall upon the assignees.

From the affidavits in this case it is clear that there has been a devastavit, and a conversion of the statute to the administrator's own use; and that, upon the administrator becoming insolvent, the property has been entirely lost to the estate. Under similar circumstances the Court allowed the bond to be attended with in *Younge* v. *Skelton* (3 Hagg. Ecc. 780); and it was held in the Court of Exchequer, that such a conversion was a breach of the condition of the bond "well and truly to administer the goods of the intestate according to law:" *Archbishop of Canterbury* v. *Robertson* (1 Cromp. & Mee. 690). In accordance with which the learned Judge of the Consistory Court allowed the bond to be attended with, though the sureties had not ever been cited to shew cause against it: *Broadwood* v. *Holland* (*c*). But it is objected that that doctrine applies only to next of kin, and not to creditors. That may or may not be so; but assignees, as regards their **[397]** title, resemble next of kin rather than creditors. Like next of kin, they have a statutory title, and their claim even takes precedence of that of next of kin.

It has been held that the executor of a bankrupt cannot take out a commission of bankrupt for a debt due to his testator, on the ground that such debt vested in the assignees: *Exparte Goodwin* (1 Atk. 100; Wms. Exors. 807, 4th edit.).

The Court, therefore, will not, in the exercise of its judicial discretion, reject the present application, and thereby prevent the assignees from seeking justice elsewhere.

---

(*c*) Ante, p. 5. The Chancery proceedings in that case resulted in a decree against the administratrix to pay to the plaintiff one third of the residue after certain deductions. Application was again made to the Consistory Court for the bond. It was supported by an affidavit to the effect, that the administratrix could not be served with the decree in Chancery, and that it was believed that she purposely kept out of the way. Upon this, Dr. Lushington (Dec. 13) directed the bond to be attended with to be put in suit against the sureties, but gave no opinion as to its forfeiture. The case was tried under the name of the *Bishop of London* v. *M'Niel;* the plaintiff obtained a verdict, and on the 13th of June last the Court of Exchequer held that he was entitled to substantial damages.

At page 107 of this volume, another case, *Lucas* v. *Johnson*, is reported, which has since been before a Court of Common Law. It seems that instead of continuing the proceedings regularly to obtain the permission of the Court for the bond to be attended with, the plaintiff by some means induced the executrix of the late Archbishop of Canterbury to allow her name to be used, and the case was tried in the Queen's Bench on the 4th of July last, *Howley* (*widow and executrix of the late Archbishop of Canterbury*) v. *Gordon.* One point of the defence was, that by the practice of the Ecclesiastical Court, an administration bond could not be enforced against a surety without the express order of the Court, which had not been made in this case; but the jury found that the practice alleged by the defendant was not proved. How they could have arrived at such a conclusion it is impossible to say; but certainly the verdict took the Profession by surprise, as it is believed the case itself forms the only exception to the practice.

Dr. Dean, in reply. This is a novel attempt to introduce into this Court the assignees of a bankrupt as the representatives of his estate in the same way as the next of kin. It may be true that in law the property of a bankrupt vests in his assignees; but it is absurd to say that they thereby have any resemblance to next of kin, for the whole proceedings of their appointment and the nature of their duties shew that they are the mere representatives of the creditors, and must be regarded in the light of creditors. It is useless to cite authorities to prove this. It is shewn through the whole mass of cases collected in Harrison's Digest under the title "Bankrupt." The Court will, therefore, not allow itself to be misled by the fallacious argument of the other side, but regard the assignees as creditors, and, in accordance with decided cases, reject this application.

The Court reserved its judgment.

June 6.—*Sir John Dodson*, after stating the circumstances of the case as set forth in the statement and in the act on petition, proceeded: That is the statement made on behalf of the sureties cited, and upon that statement they pray to be dismissed. The facts are not denied by the assignees, but they say that they, being the assignees of Charles Long, were desirous of obtaining letters of administration of his estate and of the estate of Eliza Long, his wife, to be granted to them in preference to the said John Long, they being apprehensive that John Long would not faithfully administer the same; but that they were legally advised that by the rules of this Court they were not entitled thereto without the consent of the said John Long. No doubt they were well advised upon that point; Mr. John Long was the brother and next of kin, and was therefore entitled to the grant, not only by the practice of the Court, but by the Act of Parliament.(*b*)

**[398]** They go on to say that they subsequently commenced proceedings in Chancery, and obtained a decree against Mr. John Long, by which the sum of 277l. 16s. 8d. was adjudged to be due to them, and that he then declared himself insolvent. They also say that in the inventory or declaration, made and sworn to by Mr. John Long, and exhibited by him in this cause, he has admitted that personal effects of Eliza Long to the amount of 391l. 7s. 8d. have come to his hands, and that he has only claimed, in his account, the sum of 104l. 0s. 3d., which leaves a balance of 287l. 7s. 5d. unaccounted for.

This being the case, it must, I apprehend, be considered a devastavit to that extent. Now, the assignees assert that they were the only persons entitled to receive this property, and are the only persons who have been damnified by its conversion by the administrator; they therefore claim to be allowed to put the administration bond in force against the sureties, in order, if possible, to indemnify themselves for their loss.

This was the state of the case upon the pleadings when it was first brought to the attention of the Court. In consequence, however, of an objection having been raised by Dr. Deane, which, as the Queen's Advocate urged (and the Court was of the same opinion), ought to have been stated in the pleadings, the Court directed that the case should stand over that the act might be further written to. Accordingly, on behalf of the sureties, it was stated that the decree made upon Mr. John Long to give justifying security, at the prayer of the assignees, was contrary to the rule and practice of the Court, and had never been specially brought to the notice of the Judge.

Now, I do not think it necessary for me to enter upon any discussion of this question. Whatever may have been the practice with regard to such applications on behalf of creditors, it cannot be contended that the Court has not full power to require justifying security if it should think proper. There is no doubt the statute (22 & 23 Car. 2, c. 10, s. 1) provides that "the Judge shall and may, on granting and committing of administration of the goods of persons dying intestate, take sufficient bonds with two or more able sureties, respect being had to the value of the estate." The sufficiency rests in the discretion of the Court.

This question, however, has no application to the present case, for it appears that

(*b*) If so, some alteration in the law would seem desirable; for the grant to the assignees, the parties entitled to the property, would have avoided the necessity of the suit in Chancery, the suit in the Prerogative Court, and the suit at Common Law upon the bond.

there are two bonds, and that the sureties to that respecting which this application is made were not required **[399]** to justify. They were called upon to justify upon the other bond, but not on this. The bonds are distinct, though the sureties happen to be the same. The observation of the learned counsel, therefore, falls to the ground.

The only remaining objection is, that the parties making this application being the trading and official assignees, and, as such, representing the creditors of the deceased, cannot in law assign for a breach of the bond the nonpayment of debts due to the said creditors. Numerous cases were cited by the learned counsel to establish his position; and it is from those cases that Mr. Williams has stated the law respecting the administration bond, for he says, "It is no ground of forfeiture that the administrator has not paid the debts of the intestate; and therefore a creditor cannot sue upon the bond in the name of the ordinary, and assign for breach the nonpayment of the debt to him" (Wms. Exors. 445, 4th ed.).

He states in what the various breaches of the bond consist—the nondelivery of the inventory, the nondistribution of the residue after a decree of the Ecclesiastical Judge, or a conversion of assets so that they are lost to the estate; but he expressly says that creditors cannot sue for the nonpayment of their debts; and therefore I am of opinion that they would not be entitled to come to this Court and ask for the bond to be delivered out to them.

The replication of the assignees, however, is, "that this Court has no power to decide what breaches may be assigned in an action at Common Law upon the bond, and that such a matter is wholly irrelevant to the application now made to the Court." In fact, that this Court has no power to decide whether the bond is forfeited or not, and whether it should be delivered out for the purpose of being attended with in a Court of Common Law. But I apprehend this Court has always exercised a discretion on that subject. When it clearly appears that the party making application to the Court has no right whatever to sue upon the bond, the Court has not hesitated to reject the application; but if there should be any real doubt upon the subject, and the Court should think it not improbable that the party might be entitled to recover upon the bond, this Court has allowed the bond to be delivered out, and has given no opinion of the forfeiture of the bond, but has left that point for the decision of the Courts of Common Law.

Now, I must confess that I imagined, from the latter part of the averment in the replication, that it was intended to deny the Court any discretion whatever in the matter; but I found from the argument of the learned counsel that what was meant was **[400]** this, that the averments on behalf of the sureties respecting the inability of creditors to sue upon the bond were irrelevant, because assignees were not to be considered in the light of creditors at all; that they were clothed with a peculiar character by Act of Parliament, and had peculiar rights and privileges assigned to them.

It appears to me that there is much force in this observation. They certainly are not merely creditors, for although they may be appointed for the benefit of the creditors, yet their appointment as assignees divests them of the character of mere creditors, and clothes them with a new one. By Act of Parliament the whole property of the bankrupt vested in them; they represent the estate, and are enabled to act in all respects in behalf of the estate, and they now come to this Court as the party entitled to the property of the deceased, and not as creditors of the deceased's estate. They come here with the same rights as Charles Long, and there can be no doubt that Charles Long would have been entitled to have this bond delivered out to him.

Whether the Court of Common Law will decide that this bond is forfeited, and that the sureties are liable, I cannot undertake to say; but it does not seem to me at all improbable that such may possibly be the result of a trial. If so, I consider it to be the duty of this Court to throw no impediment in the way of that trial, but to allow the bond to be attended with. I give no opinion to prejudice one side or the other as to the forfeiture; but as it is, as far as I am aware, a case primæ impressionis, I shall direct the bond to be attended with whenever it shall be required.

Proctors: for the sureties, Gregory; for the assignees, Pritchard.

EKINS *against* BROWN AND OTHERS. Prerogative Court of Canterbury, May 29, June 6, 1854.—Bona notabilia. The paraphernalia of a wife living separate from her husband, and in a different jurisdiction, do not constitute bona notabilia.—On the death of a partner, his share of the partnership property in possession, however large, does not constitute bona notabilia if the estate be insolvent, and there be no balance after the liquidation of all partnership claims.

This was originally a business of citing Elizabeth Brown, spinster, Robert Rosebrooke Morris, and Francis Eady, the executors named in the will of William Ekins, late of Brixworth, in the county of Northampton, deceased, to bring into and leave in the registry of this Court the said will, bearing date the 19th of April 1853, and to propound the same in [401] solemn form of law, or shew good and sufficient cause why the same should not be pronounced null and void, and the deceased declared to have died intestate, promoted by Anne Ekins, widow, the relict of the deceased.

The circumstances of the case were these: In the year 1840 Mrs. Ekins obtained, in the Arches Court of Canterbury, a divorce a mensâ et thoro from her husband on the ground of cruelty, and received an allotment of alimony at the rate of 20l. per annum. In consequence of an improvement in the circumstances of Mr. Ekins, a further allegation of faculties was given in, and his answers taken thereto in the month of September 1841. These proceedings, however, dropped by reason that Mr. Ekins, by an indenture made on the 13th of April 1842, secured to his wife an annuity of 150l. per annum for her life, in lieu of alimony allotted, or any claim for an increase thereof. Mr. and Mrs. Ekins, from the time of their separation, never saw nor held any communication with each other, but the annuity has been both before and since her husband's death regularly paid to Mrs. Ekins.

Mr. Ekins died on the 19th of January 1853, and in August following probate of his will was, after some opposition on the part of the next of kin, granted by the Archdeaconry Court of Northampton to the above-named executors—the whole of the deceased's personal estate being within the jurisdiction of that Court. On the 3rd of October a decree issued under seal of this Court, alleging that the deceased had whilst living, and at the time of his death, goods, chattels, or credits in divers dioceses or peculiar jurisdictions sufficient to found the jurisdiction of the Court at the suit of the said Anne Ekins, and calling upon the executors to bring in the will, &c.

The executors appeared by their proctor under protest as to the jurisdiction of the Court.

An allegation was then given in on behalf of Mrs. Ekins, pleading in substance:—

1st art. That John Ekins, the deceased, died at Brixworth, in the Archdeaconry of Northampton, possessed at the time of his death of goods in divers dioceses or peculiar jurisdictions in the province of Canterbury, by reason whereof the proving and registering any will, or granting administrations, &c., are known only and wholly to appertain to the archbishop of this province, his master, keeper, or commissary of the Prerogative Court of Canterbury, or his surrogate, and not to any inferior Judge.

2nd. That at the time of his death, his wife, who was divorced from him, was living in Omega Terrace, Regent's Park, in the [402] county of Middlesex, out of the jurisdiction of the Archdeaconry Court of Northampton, but within the jurisdiction of the Prerogative Court of Canterbury; that there were at the then lodgings of his said wife divers articles of plate and jewellery, and other goods and chattels, which were in law the property of the deceased, and that the same amounted in value to more than the sum of 5l.

3rd. That the deceased at the time of his death was a copartner with Charles Higgins in respect of a racing-mare called "Maria Monk," and entitled to one half share of the value thereof; that her value was at least 100l.; that she ran for the Waltham Abbey steeplechase on the 30th of November 1853, and is entered to run at Derby on the 8th of February next (1854); that at the time of deceased's death the said mare was located and in training at or near the residence of Mr. Higgins, at Devizes, in the county of Wilts or elsewhere, out of the jurisdiction of the Archdeaconry of Northampton, and within the jurisdiction of the Prerogative Court of Canterbury, and that since the death of the deceased a bill has been tendered for payment to the executors of the deceased, in respect of his share of expenses of the keep and training of the said mare.

4th. That divers sums of money were due to the deceased at his death from persons living and resident out of the jurisdiction of the Archdeaconry Court of Northampton, but within the jurisdiction of the Prerogative Court of Canterbury.

The answers of the executors were taken, and in their answer to the third article, which was read and thus made evidence at the hearing, they admitted the fact of the partnership, and that the mare was, at the time of the death of the deceased, of the value of 30l., but no more. They further answering said, that the deceased was partner with the said Charles Higgins in the articulate and other racing transactions; and that there was due and owing from the deceased at the time of his death on account of such partnership 260l. and upwards.

No plea was given in by the executors, but the case was argued upon the evidence produced by Mrs. Ekins, and the point of law raised in this answer.

Dr. Bayford, for the widow, cited Story's Law of Partnership (sect. 346, p. 493, edit. 1841), Ram. on Assets (pp. 783, 204), *Crosley* v. *Archdeacon of Sudbury* (3 Hagg. Ecc. 197), Roper's Husband and Wife, "Paraphernalia."

Dr. Addams (with whom was Dr. Spinks), for the executors, cited Williams' Executors (part. ii. book 3, 4th ed. pp. 663, et seq.), Black. Com. (vol. 2, book ii. ch. 29, p. 436), *Graham* v. *Lon-***[403]***-donderry* (3 Atk. 393), *Lucas* v. *Lucas* (1 Atk. 270), *West* v. *Skip* (1 Vez. 242), Gwynne on Probate Duty (p. 22).

June 6.—*Sir John Dodson.* William Ekins, late of Brixworth, in the Archdeaconry of Northampton, died at his residence within that archdeaconry, on the 19th of January, 1853. He made a will, of which, after some litigation between the executors and Mr. Ekins, the brother of the deceased, probate was granted by the Archdeaconry Court, but whether this was done in virtue of a compromise between the parties to the suit, or how otherwise, does not appear.

The case in this Court commenced by a monition at the instance of Mrs. Ekins, the widow, calling upon the executors to bring in the will, and propound the same, or to show cause why it should not be pronounced null and void—that is, that the deceased died intestate. An appearance was given for the executors, but under protest to the jurisdiction of the Court, which protest was afterwards extended; but as that has not been laid before me, I have no exact knowledge of its contents, nor is it perhaps necessary that I should have. I have not seen it at all.

An allegation was afterwards given in by the widow, upon which she herself and one other person have been examined as witnesses. The answers of the executors have also been taken, and upon this evidence the Court is called upon to decide between the parties—the sole question being whether the deceased left bona notabilia out of the Archdeaconry Court where he died, so as to found the jurisdiction of the Prerogative Court of Canterbury. The averment of the widow, as set forth in the second article of her allegation, is, that she duly obtained a sentence of separation from her husband in the Arches Court, in the month of April, 1840; that she from that time lived separate and apart from him, principally in the immediate neighbourhood of London; and that at the time of her husband's death she was residing near the Regent's Park, and not within the limits of the jurisdiction of the Archdeaconry Court of Northampton. That, being so resident, she had in her custody or possession divers articles of plate and jewellery, and other goods and chattels, which were in law the property of the said William Ekins, and that the same were of greater value than 5l., so as to constitute bona notabilia out of the jurisdiction where he died, and consequently that the jurisdiction of this Court is well founded. She further alleges in the third article **[404]** that the deceased was copartner with Charles Higgins in a racing mare, and that as such he was entitled to the half of her value, which was at least 100l., the sum ranging from 30l. to 100l., and that such mare was, at the time of the death of the deceased, located near Devizes, in Wiltshire, and out of the Archdeaconry Court of Northampton. So that there were likewise bona notabilia there according to her statement.

The evidence on the first averment, namely, as to the plate, jewellery, and other goods and chattels in the possession of the widow, is to be found in her own disposition in chief, and upon interrogatory, and in a document annexed to the deposition of Mr. Page, an appraiser, who was employed by her to set a value on these goods, or at least on some of them. The account which she gives of the goods in her possession when she was resident near Regent's Park is this: she says she had a gold guard chain and watch, that she had a very handsome writing-desk, a valuable silk shawl,

a great deal of table linen, a large damask table cloth, and also a work-box with silver fittings, and trinkets and bracelets. Then she goes on to say that she cannot undertake to state the value, but she swears that they are above the value of 5l., according to the best of her belief.

Upon the interrogatories she is asked especially as to the value of the several articles, and the account which she gives is this: she says that the gold guard chain and watch are of the value of 2l., the very handsome writing desk she reckons at 3l., then there is a valuable large shawl estimated at from 2l. to 3l., the table cloth she values at 1l., and then there is this work-box, the trinkets, bracelets, and so forth, but she gives no further special value. Mr. Page, the appraiser, brings in an inventory, annexed to his deposition, of the articles he found, and the valuation he made. He represents it thus: two yards and a half of Brussels lace, which Mrs. Ekins had also mentioned, but calls it three yards (and which seems to have composed the sleeves of her grandmother), a splendid writing desk inlaid with Buhl, a handsome large damask table cloth, work-box with silver fittings, and a gold chain; and he says that the value of the whole of these things is 11l. 15s. He is asked to specify the value of each article, but that he declines, and says it is not his custom, nor is it the custom of the trade; he adds that he does not mind giving 11l. for them himself.

If these things were all to be considered the property of the husband, then, according to the evidence of Mr. Page and Mrs. Ekins herself, there would be goods and chattels beyond the value of 5l., and consequently, there would be bona notabilia. But when I come to look at these articles, I think they are for **[405]** the most part to be considered, after the death of the husband, not as property belonging to him, but as paraphernalia belonging to the widow herself. The gold guard chain and watch seem to have been her property originally; they were both gifts to her, and these and all the other things were taken away by her when she obtained a sentence of divorce against her husband in the Arches Court, so long ago as 1840, and they have been retained in her possession from that time to the present, and were so retained with the knowledge of the husband during his lifetime. I apprehend many of the articles were so far her property that if the husband had thought proper to have taken them away from her, the Court of Arches, which granted the divorce, might have compelled him to deliver them up for her use. It is quite true that even the paraphernalia of the wife, during the lifetime of her husband, are to be considered his property; he has a right to sell them—to give them away, and the wife cannot retain them; he may pawn them, destroy them, and treat them as his own property; but upon the death of the husband, I apprehend they survive to her use, and if she is in possession of them she may retain them. It is not necessary that they should be delivered into her hands through the executors. That is the case with almost all these articles. The goods of the description of the gold guard chain were treated as ornaments belonging to herself; there might have been some doubt as to the writing desk, but that was for her use, and she was allowed to retain it. If it does not come strictly within paraphernalia, it would not amount to the value of 5l., because, though she does state in her deposition in chief that that alone is worth 5l., yet, when she is called upon in answer to an interrogatory to specify the value, she calls it 3l. only. Then as to the other goods, the shawl and Brussels lace, they were clearly a part of her property, and come strictly within what is called paraphernalia. According to all the books—indeed, many of the old books carry the matter much further—dress and trinkets worn during the lifetime of the husband not only belong to the wife, but, according to some of the old cases, she has a right to take them away for her own use.

The appraiser, then, having declined to estimate the value of these things so that I can consider whether any one of them amounts to the value of 5l., I must take it that they do not. The wife is bound to produce proof that they were of more than 5l. value, that she had goods in her possession belonging to her husband worth more than that amount, and that she has not done.

It has been said even with regard to paraphernalia, they are to **[406]** be considered as the property of the husband, because the executors would have a right to take them in case there were not sufficient assets otherwise belonging to the husband for the payment of his debts. It is said this is the true test whereby to ascertain in whom the property was vested. It has been argued that it was not the husband's, because the executors might have claimed these articles for the payment of his debts. But

according to the cases, it is laid down that the wife has a right to detain the things in her possession; she is not called upon to make application to the executors, or to obtain possession of them through them; all that is said with regard to executors is this, they have a right to claim them in case there is not sufficient to pay the debts.

There is a passage in Williams on Executors (2 Wms. Execrs. 643, 4th ed.) which gives the sum and substance of it, where, treating of paraphernalia, he says, "Another instance where the wife may acquire property in her husband's personal chattels as by gift from him so as to exclude his executors and administrators, is to be found in her paraphernalia." In a preceding sentence he has been stating what property the wife may have separate and independent of her husband, at the death of that husband, and now he adds to this the paraphernalia, which, he says, the executors and administrators of the husband are excluded from. They therefore can have no right to take them in the first instance, but if the wife is in possession of them she may retain them to their exclusion.

I am, therefore, of opinion that the alleged bona notabilia in possession of the wife at her residence near the Regent's Park is not made out in proof before the Court. She does not establish bona notabilia there; indeed, it seems somewhat extraordinary on the part of this lady that she swears she believes they were goods and chattels belonging to her husband, for she took them away from him, and had the use of them from 1840 down to his death; and, on that event taking place, how does she act with respect to them? Why she retains some of them. What does she do with them? Give them to the executors? No; she gives them to her friends; she has treated them as her own. Her conduct is perfectly consistent with what I apprehend to be the law. She was justified in treating them as paraphernalia belonging to herself. There may have been an article of small value which does not come within that description, but the main body do come under it, and I think that upon the death of the husband they were the separate property of the **[407]** wife, and she seems so to have considered them. I think, therefore, that that part of the case is not proved, namely, that the husband had goods of the value of 5l. and upwards.

The other branch which is relied upon as constituting bona notabilia out of the archdeaconry, is a moiety of the value of this racing mare, which was held in copartnership with Mr. Higgins, and which at the time of his death was at or near to Devizes, in the county of Wiltshire. Upon this part of the case, which is set forth in the third article of the wife's allegation, no witnesses have been examined, but the answers of the executors have been read and commented upon. In these answers the executors say they admit the facts to be as pleaded, save as to the value of the mare, which they believe was not more than 30l. I think I must take it that the value of the mare is 30l., and if a moiety of the value was the property of the husband, there would be bona notabilia beyond the value of 5l., because 15l. belongs to him in that mare. But then they go on to say, "That the deceased was partner with Mr. Higgins in the mare; and in the articulate and other racing transactions there was due and owing from the deceased at the time of his death on account of such partnership 260l. and upwards." Now upon this state of facts it has been contended on the part of the widow that the husband had goods of more than the value of 5l. out of the Archdeaconry of Northampton, namely, in Wiltshire, consequently that there was this bona notabilia. On the other hand, it is contended that there were no goods and chattels belonging to the deceased in the county of Wiltshire, under the circumstances stated, and the question for the consideration of the Court is, whether there were or were not.

That must depend very much upon this: What was the property belonging to the deceased in the county of Wiltshire, and how is it to be estimated? When persons are in partnership in trade or otherwise, they are considered as joint tenants; and the general rule where there are joint tenants is, that the property which they hold as joint tenants goes to the survivor; but in the case of trade or partnership in this country it is not so. Upon death of a joint tenant the partnership dissolves, but a portion of it belongs to the survivor, and the other portion to the executors of the deceased, according to their respective shares; but then the matter for consideration is, how is the value of the property to be collected? On the one side it is contended that the mare being in possession, and being of the value of 30l. there was bona notabilia. On the other side, it is said that the executor of a deceased person is not entitled to any share in the property until the goods have been collected, until the

part-[408]-nership accounts are made up; and then he is entitled to the balance, and the balance only. Upon this it will depend whether there was bona notabilia or not, because though it is admitted that the mare was of the value of 30l., yet it was a partnership concern; and if from the partnership there were 260l. due and owing, according to that mode of settlement there would be nothing at all for the executors to take.

It has been admitted by the counsel for the widow in this case, that whatever was due to the partnership, the surviving partners are to get in and collect, and to divide it when they have so done. But it is said there is a great difference as to what is in possession; that what is in possession belonging to the deceased, immediately becomes the property of his representatives, namely, of his executors. In this case, and in support of this, an authority has been relied upon, namely, Mr. Justice Story, in his Commentary upon the Law of Partnership. This certainly is a book entitled to very great weight; no doubt he is a very eminent writer, and is esteemed universally, both here and in America; indeed, we may say he has a world-wide reputation; there is no modern writer whose legal works are better worth attending to than those of Mr. Justice Story. It is true, as stated by Dr. Addams, that he is not a writer on the Law of England, but he is very conversant with the laws of this country and of America, where he has occupied the highest judicial station, and he is entitled to the greatest respect. It is quite true, as stated by the learned counsel, that we have text writers of our own, and supposing that there were decided cases in our Courts of a contrary tenor, the Court must pay attention to the former, and not to the views taken on such matters by Mr. Justice Story. But when I look into Mr. Justice Story's book I do not find that the doctrine he propounds differs materially from that laid down in our own books. The passage which has been relied upon is as follows: "One of the consequences of a dissolution of partnership by death (under the qualifications above suggested), is that the personal representatives of the deceased become tenants in common with the survivors of all the partnership property and effects in possession."(*a*) It is generally admitted, while living they are joint tenants, but upon death there is a difference; they become, as it were, tenants in common, not in possession. It was upon that principle the learned counsel founded his argument that this mare was in possession, that she was of the value of more than 5l., consequently the executor was entitled to that. Mr. Justice Story goes on to say: "We say the partnership property and effects in possession, for [409] there is at the Common Law a material distinction between such property and effects in possession and choses in action, debts, and other rights of action belonging to the partnership." That is exactly the position which the learned counsel took here. "The latter, at law, belong to the surviving partners, and they possess the sole and exclusive right and remedy to reduce them into possession; although, when so recovered, the survivors are regarded as trustees thereof for the benefit of the partnership, and the representatives of the deceased partner possess in equity the same right of sharing and participating in them which the deceased partner would have possessed if he had been living. However, the representatives of the deceased partner cannot, strictly speaking, be deemed partners with the survivors." The partnership does not go on; the business carried on afterwards belongs to the survivors. "But still, a community of interest subsists between them which is necessary for the winding up of the affairs of the partnership, and requires that what is partnership property before, shall continue so, for the purpose of being applied to the discharge of all the proper debts and obligations thereof; and for a final distribution of the surplus, according to the rights and shares of the partners." So that the things in possession are to be applied for winding up the affairs, and at the end, when they are thus wound up, they are to take according to their respective shares. Mr. Justice Story, in the first paragraph, must have meant goods reduced into the possession, after all the debts have been paid, after there has been a liquidation, and in ascertaining of the balance; because it is clear, from the concluding passage, that after these matters are arranged, the shares are to be divided. Now, if this mare was of the value of 30l., and the debts 260l., there would be nothing to be divided on each share, and, consequently, no bona notabilia.

But this matter has been made very clear by some decisions in English Courts. In the case of *West* v. *Skip* (1 Ves. 242), the Lord Chancellor thus expresses himself:

(*a*) Story's Comment. on Partnership, ch. 14, § 346.

"The partners themselves are clearly joint tenants in the stock and all effects;"—that is, the partners while living—"not only that particular stock in being at the time of entering into the partnership, but to continue so throughout, whatever changes might be made in the course of trade. Otherwise, it is impossible to carry it on. And being seised per my et per tout, when an account is to be taken, each is entitled to be allowed against the other everything he has advanced or brought in as a partnership transaction, and to charge the other in the account with what that other has not brought in, or has taken out more than he ought; and nothing is **[410]** to be considered as his share, but his proportion of the residue on balance of the account—that is, between living partners; because nothing is to be considered as his share, but his proportion of the residue on balance of the account. That this is so at law appears from two cases, 2 Lord Raym. 871, and *Heydon* v. *Heydon*, 1 Salk. 392, where it was held that judgment and execution against one partner for his separate debt does not put the other in a worse condition; for he must have all the allowances made him before the judgment creditor can have the share of the other applied to him." Then he goes on thus: "So if one partner had died, the debts and effects survived; but yet the survivor is considered in this Court barely as a trustee for the representatives of the deceased; upon which footing the account would be taken, and nothing considered as the share of the survivor till afterwards." Why then, till after the accounts were settled by the surviving partner the shares are not to be divided, and nothing is to be considered as the share of one or the other except the balance of the account. Therefore, it is really the balance of the account at which we are to look. He then goes on to describe joint tenancy, and tenancy in common.

But the matter does not rest there, because it is referred to in the case of *Taylor* v. *Fields* (4 Ves. 396); that puts the matter beyond all doubt. The Court took time to consider its judgment in that case, and then the Lord Chief Baron delivered their opinion: "The right of the separate creditor under the execution depends upon the interest each partner has in the joint property. With respect to that, we are of opinion that the corpus of the partnership effects is joint property, and neither party separately has anything in that corpus; but the interest of each is only his share of what remains, after the partnership accounts are taken." That relates to the partners themselves, not to the representatives of one; but he goes on further and says: "What is the manner in which the debtor himself had it? He had that which was undivided, and could only be divided by first delivering the effects from the partnership debts." Therefore, that is still to the same effect as between these parties. Again he says: "The mode makes no difference; but in all those cases the application takes place of the rule that the party coming in the right of the partner, comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be available, or be delivered, but under an account between the partnership and the partner; and it is an item in the account, that enough must be left for the partnership debts." That is an item in the account—that is, between **[411]** living partners. He then says: "A great deal has been said of the inconvenience. What is the inconvenience? It is true, the individual trusted to the partnership fund in his idea at the time he was lending the money; not that I believe that is very common. But it may be dangerous in a thousand instances to have anything to do with a trader; as, for instance, to purchase an estate; for an act of bankruptcy may have been committed five years before, which will reach the estate. But look to the danger on the other side: one partner giving a bond, and the creditors of the partnership looking to the stock itself. It is said, that in this case the joint creditors had done nothing; and this meritorious creditor has a right to be preferred on account of his early diligence. But what is that to which he is entitled? The estate of a partner is debtor to him. The question therefore recurs to the consideration what it was that partner had, for the creditor cannot be entitled to any more;" nor can the executor, I apprehend, be entitled to any more. Then further on he says: "It therefore argues nothing to say he has the merit of diligence, till we see upon what that merit can attach. If the partner himself therefore had nothing more than an interest in the surplus beyond the debts of the partnership upon a division, if it turns out that at Common Law that is the whole that can be delivered to, or taken by, the assignee of a partner, the executor, the sheriff, or the assignee under a commission of bankruptcy,"—so he puts these as alike—nothing more can be taken by a partner, or by an assignee, or by an executor. That is the very point: the accounts must be balanced, you are to take what there is already by

possession, and then look after the rest; but there must be an account taken, and it is the balance and the balance only to which the party is entitled. If in this case he is entitled to the balance only he is just entitled to nothing. "All that is delivered to the creditor taking out the execution is the interest of the partner in the condition and state he had it; and nothing was due to this partner separately, the partnership being insolvent." Without referring to other cases, I may say there are one or two in Swanston which entirely support the same view.(*a*)

Just to see how this has been in practice, I may refer to another book. I am not citing it as a leading authority, but it was cited by one of the learned counsel—the book of Mr. Gwynne, who was the solicitor to the Stamp Office. I do not take the law as laid down by him, but allude to it to shew what **[412]** has been the practice, and, therefore, what the law officers of the Crown must have considered the law. If they can get anything they always do. Mr. Gwynne lays it down (Gwynne on Probate Duty, p. 22): "If the deceased should have been engaged at the time of his decease in any partnership, trade, or business, it will not be his share of the gross partnership property, but his portion of the net balance, as it would appear on the balance sheet, that will be chargeable with probate or administration duty." So that the executor of Mr. Ekins in this case will not be chargeable with probate duty or legacy duty with regard to this mare or the moiety of the mare. All he could be charged with is the balance after the accounts are made out. That shews that the practice is in conformity with what I have already stated. I am, therefore, of opinion that the property which the executor takes in this case in the county of Wilts really amounts to nothing at all. It is of no value, and consequently cannot be considered bona notabilia.

Upon the whole of the case, whether with reference to the paraphernalia or with reference to the partnership with Mr. Higgins in this mare, I am of opinion that there is no proof before me that the deceased left bona notabilia out of the Archdeaconry of Northamptonshire, in which he died. Therefore I must pronounce that there is no bona notabilia, and reject the prayer made on behalf of Mrs. Ekins.

Mr. Crosse. I pray that my party, the executor, appearing under protest, may be dismissed with costs.

The Court. Yes; I must give the costs.

Proctors: for the widow, Bayford; for the executor, Crosse.

KELLY *against* KELLY. Commissary Court of Surrey, June 7, 1854.—Alimony.

The husband's income must be estimated at the amount of the previous year, and not by an average of years.

This was a suit for divorce, on the ground of cruelty, promoted by the wife against the husband.

Objection was taken to the husband's answers to the allegation of faculties, that he was bound to state his actual income during the preceding year, whereas he had given an arbitrary average with regard to one source of his income of three years, of another source of four years.

The Court (Dr. Haggard) held that the answers must be amended; that the proper mode of estimating the husband's income with reference to the allotment of alimony was to give the wife the benefit of the income of the previous year, inasmuch **[413]** as the husband would always, at any future period, have the power of applying to the Court for a reduction of the amount of alimony allotted if he could prove the amount of his income diminished.

Proctors: for the wife, Nicholl; for the husband, Crosse.

IN THE GOODS OF JOHN GOSS, Deceased. Consistory Court of London, July 5, 1854.—The deceased left a will dated in 1841. After his death a paper, purporting to be a will of subsequent date, but proved by various circumstances to be a forgery, was clandestinely sent to the executor. The circumstances having been stated, and the Court asked to grant probate of the false document, not only rejected the motion, but under the circumstances decreed probate of the genuine will of 1841.

---

(*a*) See *Jackson* v. *Sedgwick*, 1 Swanst. 460; *Crawshay* v. *Maule*, ibid. 507; *Skipp* v. *Harwood*, 2 ibid. 586; *Alder* v. *Fouracre*, 3 ibid. 489.

The deceased, who was master and part owner of the ship "Candahar," made his will on the 13th of December 1841, and therein named his wife, Mary Ann Goss, universal legatee, and appointed her and A. W. Whitrong his executors. This will he deposited with Mr. Whitrong, with whom it remained under the deceased's death.

He afterwards made several voyages in his said ship, on one of which he left England in the year 1850 for Adelaide, whence he sailed on the homeward voyage on the 29th of December in that year, having on the previous day written an affectionate letter to his wife. On the 28th of March he arrived at St. Helena, without having touched at any place during the voyage, and on the same day he again wrote a letter to his wife. The ship arrived at the port of London on the 17th of May following.

Before deceased proceeded on another voyage, Mr. Whitrong proposed to return the will to him, stating that he desired to be relieved of the executorship, as he intended to leave London and reside in the country. Upon another occasion he took the will to the deceased on board ship, but the deceased refused to receive it, and said that if that will were destroyed he should never make another. On this occasion, as well as on others of his being in England, the deceased spoke to his wife, and also to his intimate friend, Mr. Parry, about his will in the possession of Mr. Whitrong, and of his having thereby left his property to his wife, whom he always treated with great affection. Mr. Whitrong and Mr. Parry both express their conviction that the deceased would not have deceived them, but would have mentioned the fact if he had made another will.

The deceased again sailed in the month of August 1851, and died at sea on the homeward voyage on the 13th of July 1853. During the latter voyage, he several times spoke of his will to John Boyle, then mate, now master, of the "Candahar"; said he had left his property to his wife, and advised him to make his will.

On the 19th of September the intelligence of his death was **[414]** received in London. by Mr. Ridley, the other part owner of the ship; and a few days afterwards a paper writing, folded as a letter, and addressed, "Mr. A. Whitrong, care of Mr. Parry, Ludgate Hill, London," was received by Mr. Parry by the public post, bearing the Stepney postmark. On the following day Mr. Parry met Mr. Whitrong at the house of Mrs. Goss, and gave him the paper, which he opened in his presence, and found that it purported to be a will of the deceased, bearing date the 14th of February 1851.

This paper purports to bequeath all the property between the deceased's wife, his mother, brother, and sisters equally, and to appoint the wife and Mr. Anthony William Whitrong (therein called Antony only) executors; and it purports to be attested by "H. F. Archer" and "Philip Boothby."

At the period when this paper bears date, the deceased was at sea on board his ship, on the homeward voyage, and his vessel had not touched at any place between Adelaide and St. Helena. On examination of the ship's log-book and papers, and also by a list of the ship's crew and passengers, delivered to Mr. Ridley at the conclusion of the voyage, it appears that there was no person on board the ship named either "Archer" or "Boothby." This is proved by the affidavit of the mate and John Goss, a nephew of the deceased, and an apprentice on board the ship, who depose from their own knowledge that there were no such persons on board.

It appears that on the completion of a voyage, when his ship was lying in the docks, the deceased would often sign his name to blank sheets of paper, which he left with the mate or other person, for the purpose of being filled up with passes for goods or articles to be landed in his absence, so that it is not improbable that the signature to the paper writing forwarded to Mr. Ridley may have been the genuine signature of the deceased, and the paper may have been subsequently filled up by some one.

The mother of the deceased is since dead, a widow and intestate, and her eight children, the brothers and sisters of the deceased, are the only persons interested under the paper bearing date in February 1851. Of these, six have executed a proxy, declaring they will not propound the paper, and that they consent to probate of the will of 1841 being granted to the executors. The remaining two are absent from England, one having settled in Australia, the other being a seaman, sailed from Liverpool on the 25th of April last, bound for Malta and elsewhere, and has not since been heard of.

These facts were proved by the affidavits of Mrs. Goss, Mr. **[415]** Parry, Mr. Whitrong, Mr. Ridley, Mr. Boyle, and Mr. John Goss.

Dr. Addams, having fully stated the circumstances of the case, moved the Court to decree probate of the will of the deceased bearing date the 14th of February 1851, to be granted to Mary Goss, widow, the relict, and Anthony William (in the will written Antony) Whitrong, the executors named therein.

*Dr. Lushington.* From the statement of the case, I apprehend that you consider this paper to be no will, and that you want probate of the will of 1841, but I cannot understand why you pray probate of this paper of 1851.

Dr. Addams. Because upon the Court rejecting this motion we can at once take out probate in common form of the will of 1841.

The Court. I do not see that my rejection of this motion would enable you to do that. I should presume that the Registrar would certainly refuse to grant you probate of that, knowing that there exists a later paper, which purports to be a duly signed and duly attested will of the deceased. The rejection of this motion does not pronounce that paper to be of no effect.

Dr. Addams. It is the ordinary practice in such cases to move for probate of the invalid paper, and on the rejection of the motion to take probate of a former will, or take out letters of administration as a matter of course.

The Court. Well, I should certainly think the Registrar would refuse to grant it you without the decree of the Court.

Dr. Addams. I don't know what the Registrar of the Consistory Court would do, but certainly the Registrars of the Prerogative Court would not hesitate to grant it. It is every day's practice. When a will is not executed according to the Wills Act, and there is evidence to that effect, the Court is nevertheless moved to grant probate of it; and on the rejection of the motion, the parties are allowed to proceed as if there were no such parties in existence.

The Court. That is different. In those cases there is direct evidence of a nullity; in this the nullity is only inferred from a number of suspicious circumstances. By the rejection of the motion, the Court does not pronounce the paper a nullity, but only declines, under the circumstances, to grant probate of it. The parties interested might propound it. In my opinion, all the circumstances should have been fully stated to the Court, and the Court thereupon have been moved to grant probate of the will of 1841. I have read the papers, and being satisfied in my own mind that the paper of 1851 is not genuine, I should **[416]** be unwilling to put the widow to the expense of another motion. I shall, therefore, not merely reject this motion, but shall decree probate of the will of 1841. It is still competent to any one interested to propound the later paper if he thinks proper.

Proctor: Heales.

IN THE GOODS OF RICHARD PUGH, Deceased. Prerogative Court of Canterbury, July 6, 1854.—R. P. duly executed a will prior to the 1st of January, 1838, and upon the same paper a codicil subsequently thereto. He afterwards married, but survived his wife.—Held that the codicil brought the will within the operation of the statute, and that both were revoked by the marriage.

Richard Pugh, late of Walford, in the county of Hertford, died on the 29th of April, 1854.

At his death ineffectual search was made among his papers for a testamentary paper. Application was then made to Mr. Church, of Bedford Row, who had formerly been his confidential solicitor. He stated that he had formerly made a will for the deceased, but could not then find it. Some days afterwards, however, he made a further search and found an envelope containing a will of the deceased, bearing date the 14th of July 1837, and also a codicil written on the same sheet of paper, and bearing date the 13th of August, 1839.

The deceased was married on the 2nd of May, 1840, but his wife died on the 6th of June, 1851.

Dr. Twiss moved the Court to grant probate of the will and codicil to Charles Lewis, the surviving executor therein named.

*Sir John Dodson.* I must reject this motion. It is very true that the Wills Act does not apply to wills made prior to the 1st of January 1838, and that, therefore, Sir Herbert Jenner Fust held, *In the Goods of Shirley* (2 Curt. 657), that such a will

was not revoked by section 18, in consequence of the subsequent marriage of the testator; but there is a distinction in this case, for there is a codicil bearing date subsequent to the 1st of January, 1838. That codicil would, of course, be subject to the operation of the Wills Act, and would, therefore, be revoked by the subsequent marriage. I am of opinion that the codicil also brings the will under the operation of the statute (1 Vict. c. 26, s. 34); for section 34 expressly provides that "every will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived." So that I am bound to regard the will as having been made on the 13th of August, 1839, instead of the actual date of its execution, and to hold both the will and codicil to be revoked by the subsequent marriage.

Proctor: Oldershaw.

**[417]** CUTTO *against* GILBERT. Judicial Committee of Privy Council, July 7, 1854. —A. C. made a will in 1825, which existed uncancelled at his death. In 1852 he duly executed another instrument, the contents of which were unknown beyond the fact of its beginning and ending with the words "last will," but it was not forthcoming at his death, and there was no evidence of its destruction. Held: 1st, That the onus probandi lies upon the party setting up the later instrument to prove it revocatory of the former. 2. That, in order to revoke an existing instrument by parol evidence of the subsequent execution of another, such evidence must be strong and conclusive. 3. That the mere execution of an instrument, though called a last will, is not sufficient of itself to revoke a previous instrument, unless the later be proved to be different from and inconsistent with the former. 4. That when the contents of the later instrument are unknown, the former is not thereby revoked. 5. That in this case there is no proof whatever of the contents of the later instrument, and that, therefore, the judgment of the Court below, pronouncing the former revoked, must be reversed.

[S. C. 9 Moore, P. C. 131; 14 E. R. 247 (with notes).]

This was an appeal from the Prerogative Court of Canterbury. The facts of the case, and the judgment of the Court below, have already been reported in this volume, p. 276.

Judgment was delivered by Dr. Lushington. (*a*)

The testator in this cause is Mr. Abraham Cutto; he died on the 16th of July, 1853. Upon his death a will was found bearing date August the 11th, 1825, and of that will his widow, Ann Cutto, prayed probate. The probate was opposed by Mrs. Elizabeth Gilbert, the only sister of the deceased, and she alleged that the will of 1825 was revoked by a subsequent will. The learned Judge of the Court below was of opinion that such revocation had taken place, and pronounced accordingly.

The will, bearing date August the 11th, 1825, and which will gave the whole of the property to the wife, and appointed her executrix, had, from the period of the execution, remained in the custody of Ann Cutto the widow. About two years before his death the deceased had said, in answer to an inquiry of his wife as to whether any confirmation or re-execution of the will was necessary, that it was perfectly valid, and did not require any such confirmation.

Upon the death of the deceased no other will was found, and it is agreed that in this state of things the mere length of time does not operate as a revocation, and probate of the will of 1825 would, if there were no other facts, have passed in common form.

Mrs. Gilbert, the sister, and only next of kin, has pleaded a revocation by the execution of a subsequent will not forthcoming, and we agree in the opinion stated at the bar, that the onus probandi lies on her. She must establish to our satisfaction that there is a revocation when the case is viewed with reference to all the facts connected with the subsequent will.

The first fact to be proved is, the execution of some subsequent testamentary paper, and we here think it right to observe that we are of opinion that where a revocation of an existing will is sought to be established by the proof of the execution

(*a*) The Court consisted of the Rt. Hon. Sir James Parke, Dr. Lushington, Sir John Patteson, and Sir Edward Ryan.

of a subsequent will not appearing, and where there is no draft nor instructions in writing, when in fact it is to be **[418]** proved by oral evidence only, that evidence ought to be most clear; and so far we concur in the opinion which has been expressed by very learned persons, that, to revoke an existing instrument by parol evidence that another will has been executed, and by such evidence alone, though the law may admit of that course of proceeding, yet it is one attended with danger, and consequently the oral evidence produced must be strong and conclusive.

Mrs. Gilbert has pleaded that in August, 1852, the testator executed his last will and testament in writing; that he revoked the will of 1825; that he intended to make provision for her and her daughters; and she has further alleged that after the execution of the will the testator declared that he had executed his will.

The evidence of these facts is to be found in the testimony of three witnesses, Mr. Watkins, Mr. Floyd, and Mr. White, who was a solicitor and friend of the deceased —the other witnesses being his clerks. The deceased himself had been a solicitor.

With respect to Mr. Thomas Watkins, the result of his evidence is, that the deceased executed some paper in his presence, and that he apprehended that it was his will—more than that he cannot say. Mr. Floyd has a better recollection of the facts. He deposes to the testator having said, "I wish you to witness my will." Mr. Watkins can say nothing as to its being a will. Mr. Floyd says he thinks, but cannot be positive, that the paper commenced, "This is the last will and testament" of me, or some similar words, denoting the paper to be the last will of Mr. Cutto. He says: "We knew the paper to be Mr. Cutto's will, and my impression is, and I have no doubt that I saw and read so much of it as shewed it to be so, though on that point I am not able to speak from positive recollection." Mr. White's evidence is to the following effect: that the testator told him, "that he had just looked in to ask me to see him execute his will; but that, as I was not within, he had got two of my clerks to do so; and my impression further is, that he went on to say, in an off-hand manner, as in reference to his said will, 'It is very short; just a few lines; just like your poor father's;' I rather think his expression was, 'Just a few lines on a sheet of foolscap paper.' My father had, as Mr. Cutto knew, made a very short will, merely leaving all his property to his wife, and appointing her sole executrix. I believe what I have just stated to be the substance of what Mr. Cutto said on the occasion. He did not produce the will to me; I cannot be positive that he used the **[419]** word 'will,' though I think it very probable that he may have done so."

Now, what is the result of this evidence, taken in the most favourable light for the respondent? It is, that the deceased executed a paper, the only contents of which, which can be argued to be proved, are, that it concluded with the words, "This is the last will and testament of me, Abraham Cutto." It would be impossible to contend that the mere execution of a testamentary paper subsequent to the will of 1825 would be a revocation, for it might be a codicil only, or it might be a confirmation of the will, and as the onus probandi is on the respondent to shew that the former will was revoked, such revocation can never be established by proving the execution of a testamentary paper without something further. In fact, the question comes to this, whether, according to the evidence of Mr. Floyd, stating that the paper commenced as I have said, "This is the last will and testament," it becomes a revocation in law—such will being not forthcoming, and the other contents of the will being wholly and totally unknown.

In order to disencumber the case of the authorities we will observe that it is a case of revocation or non-revocation at the time of the execution of the paper of 1852. Some of the cases are mixed up with arguments as to the revival; but under the Statute of Wills, section 22, there can be no revival of an anterior will, except by the re-execution or a codicil duly executed. The will of 1852 remained in the custody of the deceased, and the presumption at law is, as it is not forthcoming, that he destroyed it animo revocandi, but the so doing cannot, since the Statute of Wills, operate in any degree as a revival of the former will. The question then is, whether, by the execution of a paper such as I have described, a revocation has been effected, and what would be the best rule to govern such cases. It is manifest the varying state of circumstances would create a wide difference. For instance, to lay down the rule that the destruction animo revocandi of a subsequent will will necessarily leave in force a will made thirty years before under totally different circumstances, and when all the legatees may be dead, and fresh connections have arisen—and that

will would be wholly inoperative—might give effect to an instrument which would be wholly contrary to the intention of the testator. On the other hand, to say that a will destroyed animo cancellendi should always revoke a former instrument, might, in very many cases, leave a testator intestate whose only object in the cancellation of the last will was that the former might take effect. Leaving, therefore, the discussion of such **[420]** difficulties as these, which would be incidental to any general rule, let us consider what is the legal authority on this question.

First, with respect to Common Law authority as to devises. Upon that we apprehend there can be no dispute, that in order to revoke a devise of real estate by a subsequent will, not appearing, it must be proved that the contents were different; but assuming for the purposes of argument that a distinction may be made between the devise of real, and the bequest of personal property, we are not called to pronounce judgment on any such case. But this, however, we must observe, with respect to the construction to be placed on the words, "This is my last will and testament," it is difficult to suppose that such words can receive one interpretation at Common Law, and a different construction in the Ecclesiastical Courts.

We will proceed, then, to consider what are the authorities bearing on this question with respect to a will of personal property, because there are authorities in civil law, and there, no doubt, it is laid down that a prior will is revoked by the execution of a subsequent one. Whether that proposition is universally true—even by the civil law—in the case of two wills of the same contents, or nearly so, it may not be necessary to inquire. The true question is, how far the doctrine of the civil law has been incorporated into the testamentary law as administered in Courts exercising jurisdiction over wills of personal estate.

The first case we have reported at length on this subject is the case of *Helyar* v. *Helyar* (1 Lee, 511). The learned Judge expressed his opinion in the following terms: "I was of opinion that the executing of a second will of a different purport was by law a revocation of the first, though the second does not now appear." These words deserve great consideration, for on that occasion all the authorities of the civil law, as to the revocation of a will by the execution of a subsequent one, were cited, and yet Sir George Lee qualified the proposition by the insertion of the words "of a different purport." Many former cases of revocation were cited, and amongst them *Whitehead* v. *Jennings* (Court of Delegates, 23rd of May, 1714). There it was proved that the second will appointed a different executor. Such also was the case of *Burt* v. *Burt* (Prerog. 1718). There is not a single case brought forward in which a will was held to be revoked by a Court exercising jurisdiction over wills of personal estate, by the execution of a subsequent one, the contents being wholly unknown. No such case has been cited. In the cases of *Whitehead* v. *Jennings* and *Burt* v. *Burt* the former **[421]** wills were held to be clearly revoked by the appointment of a different executor, and that might, perhaps, be explained by a reference to the civil law, and the effect of that law in the appointment of an executor; and the fact that this circumstance wrought out the revocation is primâ facie proof that such or similar circumstances were indispensable to revocation—that without them the mere execution of a subsequent will would not revoke. We need not further refer to the case of *Helyar* v. *Helyar*, because it was decided on the ground that the contents of the subsequent will were wholly different, and the evidence to that effect was supported by all the probabilities of the case.

The case of *Moore* v. *Moore* (1 Phill. 375) is so very complicated in its circumstances that no safe conclusion can be drawn from that case as to the question of law—none, in short; but it is not correct as stated in the marginal note, that the two wills were nearly of similar import. In the one case the property was given to the two sons, and by the second will to one only; that is to say, as to the first will, to which force and efficacy was sought to be given, it was held to be revoked by the execution and cancellation of the second; but it is quite clear that the contents of the two wills were different, and different to the effect I have stated, independently of many other circumstances and facts of minor importance.

But there is a case appended in a note to *Moore* v. *Moore*, namely, *Passey* v. *Hemming* (1 Phill. 439), in which we have the highest authority, that of Sir William Wynne, the highest authority generally considered as to testamentary law that we know of in Doctors' Commons. He makes use, according to this note, of the following words in *Passey* v. *Hemming*: "Now, I think, in all the cases in which it has been held that

the former will was revoked by the cancellation of the latter—in all the cases I have looked into, at least—it appears that the intention of the deceased was varied; consequently, there was proof that he departed from the intention of the first paper." There probably is an omission of a word, he says, "revoked by the cancellation of the latter"—he means by the execution and subsequent cancellation; but his meaning is sufficiently clear; he has expressed it in terms which nobody can doubt, that in all cases in which it has been held that a former will has been revoked by the execution of a subsequent will, and that will was cancelled, it appears that the contents of the two were different; that the testator had departed from the intention of the first.

**[422]** We will next advert to the case of *Henfrey* v. *Henfrey* (2 Curt. 468). This was simply a case of construction, whether the two papers should be taken together, or whether the latter was a revocation of the former. We see no reason to doubt the correctness of that judgment, nor can we see how that case applies to the present. There the second paper disposed of the whole of the property of the testator, and was necessarily for that reason a revocation of the former.

I will refer to one more case decided in the Ecclesiastical Courts, upon which the learned Judge in the Court below seems mainly to have founded his judgment—the case of *Plenty* v. *West* (1 Rob. 264). Upon this case we will first observe, that the two wills were essentially different; that no executors were appointed by the first; that executors were appointed by the second; and that the only ground of argument was, that the whole of the personal estate was not disposed of by the second will. It is true, Sir Herbert Jenner Fust, in his judgment, relies upon the fact that the testator called the will of 1838 his last will; but that is only one circumstance in conjunction with others upon which he based his decision.

Now, let us consider how these authorities bear upon the present case. There is not one authority which lays down the proposition that the execution of a subsequent will destroyed animo revocandi by the testator, the contents of which are not known, revokes a prior will. On the contrary, in the case where a revocation has been held to be effective, there has been proof of a difference of disposition. This alone induces us to doubt the correctness of the judgment in the Court below in the case now under consideration, and it appears to us unsound. That judgment is mainly based on the evidence that the latter paper contained the words, "This is my last will and testament." We are of opinion that these words do not import that the paper contained a different disposition of the property, and that the mere fact of calling it by such words cannot possibly render it a revocatory instrument. We think that the interpretation put upon these words by Lord Brougham in his judgment of *Stoddart* v. *Grant* (1 Macq. H. L. Cas. 163) is the true meaning to be attributed to them. With regard to any auxiliary circumstances in this case, we think the evidence wholly fails to render any assistance to the case of the respondent.

Considering that the respondent on whom the onus probandi lies has failed to prove what the law requires—the execution of a subsequent will expressly revoking the former, and of different **[423]** contents—we must reverse the judgment of the Court below, and pronounce for the will propounded by Mrs. Cutto.

Dr. Haggard. The Court will grant us the costs out of the estate?

The Court. No; each party must pay her own costs.

Proctor: Pritchard.

BROWN *against* BROWN, AND BROWN BY THEIR GUARDIAN. Prerogative Court of Canterbury, May 25, 1854.—J. B. died, leaving a widow, from whom he had separated on suspicion of her adultery, and two infant children, whom, during his life, he had left under her charge. The grandfather, on behalf of the infants, opposed the widow, and prayed the Court to grant the administration to him until one of the children should come of age. Under the circumstances the Court decreed it to the widow, but gave the grandfather's costs out of the estate.

[S. C. 18 Jur. 1121.]

This was a question as to the grant of letters of administration of the goods of Joseph Brown, late of the town and county of Haverfordwest, who died intestate on the 27th of December 1853, leaving Agnes J. P. Brown, his lawful widow and relict; J. H. J. B. and J. W. B., his natural lawful and only children, who were infants.

The grant of letters of administration to the widow was opposed by John Brown the grandfather and guardian lawfully assigned to the said infants.

He alleged, in an act on petition, that the deceased married in August, 1848, and lived happily with his wife, A. J. P. B. (by whom he had two children, J. H. J. B. and J. W. B.), until July, 1852, when she formed an adulterous intercourse with W. C., one of his assistants; that deceased instructed his solicitor to prepare a deed of separation; that, pending the instructions and execution of such deed, the said A. J. P. B. called upon the deceased's solicitor, admitted her guilt, and begged the solicitor to intercede with her husband for her, in order that he should again live with her, which he had ceased to do; that the deceased refused, and in the month of October, 1852, the said deed of separation was executed, whereby he agreed to allow his wife thirty shillings a week, and to allow the children (on account of their infancy, and by reason that he, from the nature of his business, had no settled place of residence) to remain with her; that the infidelity of his wife greatly preyed upon his mind, and that in consequence thereof he, on the 29th of December, 1853, committed suicide by drowning himself, having on the previous day written to his brother, James Brown, informing him of his state of mind, and begging him, in the event of his death, to see after and protect his children. The prayer was, that the letters of administration be granted to the guardian for the use and benefit of the infants, and until one of them should attain the age of twenty-one years.

**[424]** The answer on behalf of the widow, neither admitting nor denying the allegations respecting the adultery, admitted the separation, and alleged that she consented to such separation from fear of the violent and strange conduct of the deceased; that at the time the deceased committed suicide, he was, as he had been for some time previously, in an unsound state of mind; and that such suicide was not attributable to the infidelity of his wife preying on his mind; that during his lifetime deceased always allowed his children to remain under the care and protection of their mother, who, at the time of their separation, went with the children to the residence of her mother, and had ever since continued to reside with her; that since the deceased's death the said widow has received letters (annexed) of kindness from the various relatives of the deceased.

Dr. Deane, for the guardian of the infants, contended that it was an established rule of the Court not to grant the administration to an adulterous wife, and that in the present case there was sufficient evidence of guilt to bar the widow's claim. At all events, it was clear that, whether guilty or not, the deceased considered her to be guilty. The Court, in the exercise of its discretion, would therefore rather grant the administration to the grandfather and guardian of the children. He cited *Lambell* v. *Lambell* (3 Hagg. Ecc. 568), and *Chappell* v. *Chappell* (3 Curt. 429), and *Conyers* v. *Kilson* (3 Hagg. Ecc. 556).

Dr. Bayford, for the widow, argued to the same effect as the judgment of the Court.

*Sir J. Dodson.* This is a question as to the grant of letters of administration of the effects of Mr. Joseph Brown, deceased. One of the parties applying to the Court for the grant is the widow of the deceased, the other is the grandfather of his infant children.

It appears that the deceased lived happily with his wife from the time of their marriage in 1848 down to the month of July 1852, and during that time had two children who are now both under three years old. The deceased was a travelling mercer, and in the course of his business was, in the year 1852, accompanied by his wife to Ireland. It was upon that occasion that disputes first arose between them; circumstances occurred which at least excited his suspicions, and induced him to charge his wife with adultery with his assistant in his business.

Mr. Brown, whatever ground he may have had for his suspicions, continued to live with his wife until they returned to England; that conduct on his part would clearly amount to **[425]** condonation at the time, and I do not find that he ever commenced or ever contemplated a suit for divorce.

Upon their return to England, however, a deed of separation was executed, by which it was agreed that Mrs. Brown should receive an allowance for herself and children, and that they should continue under her charge. Mrs. Brown, on leaving her husband, went immediately to the residence of her mother, with whom she has continued to reside down to the present time.

It is said by the grandfather that his son separated from his wife on the ground of adultery, and that that is a sufficient reason for the Court in the exercise of its

discretion to refuse to commit the administration of his effects to her. It is said, moreover, that the charge is not now denied, but undoubtedly there is no distinct admission of it; and I apprehend that, being a criminal charge, she had a right to put the accuser to the proof. It is certainly a case of suspicion; but the Court should, in my opinion, have the clearest proof, or at least stronger proof than the present, of the adultery, before it departs from its ordinary practice as to the grant of letters of administration.

It is admitted to be entirely discretionary with the Court, and the question is, whether, looking at all the circumstances of the case as proved on both sides, I ought to reject the application of the widow, and commit the administration to the grandfather and guardian of the children.

Now, it appears that the deceased himself entrusted his infant children to her care, and that she then went to reside with her mother. It is, moreover, expressly sworn, that she has conducted herself well since that period, whatever may have been her conduct antecedently. Here are letters which speak of her in very high terms, which by no means justify the inference that she is a person unfit to be trusted with the administration of the deceased's effects. One from the deceased's sister after his death, in which she begs her not to give way too much to her feelings of grief, but to rouse herself for the sake of her children, and expresses the "profoundest respect" towards her. It then contains this passage: "Now, my dear Mrs. Brown, concerning the goods, father has had them sealed, and are quite safe until the time when a settlement takes place for you and your dear children." Now, this letter was written by desire of the grandfather who is now opposing this grant; but it certainly does not appear to me that at the time that letter was written the widow was considered an improper person to be entrusted with the administration of the deceased's effects; on the contrary, I think such a proceeding was con-**[426]**-templated, and that the deceased's family were taking the necessary steps to forward it. That letter is dated on the 9th of January 1854, and upon the 29th the grandfather himself writes an affectionate letter to the widow, in the postscript to which, as I understand it, he expressly says that if his son (the deceased) had slept with them one day, they had determined to make an attempt to bring about a reconciliation for the deceased and his wife to live together again.

Now, under these circumstances, ought I to take away the administration of the deceased's effects from his widow? I say take away, because, according to the ordinary practice of this Court, she is considered to have a prior right to it. In support of his argument to that effect, the learned counsel cited the case of *Lambell* v. *Lambell* (3 Hagg. Ecc. 570), but this was a question with respect to the will of the deceased being found in his repositories with the seal torn off, and not as to the right to the administration. On application being subsequently made to the Court for the grant to pass to the widow, the Court observed, "The grant is discretionary; and as the widow lived separate, I decree it to the brother." But it does not at all appear under what particular circumstances the deceased was living separate from his wife, and it must be remembered that the brother had an equal interest with the widow. I think there is nothing in that case. *Conyers* v. *Kitson* (3 Hagg. Ecc. 556) was also referred to. In that case there was a contest for the administration, and the Court granted it to the sister in preference to the widow, whom he condemned in costs. The circumstances, however, of that case were entirely different from the present; the widow had, during her husband's lifetime been living with, and had in fact been married to another man. The Court, of course, refused to commit the administration to the widow.

The case of *Chappell* against *Chappell* (3 Curt. 429) was also cited. In that case the deceased died, leaving a widow, a brother, two nephews, and two nieces, the children of a deceased sister. The brother opposed the grant to the widow, against whom various objections were urged; but that case was very different from the present, in which the widow has been described by the relatives themselves in very favourable terms indeed. In that case the Court said, "I think I ought to exercise my discretion in favour of the brother, in order to protect the interests of the children (the nephews and nieces), and ought not to leave the widow in possession of their shares of the money for so long a time as must intervene between the grant and the payment to the minors; it is chiefly in reference to this circumstance that **[427]** the Court so decides; for I do not mean to say that otherwise there is sufficient reason

for refusing to entrust the widow with the management of this property." Yet Mrs. Chappell was not only separated from her husband, but had actually married again during her husband's lifetime.

I do not think there is in the present case sufficient reason for refusing to entrust the widow with the management of the property. There are no other interests but the widow's and children's, and these children are the children of the widow, were intrusted to her care by the deceased himself, and have continued under her care up to the present time. She seems to be a fit and proper person, not only from the letters of the relatives, but from the affidavit of Mr. Lane, the solicitor, who swears to his belief "that she is a fit and proper person to become administratrix, and to have the care and charge of the infant children of the deceased, by reason that she is an affectionate mother, a woman of education, and of domestic habits."

It is in the discretion of the Court; and I do not think, looking at all the circumstances of the case, that it is one in which I should depart from the usual course. I therefore decree the administration to the widow.

Dr. Deane. The Court will give us our costs out of the estate?

Dr. Bayford. I trust not, Sir. That would be, in effect, condemning us in the costs, though the Court decides in our favour. After the letters of the relatives, upon which the Court has commented, this opposition to the grant was most unjustifiable, and its expenses ought not to be thrown either upon the widow or the children.

The Court. I cannot take that view of it. I am of opinion that there was some ground for the opposition, which was intended for the benefit of the children; and I do not think that I should burden the guardian with the costs. I decree the costs out of the estate, and direct that the sureties justify.

Proctors: for the guardian, Toker; for the widow, Lawrie.

THE "TELEGRAPH." VALENTINE *v.* CLEUGH. The High Court of Admiralty, and Privy Council, May 18, 1854.—A vessel lying at anchor in a roadstead exhibited a light in her mizen rigging instead of at her mast head. Held, in the Admiralty Court, that under the circumstances the light would be as visible in that place, and that therefore the collision could not have been occasioned by the deviation from the literal requirements of the Admiralty order; but reversed on appeal to the Privy Council, which held that the light was not as visible—that the deviation from the Admiralty order occasioned the collision, and that therefore the vessel proceeding was barred of recovery, and must be condemned in the costs of both Courts.

[S. C. 8 Moore, P. C. 167; 14 E. R. 64 (with note).]

This was a suit for damage, by collision, brought by the owners of the barque "Palermo" against the steam-ship "Telegraph" belonging to the Belfast Steam-ship Company.

**[428]** The act, on petition, alleged that the "Palermo," on a voyage from Liverpool to Genoa, was driven by stress of weather into Belfast Lough, and was brought to anchor in the roadstead therein, about midway between Carrickfergus and Grey Point, at about 8 P.M. of the 29th of November, 1853. That at such time it was about high water, the night was clear, with a light breeze, and a bright signal lanthorn was hoisted and secured in her mizen rigging, and that the light in the said lanthorn was burning brightly, so as to be visible all round, and so continued until and at the time of the collision, &c.

The answer, inter alia, alleged that as well before as at the time of and after the collision, the lights of the steam-ship were burning brightly, and such lights would have been seen, on the night in question, at the distance of more than a mile; that no light whatever was burning at the mast head of the other vessel with which the steam-ship came in contact, as there should have been, pursuant to the Admiralty order of the 1st of May, 1852, which, if there had been, it could and would have been seen from the steam-ship in time to have prevented the collision; and denied that any light was burning on the mizen rigging of the vessel with which the steam-ship so came in contact; and expressly alleged that such collision was solely owing to the neglect of some of those on board the barque in not having exhibited a proper light, or in having permitted the same to go out, anchored as such vessel was in the direct course of ships proceeding from Belfast. In reply, it was denied on behalf of the "Palermo," that if the light of the "Palermo" had been at the mast head, it

could and would have been seen from the steam-ship in time to have prevented the collision; and, on the contrary, it was alleged that, riding as the "Palermo" was, the mizen rigging to which the said light was attached and burning brightly at the time of the collision, was the best position for enabling those on board the steam-ship to see the light and keep clear of the barque.

This was denied in the rejoinder.

Dr. Haggard and Dr. R. J. Phillimore appeared for the "Palermo"; Dr. Addams and Dr. Dasent for the "Telegraph."

*Dr. Lushington*, addressing the Elder Brethren (Captain Nelson and Captain Weare), said:

Gentlemen, it may be convenient, before I advert to the particular circumstances of this case, to point out to you what are the rules of law with respect to cases of collision with ships that are lying at anchor, and that I can do in a very few words. Where a suit is brought by the owners of a vessel lying at **[429]** anchor in a fairway or roadstead at the time of the collision, it must be proved, in the first instance, on behalf of such a ship, that she was anchored in a proper place, and a proper manner; and if the collision took place at night, it must further be proved, as now settled, that she has substantially complied with the requisitions of the Act of Parliament in regard to the hoisting of a light. It is indispensable that these positions should be established at the commencement of such a suit, and when these are proved, in any particular case, then the burden of proof shifts, and it lies upon the ship against which the action is brought, whether a steamer or a sailing-vessel, to shew under what circumstances, or how it was, that the collision with a vessel so lying at anchor took place. This rule is obviously founded upon principles of good sense, because a vessel lying at anchor is naturally and necessarily incompetent to take any measures to avoid collision, beyond that of making known to other vessels in her vicinity the position in which she is lying. If she places herself in a proper position, and makes that position sufficiently known, then it is the duty of all vessels, either steamers or sailing-vessels, proceeding in the neighbourhood of such vessel, to avoid coming into collision with her.

These are general principles of law which I apprehend to be perfectly undoubted. Let us now proceed to consider the particular circumstances of the case before us, and in so doing let us, in the first instance, lay aside all questions which have been discussed in argument on the one side and on the other, which are not necessary for us to consider, or even proper, perhaps, to take into consideration at all.

It is to be observed that those who have brought forward the case of the "Palermo" have not alleged that the "Telegraph" was going at an undue speed; they make no averment of that kind; they have contented themselves with stating the manner in which the collision took place, and there is no charge that she was going at undue speed. It appears to me, therefore, that we need not consider with any particularity the rate at which the "Telegraph" was sailing, but it must be presumed that she was going at her ordinary speed.

Again, with respect to the course which the "Telegraph" was pursuing at the time. I apprehend, as it is not stated that she was out of her proper course, it is to be assumed that no culpability attaches to her in this respect. It certainly was the duty of the parties proceeding in the cause, if it were intended to bring forward any such question on the present occasion, to state it clearly and with precision, but this has not been done at all.

**[430]** This narrows the whole matter to what I am now about to bring under your attention. I apprehend the "Palermo" was, at the time in question, lying at anchor in a proper place, and was properly anchored, so far as appears. That I apprehend to be a position which is not contradicted on the present occasion; but the main controversy, the great point which I shall have to submit to you is, whether she had or had not a proper light hoisted.

Now, gentlemen, it is perfectly clear, indeed it is admitted on all sides, that she has not literally complied with the provisions of the Act of Parliament, because the provisions of the Act of Parliament are in the following words: "All sailing-vessels at anchor in roadsteads or fairways shall be bound to exhibit, between sunset and sunrise, a constant bright light at the mast head. Whatever might have been the light which the "Palermo" carried, it is admitted that she had no light at the mast head. Then we must look to see, first, what are the legal consequences of not having

literally complied with the statute and the regulations made. The legal consequences are these: without reading them in the precise words of the provisions of the Act of Parliament, and I only omit to do it because you are so familiar with them, and I have so repeatedly had occasion to bring them under the notice of the Trinity Masters; the legal consequences, in substance, are these, videlicet, that a neglect to comply literally with the directions of the Lords Commissioners of the Admiralty by not hoisting a bright light at the mast head, shall preclude the parties guilty of such neglect from recovering the loss sustained in any collision where it shall appear that such collision was occasioned by the non-observance of that rule; and that brings the case back to this short point, whether you are of opinion that the omitting to hoist a light at the mast head was the occasion of this collision.

Gentlemen, looking to the evidence, I am satisfied in my own mind, but it is for you to determine it, that there was a light hoisted on board the "Palermo" at the time the pilot quitted. That such light was hoisted, according to all the evidence, in the larboard mizen rigging, and that the light continued to burn at the larboard mizen rigging at the time of the collision.

Now, that being so, the question resolves itself into the degree of visibility, if I may use that expression, between a light hoisted at the mast head and one hoisted eighteen feet above deck, on the larboard mizen rigging. The solution of this question must depend on considerations which particularly belong to you as relates to this particular case, because you are **[431]** best capable of judging whether this vessel, the "Telegraph," proceeding from the port of Belfast, would be able to descry a vessel with the same facility, with a light hoisted at the larboard mizen rigging, as she would if it had been at the mast head. If you are of opinion that she would not, then I cannot help thinking that this collision might have been avoided by hoisting a light at the mast head, and that it is fairly to be inferred that the collision was occasioned in consequence of its not being so hoisted. On the other hand, if your nautical knowledge leads you to the conclusion that, in all probability, the light would be equally discerned at the larboard mizen rigging and at the mast head, then, under these circumstances, it appears it would be impossible to say that the collision was occasioned by a disregard of the terms of the Act of Parliament.

I do not know that I can possibly put the question to you in a stronger and clearer light than I have put it. You have the evidence on the one side as to the light burning brightly, so that it could be seen at a distance; on the other hand, evidence of most respectable persons on board the steamer, who can swear—not to the fact, all they can swear to is their belief—that if the light had been at the mast head, they must have discerned it; and they also swear that they did not see the light.

Now, gentlemen, these are the points on which I wish to have your opinion, and if you are desirous we will retire together and consider them.

On returning into Court, after conferring with the Trinity Masters, *Dr. Lushington* said:—

The Trinity Masters are of opinion, looking at all the circumstances of the case, that a light hoisted in the larboard mizen rigging was as visible as if it were at the mast head. They say, moreover, that if any comparison is to be drawn between the two positions, they think all the circumstances of this case shew it would be more visible at the larboard mizen rigging than it would have been at the mast head. Therefore I pronounce for the damage.

Against this judgment the "Telegraph" appealed. The case, under the name *Valentine and Others* against *Cleugh*, was argued before the Privy Council (*a*), by

Dr. Addams and Mr. Forsyth for the appellant.

Dr. Haggard and Mr. Willes for the respondent.

**[432]** *Sir J. Patteson* delivered the judgment of the Court. This is a question decided originally in the Court of Admiralty, with respect to the damage sustained by the barque "Palermo," in consequence of the steamer "Telegraph" having struck her stern, as she lay at anchor, and done her considerable damage.

Many witnesses have been examined on both sides, and there are the usual discrepancies appearing in their evidence, probably not from anything like an intention

(*a*) Present, the Rt. Hon. Sir J. Patteson, the Rt. Hon. Sir John Dodson, and the Rt. Hon. Sir E. Ryan, assisted by sailing masters

on the part of the witnesses not to speak the truth, but from the bias which they naturally all feel, both on the one side and on the other, to state the facts favourably to their own party. Many points apparently might have arisen in the course of giving that evidence, besides the one upon which the decision ultimately went; but all those points, whatever they were, which might have arisen, have been disposed of by the learned Judge in the Court below, in his address to the Trinity Masters. We are very glad they were so disposed of, and we quite agree with him in the view which he took with respect to those points, and with respect to the general law which he laid down on the subject.

It appears to be quite clear, according to the evidence, and according to the opinion expressed by the learned Judge himself, in addressing the Trinity Masters, that the "Palermo" was anchored in a proper place on the night in question. It appears, also, that the steamer was proceeding from Belfast to Liverpool in her proper course; that her steering was proper, and her speed such as was right and proper. Therefore, there was nothing wrong done by the owners of the "Palermo," with respect to anchoring; and nothing wrong done by the owners of the steamer, with respect to the course she was pursuing, or the speed at which she was going; but the whole question turns upon the position of the light that was exhibited, if any light were exhibited, by the "Palermo."

Now doubtless many of the witnesses for the "Telegraph" say there was no light at all exhibited by the "Palermo." One can easily understand their saying so; if in truth they did not see the light, they would say there was none. But it does not follow that there should be no light because they did not see it. The light may have been placed in such a position that they were not able to see it. But it is positively sworn by the persons on board the "Palermo," that there was a light in the larboard mizen rigging, which was put there as soon as she came to anchor, remained there an hour and a half before and until after the collision took place, and continued burning brightly as before.

There are other questions as to the state of the weather, upon **[433]** which the witnesses seem not to agree. Some say that it was rainy, some that it was hazy; and other witnesses say that lights could be seen all through the night wherever they were exhibited. It is sworn that the steamer passed some thirty vessels that exhibited lights, and she did not strike any of them. It is admitted that the state of the night was such that lights could be seen to a considerable distance, whether to such a distance as on a clear dark night, as it is called, is another question; but still they were seen to a considerable distance.

All that is cleared away; and we now come to the question raised on the Act of Parliament, 14 & 15 Vict. c. 79, and to the regulations of the Lords of the Admiralty, which were made in pursuance of the Act, and which, by virtue of the Act, have the force of an Act of Parliament, because it is expressly said that the Lord High Admiral, or the commissioners for executing the office of Lord High Admiral, may make regulations for lights, and that all such regulations shall continue in force until they be revoked. The 27th section regards vessels passing each other where both are in motion; therefore, that need not be adverted to. Then comes the 28th section, which says, "If in any case of a collision between two or more vessels, it appear that such collision was occasioned by the nonobservance either of the foregoing rules with respect to the passing of steamers, or of the rules to be made as aforesaid by the Lord High Admiral, or the commissioners for executing the office of Lord High Admiral, with respect to the exhibition of lights, the owner of the vessel by which any such rule has been infringed shall not be entitled to recover any recompense whatsoever for any damage sustained by such vessel in such collision, unless it appears to the Court before which the case is tried that the circumstances of the case were such as to justify a departure from the rule." Now, here the circumstances of the case do not appear to be such as to justify a departure from the rule. In the Court below, on the part of the "Palermo," no reason was given why the regulations were not strictly and literally complied with; to this I shall advert again presently. They do not say there were such circumstances as justified a departure from the regulations; they do not put it on that ground at all.

The section then goes on, "And in case any damage to person or property be sustained in consequence of the nonobservance of any of the said rules, the same shall in all courts of justice be deemed, in the absence of proof to the contrary, to have

been occasioned by the wilful default of the master, or the person having the charge of such vessel: and such master or **[434]** other person shall, unless it appears to the Court before which the case is tried that the circumstances of the case were such as to justify a departure from the rule, be subject in all proceedings, whether civil or criminal, to the legal consequences of such default." Here, therefore, it is perfectly clear that if the regulations which are put forth by the commissioners of the Admiralty are not literally complied with, and any collision takes place, and damage occurs, which is attributable to departure from the regulations, and not under justifiable circumstances, the party who has so departed from the regulations cannot recover; supposing always that the damage arises from that departure.

Then we have the Lords of the Admiralty making a regulation; and it is upon that that the case really turns. It distinctly says, "all sailing-vessels"—the "Palermo" was a sailing-vessel—"at anchor"—she was at anchor—"in roadsteads or fairways, shall be also bound to exhibit between sunset and sunrise a constant bright light at the mast head, except within harbours or other places where regulations for other lights for ships are legally established." Then it goes on to say: "The lantern to be used when at anchor, both by steam-vessels and sailing-vessels, to be so constructed as to shew a clear good light all round the horizon." This is perfectly plain, except there be any difficulty with respect to what is meant by "at the mast head." It does not say at what mast head, whether foremast, or mainmast, or mizenmast; but simply, "at the mast head." Now, in the course of this discussion, it seemed to be somewhat assumed, we thought, that the words "at the mast head" referred to the first mast—perhaps I do not express myself nautically—and might mean, on or attached to the mast. If that were so, it is obvious that putting a light against the mast, whether on the one side or the other, must necessarily prevent the light being seen all round; it would be dark on the other side of the mast. It seemed to us very extraordinary that that should really be the meaning of "mast head." Upon consulting the gentlemen whose assistance we have, they were kind enough to tell us what seems to be the meaning; and, looking ourselves at the words, "the lantern shall shew a clear good light all round the horizon," we are clearly of opinion that "at the mast head" means "at the very top"; that if the topgallant mast be standing, it must be at the topgallant mast—whichever is the standing mast, that is the mast. We do not mean one of the three masts as compared with the other masts of the vessel; perhaps there is a choice as to the mast. There is no difficulty in doing this. There are halyards by which it is **[435]** easier to run a light to the top than to put it against the mast. Now, if the lantern were at the very top it would shew a light all round the horizon. It is conceded by the respondent, that those who had charge of the "Palermo" did not literally comply with the regulation; they did not hoist a constant bright light at any mast head at all; but they hoisted a light on the mizen rigging; and so far it is quite plain that they departed from the literal meaning of the Act of Parliament, and the regulations of the Admiralty. As we have already said, the respondent has not assigned any specific reason to justify the departure from these regulations, and the case is not put upon that ground; but it is very justly, and most fairly and properly put in the address by the learned Judge to the Trinity Masters: "Whether you are of opinion, that the omitting to hoist a light at the mast head was the occasion of this collision." The learned Judge goes on to say, "The solution of this question must depend on considerations which particularly belong to you," (speaking to the Trinity Masters who assisted him), as relates to this particular case, because you are best capable of judging whether this vessel, the 'Telegraph,' proceeding from the port of Belfast, would be able to descry a vessel with the same facility with a light hoisted in the larboard mizen rigging, as she would if it had been at the mast head." The "Palermo" was anchored, be it observed, with her head to the south, about S.S.E., or thereabouts, and the wind was blowing against her head; the proper course of the steamer being E. by N., she would come on the starboard side of the vessel, this light being in the larboard mizen rigging. We do not think there could be a mistake in the Court below with respect to the steamer coming on the larboard side, and not on the starboard, because the evidence is so clear as to these points. But the learned Judge goes on to say, "If you are of opinion that she would not,"—that is, not see the light so well as if it were placed at the mast head—"then I cannot help thinking that this collision might have been avoided by hoisting a light at the mast head; and that it is fairly to be inferred that the collision was occasioned in consequence of its

not being so hoisted." Now, we think that inference very fair and very right and proper; because, there being express regulations of the Admiralty, that lights are to be hoisted at the mast head, if you will, of your own authority, and without justifiable reason, depart from the regulations, and put a light somewhere else, it ought to be at your own risk. The consequence of making nice distinctions in every case that arose **[436]** would be in a great measure to do away with the Act of Parliament, and the regulations founded upon it.

Now, as admitted in argument, it is not departure from the regulations which would preclude a vessel from recovering altogether, unless that was the occasion of the collision. It might be a light night, so that a vessel could be seen without a light, or there might be misconduct on the part of the other vessel; and in these and a hundred other cases that might be put, the party would be entitled to recover (*a*), although the regulations had not been complied with. Clearly the collision must be traced to a departure from the regulations; but it is our desire that it should be understood that those who depart from them, do it at their own peril.

The learned Judge goes on to say, "On the other hand, if your nautical knowledge lead you to the conclusion that, in all probability, the light would be equally discerned in the larboard mizen rigging and at the mast head, then, under these circumstances, it appears it would be impossible to say that the collision was occasioned by a disregard of the terms of the Act of Parliament." Now, nothing can be fairer than that way of putting it; and it really is reduced to this simple question, whether the Trinity Masters and the learned Judge, who acquiesced in their view, are right in the opinion at which they arrived, because the whole case turns on that. "The Trinity Masters," the learned Judge said, "are of opinion, looking at all the circumstances of the case, that a light hoisted in the larboard mizen rigging was as visible as if it were at the mast head."

No doubt it might be as visible to persons on the larboard side of the vessel; but was it as visible to all persons? is the question. He then proceeds: "They say, moreover, that if any comparison is to be drawn between the two positions, they think all the circumstances of this case show it would be more visible in the larboard mizen rigging than it would have been at the mast head." Their Lordships are in very great **[437]** difficulty to understand how they arrived at that conclusion. How it could possibly be said to be more visible, we are really quite unable to conjecture.

We have had the advantage of being assisted by gentlemen fully conversant with matters of this sort, who are clearly of opinion, as their Lordships are clearly of opinion, that the Trinity Masters were entirely wrong in their view of the case. The question turns simply upon whether or not the steamer, coming as she did, would be able to descry the vessel with the same facility with the light hoisted in the larboard mizen rigging, as she would if it had been at the mast head. The Trinity Masters—and the learned Judge adopted their decision—have determined that she would be able to do it. The Sailing Masters who assist us entertain a totally different and opposite opinion; and in their view we concur, as we think she certainly could not. Here is the light in the mizen rigging; here is the steam-vessel coming up, and no doubt the mizen-mast, and the sail that was brailed up, and various other things, might very likely have hidden the light from view; but if it had been at the top of the mast it could not have been hidden. Therefore we cannot see, looking at it as ordinary men and not practical men, how there can be the slightest doubt on the question; and we are assisted by nautical men, who take the same view of the case.

We are clearly of opinion that the view taken by the Trinity Masters is not a just

---

(*a*) It is apprehended that it is not the intention of the Court to lay it down that in all cases where there is misconduct on the part of the vessel proceeded against, the vessel proceeding would be freed from the statute consequences of her disobedience to the Admiralty regulations, but merely that she would not be liable to those consequences when the misconduct of the vessel proceeded against wholly occasioned the collision. Otherwise this decision would, in effect, overrule the decision of the Admiralty Court in *The "Aliwal,"* 1 Ecc. & Adm. Rep. 96, and *The "Wansfell,"* 1 Ecc. & Adm. Rep. 269, for in both those cases the Court held that there was misconduct on the part of the vessels proceeded against, but that as the collision was in part occasioned by the nonobedience to the Act of Parliament or the Admiralty rules on the part of the vessel proceeding, she could not recover.

and proper view; but that the light was in all probability hidden by the position in which it was placed; at the mast head it might, and in all probability would, have been seen. Be it observed there was a good look-out on board the steamer, which fact is not denied. It is admitted they had seen a great many vessels—there was a cautious look-out; and therefore it is fairly and properly to be assumed (indeed, from the facts of the case it is quite apparent) that this collision was occasioned by a breach of the regulations, in not placing the light at the mast head. That being so, by the Act of Parliament the owners of the "Palermo" are not entitled to recover.

Their Lordships are of opinion that the decree and sentence of the Court below must be reversed and the cause retained; and that the owners of the "Palermo" must be condemned in the costs below as well as here. The unsuccessful party must take the consequences of bringing an action which he cannot sustain. We shall advise Her Majesty accordingly.

Proctors: for the "Palermo," Stokes; for the "Telegraph," Bathurst.

**[438]** THE "FLECHA." The High Court of Admiralty, July 31, 1854.—The master of a Belgian steamer, plying constantly between Ghent and London, employed an engineer in London to do some repairs, and to supply him with a new screw propeller.—Held, 1st, that the Court had jurisdiction under the statute, as whatever was necessary to put the machinery of a passenger steamship in the best working order was a "necessary" within the meaning of the Act. 2ndly, that where no special contract was proved, the purchaser takes at his own risk.

[Disapproved, *Northcote* v. *Owners of* "*Heinrich Björn*," 1886, 11 A. C. 279; *The* "*Mecca*" [1895] P. 110.]

This was a suit for necessaries brought by Mr. William Bache, of Bermondsey, engineer and millwright, against the foreign steam-ship "Flecha." The amount claimed was 87l. 14s. 6d. A tender of 15l. 2s. for certain repairs was made and rejected. The dispute was respecting the terms upon which two propellers had been supplied.

The act on petition alleged that in pursuance of the orders of H. Seenwen, the master of the Belgian screw-vessel "Flecha," Mr. Bache did, in the month of August, 1853, and the five following months, furnish certain articles, and perform certain reparations, to the said ship while in the river Thames, amounting in value to the sum of 87l. 14s. 6d., to wit, &c.: "November 16. To a new propeller, and fixing the same, with keys, 40l.—January 26. To altering pattern of propeller, and a new propeller, fitted with keys, &c., 35l." &c.; that application was duly made to the said master for payment; but that he hath refused, and still refuses to pay the same.

The answer alleged that in November last, James Lowe, the patentee of a certain new screw propeller came on board the "Flecha" with Mr. Bache, and after representing to the master the merits thereof, stated that by adopting the same the vessel would be enabled to make two knots per hour more than could be obtained from the one she had then in use, and with a less consumption of fuel; that in answer to the master's inquiry Mr. Lowe stated the cost of such a screw would be 40l.; that it was also distinctly agreed that if the screw did not answer the purposes intended no charge whatever was to be made for the same; that on these conditions, and for the sum aforesaid, a screw on Mr. Lowe's patent was ordered by the master; that in the month of November the screw was fixed, but on trial to Ghent and back the same was found to be wholly ineffectual, and the patentee, Mr. Lowe, having again come on board with Mr. Bache, they both at once declared they saw how and where they had made a mistake in the construction of the screw, and prevailed on the master to allow them to make a second screw, whereby they engaged to remedy the mistake made in the first; that they accordingly took away the first screw, which they retained, and still retain; that in January, 1854, they furnished the second screw; but that it was found upon trial to be quite as defective and useless as the first; that upon both trials it was found that instead of the new screws accelerating the speed of the "Flecha," she lost six hours in a passage usually performed **[439]** in about twenty; that in consequence of such defect the screw had to be unshipped, and the original screw of the vessel replaced; that since that time the "Flecha" has been working with her said original screw, until the week preceding the giving in the plea, when it was replaced by a new screw made in Ghent; that after the failure of the

second screw Mr. Bache was requested by letter to fetch the same away, but as he took no notice thereof, the said useless screw was landed on Mr. Cotton's wharf, Bermondsey, near the premises of Mr. Bache, where the same now remains, the said Mr. Bache, although duly informed thereof, having neglected to take the same away; that during the whole time the negotiations and trials aforesaid were going on, the master of the "Flecha" was led to believe that he was treating with Mr. Lowe, the patentee; that he made no engagement whatever with Mr. Bache with regard to the said screw; but that Mr. Bache took his instructions relative thereto from Mr. Lowe, as he had previously done for a screw furnished by a Mr. Rankin, which, like Mr. Lowe's, turned out a failure, but for which no charge was claimed. That in reference to the other items, &c.

That the "Flecha" is a vessel going and returning every fourteen days to and from London and Ghent, and not a foreign vessel, contemplated under the Act of 3 & 4 Vict. c. 65, s. 6. That the "Flecha" has been twice arrested, and twice bailed on the same claim,(*a*)[1] and the owner has been thereby put to vexatious expense in this matter. The prayer was, that the Judge would be pleased either to pronounce the tender sufficient, or to refer Mr. Bache to substantiate any claim he may have to a jury to enforce the same, if entitled to any, and to condemn Mr. Bache in the costs of this suit since the tender.

On behalf of Mr. Bache the principal averments were denied, and it was alleged in the reply, that the two screws were supplied by Mr. Bache in the ordinary course of trade, and without any condition or agreement whatever to the effect that if they did not answer no charge should be made; that the propeller first supplied did answer the purposes required thereby; that the pattern and make thereof was superintended by Mr. Lowe, the patentee (for which pattern **[440]** and superintendence Mr. Bache paid Mr. Lowe the sum of 5l.); that it was made in the same manner as the former successful propellers (*a*)[2] had been made; that the master of the "Flecha" required a propeller made according to his own plans and wishes, which he thought and said would answer better; that he gave Mr. Bache an order for another after and in consequence of its being found impracticable to alter such propeller according to the master's wishes, and the price of the second propeller was agreed between the master and Mr. Bache at 30l., &c.

That the said vessel is a foreign and sea-going vessel, and sails under the Belgian flag, and with Belgian papers, &c.

The Queen's Advocate and Dr. Spinks appeared for Mr. Bache; and Dr. Bayford for the "Flecha." He cited *The "Sophie"* (1 W. Rob. 368) and *The "Ocean"* (see Notes of Cases, 31).

*Dr. Lushington.* The first point to which I must apply my mind is the question whether I ought, in compliance with the prayer of the act on petition, which has been so strongly pressed by Dr. Bayford, to send this case to be tried by a jury.

Undoubtedly, the Court has power, if it think fit, to direct a trial by jury of any issue in any contested suit depending here; but in a case like the present, where there is a difference of only 60l. or 70l. between the parties, it would, in my opinion, subject the Court to severe censure. It was only intended that the Court should exercise the power in cases where some important issue was involved, and not in cases like the present, where the principal difficulty lies in discrepant evidence as to the terms of a contract. Indeed, I cannot think it was the intention of the parties to make a prayer of that kind, a compliance with which would necessarily entail expenses far beyond the amount in dispute. They seem to be under some misapprehension on the subject, and for their sake, no less than for the credit of the Court, I must decline to accede to their request.

---

(*a*)[1] In consequence of a misapprehension respecting the assignation on the part of the plaintiff, the suit was dismissed, and upon the vessel being arrested the second time, the owner appeared under protest. The question as to the ship's liability to a second arrest upon the same claim was argued, and the Court decided that the dismissal of the suit was analogous to a nonsuit; that the plaintiff had a right to arrest the ship a second time; that he must pay the costs incurred in the first action, but that the defendant must pay the costs of the appearance under protest.

(*a*)[2] This patent screw had been supplied to several steamers, among which was Her Majesty's yacht "Fairy."

I now come to the next objection. It is said that the jurisdiction of the Court depends upon the Act of Parliament, and that the facts of the case do not bring it within the meaning of the words of the Act, according to their true construction.

Now the facts are these: this vessel, belonging to Belgian owners and sailing under Belgian colours, has, for the last two years, been constantly running, every fortnight, between Ghent and London, with cargoes and passengers. On various occasions **[441]**, when lying in the Thames, Mr. Bache, an English engineer, has done repairs to her machinery; and on two occasions, according to his statement, has supplied her with a screw propeller. These being the facts, what is the law applicable to them? The words of the statute, fairly construed, must govern this Court. It enacts, section sixth, that "the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatever for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the necessaries were furnished in respect of which such claim is made."

Now the first question will be, Is not this a foreign ship? The second, Are the articles alleged to have been furnished necessary or not? I apprehend that this vessel is to all intents and purposes a foreign ship, and the fact of its frequent voyages to England cannot divest it of that character; and, looking at all the circumstances of the case, and the nature of the traffic in which she was engaged, viz. carrying passengers between the two countries, I am of opinion that the articles were necessaries within the meaning of the statute. It is clear that to a vessel of this description a screw propeller is a necessary; but it is argued, that although a propeller may be a necessary generally, yet in this particular instance it was not so, because the vessel was perfectly capable of making her voyage in safety with her old screw. I cannot accede to that proposition, for I think there is a necessity to make such vessels perfect and seaworthy in all respects. The opinion of the Court will always be that these vessels, to which the lives of passengers are entrusted, should be constantly kept in that state of repair which most conduces to their safety. The learned counsel has cited two cases in which I formerly expressed my opinion as to the reasons which led to the passing of this section of the statute; but I then gave the leading reasons, not the only reasons; there were various others, and not the least important among them was that the law of this country might in that respect be assimilated to the general law of the maritime states of Europe, which gives a lien to persons which furnish necessaries to a vessel in port or on the neighbouring high seas. I have no hesitation whatever in pronouncing the case to be within the jurisdiction of the Court.

What, then, are the merits of the case? It is a suit brought by a Mr. Bache, of Bermondsey, an engineer, who alleges that he has performed certain work and supplied certain materials to this vessel. A tender has been made for a certain portion of the work, but there is a dispute as to the terms upon which Mr. **[442]** Bache supplied the ship with two screw propellers made from the patent of a Mr. Lowe. There is no doubt that the screws were furnished to the vessel, and I have to decide upon what conditions or under what contract they were so furnished.

In the first place, what would be the ordinary contract in such a case, provided no special contract was entered into between the parties? Clearly the purchaser would be bound by his order, unless some fraud had been practised to induce that order, or unless the vendor had not fulfilled his part of the contract by its proper execution.

Now, what is the defence in this case? It is alleged, first, that nothing is due; that all the work which has been performed by Mr. Bache is covered by the tender; that no contract whatever was made with Mr. Bache respecting the screws, but that the contract, whatever it was, was made with Mr. Lowe, who employed Mr. Bache as his workman. If this be so, then, of course, Mr. Bache cannot recover. How stands the matter in the evidence? Of course, I expect to find contradictory evidence. The master swears that "he gave the order to Mr. Lowe, and that during the negotiations for, and trials of, the said screw propellers, he believed and considered that he was treating with Mr. Lowe, the patentee." He is contradicted by Mr. Bache. But the best evidence in my opinion is that of Mr. Lowe himself, who disclaims the contract altogether, and states, in positive terms, "that he never instructed Mr. Bache to make the propellers; that the master alone gave the orders to Mr. Bache for the making thereof; that he himself was merely consulted by the said

master for the purpose of giving his consent to his patent being applied to Mr. Bache's workmanship; that such consent was given on condition of his being paid the sum of 5l., which was duly paid to him by Mr. Bache." I am of opinion that Mr. Lowe clearly shews that the contract was made with Mr. Bache, and consequently that Mr. Bache is entitled to recover.

The second point of the defence is this: it is said that there was a special contract, the terms of which were such that the present claim cannot be sustained. I would here observe that it appears to me extremely inconvenient that such contracts should depend upon parol evidence; the Court would naturally expect the conditions of such a contract to be reduced into writing. It may not, perhaps, be required by the Statute of Frauds, but great difficulties will constantly arise from its neglect. According to the averment of the owners the terms of the contract were these: that "unless the screw supplied proved satisfactory to the master in producing an increased **[443]** speed and a decreased consumption of fuel, it was to be returned, and no charge whatever was to be made." Then they say that the contract was not fulfilled, for that the vessel actually lost speed and consumed more fuel, and that, therefore, the plaintiff cannot recover. Is this satisfactorily proved by the evidence? I must again refer to the evidence of Mr. Lowe, who is the only witness not under a bias: he expressly denies that any specific contract whatever was made; he distinctly says that such averment is untrue.

If such a contract had existed the Court would expect to find it reduced to writing, especially when it appears that on a previous occasion the master had made a similar contract with an engineer named Rankin, and that such contract was in writing, and signed by both parties. This document is annexed to the affidavit of the master, and is in these words:—

"London, 22nd September, 1853.

"It is agreed between the captain of the 'Flecha' and Benjamin Rankin, that the said Benjamin Rankin shall have the use of the said steam-ship to make trial of a new propeller, patented by him, the said Benjamin Rankin, called the 'semi-disc propeller,' upon the following understanding, that in consideration of the said ship, he, the said Benjamin Rankin, at his own cost, make and fix the said propeller; and, in the event of the trial being successful, the said propeller shall become the property of the owners of the said steam-ship, and on the contrary, the screw to be refixed without charge to the said owners. (Signed) "B. RANKIN.

"H. SEENWEN."

Now, it is contended that the new contract was to stand on the same footing as that with Mr. Rankin; but the argument was well pressed by counsel, and I certainly think it is very strong, that the fact of the special contract having been reduced into writing, and signed by the respective parties in the one case, leads to the conclusion that the contract in the subsequent case, not having been so reduced into writing, was not special, but only the ordinary contract between vendor and purchaser. This conclusion is supported by the fact that Mr. Lowe's patent had already been successfully applied to various other vessels, and therefore did not require the loan of the "Flecha" in order to test it. I do not think the master can contend that he entered into any such arrangement with Mr. Bache as he had done with Mr. Rankin.

I am of opinion that there is a failure on the part of the **[444]** defendant to prove any special contract which should exempt this case from the general principles of ordinary contracts between vendors and purchasers. It is not sufficient that the propeller did not answer his expectations or his purposes. It is a general rule of law that if you take an article with your eyes open, and it should afterwards prove inefficient for your object, you must bear the loss, unless you have made some express stipulation to the contrary.

That brings me to the last point, which, indeed, is the only one of any great difficulty. It is this: the first screw was, it seems, taken away by Mr. Bache, and has been retained by him: nothing more is said of it, and I have no explanation whatever of this part of the transaction. The averment is, "that they took away the first screw, which they retained and still retain;" this is not denied. There must, I think, have been some understanding with respect to this screw, though I am not informed of it. It is merely stated by Mr. Bache that he agreed to make the second screw for 30l., whereas the price of the first had been 40l.

Looking at all the circumstances of the case, I think I shall do justice to both

parties if I exercise the equitable powers with which I am invested, overrule the tender, and pronounce for the claim with costs, but deduct the sum of 25l. for the screw which Mr. Bache received back, and still retains in his possession.

Proctors: for Mr. Bache, Wills; for the owner, Gostling.

"INDUSTRIE." Admiralty Prize Court, Aug. 15, 1854.—A vessel under Russian colours, with a Russian pass, and whose papers disclosed only Russian owners, being captured, a claim was made by the master as being a neutral, and the lawful owner of one fourth part thereof. Held that the claim could not be sustained, as the enemy's flag and pass imprinted a hostile character on the whole.

[S. C. Sp. Pr. Cas. 54; 2 Eng. Pr. Cas. 297; 18 Jur. 1005. Applied, *The "Marie Glaeser,"* [1914] P. 238. Referred to, *The "Hamborn,"* [1918] P. 22.]

This vessel, a Russian ship, left Hull with a cargo of salt, bound to Riga, on the 18th of December, 1853, and after meeting various mischances, was captured off Memel on the 26th of April.

Three fourths of the ship, having been admitted to belong to Russian merchants, was condemned, but a claim was made for one fourth by Jeus Neilson Fuhl, the master, who was, as alleged, a subject of Denmark.

The Queen's Advocate and Dr. R. Phillimore for the captor, cited *The "Vrow Elizabeth"* (5 C. Rob. 4) and *The "Primus"* (ante, p. 353).

Dr. Addams and Dr. Twiss for the claimant cited *The "For-*[445]*-tuna"* (1 Dods. 86), *"Donna Marianna"* (ibid., 92), *"Success"* (ibid., 131), *"Anna Catharina"* (4 C. Rob. 107), *"Onderneeming"* (5 C. Rob. 7, note), *"Diana"* (ibid., 60), *"Calma"* (*g*), and *The "San Francisco Antonius."* (*h*)

*Dr. Lushington.* In all cases of doubt and difficulty, or where there is any novelty, the Court is desirous of taking time, in order that its determination may be expressed in clear and intelligible words; but where the Court entertains no doubt whatever as to the judgment to which it will arrive, and where it sees no difficulty whatever in expressing its reasons with sufficient perspicuity to satisfy its own view of the justice of the case, it is very desirable that no delay should be interposed, lest it should be imagined that it does entertain any doubt at all. Upon the present occasion I am fully prepared, according to the judgment I have formed, to pronounce my opinion. I think, in so doing, I may entirely lay out of consideration what I said in the case of *The "Primus,"* because if it should so happen that I expressed myself hastily, or saw reason to depart from anything I said, I should have the candour and the courage to be ready and willing to reconsider the matter, and to correct it if I were in error.

The facts of this case appear to me to be these. This was a vessel sailing under Russian colours, and, as I understand, with Russian papers, not divulging any other interest than that the ship was wholly owned by Russians. She is now claimed by the master, who contends that he is a subject of Denmark, and is entitled to a restoration of one fourth of the vessel, because he was a neutral at the time; and he is not prevented from asserting that claim by reason of the vessel being under Russian colours, or by reason of the papers not disclosing any such interest.

I will entirely divert my mind from anything relating to the national character of this individual, for the purpose of argument; but I must candidly state that there are facts appearing on the face of the evidence which would, undoubtedly, create some doubt in my mind as to whether this man is entitled to the national character of a Dane or not. I will state what could not come under the cognizance of counsel. When the interrogatory is first put to him, he states that his home is partly at Riga and partly elsewhere, and then the former is struck out.

[446] The question then comes simply to this, can he maintain a title to restitution at this period—the commencement of a war—by reason of being bonâ fide entitled to one fourth part of the vessel at a period antecedent to the war, and up to the time of seizure? I will give him the benefit of all these facts. If this be a question already concluded by high authority, and acquiesced in in various judgments by Lord Stowell, and never carried up to the Appeal Court, which then had jurisdiction in prize matters, it is vain for the Court to inquire whether it is bound by such authority.

---

(*g*) Life of Sir Leoline Jenkyns, vol. ii. p. 783.

(*h*) Not reported, but cited from a MS. volume of the late Sir James Marriott, now in the possession of Dr. Twiss.

In the case of *The "Vrow Elizabeth"* (5 C. Rob. 4), Lord Stowell has expressed himself in the most decided terms with regard to the law. He said, "It would, I think, be extremely hazardous to admit a claim in opposition to this evidence." That relates merely to the question of evidence; but as to the rule of law, he says, "I will go further, and say that I hold the claim to be also against the established rules of law; by which it has been decided that a vessel sailing under the colours and pass of a nation is to be considered as clothed with the national character of that country." There cannot be a stronger expression than this, and the proposition cannot be more clearly enunciated. It may be said that Lord Stowell would condemn the property on other grounds, but of that I know nothing. He stated the reasons which led to his judgment, and the principles of law on which he proceeded.

In a note to this case it is said, in *The "Onderneeming"* (5 C. Rob. 7), a British subject obtained restitution of seven-eighths of the ship, under a Dutch flag and pass. Now, assuming there was no Order in Council, and assuming there were no special directions from the Crown, he would have obtained restitution against the whole law laid down by Lord Stowell, and it would have been remarkable if that had been adverted to in a note instead of coming forward as a prominent case, shewing the doctrine of the Court. But I cannot doubt what the fact was, for the note goes on, "The King's instructions, July 23, 1803, direct restitutions of ships and cargoes bonâ fide belonging to British subjects, sailing before the knowledge of hostilities from the colonies of France and Holland, to whatever country they might be going." This opinion which I have formed appears to be borne out by a note at the end of the volume (5 C. Rob. Appendix): "Since the decision of the Court of Admiralty in the case of *The 'Vrow Elizabeth,'* where the flag and pass of the enemy was held conclusive for the claim of the ship on behalf of a neutral proprietor, though adopted prior to hostilities, and without any prospect of such an event, the same question has been fully agitated **[447]** before the Court of Appeal in several cases, and with a similar result." No distinction was made between the flag being adopted prior to the commencement of hostilities, and when there was no reason to suppose that hostilities would have taken place, and the flag being adopted flagrante bello. By these authorities I must hold myself concluded.

If there be an exception on the present occasion it must be shewn to be in circumstances which have not been brought to my attention, but which will take it out of the principle. When the vessel is sailing under a neutral flag, the captors may shew that all the property is not neutral, but part of it belongs to an enemy, and in that case you divide it, and condemn the part which is hostile, and not the part which is neutral; but the proposition is not true vice versâ, that where a vessel is sailing under a hostile flag, you can claim, on behalf of a neutral, the property under an enemy's flag.

From the cases cited from Sir Leoline Jenkyns and Sir James Marriott, I cannot draw deductions contrary to the principles to which I have adverted. What would become of belligerent rights, if, when you search vessels under hostile colours, you are to be told, "This is not a Russian vessel; it is neutral, or nine-tenths is neutral. You are quite mistaken; it is entitled to restitution at the hands of the Court." It is manifest that the right of search under these circumstances would be destroyed. It is clear that the whole trade of an enemy might be carried on with perfect impunity, and all the naval force of France and Great Britain would never be able to carry into execution those rights which they are undoubtedly justified in exercising by the law of nations. I entertain no doubt in this case, and I condemn the vessel.

Proctors: for the captors, The Queen's Proctor; for the claimant, F. Clarkson.

THE "POLKA." Admiralty Prize Court, August 15, 1854.—Under peculiar circumstances the Court will condemn a prize which has been taken into and lies in a neutral port and allow it to be sold there.

[S. C. Sp. Pr. Cas. 55; 2 Eng. Pr. Cas. 301. Referred to, *Dyke* v. *Elliott*; *The "Gauntlet,"* 1872, L. R. 4 P. C. 189.]

The commanders of Her Majesty's ships "Amphion" and "Conflict" having received information that a number of Russian merchant-vessels were lying in the port of Libau, anchored within gunshot of the town on the 17th of May last, summoned the governor to surrender the said vessels within three hours. At half-past three P.M. of the same day an answer was received from the authorities, to the effect that they were without

the means of defence, and would readily send the vessels out, but could not possibly do it within the time specified. [448] Whereupon the captains of the "Amphion" and "Conflict" caused the ships' boats to be manned and armed, and they proceeded with them to the port. Having had the Russian vessels—seven schooners and one brigantine—pointed out, they took possession of them, brought them out into the roads, and finding them not to be in a condition to perform a voyage to England, afterwards took them to the port of Memel, where they remained to await the decision of the Court.

At the time of their capture the vessels were found all dismantled, their sails unbent, and some of them aground. Two of them were scuttled, the whole of them deserted by their crews, and no papers whatever were found on board, neither could the captors obtain any information whatever respecting them, but believed they had been taken away by the masters when they deserted the vessels.

The above circumstances were fully verified by affidavits, and the Queen's Advocate moved the Court to condemn the vessels and decree their sale in the port of Memel, stating that an intimation had been received from the Prussian Government, that no objection would be made to such a course, provided they were sold by private contract, without being advertised or put up to auction.

*Dr. Lushington.* The circumstances under which the present application is made are quite peculiar, and form an exception to the general principle upon which this Court proceeds. Though there is no direct evidence that the vessels are Russian, yet there is no claim, and the Court entertains no doubt upon the subject. I have no hesitation in condemning them; and, looking at the fact deposed to, that they are not in a fit state to be brought to England, and the consent of the Prussian Government to their sale at Memel, the Court will allow that course in the present case, but with the proviso that the wishes of the Prussian Government shall be fully observed with respect to the sale.

I wish it, moreover, to be expressly understood, that this case is decided upon its own peculiar circumstances, and is not to be considered as a precedent for the condemnation of a prize while lying in a neutral port. The rule is that the prize shall be brought into a port belonging to the captors' country, and the Court must guard itself against allowing a precedent to the contrary to be established.

Proctor: The Queen's Proctor.

---

# APPENDIX.

[1] No. 1.—Declaration of Her Majesty with Reference to Neutrals and Letters of Marque.

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, having been compelled to take up arms in support of an ally, is desirous of rendering the war as little onerous as possible to the powers with whom she remains at peace.

To preserve the commerce of neutrals from all unnecessary obstruction, Her Majesty is willing, for the present, to waive a part of the belligerent rights appertaining to her by the Law of Nations.

It is impossible for Her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's dispatches, and she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's forts, harbours, or coasts.

But Her Majesty will waive the right of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war.

It is not Her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board enemy's ships; and Her Majesty further declares, that being anxious to lessen as much as possible the evils of war, and to restrict its operations to the regularly organised forces of the country, it is not her present intention to issue letters of marque for the commissioning of privateers.

Westminster, March 28, 1854.

No. II.—At the Court at Buckingham Palace, the 29th day of March, 1854.
Present, the Queen's Most Excellent Majesty in Council.

Her Majesty having determined to afford active assistance to her ally, His Highness the Sultan of the Ottoman Empire, for the protection of his dominions against the encroachments and unprovoked aggression of His Imperial Majesty the Emperor of All the Russias, Her Majesty therefore is pleased, by and with the advice of her Privy Council, to order, and it is hereby ordered, that general reprisals be granted against the ships, vessels, and goods of the Emperor of All the Russias, and of his subjects or others inhabiting within any of his countries, territories, or dominions, so that Her Majesty's fleets and ships shall and may lawfully seize all ships, vessels, and goods belonging to the Emperor of All the Russias, or his subjects, or others inhabiting within any of his countries, territories, or dominions, and bring the same to judgment in such Courts of Admiralty within Her [2] Majesty's dominions, possessions, or colonies as shall be duly commissionated to take cognizance thereof. And to that end Her Majesty's Advocate-General, with the Advocate of Her Majesty in her office of Admiralty, are forthwith to prepare the draft of a commission, and present the same to Her Majesty at this Board, authorizing the Commissioners for executing the Office of Lord High Admiral to will and require the High Court of Admiralty of England, and the Lieutenant and Judge of the said Court, his surrogate or surrogates, as also the several Courts of Admiralty within Her Majesty's dominions which shall be duly commissionated, to take cognizance of, and judicially proceed upon, all and all manner of captures, seizures, prizes, and reprisals of all ships, vessels, and goods that are or shall be taken, and to hear and determine the same; and, according to the course of Admiralty and the Law of Nations, to adjudge and condemn all such ships, vessels, and goods, as shall belong to the Emperor of All the Russias, or his subjects, or to any others inhabiting within any of his countries, territories, or dominions; and they are likewise to prepare and lay before Her Majesty, at this board, a draft of such instructions as may be proper to be sent to the said several Courts of Admiralty in Her Majesty's dominions, possessions, and colonies, for their guidance herein.

From the Court at Buckingham Palace, this 29th day of March, 1854.

| | |
|---|---|
| Cranworth, C. | Drumlanrig. |
| Granville, P. | Mulgrave. |
| Argyll, C. P. S. | J. Russell. |
| Newcastle. | Ernest Bruce. |
| Breadalbane. | Sidney Herbert. |
| Lansdowne. | J. R. G. Graham. |
| Abercorn. | Stephen Lushington. |
| Aberdeen. | W. E. Gladstone. |
| Clarendon. | William Molesworth. |

No. III.—At the Court at Buckingham Palace, the 29th day of March, 1854.
Present, the Queen's Most Excellent Majesty in Council.

It is this day ordered by Her Majesty, by and with the advice of her Privy Council, that no ships or vessels belonging to any of Her Majesty's subjects be permitted to enter and clear out for any of the ports of Russia, until further order; and Her Majesty is further pleased to order, that a general embargo or stop be made of all Russian ships and vessels whatsoever, now within or which shall hereafter come into any of the ports, harbours, or roads within any of Her Majesty's dominions, together with all persons and effects on board the said ships or vessels: provided always, that nothing herein contained shall extend to any ships or vessels specified or comprised in a certain Order of Her Majesty in Council, dated this 29th day of March, for exempting from capture or detention Russian vessels under special circumstances; and Her Majesty is pleased further to order, and it is hereby ordered, that the utmost care be taken for the preservation of all and every part of the cargoes on board any of the said ships or vessels, so that no damage or embezzlement whatever be sustained.

And the Right Honourable the Lords Commissioners of Her Majesty's Treasury, the Lords Commissioners of the Admiralty, and the Lord Warden of the Cinque Ports are to give the necessary directions herein as to them may respectively appertain.

C. C. Greville.

[3] No. IV.—At the Court at Buckingham Palace, the 29th day of March, 1854.
Present, the Queen's Most Excellent Majesty in Council.

Her Majesty, being compelled to declare war against His Imperial Majesty the Emperor of All the Russias, and being desirous to lessen as much as possible the evils thereof, is pleased, by and with the advice of her Privy Council, to order, and it is hereby ordered, that Russian merchant vessels, in any ports or places within Her Majesty's dominions, shall be allowed until the 10th day of May next, six weeks from the date hereof, for loading their cargoes and departing from such ports or places; and that such Russian merchant vessels, if met at sea by any of Her Majesty's ships, shall be permitted to continue their voyage, if on examination of their papers it shall appear that their cargoes were taken on board before the expiration of the above term: provided, that nothing herein contained shall extend or be taken to extend to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited or contraband of war, or any despatch of or to the Russian Government.

And it is hereby further ordered by Her Majesty, by and with the advice of her Privy Council as aforesaid, that any Russian merchant vessel which, prior to the date of this Order, shall have sailed from any foreign port bound for any port or place in Her Majesty's dominions, shall be permitted to enter such port or place and to discharge her cargo, and afterwards forthwith to depart without molestation, and that any such vessel, if met at sea by any of Her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.

And the Right Honourable the Lords Commissioners of Her Majesty's Treasury, the Lords Commissioners of the Admiralty, and the Lord Warden of the Cinque Ports, are to give the necessary directions herein as to them may respectively appertain.

C. C. GREVILLE.

No. V.—By the Queen. A Proclamation.

VICTORIA R.

Whereas, by our Order in Council bearing date the 29th day of March 1854, we have ordered that the general reprisals be granted against the ships, goods, and subjects of the Emperor of All the Russias, his subjects or others inhabiting within any of his countries, territories, or dominions (save and except any vessels to which our license has been or may be granted, or which have been directed to be released from the embargo, any have not since arrived at any foreign port), so that our fleets and ships shall and may lawfully seize all ships, vessels, and goods belonging to the Emperor of All the Russias, or his subjects, or others inhabiting within any of his countries, territories, or dominions, and bring the same to judgment in any of the Courts of Admiralty within our dominions duly authorized and required to take cognizance thereof, we do do hereby order and direct that the net produce of all such prizes taken by any of our ships or vessels of war (save and except when they shall be acting on any conjunct expedition with our army, [4] in which case we reserve to ourselves the division and distribution of all prize and booty taken, and also save and except as hereinafter mentioned), shall be for the entire benefit and encouragement of our flag officers, captains, commanders, and other commissioned officers in our pay, and of all subordinate, warrant, petty, and non-commissioned officers, and of the seamen, marines, and soldiers on board our said ships and vessels at the time of the captures after the same shall have been to us finally adjudged lawful prize.

Whenever any prize shall be taken by any of our fleets, squadrons, ships, or vessels of war whilst acting in conjunction with any fleets, squadrons, ships, or vessels of war belonging to any other power or powers in alliance with us, our High Court of Admiralty, or the Vice-Admiralty Court within our dominions adjudicating thereon, shall apportion to such ally or allies a share or shares of the proceeds of such prize or prizes proportionate to the number of officers and men, etc., present and employed on the part of such ally or allies as compared with the number of officers and men, etc., present and employed on our behalf in such capture or captures, without reference to their respective ranks, and the share or shares so set apart for such ally or allies shall be transmitted to such persons as may be duly authorized on behalf of such ally or allies to receive the same.

Ships or vessels, being in sight of the prize, as also of the captor, under circum-

stances to cause intimidation to the enemy and encouragement to the captor, shall be alone entitled to share as joint captors.

After having deducted the portion set apart as aforesaid for our allies, a distribution, so far as regards Her Majesty's forces, shall be as follows:—The flag officer or officers shall have one twentieth part of the whole net proceeds arising from prizes captured from the enemy by any of the ships or vessels under his or their command, and of the rewards conferred for the same, according to the following conditions and modifications, save and except as hereinafter provided and directed; that is to say,

When there is but one flag officer he shall have the entire one twentieth part; when two flag officers shall be sharing together, the chief shall have two thirds, and the other flag officer shall have the remaining one third of the one twentieth part; and when there shall be more than two flag officers, the chief shall have one half of the said one twentieth part, and the remaining half shall be equally divided among the junior flag officers; commodores of the first class and captains of the fleet to share as flag officers: provided always, that no flag officer, unless actually on board any of our ships or vessels of war, and at the actual taking, sinking, burning, or otherwise destroying any ship or ships of war, privateer or privateers, belonging to the enemy, shall share in the distribution of any head money or bounty money granted as a reward for taking, sinking, burning, or otherwise destroying any such ship or vessel of the enemy.

That no flag officer commanding in any port in the United Kingdom shall share in the proceeds of any prize captured from the enemy by any ship or vessel which shall sail from or leave such port by order of the Lord High Admiral, or of our Commissioners for executing the Office of Lord High Admiral.

That when ships or vessels under the command of several flag officers belonging to separate stations shall be joint captors, each flag officer shall receive a proportion of the one twentieth part, according to the number of officers and men present under the command of each such flag officer; and when any ship or vessel under orders from the Lord High Admiral, or from our Commissioners for executing the Office of Lord High Admiral, are joint captors with other ships or vessels under a flag or flags, the like regulations as to the apportionment of the flag share to the flag officer or officers are to be observed.

[5] With reference to flag officers, it is to be noted,(*a*)

That when an inferior flag officer is sent to reinforce a superior officer on any station, the superior flag officer shall not share in any prize taken by the inferior flag officer before he has arrived within the limits of that station, unless the inferior officer shall have received some order directly from, and shall be acting in execution of some order issued by, such superior flag officer.

No chief flag officer quitting any station, except upon some definite urgent service, and with the intention of returning to the station as soon as such service is performed, shall share in any prize taken by our ships or vessels left behind after he has passed the limits of the station, or after he has surrendered the command to another flag officer appointed by the Admiralty to command in chief upon such station.

An inferior flag officer quitting any station (except when detached by orders from his commander-in-chief upon a special service, accompanied with orders to return to such station as soon as the service has been performed) shall have no share in prizes taken by the ships and vessels remaining on the station after he has passed the limits thereof.

In like manner flag officers remaining on such station shall not share in the prizes taken by such inferior officer, or by ships or vessels under his immediate command, after he has quitted the limits of the station, except he has been detached as aforesaid.

A commander-in-chief or other flag officer belonging to any station shall not share in any prize or prizes taken out of the limits of that station by any

---

(*a*) Decisions respecting the Flag share will be found in 3 C. Rob. 60, 4 C. Rob. 362, 422, 5 C. Rob. 209, 2 Dods. 413, 1 Acton 69, 239, 1 Hagg. 129. Also in 4 East, 238, 6 East, 220, 8 East, 502, 13 East, 574, 1 Taunt. 1, 2 Taunt. 7, 2 M. & S. 105, 4 M. & S. 105, H. Black. 262, 4, n., 4 Doug. 202.

ship or vessel under the command of a flag officer of any other station, or under orders from our Commissioners of the Admiralty, unless such commander-in-chief or flag officer is expressly authorized by our said Commissioners to take the command of that station in which the prize or prizes is or are taken, and shall actually have taken upon him such command.

Every commodore having a captain under him shall be esteemed a flag officer with respect to the twentieth part of prizes taken, whether he be commanding in chief or serving under command.

The first captain to the admiral and commander-in-chief of our fleet, and also the first captain to any flag officer appointed to command a fleet of ten ships of the line or upwards, shall be deemed to be a flag officer for the purpose of sharing in prize, and shall be entitled to share therein as the junior flag officer of such fleet.

Any officer on board any of our ships of war at the time of capturing any prize or prizes who shall have more commissions than one, shall be entitled only to share in such prize or prizes according to the share allotted to him by the above-mentioned distribution in respect to his superior commission or office.

And with reference to other officers it is to be noted, that a captain, commander, or other commanding officer of a ship or vessel, shall be deemed to be under the command of a flag when he shall have received some order from, or be acting in the execution of some order issued by, a flag officer, whether he be or be not within the limits of the station of such flag officer; and in the event of his being directed to join a flag officer on any station, he shall be deemed to be under the command of such flag officer from the time when he arrives within the limits of the station, which circumstance is always to be carefully noted in the log book; and it [6] shall be considered that he continues under the flag officer of such station until he shall have received some order directly from, or be acting in the execution of some order issued by, some other flag officer, duly authorized, or by the Lord High Admiral, or our Commissioners for executing the Office of Lord High Admiral.

And we hereby direct, that the captain, commander, lieutenant commanding, master commanding, or any other officer duly commanding any ship, sloop, or vessel of war singly taking any prize from the enemy, that is to say, the officer actually in command at the time, shall have one eighth of the remainder, or if there is no flag one eighth of the entire net proceeds, except that if the single capturing ship be a rated ship having a commander under the captain, the commander shall take a portion of the one eight part as if he were commander of a sloop, according to the proportion hereinafter set forth; and if more than one commanding officer of the same rank of command shall be entitled to share as joint captors, the one eighth shall be equally divided between them; but when captains, commanders, lieutenants commanding, and masters commanding respectively, our ships and vessels of war, and commanders under captains in rated ships, shall share together, in whatever variety of combination, the one eighth shall be so divided into parts for a graduated apportionment as to provide for each captain receiving six parts; each commander of a sloop, or commander under a captain in a rated ship, three parts; and each lieutenant commanding, or master commanding, or other officer actually commanding a small vessel of war, two parts; which we hereby direct shall be the proportion in which they shall respectively share; commodores of the second class, and field officers of marines or of land forces serving as marines, doing duty as field officers, above the rank of major, to share as captains, and field officers of marines or of land forces serving as marines, and doing duty in the rank of major, to share as commanders of sloops.

And we further direct, that after provision shall thus have been made for the flag share (if any), and for the portion of the commanding officer or officers and others as above specified, the remainder of the net proceeds shall be distributed in ten classes, so that each officer, man, and boy composing the rest of the complements of our ships, sloops, and vessels of war, and actually on board at the time of any such capture, and every person present and assisting, shall receive shares or a share according to his class, as set forth in the following scale:—

First class: Master of the fleet, inspector of steam machinery afloat when embarked with a fleet, medical inspector or deputy medical inspector when embarked with a fleet, forty-five shares each.

Second class: Senior lieutenant of a rated ship, not bearing a commander under the captain, secretary to the admiral of the fleet or admiral commanding in chief, thirty-five shares each.

Third class: Sea lieutenant, master, captain of marines, of marine artillery, or of land forces doing duty as marines, whether having higher brevet rank or not, secretary to an admiral or to a commodore of the first class not commanding in chief, chief engineer, twenty-eight shares each.

Fourth class: Lieutenant or quarter master of marines, lieutenant of marine artillery, lieutenant, quarter master, or ensign of land forces doing duty as marines, secretary to a commodore of the second class, chaplain, surgeon, paymaster, naval instructor, mate, assistant surgeon, second master, clerk in charge, passed clerk, assistant engineer, gunner, boatswain, carpenter, eighteen shares each.

Fifth class: Midshipman, master's assistant, pilot, clerk (not passed), master-at-arms, chief gunner's mate, chief boatswain's mate, chief carpenter's mate, chief captain of the forecastle, admiral's coxswain, chief quarter master, seamen's schoolmaster, ship's steward, ship's cook, ten shares each.

[7] Sixth class: Naval cadet, clerk's assistant, captain's coxswain, ship's corporal, quarter master, gunner's mate, boatswain's mate, captain of the forecastle, captain of the afterguard, captain of the hold, captain of the main top, captain of the foretop, coxswain of the launch, sailmaker, ropemaker, caulker, leading stoker, blacksmith, serjeant of marines, of marine artillery, or of land forces doing duty as marines, nine shares each.

Seventh class: Captain of the mast, captain of the mizen top, yeoman of the signals, coxswain of the barge, coxswain of the pinnace, coxswain of the cutter, second captain of the forecastle, second captain of the main top, second captain of the foretop, second captain of the afterguard, sailmaker's mate, caulker's mate, musician, cooper, armourer, corporal of marines or of land forces doing duty as marines, bombardier of marine artillery, head krooman, six shares each.

Eighth class: Leading seamen, shipwright, second captain of the hold, able seamen, carpenter's crew, sailmaker's crew, cooper's crew, armourer's crew, yeoman of the store rooms, steward's assistant, ordinary seamen, blacksmith's mate, private and fifer of marines or of land forces doing duty as marines, gunner of marine artillery, painter, stoker, coal trimmer, second head krooman, sick berth attendant, bandsman, tailor, butcher, three shares each.

Ninth class: Cook's mate, ship's steward's boy, admiral's domestic, superintendent's domestic, admiral's steward and cook, captain's steward and cook, ward room and gun room steward and cook, subordinate officers' steward and cook, commander's servant, secretary's servant, second class ordinary seamen, assistant stoker, barber, boy of the first class, first and second class krooman, supernumeraries, except as hereinafter provided, persons borne merely as passengers and not declining to render assistance on occasion of capture, two shares each.

Tenth class: Boy below first class, one share.

All supernumeraries holding ranks in the service above the ranks or ratings specified in the fifth class of this our Proclamation who have been ordered to do duty in any of our ships or vessels by the Lord High Admiral, or by our Commissioners for executing the Office of Lord High Admiral, by the senior officer of the fleet or squadron, or if none senior then by the captain or commanding officer of the capturing ship or vessel, if not by special authority employed in higher capacities, shall share according to the rank which they respectively hold in the service; put in all cases, to qualify them for so sharing, and not merely as supernumeraries in the ninth class, due notation of their being thus respectively ordered to do duty must have been made on the muster books.

And with respect to supernumeraries of ratings in the service below the denominations of those specified in the fourth class of this our Proclamation, and who at full victuals are engaged in the ordinary duties of the ship, it is our will and pleasure that they shall always share according to the ratings which they bear in the service.

And in order that our royal intentions herein may be duly carried into effect, we further direct, that when any capture is made from the enemy, the captains or commanding officers of our ships or vessels of war making the same shall transmit or cause to be transmitted, as soon as may be, to the secretary to the Admiralty, a true

and perfect list of all the officers, seamen, and marines, soldiers, and others, who were actually on board on the occasion, accompanied by a separate list containing the names of those belonging to the crew who were absent on duty or otherwise at the time, specifying the cause of such absence, each list to contain the quality of the service of each person, together with the respective descriptions of men taken from the description book of the ship or vessel, and their several ratings, to be subscribed by the captain or commanding officer, and three or four more of the chief officers on board.

[8] And when the list of those actually on board, and the separate list of persons absent though belonging to the ship or vessel, shall have been verified on examination with the muster books lodged as official records, the Accountant-General of our Navy shall, upon request, grant to the agent or agents nominated or appointed by the captors, a certificate that such lists are correct or have been corrected as occasion may require, in order that distribution of the prize or other proceeds may be duly made.

And in the event of difficulty arising with respect to any of the regulations hereby ordered, or if any case should occur not herein provided for, or not sufficiently provided for, we are pleased hereby to authorise the Lord High Admiral, or our Commissioners for executing the Office of Lord High Admiral for the time being, to issue such directions thereupon as may appear just and expedient; which directions shall have the same force and effect as if specially provided for in this our royal Proclamation.

Given at our Court at Buckingham Palace, this 29th day of March in the year of our Lord 1854, and in the seventeenth year of our reign.

God save the Queen.

No. VI.—At the Court at Buckingham Palace, the 7th day of April, 1854.

Present, the Queen's Most Excellent Majesty in Council.

Her Majesty being compelled to declare war against His Imperial Majesty the Emperor of All the Russias, and being desirous to lessen as much as possible the evils thereof, is pleased, by and with the advice of her Privy Council, to order, and it is hereby ordered, that Russian merchant vessels which, at the time of the publication of this Order, shall be in any ports or places in Her Majesty's Indian territories under the government of the East India Company, or within any of Her Majesty's foreign or colonial possessions, shall be allowed thirty days from the time of the publication of this Order in such Indian territories, or foreign or colonial possession, for loading their cargoes and departing from such ports or places; and that such Russian merchant vessels, if met at sea by any of Her Majesty's ships, shall be permitted to continue their voyage if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term; provided that nothing herein contained shall extend, or be taken to extend, to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited or contraband of war, or any despatch of or to the Russian Government.

And it is hereby further ordered by Her Majesty, by and with the advice of her Privy Council as aforesaid, that any Russian merchant vessel which, prior to the 29th day of March now last past, shall have sailed from any foreign port, bound for any port or place in any of Her Majesty's Indian territories, or foreign or colonial possessions, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by any of Her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.

And the Right Honourable the Lords Commissioners of Her Majesty's Treasury, the Lords Commissioners of the Admiralty, and Her Majesty's principal Secretary of State for War and the Colonies, the Right Honourable the Commissioners for the affairs of India, and all governors, officers, and authorities whom it may concern, in Her Majesty's East Indian, foreign, and colonial possessions, are to give the necessary directions herein as to them may respectively appertain. C. C. Greville.

[9] No. VII.—At the Court at Buckingham Palace, the 7th day of April, 1854.

Present, the Queen's Most Excellent Majesty in Council.

It is this day ordered by Her Majesty, by and with the advice of her Privy Council, that no ships or vessels belonging to any of Her Majesty's subjects be permitted to

enter and clear out for any of the ports of Russia until further order; and Her Majesty is further pleased to order, that a general embargo or stop be made of all Russian ships and vessels whatsoever now within or which shall hereafter come into any of the ports, harbours, or roads, within Her Majesty's islands of Jersey, Guernsey, Alderney, and Sark, and the Isle of Man, together with all persons and effects on board the said ships or vessels: provided always, that nothing herein contained shall extend to any ships or vessels specified or comprised in a certain Order of Her Majesty in Council, dated the 29th day of March last, for exempting from capture or detention Russian vessels under special circumstances; and Her Majesty is pleased further to order, and it is hereby ordered, that the utmost care be taken for the preservation of all and every part of the cargoes on board any of the said ships or vessels, so that no damage or embezzlement whatever be sustained.

And the Lieutenant-Governors of Her Majesty's islands of Jersey, Guernsey, Alderney, and Sark, and of the Isle of Man, for the time being, are to give the necessary directions herein as to them may respectively appertain, and to return an account of their proceedings to this board. C. C. Greville.

No. VIII.—At the Court at Windsor, the 15th day of April, 1854.

Present, the Queen's Most Excellent Majesty in Council.

Whereas Her Majesty was graciously pleased, on the 28th day of March last, to issue her royal declaration in the following terms:

"Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, having been compelled to take up arms in support of an ally, is desirous of rendering the war as little onerous as possible to the powers with whom she remains at peace.

"To preserve the commerce of neutrals from all unnecessary obstruction, Her Majesty is willing, for the present, to waive a part of the belligerent rights appertaining to her by the Law of Nations.

"It is impossible for Her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches, and she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's forts, harbours, or coasts.

"But Her Majesty will waive the right of seizing enemy's property laden on board a neutral vessel unless it be contraband of war.

"It is not Her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board enemy's ships; and Her Majesty further declares, that being anxious to lessen as much as [10] possible the evils of war, and to restrict its operations to the regularly organised forces of the country, it is not her present intention to issue letters of marque for the commissioning of privateers."

Now it is this day ordered, by and with the advice of her Privy Council, that all vessels under a neutral or friendly flag, being neutral or friendly property, shall be permitted to import into any port or place in Her Majesty's dominions all goods and merchandise whatsoever, to whomsoever the same may belong; and to export from any port or place in Her Majesty's dominions to any port not blockaded any cargo or goods, not being contraband of war, or not requiring a special permission, to whomsoever the same may belong.

And Her Majesty is further pleased, by and with the advice of her Privy Council, to order, and it is hereby further ordered, that, save and except only as aforesaid, all the subjects of Her Majesty and the subjects or citizens of any neutral or friendly state shall and may, during and notwithstanding the present hostilities with Russia, freely trade with all ports and places wheresoever situate which shall not be in a state of blockade, save and except that no British vessel shall, under any circumstances whatsoever, either under or by virtue of this Order or otherwise, be permitted or empowered to enter or communicate with any port or place which shall belong to or be in the possession or occupation of Her Majesty's enemies.

And the Right Honourable the Lords Commissioners of Her Majesty's Treasury, the Lords Commissioners of the Admiralty, the Lord Warden of the Cinque Ports, and Her Majesty's principal Secretary of State for War and the Colonies, are to give the necessary directions herein as to them may respectively appertain.

C. C. Greville.

No. IX.—At the Court at Windsor, the 15th day of April, 1854.
Present, the Queen's Most Excellent Majesty in Council.

Whereas by an Order of Her Majesty in Council of the 29th of March last, it was amongst other things ordered, "that any Russian merchant vessel which prior to the date of this order shall have sailed from any foreign port, bound for any port or place in Her Majesty's dominions, shall be permitted to enter such port or place and to discharge her cargo, and afterwards forthwith to depart without molestation, and that any such vessel, if met at sea by any of Her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded:"

And whereas Her Majesty, by and with the advice of her said Council, is now pleased to alter and extend such part of the said Order: It is hereby ordered, by and with such advice as aforesaid, as follows; that is to say,—That any Russian merchant vessel which, prior to the 15th day of May 1854, shall have sailed from any port of Russia, situated either in or upon the shores or coasts of the Baltic Sea or of the White Sea, bound for any port or place in Her Majesty's dominions, shall be permitted to enter such last-mentioned port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by any of Her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.

And Her Majesty is pleased, by and with the advice aforesaid, further to order, and it is hereby further ordered, that in all other respects her [11] Majesty's aforesaid Order in Council of the 29th day of March last shall be and remain in full force, effect, and operation.

And the Right Honourable the Lords Commissioners of Her Majesty's Treasury, the Lords Commissioners of the Admiralty, and the Lord Warden of the Cinque Ports, are to give the necessary directions herein as to them may respectively appertain.

C. C. Greville.

No. X.—Instructions for the Commanders of Her Majesty's Ships and Vessels of War, as to the Disposal of Captured Vessels.

Article I.—The commanders of Her Majesty's ships and vessels of war shall send all ships, vessels, and goods, which they shall seize and take, into such port, within Her Majesty's dominions, as shall be most convenient for them, in order to have the same legally adjudged in the High Court of Admiralty of England, or in some other Admiralty Court lawfully authorized to take cognizance of matters of prize.

Article II.—After such ships, vessels, and goods (save as to ships of war) shall have been taken into any such port, the captor, or one of his chief officers, or some other person present at the capture, shall bring or send, as soon as possibly may be, three or four of the principal persons belonging to the captured ship or vessel (two of whom shall always, if possible, be either the master, supercargo, mate, or boatswain), before the Judge of the High Court of Admiralty of England, or his surrogate, or before the Judge of some other Admiralty Court within the British dominions, lawfully authorized as aforesaid, or such persons as shall be lawfully commissioned in that behalf, to be sworn and examined upon such interrogatories as shall tend to the discovery of the truth concerning the interest or property of such ship or ships, vessel or vessels, and of the goods, wares, merchandise, and other effects found therein; and the captor shall also at the time of producing the aforesaid persons to be examined, and before any monition shall be issued, bring and deliver into the hands of the Judge of the High Court of Admiralty of England, his surrogate, or the Judge of some other Admiralty Court within the British dominions lawfully authorized, or others commissioned for that purpose as aforesaid, all such books, papers, passes, sea briefs, charter-parties, bills of lading, cockets, letters, and other documents and writings whatsoever as shall be delivered up, or found on board any such ship or vessel; and the captor, or one of his chief officers, or some other person who was present at the capture, and saw the said papers and writings delivered up, or otherwise found on board at the time of the capture, shall make oath that the said papers and writings are brought and delivered in, as they were received and taken, without any fraud, addition, subduction, alteration, or embezzlement whatever, or otherwise shall account for the same upon oath to the satisfaction of the Court.

Article III.—All ships, vessels, goods, wares, merchandises, and other effects (save as to ships of war) so captured as aforesaid shall, immediately upon being brought

into port, be delivered over into the custody of the marshal or other duly qualified officer of the High Court of Admiralty of England, or other Court of Admiralty commissioned as aforesaid, or in the absence of any such officer into the custody of the collector, comptroller, or other principal officer of the customs, or navigation laws, and such ships, vessels, goods, wares, merchandises, and effects shall be kept and preserved, [12] and no part thereof shall be sold, spoiled, wasted, or diminished, and the bulk thereof shall not be broken (save only in case of urgent necessity, or by decree of the Court), until final judgment shall have been given in the said Court of Admiralty touching and concerning the same.

Article IV.—If any ships or vessels belonging to Her Majesty, or her subjects, or to any of her allies, or their subjects, shall be found in distress by being in fight, set upon, or captured by the enemy, or by reason of any other accident, the commanders of Her Majesty's ships and vessels of war shall use their best endeavours, and give aid and succour, and to the utmost of their power labour to re-capture and free the same from the enemy, or such other distress.

Article V.—The commanders of Her Majesty's ships and vessels of war shall not ransom, or agree to ransom, or quit or set at liberty, any ship or vessel, goods or wares, merchandises, or other effects belonging to the enemy, which shall have been seized and taken by them, save only in case of urgent necessity.

Article VI.—The commanders of Her Majesty's ships and vessels of war shall carry all persons taken on board of any captured men of war, or other ships or vessels, to ports at which there are or shall be established dépôts for the reception of prisoners of war, and shall there deliver them over to such persons as shall be duly authorized to receive and take charge of them; and no such commander or other officer shall presume, upon any pretence whatever, to land, release, or deliver over any such persons at any other place, to any other person, or in any other manner than as aforesaid.

Article VII.—The commanders of Her Majesty's ships and vessels of war shall not, until further orders, capture, detain, or molest any ship or vessel belonging to any subject or citizen of any state in amity with Her Majesty, solely by reason of enemy's goods being laden on board her, nor shall they, until further orders, capture, detain, or molest any goods, wares, merchandises, and effects, laden on board the same, solely by reason of their belonging to the enemy.

Article VIII.—The commanders of Her Majesty's ships and vessels of war shall seize, detain, and capture all ships and vessels laden wholly or in part with arms, ammunition, naval or military stores, officers, troops, seamen, or despatches, or any other contraband of war, which is destined for the use of the enemy, and shall send such ships or vessels, and contraband (except as hereinafter mentioned), into some port within Her Majesty's dominions, for adjudication before the High Court of Admiralty of England, or some other Court of Admiralty duly authorized to take cognizance thereof; provided, that if any such ships, vessels, or contraband be owned by subjects of France, the same shall be taken into some port of France for adjudication.

Article IX.—The commanders of Her Majesty's ships and vessels of war shall seize all ships or vessels, and the goods, merchandise, and effects laden therein, to whomsoever belonging, that shall be found attempting to violate any blockade of the ports, harbours, or coasts of the enemy, and shall send them (except as hereinafter excepted) into some port within Her Majesty's dominions, for adjudication before the High Court of Admiralty duly commissioned to take cognizance thereof; provided, that if such ships or vessels be owned by subjects of France the same shall be taken into some port of France for adjudication.

Article X.—In case Her Majesty shall declare any ports, harbours, or coasts to be in a state of blockade, the commanders of Her Majesty's ships and vessels of war are hereby enjoined to stop all neutral vessels, which they shall meet at sea, destined to the said ports, harbours, or coasts, and if they shall appear to be ignorant of the existence of the said blockade, and have no contraband of war on board, they shall turn them away, apprising them that the said ports, harbour, or coasts are in a state of blockade, and shall write a notice to that effect upon one or more of the [13] principal ship's papers; and if any neutral ship or vessel, which shall appear to have been so warned, or to have been otherwise informed of the existence of the blockade, or to have sailed from her last port, after it may reasonably be supposed that notifica-

tion of the blockade had been made public there, shall yet be found attempting or intending to violate such blockade, such vessel shall be seized, and sent into some port within Her Majesty's dominions, for legal adjudication before the High Court of Admiralty of England, or some other Court of Admiralty duly commissioned to take cognizance thereof; provided, that if such ship or vessel be owned by subjects of France the same shall be taken into some port of France for adjudication. And if any neutral ship or vessel be found coming out of any blockaded port, which she shall previously have entered in breach of such blockade, or if she shall have any goods or merchandise on board laden after knowledge of the blockade, such ship or vessel, and the goods, wares, merchandises, and other effects on board the same shall in like manner be seized, and sent in for adjudication; provided that, if such ship or vessel be owned by subjects of France, she shall be taken into some port of France for adjudication. But any neutral ship or vessel coming out of any such blockaded port, in ballast, or having only goods or merchandise on board laden before the knowledge of the blockade, shall be suffered to pass, except there be other grounds for detaining her, and a notice and warning shall be written upon one or more of her principal ship's papers, prohibiting such vessel from again attempting to enter such port during the existence of the blockade.

### No. XI.—Standing Interrogatories.

Standing interrogatories to be administered on behalf of our Sovereign Lady Victoria, by the Grace of God of Great Britain and Ireland Queen, Defender of the Faith. To all Commanders, Masters, Officers, Mariners, and other persons found on board any ship or vessel which hath been or shall be seized or taken as prize by any of Her Majesty's ships or vessels of war, concerning such captured ships or vessels, or any goods, wares, or merchandise on board the same, examined as witnesses in preparatory during the present hostilities.

Let each witness be asked the following questions, and let his answer to each question be written down distinctly and separately.

1. What are your true names? Where were you born? In what place or places have you lived during the seven years last past? Where do you now live, and how long have you lived in that place? To what prince, state, or power are you now, or have you at any previous time, and when, been a subject? or said or represented that you were a subject? Have you ever, and when, taken any and what oath of allegiance, and to whom? or obtained, or received, or applied for any and what certificate of your being a citizen or subject of, or entitled to the protection of, any and what state or country? Of what cities or towns have you ever been admitted a burgher or freeman? And when and in what manner were you so admitted? How long have you resided there since you were so admitted? Where have you since resided? What did you pay for your aforesaid admission? Are you married? If yea, where do your wife and family reside?

2. Were you present at the time of the taking and seizing of the ship or her lading, or any of the goods or merchandises concerning which you are now examined? Had the ship concerning which you are now examined any and what commission or letters of marque? If she had, what was that **[14]** commission or letter of marque, and by whom, when, and where was it granted?

3. In what port or place, by latitude and longitude, bearing and distance, and in what year, month, and day were the ship and goods, concerning which you are now examined, taken and seized? Upon what pretence, and for what reasons, were they, or any, and what part thereof, so seized? Into what port or place were they carried? Under what colours did the said ship sail first on her voyage? What colours had she hoisted or flying when seized or captured? What other colours had she on board, and for what reason had she such other colours? Did she ever, and when, hoist the same, or any, and which of them? Was any resistance made at the time the said ship was taken? and if yea, what sort of resistance, and by whom? Were any and what discription of fire arms, or cannon, or muskets, or any other and what kind of weapons used in such resistance? By whom, or by what ship or ships were you taken? Was such vessel a ship of war, or a vessel acting without any commission as you believe? Were any other, and, if yea, what ships in sight at the time of the capture?

4. What is the name of the master or commander of the captured ship concerning

which you are now examined? How long have you known the said master? Who appointed him to command the said ship? Where and when did he first take possession of her, and at what time? and who by name delivered the possession of her to him? Where is such person? and where is the master now? Where is the fixed place of abode of each of them? If the witness replies that either has no fixed place of abode, then ask him where was the last place of abode of such person? And where did he generally reside? How long has he lived there? Where was he born, and of what state is he now a subject? Is he married? If yea, where do his wife and family reside?

5. Of what tonnage or burthen is the ship concerning which you are now examined? What was the number of mariners on board her when you joined her? And at the time of her capture or seizure? And of what country was each of the said mariners? Did all such mariners come on board at the same port? And if nay, at what ports did they severally come on board? Who shipped or hired each of them, and when and where were they so shipped or hired? and for, or upon, what voyage?

6. Had you, or any, and which of the officers or mariners belonging to the ship concerning which you are now examined any, and if yea, what part, share, or interest in the said ship or her lading? Set forth who among the said officers or mariners are so interested, and to what extent you or they are so interested? Did you belong to the ship at the time she was seized and taken? If yea, in what capacity? How long have you known the said ship? When and where did you first see her? Where was she built?

7. What is the name of the said ship? How long has she been so called? Do you know of any other name or names by which she has ever and when been called? If yea, set forth such names, and when, and why, and for how long she was called by each or any of such names? Had she any passport or sea-brief on board? and if yea, from whom?

8. To what ports and places did she sail during the said voyage before she was taken? Where did the voyage on which she was taken begin? and where was it to have ended? Set forth the nature of every voyage the said ship has sailed upon, and the quality of every cargo the said ship has carried from the time you have known her up to the time of her capture, and state at what port each of such cargoes has been delivered? From what ports and at what time, particularly from the last clearing port, did the said ship sail previously to the capture? Under whose direction and management has she usually been with respect to her employment or trade? With whom do you correspond on the concerns of the vessel or her cargo?

9. What lading did the said ship carry at the time of her setting sail in **[15]** her last voyage, and what particular sort of lading and goods had she on board at the time she was taken? In what year, month, and place was the same put on board her? Set forth the different species of the lading, specifying the quantity of each species?

10. Who were the owners of the ship, concerning which you are now examined, at the time when she was seized? How do you know that such persons were the owners at such time? Of what nation or country are such owners by birth? Where do they reside? and where do their wives and families reside? How long have they resided there? Where did they reside before, to the best of your knowledge? Of what princes, states or powers are they subjects or citizens?

11. Was any bill of sale, or any and what similar document of transfer, made? —and, if yea, by whom?—to the aforesaid owners of the said ship? If any was made, in what month, year, where, and before what witnesses was such bill of sale or similar document of transfer made? Where did you last see it, and what is become of it? Was any, and what, engagement entered into concerning the purchase further than what appears upon the bill of sale? If yea, was it verbal, or in writing? If in writing, where did you last see such writing, and what has become of it?

12. Was the said lading put on board in one port, and at one time, or in several ports, and at several times; and in what ports by name, and at what times particularly? Set forth what quantities of each sort of goods were shipped at each port?

13. What are the names of the respective laders, or owners, or consignees of the said goods? What countrymen are they? Where do they now live and carry on their business or trade? How long have they resided there? Where did they reside before, to the best of your knowledge? And where were the said goods to be

delivered, and for whose real account, risk, or benefit? Have any of the said consignees or laders any, and what, interest in the said goods? If yea, whereon do you found your belief that they have such interest? Can you take upon yourself to swear that you believe that at the time of the lading the cargo, and at the present time, and also if the said goods shall be restored and unladen at the destined ports, the goods did, do, and will belong to the same persons, and to none others?

14. How many bills of lading were signed for the goods seized on board the said ship? Where any of those bills of lading false or colourable, or were any bills of lading signed which were different in any respect from those which were on board the ship at the time she was taken? What were the contents of such other bills of lading, and what became of them?

15. Are there anywhere in Great Britain, and where particularly, any bills of lading, invoices, letters, or instruments relative to the ship and goods concerning which you are now examined? If yea, set forth where they are, and in whose possession, and what is the purport thereof, and when they were brought or sent there.

16. Was there any charter-party signed for the voyage in which the ship concerning which you are now examined was seized and taken? What became thereof? When, where, and between whom was such charter-party made? What were the contents of it?

17. What papers, charter-parties, bills of lading, invoices, letters, or other writings were on board the ship at the time she took her departure from the last clearing port, before she was taken as prize? Were any, and, if yea, which of them burned, torn, thrown overboard, destroyed, altered, or cancelled, or concealed, or attempted to be concealed, and when, and by whom, and in whose presence?

18. Has the ship concerning which you are now examined ever been, and, if yea, when, seized as prize, and condemned as such? If yea, set forth by whom, when, and where she was seized and into what port she was carried, and by whom, and by what authority, and on what account she was so condemned.

19. Have you sustained any loss, and what, by the seizing and taking **[16]** of the ship or goods concerning which you are examined? If yea, how do you compute such loss? Have you hitherto received any indemnity, satisfaction, or promise of satisfaction, for any part of the loss or damage which you have sustained, or may sustain, by this capture and detention? And if yea, when, and from whom?

20. Are the said ship and goods, or is any, and what part thereof, insured? If yea, for what voyage, and against what risks was such insurance made? And at what premium? And when and by what persons and in what country?

21. In case you had arrived at your destined port, would your cargo or any part thereof, on being unladen, have immediately become the property of the consignees or any other party, and whom? Or was the lader to take the chance of the market for the sale of his goods?

22. State in respect to the lading of the ship concerning which you are now examined and each part thereof, in what country the same was grown, and produced, and manufactured respectively.

23. When the said cargo was originally put on board, was all the said cargo, or any, and what, part thereof, and when taken from the shore and quay, or removed or transhipped from one boat, barque, vessel, or ship to another? From what, and to what, shore, quay, boat, barque, vessel, or ship, and when and where was the same so taken, removed, or transhipped?

24. Are there in any country besides Great Britain, and where, particularly, or on board any and what ship or vessel, other than the ship concerning which you are now examined, any letters, instruments, papers, or documents relative to the said ship or goods as you know, believe, or have heard? And of what nature are such letters, instruments, papers, or documents? And what are their contents as you know, believe, or have heard? In whose possession are they, and do they differ from any of the papers on board? And, if yea, in what particular?

25. Were any papers delivered out of the said ship or vessel, and carried away in any manner whatsoever? And if yea, when, and by whom, and to whom? And in whose custody, possession, or power do you believe the same now to be?

26. Was bulk broken during the voyage in which you were taken, or since the said ship was captured? And if yea, when, where, and by whom? By whose orders, for what purpose, and in what manner?

27. Were there any passengers on board the aforesaid ship during any, and what, part of the voyage on which she was captured? If yea, how many, and who were such passengers by name? Of what nation, rank, profession, or occupation was each of them? Did any, and which of them, hold any, and what, commission? And from whom and for what purpose? Were any, and which, of such passengers secreted at the time of the capture, and why? At what place, and when, was each of them taken on board? To what place was each of them destined, or said or supposed to be destined, and upon what business? or for what real purpose or design was he destined there? Did they pay, or agree to pay, anything, and what, for their passage, and to whom? Had any, and which, of such passengers any, and what, property, or concern, or authority, directly or indirectly, regarding the ship or cargo? Were there at any time during the voyage in which the said ship was captured any officers, soldiers, or mariners secreted on board her? and if yea, for what reason were they so secreted? Were any of Her Britannic Majesty's subjects on board, or secreted or confined, during the said voyage or at the time of the capture? If yea, how long had they been so secreted, or confined, and for what reason?

28. Where, and are, all the pass-ports, sea-briefs, charter-parties, bills of sale or lading, invoices, and papers found on board the said ship, and referring to the ownership thereof or to the cargo, true and fair, or are any, and which, of them false and colourable? Do you know of any matter or circumstance to affect their credit? By, and from, whom were the passports and sea-briefs obtained? Were they obtained for this ship only, and upon the oath or affirmation of the persons therein described? or were they delivered to, or on behalf of, the person or persons who appear to have been sworn, or to have affirmed thereto without their having ever, in fact, made any such oath or affirmation? How long a time were they to last? Was any duty or fee payable and paid for the same? And is there any duty or fee payable and paid for the same? And is there any duty or fee to be paid on the renewal thereof? Have such passports been renewed, and how often, and has the duty or fee been paid for such renewal? Was the ship in a port in the country where the passports and sea-briefs were granted? And if not, where was the ship at the time? Had any person on board any let-pass or letters of safe conduct? If yea, from whom, and for what business?

29. If it should appear that there are in any place or country besides Great Britain any bills of lading, invoices, instruments or papers relative to the ship concerning which the witness is now examined, ask him, how did the same come to be in such place or country? Were you ever in such place or country? and if yea, when, and on what account? In whose possession are such instruments or papers? Do they differ? and if yea, in what particulars, from any of the papers on board or in Great Britain, or from any other papers referring to the same ship in any other place? Have you written or signed any letters or papers concerning the said ship or her cargo? If yea, set forth their purport. To whom were such papers written and sent, and what has become of them?

30. Towards what port or place was the ship steering her course at the time of her being first pursued and taken? Was her course altered upon or after the appearance of the vessel by whom she was taken, and how altered, and with what object or purpose? Was her course at all times when the weather would permit directed to the place or port for which she appears to have been destined by the ship's papers? Was the ship before, or at the time of, her capture sailing beyond or wide of the said place or port to which she was so destined by the said ship's papers? At what distance was she therefrom? Was her course altered at any and what time, and to or towards any, and what, other port or place, and for what reason? Did she make any, and what, attempt to escape the said ship by which she was captured? When did she first see that ship, and at what distance? Did she thereupon make or shorten sail, or slacken, or increase her speed, and how? When and by what means was she stopped, brought to, or boarded?

31. By whom, and to whom, has the said ship ever been sold and transferred, and how often and at what time and place, and for what sum or consideration? Has such sum or consideration been paid or satisfied? Was such sum a fair equivalent for her? If such sum has not been paid, what security or securities have been given for the payment of the same and by whom? And where do the persons who have given such security now live? Do you know or believe in your conscience, such sale or transfer to have been truly made, and not for the purpose of covering or concealing the real

property or interest in the ship? Do you verily believe, that if the ship be restored, she will belong to the persons now asserted to be her owners, and no others? Are there any, and if yea, what, private agreements for the return of the ship to her former owners, at the conclusion of the war, or at any and what other period?

32. What guns were mounted on board the said ship, and of what calibre were they? and what arms, and ammunition were there belonging to her? Why was she so armed? Were there on board any other guns, mortars, howitzers, balls, shells, rockets, hand grenades, rifles, muskets, carabines, pistols, fuzees, halberts, spontoons, swords, bayonets, locks for musket-[18]-flints, ramrods, belts, cartridges, cartridge boxes, pouches, gunpowder, percussion caps, saltpetre, nitre, camp equipage, military tools, uniforms, soldiers' clothing or accoutrements, or any sort of warlike and naval stores, or steam engines or machinery, or parts thereof? Were any of such warlike or naval stores or things thrown overboard, at or before the time of the capture? And were, and are, any such warlike or other stores before described concealed on board under the names of merchandise, or any other coloured appellation, in the ship's papers? If yea, what are the marks of the casks, bales, and packages, in which the same are concealed. Were any of the before-named articles, and which, intended for the use of any fortress or garrison in the port or place to which such ship was bound? If nay, to whose use, and for what place, were the same, or any and which of them, really destined or intended? Do you know, or have you heard of, any ordinance, notice, or law, existing in the kingdom or state from which the voyage began, or where they were shipped, forbidding the exportation of the same by private persons? Were such warlike or naval stores put on board by any, and what public authority? When, and where, and by whom, were they put on board?

33. What is the whole which you know or believe regarding the real and true property and destination at the time of the capture of the ship and cargo concerning which you are now examined?

34. Did the said ship on the voyage in which she was captured, or during any, and what former voyage, sail under the convoy of any and what ship or ships of war, and other armed vessel or vessels? And if yea, for what reason did she sail under such convoy? Of what force was or were such convoying ship or ships? And to what state did they belong? What instructions or directions did you receive on each and every such voyage, when under convoy, respecting your sailing or keeping in company with such armed or convoying ship or ships? and from whom did you receive such instructions and directions? And from whom did you receive any instructions for resisting, or endeavouring to avoid, or escape from capture; or for destroying, or concealing, or refusing to deliver up your ship's documents or papers, or any and what other papers that might be, or had been put on board your vessel? If you had any such instructions, state their tenor, and all particulars relating thereto. Ask the witness if he is in possession of such instructions or copies thereof; and if he be, direct him to leave the same with the examiner, to be annexed to his deposition.

35. Did the said ship during the voyage in which she was captured, or on, or during any, and what former voyage, sail to, or attempt to enter or leave, any port, place, river, or coast which was under blockade by the arms or forces of any, and which of the belligerent powers? If yea, when, where, and how did you first hear of such port, place, river, or coast being so blockaded? And were you at any, and what, time; and if yea, by whom, and where, warned not to proceed to, or not to attempt to enter or to leave such blockaded port, place, river, or coast? What conversation or other communication passed between you and your informant, in respect thereto? And what course did you pursue upon, and after such warning?

36. What instructions did you or did any, and what other, person on board receive, and from whom, and when, with respect to any and what blockade which there was, or might thereafter be established? Or will you swear that you never received, and do not know or believe that any other person on board received, any instructions whatsoever in respect to any blockade which was, or might, be established of any port, place, or coast? (*a*)

---

(*a*) These interrogatories, except the last, which appears to be new, are almost identical with those administered during the last war. (*Vide* 1 C. Rob. 381.)

The ECCLESIASTICAL and ADMIRALTY REPORTS; being REPORTS of CASES heard before the ARCHES and PREROGATIVE COURTS of CANTERBURY and the CONSISTORY COURT OF LONDON respectively, the HIGH COURT of ADMIRALTY and the ADMIRALTY PRIZE COURT, together with such Cases as have been carried by Appeal from those Courts respectively to the Privy Council. By THOMAS SPINKS, D.C.L. Vol. II. Michaelmas Term, 1854, to Michaelmas Term, 1855, 18 & 19 Vict. London, 1855.

[1] THE "PRIMUS" (Müller) (1 Ecc. & Adm. Rep. 353). Admiralty Prize Court, Oct. 6, 1854.—Motion that the expenses of the owners of a neutral cargo shipped on board an enemy ship which was condemned, should be defrayed out of the proceeds of the sale of the ship, rejected, with costs.

[S. C. Sp. Pr. Cas. 59; 2 Eng. Pr. Cas. 293.]

Motion. The Court condemned this vessel as enemy property, but restored the neutral cargo without further proof. The vessel was sold by the Marshal of the Admiralty, and produced the sum of 1550l.

Dr. Addams, on behalf of the owners of the cargo, now stated the circumstances of the case, that the cargo was entirely owned by neutrals, and had been shipped prior to the commencement of hostilities; and moved the Court to decree to them, out of the proceeds of the ship, the expenses which they had incurred in consequence of her capture.

The Queen's Advocate opposed the motion.

*Dr. Lushington.* This is a question arising under the following circumstances:—This vessel was a Russian barque, which sailed early in March last with a cargo of salt, "for a voyage from St. Ubes to a port in the Baltic, calling at Elsinore for orders." On arriving at Elsinore her master received orders to proceed to any Russian or Finnish port for further orders. He sailed for Albo, which he was unable to reach by reason of the ice, but put into Maarsund to avoid capture; and there, on his own responsibility, unshipped and delivered into small boats about one [2] half of the salt. With the remainder of the cargo he sailed on the 7th of May, but was captured on the following day by Her Majesty's ships "Valorous" and "Vulture." She was brought to England, and has been condemned by the Court as lawful prize, but at the same time the Court restored the cargo to its neutral owners without requiring any

further proof. The vessel having been sold and the proceeds paid into the registry, application is now made on behalf of the owners of the cargo, that they may be indemnified for the expenses which they have incurred out of the proceeds of such sale.

I am at a loss to understand upon what ground this application is made. No instance has been cited, and I certainly cannot call to my recollection any one, in which the owners of a cargo under similar circumstances have been held to be entitled to their expenses. It is quite clear that at the time of shipment of this cargo war between this country and Russia was imminent. This was notorious to Europe; yet, notwithstanding, the owners of this cargo think proper to put it on board a Russian vessel, and send it to the Baltic. Accordingly, they must be held to have done so at their own risk. They must be bound, moreover, by the conduct of the master. What was that, according to his own account? He sailed for Abo, but being unable to reach it, he broke bulk and discharged a large portion of his cargo into small boats to be conveyed to Abo, and subsequently ran his ship ashore in Saggo Bay to avoid capture. Certainly no blame attaches to the master for his endeavours to save his ship, but undoubtedly the neutral owners must suffer for his act.

This motion is in my opinion without precedent and without justification, and must be rejected, with costs.

Proctors: for the captors, the Queen's Proctor; for the owners of the cargo, Rothery.

THE "JOHANN CHRISTOPH" (Bohss). Admiralty Prize Court, October 13, 1854. —A ship sailing under neutral colours and with neutral papers from a Russian to a British port with a cargo, within the time granted to Russian vessels by the Order in Council, was seized by the Custom House officers, and claimed by the master as the bonâ fide purchaser and a neutral. Held, on further proof, that 1st, the neutral character was not established; 2nd, the transfer to the master was merely colourable; 3rd, the Court could not restore the ship as Russian, but protected by the Order in Council, when it was claimed as neutral.

[S. C. Sp. Pr. Cas. 60; 2 Eng. Pr. Cas. 302.]

This vessel, sailing under Danish colours, was seized by the Custom House officers at Grimsby. The circumstances of the case were these:—

Mr. Christiansen, a native of Denmark, who for six years had **[3]** been carrying on business as a merchant at Leith, on the 4th of April wrote to Lord Clarendon, informing him of some purchases he had made at Libau, of Mr. H. Sorensen, the Danish Consul at that place, and inquiring "whether, in the event of his goods being shipped on board neutral vessels, they would be subject to seizure and condemnation either by and at the instance of the commanders of Her Majesty's cruisers, or by Her Majesty's officers of Customs on the arrival of the vessels in the ports of this country." On the 22nd of April, a letter was sent from the Foreign Office to Mr. Christiansen, "referring him, in reply to his inquiry, to Her Majesty's Order in Council of the 15th of April, which permits the importation of the goods in question in neutral vessels." Mr. Sorensen chartered the "Johann Christoph," and, about the 4th or 5th of May, put the cargo, consisting chiefly of railway sleepers, on board, consigned to Mr. Christiansen. The ship sailed from Libau on the 9th of May, arrived at Grimsby, and delivered her cargo. She was then seized by the Custom House officers on the 18th of June on suspicion of being a Russian vessel, and her papers were taken away. On the 25th she was liberated, and her papers restored. She prepared to take her departure in ballast, and on the 28th received from the Custom House authorities at Grimsby her clearance certificate,(a) but upon the following day she was again seized by the officers of the Customs.

A claim was given in by Mr. A. H. Lindgren, of Crown Court, Old Broad Street, on behalf of "Johann Gottlieb Bohss, of Altona, master mariner, a subject of the King of Denmark, the true, lawful, and sole owner and proprietor of the said ship."

The master, mate, and carpenter were examined on the standing interrogatories.

The evidence of the master with respect to his own national character was to the

(a) "This is to certify that the ship 'Johann Christoph' (Bohss, master), which has this day been cleared outwards at this Custom House for Copenhagen, is free to depart from this port, and to proceed on her voyage without any stop or impediment whatever."

effect "that he was born at sea in the Baltic, and christened at Libau; that during the seven years last past, up to February last, he has lived at Riga; that since February last he has lived at Altona, which he considers his present home when he is not at sea; that he is now a subject of the King of Denmark; that in 1840 he became a Russian subject, but ceased to be so in February last; that he has taken an oath of allegiance to the Emperor of Russia in 1840, [4] and another to the King of Denmark on the 8th of April, 1854; that he obtained a certificate of being a subject of the Emperor of Russia in 1840; that on becoming a Danish subject he obtained a certificate of being a subject of the King of Denmark; that he has been admitted a burgher of the city of Altona, and was so admitted by taking an oath of allegiance before the magistrate, which he did on the 8th of April, in the usual manner; that he has resided there ever since, except when on board ship; that he paid about 200 Danish dollars for his admission; that he is married; that his wife and family have hitherto resided in Riga, but that his wife was with him on his last voyage before he left Libau; that she left him at Libau with the intention of returning to Riga, and selling off all their property there, and then joining her own family, who reside near Copenhagen, but that he has not yet heard what has become of them."

On the admission of the claim the Court intimated its opinion that it was a case for further proof, and that it should expect some more satisfactory evidence of the national character of the claimant, and stringent proof that the sale was bonâ fide, and not merely a colourable transfer.

October 13.—The case now came on for hearing on the further proof. The Queen's Advocate and the Admiralty Advocate for the seizor, cited, on the question of the national character of the master, *The "Endraught"* (*a*)[1], *The "Eleanora Wilhelmina"* (6 C. Rob. 335), and *The "Graaf Bernstorff"* (3 C. Rob. 115).

Dr. Twiss and Dr. Spinks appeared for the claimant.

*Dr. Lushington.* In this case, when it originally came before the Court, two questions were raised: first, what is the national character of the claimant? and, secondly, whether the purchase of the vessel by the claimant was a bonâ fide purchase, or not? The Court directed that further proof should be adduced upon both these points, and intimated at the same time that it should expect clear and positive evidence of the actual payment of the purchase money. I have now to decide whether the evidence produced is sufficient to justify me in restoring [5] this vessel. Of course it must be sufficient to satisfy my mind upon both the questions at issue, or she must be condemned; because, if the claimant fails to prove the purchase, he is not entitled to restitution; and, where a person claims as a Danish subject—notwithstanding the ingenious argument of the learned counsel—I have no power to restore to him in any other character, or under the Order in Council, whereby it is directed that a Russian owner coming before the Court shall, under certain circumstances, have his vessel restored.(*a*)[2]

I will first address myself to the question of the national character of Mr. Bohss; and I would observe, that with respect to national character, it has been over and over again laid down, that the application of the general principle must depend on the circumstances of each individual case. Now what are the circumstances of this case, according to Mr. Bohss's own representation? His father, he says, was a Dutchman, and he was born at sea, somewhere in the Baltic: he seems to have been

---

(*a*)[1] 1 C. Rob. 24, where Lord Stowell observes, "The master I must consider a Dutchman, for although he was by birth a Dane, and although he may have a wife and family resident in a neutral country, yet his own personal occupation has always been in the Dutch trade; and therefore, under the general rule that mariners are to be characterised by the country in whose service they are employed, I must consider him as a Dutchman." Again, in *The "Eleanora Wilhelmina,"* "I shall hold that the national character of a man who has only just quitted the Prussian navigation, and has his wife and family still resident at Pillau, cannot fairly be considered 'as of the people of Russia.'"

(*a*)[2] Order in Council, April 15, 1854. "Any Russian vessel which, prior to the 15th of May, 1854, shall have sailed from any port of Russia situated either in or upon the shores or coasts of the Baltic Sea or of the White Sea, bound for any port or place in Her Majesty's dominions, shall be permitted to enter such last-mentioned port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation."

christened at Libau; but that circumstance would not affect his native character as a Dutchman. In that character, he followed the vocation of a seaman until the year 1840, when, for the purpose of obtaining certain advantages in his profession, he took the oath of allegiance to the Emperor of Russia, became a Russian subject, and subsequently resided with his family at Riga for seven years up to February last. So that there can be no doubt that, at the commencement of the year 1854, there was impressed upon him the quality of a Russian subject; and the question for the Court now to decide is, whether anything occurred between February 1854, and the purchase of this vessel on the 12th of April following, which could divest him of that quality, and convert him into a Danish subject, in which character he now claims restitution.

He left Russia, according to his statement, in February last; and on the 8th of April took the oath of allegiance to the King of Denmark, and was admitted as a burgher of the city of Altona. But I am clearly of opinion that that circumstance alone never could confer upon him a national character. I apprehend that five minutes' notice and the payment of so many dollars might entitle him at any time to exercise all the rights of a Dane within the dominions of Denmark; but I must pro-[6]-test against the argument that he is therefore to be considered in the Prize Courts of belligerent nations as having changed his national character. To enable him to do this, the Law of Nations, by which these Courts are governed, requires several other things to concur. He must have actually abandoned his previous national character—not be merely in the course of abandonment; he must have taken up his abode with his wife and family, with the intention of remaining in the country of which he claimed to be a subject. Do the circumstances answer these requirements? Mr. Bohss, according to his own representation, having heard, in January 1854, that this ship was advertised for sale, conversed with its owners at Libau with respect to it; and it then entered into his head, that as the ship was likely to be sold, he would make himself a Danish subject, and purchase her; and that he should be able to navigate her under the Danish flag. What does he do? He goes to Altona and after a residence of a few days, without having taken any house or given any proof of intention to fix his domicil there, on the 12th of April he purchases the ship. He does not even pretend that his wife and family were about to join him at Altona. On the contrary, he expressly states that when he parted from her at Libau, she repaired to Riga to sell off their goods, with the intention of proceeding immediately to reside with her relations at Copenhagen. This might certainly be evidence of an intention to abandon Russia, but it is no evidence of an intention to become the subjects of Denmark. But whether even this intention has been carried into effect we have no certain information.

I am clearly of opinion, that the assumption of the national character of a Dane is a fiction from the beginning to the end; and further, that even if the facts stated are true, there is not sufficient to effect any change in the national character of Mr. Bohss. After living at Riga and having become to all intents and purposes a Russian subject, the mere proceeding to Denmark, and going through a few formalities, would not enable him to lose his national character and to become a Dane at once; he must actually have quitted his former domicil. I do not mean to say that a character assumed for the purposes of trade may not be changed with greater facility than under other circumstances; but I do say it must be a real and not merely a nominal change, as I hold it to have been in the present case.

The Court being of this opinion with respect to the national character of the claimant, the determination of the second question becomes of minor importance. I will, however, give my [7] opinion upon it, that there may be no doubt as to the grounds of the Court's decision.

The circumstances of the purchase of the ship are stated to be the following:—Mr. Bohss, having been in command of the ship, and become attached to her, was anxious, when he heard she was advertised for sale, to become the purchaser from the former owners, and for that purpose proceeded to Hamburg. Now it does appear to me a little curious, if this was intended to be a bonâ fide sale, that he should have heard of the sale by an advertisement in Hamburg, and that he should not have communicated with the owners upon it when he was at Libau, instead of proceeding to Hamburg, and purchasing it of Messrs. Merck & Co., by virtue of a power of attorney which they had from the owners for that purpose. These are circumstances of suspicion which naturally induce the Court to look more closely into the evidence

of the purchase, and, above all, of the actual payment of the money. But of what does that evidence consist?

A certificate from the British Vice-Consul at Libau has been produced; it is in these words—"I, the undersigned, do hereby declare and certify that the former Russian bark, 'Johann Christoph,' has been sold to the Danish subject, Johann Gottlieb Bohss, Esq., of Altona; and that the sale has taken place at Altona on the 12th of April, at the price of 45,000 marcs Hamburg banco. I further declare and certify, that the bill of emption of the bark, 'Johann Christoph,' has been delivered by the magistrate of Altona, and produced to me this day, the 15/27th of April. Given under my hand and seal of office. Libau, April 15/27th, 1854." And it is signed by Her Majesty's Consul. Now what is the value of this document as evidence? The Vice-Consul could not be cognizant of the facts to which he certifies, except from documents shewn to him, or from the statements of others; and yet it would appear that he was certifying to something within his own knowledge. The certificate comes to nothing—the facts could not be within the knowledge or grasp of this gentleman at all. It is, moreover, not a little extraordinary that he certifies the sale to have taken place at Altona, whereas the copy of the bill of sale expressly states the transaction to have taken place at Hamburg.

That copy—for the original has not been produced—is attached to the affidavit of a Dr. Schram, a notary public of Hamburg, who appears to carry on what, no doubt, will shortly become a very lucrative business, in assisting at and attesting the conversion of Russians into Danes, and the fictitious transfer of the enemy's property. He does not, how-**[8]**-ever, in this case, depose to the payment of the purchase money for the ship; and here lies the gist of the whole matter. He merely says, "that the receipt of the consideration money for the said ship, to wit, the sum of 45,000 marcs Hamburg banco, was acknowledged by Justus Carl Wilhelm Ruperti, one of the firm of H. J. Merck & Company, the sellers, in his presence." From Mr. Ruperti or Messrs. Merck no evidence whatever is produced; for some reason or other, they have made no affidavit. Now I have stated before, and I repeat it again, that in all purchases of this kind, made under similar circumstances, proof of actual payment of the money is most stringently required; but in this case I have nothing but a declaration—even the appearance of a receipt is not produced, and there is no evidence whatever from the agent of the vendors; and yet I am asked to believe that this master mariner has been the bonâ fide purchaser of this vessel at the price of 45,000 marcs banco. I do not believe in the truthfulness of the whole transaction, but am of opinion that the sale to Mr. Bohss was merely colourable. The vessel, therefore, must be condemned on both grounds—the national character of the claimant, and the want of proof of the sale.

Proctors: for the seizor, the Admiralty Proctor; for the claimant, Burchett.

THE "OCEAN BRIDE." (A. Smith). Admiralty Prize Court. October 6 and 13, 1854. A British ship fictitiously transferred to Russian merchants to prevent her seizure by the Russian authorities, while lying ice-bound in a Russian port at the outbreak of the war, but seized as Russian property by the officers of the Customs on her arrival at Leith, restored to the British owners on payment of the seizor's expenses.

[S. C. Sp. Pr. Cas. 66; 2 Eng. Pr. Cas. 309; 18 Jur. 1031. Referred to, *The "Hamborn"* [1918] P. 21.]

This vessel, a British built ship, sailed from this country for Archangel in September 1853, was there frozen in, and detained by the ice until some time after the outbreak of the war. She sailed in the beginning of June, and arrived at Leith about the 10th of July, when she was seized with her cargo by the Custom House officers as a Russian prize. On the 29th of July the cargo was restored by consent on payment of costs and freight; and on the 2nd of August a claim on the ship was given in by a Mr. Clark on behalf of the asserted owners, Messrs. Stewart & Smith. It was argued on admission of the claim on the 14th of August, when the Court directed that further proof should be given on both sides.(*a*)

The case of the claimants was, that this vessel was a British ship duly registered

(*a*) The Court allowed further proof to the seizors in this case from the peculiar nature of its circumstances, but said it was a privilege and not a right, as the usual practice was to allow further proof to the claimant only.

in 1853 at the port of Dundee, but that [9] being detained by the ice at Archangel at the outbreak of the war, her owners, Messrs. Stewart & Smith of Dundee, became alarmed lest she should be seized in Russia as the property of British subjects, and, in order to protect her, assigned her by vendition, or bill of sale, dated 11th March 1854, to Messrs. William Brandt & Sons of Archangel and London: that such bill of sale was granted by the owners to Messrs. Brandt without any sale taking place, or any price paid, and truly that they might hold the vessel in trust for behoof of the owners, and that she might appear to the Russian authorities as the property of Messrs. Brandt & Sons of Archangel; that the transaction was explained to Mr. Wrongham, merchant of Dundee, the agent to Messrs. Brandt, and to Mr. Kerr, the solicitor employed, before the bill of sale was signed; that the owners transmitted this bill of sale to Mr. Wrongham on the 14th of March, with a letter stating the object thereof, and Mr. Wrongham transmitted the bill of sale to Messrs. Brandt & Son of London, who immediately returned it with the request that the signatures might be attested by the Russian consul; and that when this was done it was again transmitted to Messrs. Brandt. That on the 8th of April following Mr. Brandt of London transmitted to Mr. Wrongham a letter from Captain Smith, the master of the vessel, and a draft by him upon Mr. Stewart, one of the owners, for 137l. 16s., the amount of advances of money he had received at Archangel for the use of the vessel, that Mr. Wrongham might obtain payment from the owners; and Mr. Brandt further required a sum of 270l. to defray the necessary expense of repairing and placing the vessel in safety from the ice. That the said sum of 137l. 16s., with interest, was paid to Mr. Wrongham, and transmitted by him to Mr. Brandt of London, who acknowledged its receipt on the 28th of April, and after stating that his Archangel friends would not allow the vessel to leave before the deposit they required was made, the vendition or bill of sale being of no use to them, suggested that the owners should give a bond on the vessel. That on the 1st of May Mr. Wrongham wrote Mr. Brandt of London, recommending that the captain of the vessel should grant a bottomry bond for any advances he might receive at Archangel; whereupon Mr. Brandt, in reply, requested Mr. Wrongham also to procure from the owners a bond for the advances to be made in his own name as a collateral security. That accordingly on the 10th of May the owners executed a bond and vendition in security, conveying the vessel, in further security of such advances, to Mr. Wrongham. That on the 8th of July Messrs. Brandt & Sons, by vendition or bill of [10] sale, conveyed the vessel to Mr. Wrongham, who presented this bill of sale for registration at the Custom House, Dundee, on the 10th of July. That the vessel is bonâ fide the property of Messrs. Stewart & Smith, and that the transfer of her to Messrs. Brandt & Sons was truly made for the purpose of preventing her being seized by the Russian authorities; and that Messrs. Brandt and Mr. Wrongham are ready to transfer and reconvey the vessel to the owners on payment of their advances.

The Queen's Advocate and the Admiralty Advocate appeared for the seizor; Dr. Addams and Dr. Twiss for the claimant.

*Dr. Lushington.* This case undoubtedly presents many very considerable difficulties, which the Court is bound to consider, and to pronounce a judgment upon. I should take more time to determine what that judgment should be, had it not happened that since this case was partly heard, I have had the opportunity of reading the whole of the evidence over again, and going through, I think carefully and cautiously, every part of it, paying at the same time due attention to the question of law raised on the one side, and controverted on the other. It appears to me, therefore, that no good could be attained, that I am not likely to arrive at a greater certainty as to the judgment I am about to pronounce, by further delay.

The persons principally concerned in this transaction are Messrs. Stewart & Smith, merchants of Dundee; Messrs. Brandt & Co.(*a*), who are merchants at

(*a*) In the case of *The "Rapid,"* October 18, the Court observed, "It is clear from previous cases that the house of Brandt & Co., at Archangel and at Riga, are connected together to a certain extent with the house in London. I may here observe, because it may be of use in other cases, that it is the custom of the Court, where information has been acquired in one case, to use it in others. Lord Stowell over and over again stated, 'I do not forget the information which I have received from other cases.'"

Archangel; Mr. Wrongham, their agent at Dundee; and the house of Brandt & Co., of London. These may be called the dramatis personæ in this case. I will endeavour to ascertain what the facts of the case are by a reference to the evidence. I cannot avoid, I fear, making a statement somewhat in detail, because it is very important to satisfy my mind, and to shew how my mind was satisfied as to the real facts of this case.

This ship was in the year 1853 the property of Mr. Stewart and Mr. C. Smith, British subjects resident at Dundee. She sailed under British colours, and she never changed those colours. In September 1853 she went in ballast to Archangel. In November she took on board her cargo, sailed from Archangel, was compelled by stress of weather to put back, wintered in [11] that port, sailed again June 6, reached Leith either on the 8th or 9th of July, was seized by the Custom House authorities on the 10th or 11th of July, and has now been proceeded against by the Admiralty Proctor. A claim was subsequently given for the cargo, which was restored by consent. On the 2nd of August a claim was given by Mr. Clark of this town for the ship and freight as the property of Messrs. Stewart & Smith. On the 15th further proof was directed to be given by both parties, and now the cause comes on to be heard, and I must finally determine whether the ship and freight ought to be condemned or restored, and if condemned, in what form such condemnation should pass. Now the first inquiry must necessarily be, to ascertain, as far as is practicable, what is the true state of the facts; and having done this to the best of my power, I shall then consider the law as applicable to such state of facts.

On the 11th of March 1854, a bill of sale of the vessel was granted by the claimants in Scotland to Messrs. Brandt of Archangel: they were the shippers of the cargo, and the agents of the ship at Archangel, and this bill of sale was registered at the Custom House at Dundee. This is the first instrument.

The second instrument bears date on the 10th of May 1854, whereby the claimants transfer the ship to Mr. Wrongham, the agent of Brandt & Co. at Dundee, by way of security for any advances which might have been made by Brandt & Co. at Archangel. It does not appear that the deed was registered anywhere at all, though, according to the form in use in Scotland, the parties undertake that it shall be registered.

The last instrument bears date on the 8th of July, and by that Brandt & Co., described therein as merchants of Archangel and London, conveyed the vessel to Mr. Wrongham, who caused such bill of sale to be offered for registry, or, I should say, offered it to be registered at the Custom House at Dundee, on the 10th of July 1854.

Now, the real character of these documents must be ascertained not merely from the contents, but from the measures adopted, and from all the other evidence which has reference to them.

Messrs. Stewart & Smith allege that the transfer of the 11th of March, and everything done thereupon, was colourable and fictitious; that such deed of sale was not intended to convey the vessel or any right in her whatever, but was for the sole purpose of protecting her from capture by the Russian government, which was deemed probable, as she was detained at Archangel by the ice.

Now, certainly, looking at the state of public affairs at that time, it cannot be denied that there was every prospect of an [12] immediate war, and therefore it was natural that Messrs. Stewart & Smith should be anxious to protect their property, though whether the means employed for such purpose were legitimate or not, is a distinct and subsequent question.

It is therefore probable that this sale was intended to be merely colourable; but there would still remain another inquiry, whether, though colourable in the view of the vendors, it was so considered altogether by the vendees or their agent. I do not mean to say that that point has been very distinctly raised. It has been very fairly argued by Her Majesty's Advocate, that there was an intention on the part of these parties that the vessel should be conveyed to cover the advances which necessarily must have been made and were made by Brandt & Co. of Archangel. With regard to the instrument itself, it takes no notice of any advances whatsoever, and to that perhaps I must again advert.

The deed of the 10th of May appears to supply strong corroborative proof, that the sale of March 11th was intended to be colourable only; for if the deed of March

11th was a real transfer, what possible right, or pretence of right, could Messrs. Stewart & Smith have to mortgage a ship already sold by them; but all the correspondence, and all the res gestæ, and all the evidence shew that the deed of the 11th of May was a bonâ fide mortgage, was intended for the purpose of giving to Mr. Wrongham a power over that ship by a regular Scotch mortgage deed to protect his correspondents and principals, the house of Brandt & Co. of Archangel and London (for they are mixed up together), for any advances which might have been made. The validity of the deed as conveying a right to an enemy is quite another and distinct consideration, but this deed appears to me to be perfectly incompatible with the fact that the deed of March 11th was a bonâ fide transfer. I cannot reconcile it to my mind, and suppose that, if the deed of the 11th of March was bonâ fide for any purpose, the deed of the 10th of May could have been executed at all. If it was to transfer the ship, it being colourable in part and bonâ fide in part, to secure advances, what could be the purpose of taking the deed of the 10th of May again from the same parties who had conveyed the ship by the deed of the 11th of March, for the purpose of securing these same advances? These are manifestly incompatible the one with the other. The deed of the 10th of May is in these words, "Although the said vendition"—that is, the vendition of the 11th of March, it is called now—"bears to be ex facie absolute, yet the same was granted by us truly in trust for our behalf, and for the purpose of securing the safety **[13]** of the said ship or vessel while she then lay in or near the harbour of Archangel, and while she might be in the Russian waters." Now there is not a word about that in the deed of the 11th of March—there is not a word there reciting it was for such purpose; but it goes on here to state, "And also considering that William Wrongham, Esquire, merchant in Dundee, has on our account, and at our request, agreed to recommend his correspondents"—that is a subsequent transaction—"to make advances of money to the master of the said vessel and others, on account of the said vessel, upon our granting for his and their security, and more sure payment of the said advances, these presents in manner under written." Then it goes on to secure any advances which may have been made in consequence of this agreement with Mr. Wrongham on account of the ship.

I must say that this instrument appears to me of great importance to ascertain the bonâ fides of this case, and what the real intention of these parties was at the time.

At the time of the execution of the deed of March 11th, 1854, a letter which appears to be No. 11, and bears date March 14th, was written and sent to Mr. Wrongham with the bill of the sale—it is not very explicit, but it is consistent with the averment made on behalf of the claimants, that the transaction was merely a colourable transaction. The letter No. 13 also clearly shews that Mr. Wrongham did not consider that any bonâ fide transfer had taken place at all. That letter shews what the res gestæ were at the time: he says, "I beg to hand you a letter from Captain Smith, of the 'Ocean Bride'; I have also received his draft on you, payable at sight, for 137l. 16s., to the order of Mr. Richard Brandt, against advances made by his Archangel house on account of the said vessel. I am also advised that Captain Smith has requested you to lodge with Mr. Brandt funds to be held at the disposal of Messrs. W. Brandt & Son, to enable them to have the necessary repairs executed, and the vessel placed in safety; but as these funds have not as yet been lodged, I have to request you will remit to Mr. Brandt (6 Great Winchester Street, London), say to the extent of 270l., which may be about the amount required for the necessary repairs, and to place the vessel in safety from the ice." That letter shews clearly to my mind that Mr. Wrongham did not consider that any transfer whatever had been made at that time; and for this reason—because he advises Messrs. Stewart & Smith to remit 270l. to Brandt's account to pay for the repairs. It is impossible that he could have advised, or asked them to do it, if the vessel had been sold. If there had been any actual transference, it is clear Mr. Wrongham would **[14]** have had no pretence for saying to those who sold the vessel, "We are compelled to make these advances, and although we have got, as you say, the security of the vessel, yet, notwithstanding that, you must make remittances to the full amount of the whole debt that is incurred."

Many comments have been made with respect to other parts of this evidence, namely, the evidence of several persons that they were cognizant of the transaction, and believed it to be colourable. I think that some of the comments were very

properly made, and I think I am not entitled to place on all these affidavits any implicit reliance; for it must be admitted that they are loosely worded—that they have no distinct reference to the time when the declarations were made, or the periods when the facts were asserted; but perhaps they are not to be left wholly out of consideration. There is, however, one of great importance; that is, the affidavit of the Russian Vice-Consul, marked G. I consider that exhibit is entitled to great weight; because he states in that affidavit, before the transfer of the vessel on the 11th of March 1849, he was advised with by Messrs. Stewart & Smith, as to whether the scheme they at the time thought of putting into execution for the protection of the property was advisable; and that he declined to give them any advice—and very properly, considering the position in which he was then placed. This appears strongly to corroborate the statement made on behalf of the claimants; for, according to that, he was well aware that the intention was to make a colourable transfer, and nothing more.

I must further observe, that the very nature of this transaction, so far as appears before the Court, favours the conclusion that the sale was colourable only; for it must be recollected that in the sale of a ship there must be two parties—there must be a vendor, and there must be a purchaser; and that the house of Brandt & Co., either by themselves or their agent, Mr. Wrongham, purchased this vessel, there is not a scintilla of evidence. Surely the Court would expect there would be something in the nature of evidence, if they performed the part of purchasers. All that was done was this:—Brandt & Co. of London returned the bill of sale of the 11th of March to be certified by the Russian Consul. This was a proceeding which I apprehend was absolutely necessary, if the intended deception on the Russian authorities was to be carried into effect at all.

Again, when I look to the alleged consideration for the sale, what is that consideration in the instrument of the 11th of March? It is a settlement of account, and no more—a very **[15]** unusual proceeding, according to my experience in bonâ fide transfers.

It must be recollected that I am now endeavouring to ascertain facts only, and not the law, and that at present I have not considered the bill of sale of July 8th. Then, laying out of consideration for the present the last-mentioned bill of sale, I am disposed to come to the conclusion, upon considering all the other evidence, that the bill of sale of the 11th of March was, as represented by the claimants, a colourable transfer, for the purpose of protecting the ship from condemnation by the Russian government if war ensued.

But I must look at the whole of this case; I must not come to a conclusion from a part of the evidence, however I may think it, taking it singly, to be cogent in coming to that conclusion.

I now come to the bill of sale of July 1854. Here I must say I think that the Court has some right to complain of the neglect to furnish any information about this bill of sale. I have no explanation why or wherefore, or under what circumstances the bill of sale of July 1854 was executed. What motives stimulated the parties to adopt those measures at all? Upon what reasons this measure was founded I am left entirely to conjecture, for I have not the slightest idea of what governed them in this transaction.

I must look at the instrument itself to see what is made out from that instrument. It purports to be a conveyance by Brandt & Son of Archangel and London, mixing up the enemy and the friend together; and it purports to be to Mr. Wrongham, their own agent, and for a price said to be settled with him for this vessel, then stated to be on her voyage from Archangel to Leith. The instrument then refers to the sale by Stewart & Smith, of the 11th March, registered in the Custom House on the 13th of March, namely, to the bill of sale, which is alleged to be fictitious and colourable. I asked whether this bill of sale of the 8th of July was registered? All I find is, that it was presented for registration on the 10th of July.

It does appear somewhat singular that this transfer was made to Mr. Wrongham, if truly this bill of sale was colourable only. If all these documents were colourable only, and such second transfer necessary for Custom House purposes to invest the property in Messrs. Stewart & Smith, the natural course would have been to reconvey the property to them, and not to convey it to Mr. Wrongham. It is stated in the memorial that **[16]** Brandt and Wrongham are ready to reconvey upon being paid their advances.

Confining my consideration for the moment to those facts, I think that the necessary inference would be that Brandt & Co., by virtue of the conveyance of March 11th, had this ship validly conveyed to them to the extent of covering their advances, notwithstanding that, ex facie, it was an absolute conveyance for a price settled.

The effect of this would be, that the legal title would be in Brandt & Co.; the equitable title, subject to payment of advances, would be in Stewart and Smith; and then in cases which occurred before in wars under ordinary circumstances—not under special circumstances—would arise the question, whether a British subject could support an equitable title to a vessel, when an enemy possessed the legal title. That would have been the case in former wars—whether in this, I need not say.

If this vessel had been sailing under the colours of an enemy, I should say this was a claim that could not be sustainable, but here she remains navigated under British colours; and that prevents a difficulty which would have been insuperable—for if the vessel had been under Russian colours, that would have been conclusive against all the world, for reasons I need not refer to, as it is a well-known principle.

However, the fact of this vessel being under British colours is of importance, because it shews that Brandt & Co. of Archangel—and these are the enemy merchants—did not adopt the transfer of the 11th of March; for the letter containing the representations made to the Custom House states, amongst other things, as well as the facts I am adverting to, that that transfer was of no use to them—I think that is the expression—that transfer would be of no use to them.

Now, assuming that Brandt & Co. and Mr. Wrongham do now claim a lien for advances on account of the ship, and are willing to transfer only on condition of being paid such advances, it does not appear to me to follow—necessarily at least—that under these documents their claim would be a legal claim. It must be recollected that neither their opinion nor their conduct will make such claim legal if it be not so by law. They cannot engraft a claim on such a deed unless there is something that would justify them legally speaking.

I am of opinion that the sale of the 11th of March was colourable and fictitious, and that it conveyed no right nor title of any kind to Messrs. Brandt. I am of opinion, furthermore, that Brandt & Co. could by no possibility engraft a lien upon that which was a nullity in itself. I perfectly well **[17]** understand that Messrs. Brandt & Co., and Mr. Wrongham, as their agent, having got the deed, and not having got the money, are disposed to hold the vessel till they got the money back. Whether they are entitled to do so depends on legal considerations. There are other facts which I think will throw more light on the subject.

I have now dealt with these transfers as they appear in themselves, and with a supposed claim under them, but there is other matter, I am sorry to say, which I must necessarily consider.

I must come back to the deed of the 10th May. This is a mortgage deed to the agent of the enemy merchant, because Mr. Brandt had changed his character between the period of granting the first deed and granting the second. He had been a friend—a neutral, and had become an enemy in the interval, and it was granted to cover advances made, and to be made, on a British ship detained by the ice in the enemy's port. According to ordinary Prize Law, I apprehend this instrument might have been of no validity, though a bonâ fide dealing between the parties. It is unnecessary for me to decide upon its validity under present circumstances. I need not now determine what may be the rights of alien enemies with respect to collateral interests under the order of the 15th of April; nor how far British subjects are relieved from the restrictions heretofore imposed on trade with the enemy.

I do not concern myself whether this mortgage was valid according to Prize Law or not, nor whether it was invalid by our municipal law. I advert to this deed only because it may by possibility explain the statement in the memorial—that Brandt and Wrongham were willing to transfer on payment of their claim, because of course I must not assume that neither Brandt & Co. nor Mr. Wrongham are very great lawyers, and they might, when that statement was made, and they pursued this line of conduct, apprehend that under this deed of the 10th of May, however colourable the former might be, they acquired a right to the vessel to the extent of the advances made to the vessel at Archangel.

Then, as to this third instrument; first, I am of opinion that the bill of sale of

March 11th, as I have already stated, was colourable and fictitious, and that according to Prize Law it neither conveyed the ship nor created any lien upon her. Secondly, I am of opinion that the deed of sale of July 8th, being founded expressly upon the deed of March 11th, was also a nullity, because it was founded on a nullity, and no man can convey that to which he has no title. I say this bill of sale was null and void; I do not say it was altogether false or **[18]** colourable—the bill of sale of the 8th of July—I am by no means of that opinion; I am very much inclined to think it was only false and colourable in part, and it intended to reserve an interest in the ship by way of security for the advances.

Now, whether it was intended to make the deed of May or that of March the foundation of this reservation, I do not pretend to say, for I am of opinion that neither can uphold their purpose—that is to say, neither the deed of March or of May can uphold the deed of July 8th. I hope I have made that clear—that I consider the deed of March to be a nullity, therefore no foundation for the deed of July 8th. I consider the deed of May to be simply a mortgage deed, and a mortgage deed never can give the power of making a sale unless under circumstances which do not occur in this case. I ought to add, so far as appears, this ship was never out of the legal possession of the owners, Stewart & Smith.

If then, according to my view of this case—if according to Prize Law there has been no legal transfer—if that law requires that to divest the title from the original owners the transaction should be bonâ fide, and there should be a legal and equitable title conferred, or other considerations which I need not mention, what is there to prevent me decreeing restitution of the ship to the claimants?

The first objection is, that this vessel is registered in the names of Wrongham and Brandt & Co., of Archangel, that by statute law no other persons can have a legal or equitable title thereto. I state this proposition generally, because it is true generally. I apprehend, to put it as shortly as I can, that by the law at present in force and operation, a bill of sale duly registered gives a title to those in whose favour it is registered, notwithstanding it may have been offered as a security against any person who does not get a transfer under the clause in the Act of Parliament. But there is no such case here; there is no one claims under the Registry, because the persons who claim are neither more nor less than Stewart & Smith the vendors.

Now here arise several questions: whether I shall be successful in disposing of them I do not know; but at any rate I must have the courage to meet them. Nothing, in my opinion, is more undesirable than to put the case vaguely. If the Court is unable to come to a right conclusion, its judgment may be afterwards corrected; but if the Court gives a judgment, and that appears easy, and the difficulty is never noticed, it leads to a supposition that the real point of the case never did arise. Now I will endeavour not to avoid the difficulties; I grant that they are not small.

**[19]** Now, first, how far is it the duty of this Court to take cognizance of the municipal law of this country, sitting as a Court of Prize? And this head, I am sorry to say, may be again divided; first, as to a breach of the municipal law, and secondly, as to pronouncing a decision which may be incompatible with it.

As to the first point, it is settled by various cases, that property claimed by British merchants cannot be restored, if at the time of capture the trade is contrary to British statute law. This is expressly laid down in *The "Walsingham Packet"* (2 C. Rob. 77) and the cases there cited, and in *The "Etrusco."* (*b*)

Now this rule of law cannot, I think, apply to the present case, for I am not aware that it has ever been contended that this ship was illegally engaged in trade. To whomsoever she belonged she might lawfully bring this cargo to Great Britain. It is also fit to observe, that I deem the protection of British property from hostile confiscation a lawful and praiseworthy object, and that this circumstance renders this case wholly different from those I have cited.

The principle on which *The "Walsingham Packet"* goes is—you are not merely violating the law of the country in name and appearance, but doing an act held by

(*b*) 4 C. Rob. 262, n. "In the case of *The 'Etrusco,'* Lords, 11th Aug., 1803, it was decided, after long deliberation, that property condemned in consequence of the inadmissibility of such a claim, is to be condemned not to the individual captor, but to the king."

the statute law to be injurious to Great Britain. You are endeavouring to obtain for yourself, for your own commercial purposes, the advantage of a trade prohibited by that statute law; therefore, as Lord Stowell very properly said, it was a great moral and legal principle. Stronger words I need not use, and the whole of that judgment proceeds on that ground. *The "Etrusco"* was a similar case. There the claimants of the "Etrusco" were carrying on a trade prohibited by the law.

Now the second point is undoubtedly one of great difficulty, and of no ordinary magnitude, namely, that a decree of restitution would convey the ship to claimants not on the register, and that this ship is a British ship.

Now upon this I will observe, I do not recollect, and I do not believe, that there has been any case in which a British ship has been claimed, that any enquiry or question has arisen in the Prize Court as to the British registry, or compliance with all our navigation laws. Such formalities have not been entered upon, and, unless it was my bounden duty to do so, I should be reluctant to embarrass the Court with such questions, perhaps less embarrassing and perplexing now than they were in those [20] days, but still quite sufficiently difficult not to induce the Court to volunteer to go into them unless it was distinctly a part of its duty.

Again, it is a serious question how far the register alone would be binding in a Court of Prize. Could I, for instance, condemn this ship as the property of Brandt & Co. merely because she was registered in their names, when I am of opinion that there was no transfer, and that the proceeding was merely colourable? I apprehend I could not. I might condemn her for another reason, but I could not on the ground that she was the property of Brandt & Co., because the Court of Prize never goes on a mere formal instrument. Over and over again Lord Stowell has said, it is not the documents themselves which the Court goes upon—they must be true, they must be bonâ fide—it never goes on formalities. This is a broad distinction, which I consider not only indispensable to Prize Law, but to be one of the most honourable distinctions which exist between a prize and a municipal Court; that a Prize Court looks to that which is bonâ fide true, while a Court of Law is sometimes bound by formality, which prevents real justice in the case.

But supposing this colourable bill of sale, and consequent registry, to be made to a neutral merchant, could I restore to him, on the ground that no one else had a legal or equitable title? Now what would be the effect of a decree of restitution in the Court of Prize? The possession of the vessel would be given to the claimant. This Court does not decide that the vessel is entitled to a British register—it has nothing to do with that question. It does not say whether there has been a forfeiture according to statute law or not, that is the province of another Court. It is silent, as it ought to be, as to penalties. The vessel may have been fortified twice over by municipal law, but the Court would act exactly as if no such thing had taken place.

Are there not cases in which a Prize Court would restore whatever might be the case with respect to a British register? There are no such cases on record; no such cases have occurred, as I believe; I know none. But let us suppose one. Suppose a British vessel sold abroad to a neutral subject. I apprehend a neutral subject might acquire a title which this Court must recognize, whatever was the state of the register. I apprehend that, although, perhaps, it might give no title to a British subject, it would convey a good title to a neutral, which I should be bound to respect; for this Court restores not as a British ship or any ship, but simply as a ship bonâ fide sold. I should not generally inquire by what law a vessel has [21] been sold. See what the consequence would be if I did. If I were bound, in case a vessel was claimed by any neutral subject of any one of the States at present neutral, to ascertain precisely what was their law, whether he had acquired a good title by their law, I should be under the necessity of becoming—what I am sure I never shall be—master of the navigation laws of all these countries. Supposing I could, by possibility, get a glimpse of them, I never could ascertain whether there had been a fraudulent use made of it, if they had a register answering to something like our own, or whether all the formalities had been strictly complied with.

Sometimes, certainly, the Court does make the inquiry. But why? For the purpose of ascertaining if the sale was bonâ fide. For that purpose I confess it might be considered important. But supposing you take the case of a neutral subject claiming a ship, and supposing the neutral in possession of the ship, and I was satisfied that the possession was a bonâ fide possession, I certainly should not inquire if he had

obtained his title through all the formalities of the country, both of the vendor and the vendee, because both would be necessary to be inquired into. Again I say, I should not enter into that inquiry, provided I was satisfied that he was the bonâ fide owner.

I am well aware, with respect to English Law, that the obligation upon this Court may in some respects be different; but still, I think, according to the best of my judgment, not to the extent of requiring me minutely to examine the title not contested by any other claimant. I am of opinion, therefore, that I am at liberty to make a decree restoring this vessel to the claimants not as a British ship entitled to a British register, for of that I do not judge, nor do I say, I repeat it again, that there has not been a forfeiture or penalty incurred. With that I have nothing to do.

Before I come to a conclusion, I must consider what are the other objections so properly raised, and so very ably supported on the present occasion.

One, I think, I may dispose of, though not unimportant, in few words. It was argued in opposition to the bonâ fides of this transaction, that the claim was made by an agent, and ought to have been made by the parties. I entirely agree with the truth of that observation, and think it was a circumstance of some suspicion; but I cannot say it was really anything more. I cannot suppose, as it is the commencement of the war, the parties who are concerned in this matter, or their advisers in Scotland, were so well aware of the ordinary practice of this Court as to render it absolutely incumbent on them to be possessed of a **[22]** knowledge of this course of proceeding, or that it was not a venial error; though, at the same time, it would be of importance, unless the other facts removed the suspicion that arose from this circumstance.

It is said, secondly, I might restore the ship, and condemn the enemy's interest in it, if he has one. Now what is that interest? A bottomry bond is admitted in the memorial. That fact never was kept back. As to the master not having mentioned the circumstance of a bottomry bond, I was originally struck with the argument as to his silence; but I have had reference to the interrogatories, and I do not see that the interrogatories pointed to a bottomry bond at all. I do not see that there was an intentional concealment, and it comes out from the mate. I do not see that the interrogatories distinctly called for the master to allude to it, or indeed at all.

I may here observe it is not improbable, though I think I might have had more information on the subject, but some of the parties did not choose to give it, that Messrs Brandt & Company having a bottomry bond, and knowing or believing they could not enforce it here, for that reason, among others, offered to restore the ship on condition of their advances being paid. They said, first, we have got a mortgage deed of doubtful validity; and again, we have got a bottomry bond of still more doubtful validity; we cannot enforce it; but we will not transfer the ship; we will not be active unless we get our money back again. That I believe to be the real condition of the deed of the 8th of July.

But how can I follow the course suggested of condemning this interest? If the bond be considered as given to an enemy, it is a nullity; it could not be enforced; if it is not given to an enemy, then I could not condemn such interest. Again, it is wholly contrary to the usage of this Court to take notice of either a mortgage or bottomry bond. I believe there is no instance in which it has been done; and all the cases, principles, and decisions are to the contrary. I should be very unwilling so to do in the present state of the law with reference to mere declarations and orders in Council.

If I do not restore this vessel to the claimants, I have no alternative but to condemn her to the Crown. And how? Not as taken by a non-commissioned captor, but I must condemn her as the "Etrusco" was condemned—for a violation of British law, to the Crown (Vide p. 19 (*b*)). I could not condemn her on any other grounds. This, I think, I could not do; first, because I have no proof of a violation of British law, which, by British law, **[23]** would entail such consequences as condemnation; secondly, because there has been no intention to commit a malâ fide act in violation of British law; lastly, because the whole transaction is a deception on the British customs for the purpose of protecting British property; not for the purpose of deceiving British authorities; not with the intention of violating British law, but for rescuing property supposed to be in the grasp of the enemy.

I do not say that this course of proceeding, even for a laudable purpose, is quite correct; but I think it ought not to stay my hand in pronouncing a decree, restoring

the ship. I trust, in coming to this conclusion, whether well founded or not, I have at least fairly stated, and met, all the difficulties of the case. This inquiry has been most properly instituted. Neither the officers of the Customs, nor the officers of the Crown, would, in my opinion, have been justified in releasing this vessel without the judgment of this Court. It has had to steer through many difficulties of a perfectly novel character; and where there are difficulties, according to my view of the case, a ship never ought to be restored except by a competent jurisdiction.

The judgment of the Court will be, to restore the ship on payment of the expenses which have been incurred by the Crown.

Proctors: for the seizor, the Admiralty Proctor; for the claimant, Deacon.

THE "CATALINA." High Court of Admiralty. October 20, 1854. Collision. Costs. A Dutch and Spanish vessel coming into collision, the Spanish crew boarded the other, and behaved with great violence. The Court being of opinion that the Dutchman was to blame for the collision, pronounced for the Spaniard, but gave no costs in consequence of the subsequent misconduct of the crew.

The Dutch barque "Drie Gebrœders" and the Spanish schooner "Catalina" came into collision with each other at 10.30 P.M. on the 25th of June last, off Hastings. A cross action was entered.

It appeared that after the collision, the Spaniards boarded the barque, exhibited their knives, and conducted themselves with great violence.

The Trinity Masters having expressed their opinion that the Dutch barque was entirely to blame,

The Court said: My opinion entirely accords with that expressed by the Trinity Masters, but looking at the subsequent occurrences in this case, and the manner in which the crew of the "Catalina" conducted themselves after the time of the collision, it is a case in which I shall give no costs. I pronounce for the damage, but I cannot encourage parties taking justice into their own hands.

**[24]** THE "CHRISTINE." (Schwartz). Admiralty Prize Court. October 18, 1854.—A purchase shortly before the war, by the master of the ship, which continues in the same trade, is of the most suspicious character, and would require stringent proof of the actual payment of the money. When it appears that the money has not been paid, and that there was no bill of sale on board, further proof cannot be allowed.

[S. C. Sp. Pr. Cas. 82; 2 Eng. Pr. Cas. 320.]

This vessel having arrived at Liverpool, from Memel, under Lubeck colours, on the 31st of July, was seized by the Custom-house officers on the 11th of August.

She was claimed by Mr. Schwartz, her master, on the ground that he was a neutral, being a citizen of Lubeck, and had purchased her of Russian owners. He admitted, however, that he had not paid any part of the purchase-money, nor given any security beyond his own personal engagement, but stated that his property at Lubeck was liable to satisfy the claim against him for the purchase.

The Queen's Advocate (with whom was the Admiralty Advocate) contended to the same effect as the judgment.

Dr. Addams (with whom was Dr. Twiss) contended that there had been a bonâ fide transfer of the ship from the Russian owners to the master, and that the property being absolutely divested, the nonpayment of the money would not invalidate the transfer. The case was, at the worst, merely one of suspicion, which suspicion might be cleared away if the Court allowed further proof. *The "Marianna"* (6 C. Rob. 24), *The "Bernon"* (1 C. Bob. 102), and *The "Jemmy"* (4 C. Rob. 31), were cited.

*Dr. Lushington.* For the purpose of the judgment I am about to deliver, I will assume that the master is entitled to the neutral character which he claims as a citizen of Lubeck, and confine my observations to the circumstances of the purchase of this vessel.

According to the master's own statement, this purchase was made at Libau, by a contract between himself and the owner, executed at Libau in February or March 1854, he having been previously master of the vessel from June 1853, and sailing under Russian colours. This contract is a very suspicious one, not only on the ground that it was immediately antecedent to the war, but also on the ground that it was a

purchase by the master (*d*); I very much doubt, if all the records of this Court [25] were examined, during the last war, whether there would be found a single instance in which restitution passed to a master, who was master of the vessel at the time of the sale, and who afterwards continued master, the vessel being still employed in the same or an analogous trade. Be that as it may, and not considering it to be a fatal objection, yet it is abundantly clear that a party coming forward under such circumstances, and claiming a ship in a neutral character as a burgess of Lubeck, is bound not only to produce, but to have on board sufficient documents to satisfy the Court that he possesses a bonâ fide title. I do not say that the Court would bind him down to the production, in the first instance, of all the papers which it might ultimately deem necessary, to induce it to pronounce for a restitution; but I do say it ought to be a contract of that nature in itself, supported by such documents found on board, as would give the Court good reason to suppose that if the opportunity of producing further proof was allowed, it would give him a title to restitution; otherwise further proof is a mockery.

Now in the present case there are two capital defects. The master's answer to the thirty-first interrogatory is in substance this: that he, the party who now claims as the purchaser of the vessel, has not paid one single shilling of the purchase money, 4000 roubles; that he has given no security for it, but that he believes his property at Lubeck would be liable to pay for it, and perhaps the ship, if it went back, would be also liable. He then goes on to say, that after the payment of expenses he should remit the earnings of the ship to liquidate the interest, and reduce the principal.

I am of opinion, looking at all the decisions which have taken place in this Court, that the case is felo de se, on the statement of the master. It has been laid down, not in one, but in half-a-dozen cases, that there must be proof of payment in all cases where any suspicion arises as to the validity of the contract at the time of sale. It is quite vain to say, "mine is a bonâ fide valid contract." The money must have been paid before the master assumes the command, or ventures out on the high seas during war, otherwise the ship would be liable to be condemned. I have been asked, in the course of the argument, whether it is necessary that the money should be paid in all cases; whether a bill of exchange would not do? That question I will answer when such a case comes before me for my decision. But I will say this, that if in any case it appeared to me that one ship had been exchanged against another, or that some equivalent had been actually paid over, that would, in my opinion, be a totally different case from the one now under dis-[26]-cussion. All that is now stated by the master is that he had agreed to purchase the ship, but had not paid one farthing. That is a title of which no Prize Court can take cognizance.

That, however, is not the only defect in the case: the title on which the master claims, the bill of sale, is not here. Now this may be a bonâ fide claim; I do not decide whether it is or not; but I decide that it is not legal, according to the usage and practice of the Court, and the laws which regulate the Court in matters of prize. If this important paper, which is the sole title deed, is not produced, what satisfaction can the Court have? The title deed to the ship should be on board the ship. If further proof were allowed in this particular case, could the Court feel satisfied that it would receive a genuine document? The case is teeming with suspicion throughout. Is there any one document whatever produced that can satisfy the Court that the transaction was bonâ fide, independently of all the circumstances I have mentioned? Certainly, there is one document, marked No. 5, to this effect—"We, the Senate of the Free Hanseatic town of Lubeck, do hereby make known and declare, that before the senator, H. C. Dettmer, by us specially hereunto appointed, hath in our Chancery personally appeared the local ships' clearer, J. C. F. Schutt, of the firm of Schutt & Company, as lawfully authorized by the local burgher, and Captain Johann Frederick

(*d*) In the somewhat similar case of *The "Rapid"* [Sp. Pr. Cas. 80] on the same day, the Court observed: "This was a purchase purporting to be made just antecedent to the war, by the master who had commanded her before, and who had sailed as a Russian subject. According to all the rules and principles that have been laid down and established, this has been considered as a transaction that cannot be upheld in any Court of Prize, unless it be indisputably clear that the transfer was bonâ fide, that the money agreed to be paid was paid, and the person to whom the vessel was transferred was a neutral subject."

Schwartz, by his power of attorney, dated Libau, the 12th of February, 1854, a burgher of this town, and deposed, and upon corporeal oath affirmed, that the aforesaid ship 'Christine,' commanded by the local burgher and captain J. F. Schwartz, doth solely and bonâ fide to the last-mentioned belong, and that none other, whether directly or indirectly, hath any share or interest therein."

So that this gentleman makes oath, by virtue of a power of attorney from Captain Schwartz, which power of attorney is not produced. I have simply this document, which in no degree corroborates the claim. No case could be produced which would alter my impression of the present one. *The "Marianna"* (6 C. Rob. 24) was a totally different case; that was an enemy's ship, and the question before the Court was the title of property in some goods and in the freight, for which a claim was made by the former owner of the vessel, on the ground that he had a lien on the property for the purchase money, which had not been paid. Lord Stowell's remark, that the fact of the purchase money not having been paid could have little weight, since it was a matter solely for the consideration of the person who sells to judge what mode of payment he will accept, applied **[27]** (and I perfectly agree with him) to the circumstances of that and similar cases, but not to a case where the question in dispute is the bonâ fides of the sale, for in such cases, it has always been held that proof of actual payment was essential.

I cannot allow further proof, and have no hesitation whatever in condemning this vessel.

Proctors: for the seizor, the Admiralty Proctor; for the claimant, Nelson.

THE "CLYDE." High Court of Admiralty, October 20, 1854. A foreign vessel descrying a light at a distance, but not knowing it to be the light of a steamer until she was nearly upon her, delayed exhibiting a light, and then when a collision was inevitable, starboarded her helm to ease the blow.—*Held,* not to blame.

This was a suit promoted by the Danish schooner "Catharine Ferdinando," of the burthen of 96 tons, against the screw steam-ship "Clyde," of the burthen of 266 tons, to recover compensation for the damage arising from a collision between them at about 2 A.M. of the 6th of December last, about six miles off Flamborough Head. The schooner was proceeding from Dantzic to Grimsby with a cargo of railway sleepers and staves; the steamer from Gravesend to Grangemouth with a general cargo.

Their respective cases are fully set forth in the judgment.

The Queen's Advocate and Dr. Bayford appeared for the schooner; Dr. Addams and Dr. Robinson for the steamer.

*Dr. Lushington,* addressing the Elder Brethren (*a*): Gentlemen, it has been stated that there is a very grave contradiction between the statements of the opposing parties in this case, and also between the evidence; but surely that is not a matter of surprise and wonder to you, who have been somewhat accustomed to trials in this Court, and certainly it is none to me. You have also heard a discussion as to the tests by which we should try the witnesses. With one of these tests I agree, namely, it will be important to bear in mind the probabilities on the one side and on the other. But there is another test, of which we must not lose sight; having ascertained what facts are indisputably proved or admitted on the one side and on the other, we must take care to make doubtful matters conform to those facts. We shall have to try whether the "Clyde" is to blame or the schooner—whether blame attaches to both or to one only.

The statement of the schooner, put shortly, is to the following effect: She is of the burthen of 96 tons only, and was **[28]** bound from Dantzig to Grimsby, with railway sleepers. The period at which the collision took place was about 2 A.M. on the 6th of December. The place is in some degree of uncertainty, but it was off Flamborough Head. The schooner states that she was standing in for the land on the larboard tack. I will now bring to your notice an objection which has been very strongly urged on the part of the "Clyde." It is said that the schooner, being bound to Grimsby, and the wind being fair for entering that port, why should she, instead of prosecuting her voyage, put herself on the contrary tack, and wait till daylight?

(*a*) Capt. Probyn and Capt. Piggott.

Bearing in mind that the master was a foreigner, that the night was dark, with showers, and, as the master says, he expected to be about Flamborough Head, though he could not exactly say where he was, it will be for you to say whether the measure so adopted by him was a wise and prudent precaution, or whether there was any such great absurdity in it as to show that the statement itself cannot be true. This question has been so much discussed, that your solution of it will be a matter of no small importance. According to the statement of the schooner, although the weather was dark, yet vessels could be seen at a considerable distance. She was going at the rate of three knots an hour, with a light ready to be exhibited. The master says he saw the light of the "Clyde" on his starboard quarter, and that the lantern was shown over the starboard side. I take it that it is abundantly clear that the light of the steamer was seen a very considerable time antecedent to the collision, and the witnesses are unable to describe with accuracy how the interval was occupied. According to the statement of the master, he was in doubt whether it was a light on shore or not. He represents that he was steering N.E., and saw the light to the southward; and, under those circumstances, I think it is singular that he could expect to see a light on shore. He states that he proceeded on his course without doing anything at all, until the period arrived when the vessel which had a light was ascertained to be a steamer. There is certainly a discrepancy in the evidence as to the time at which the light was shown on board the schooner, and it is impossible to ascertain at what period it was antecedent to the collision. I will put a question to you on that point, and it will be this—whether there was any improper delay in showing a light to the steamer, and whether that delay was a contributing cause to the collision?

According to the representation of the schooner, when the vessels approached near to each other, the "Clyde's" red light was seen; and to prevent being sunk she starboarded her helm; but that had scarcely been done when the "Clyde" struck her [29] amidships, on the starboard side, with the bluff of her port bow. Are you of opinion the schooner was right or wrong in starboarding her helm under the circumstances? If she starboarded her helm wisely, for the purpose of easing the blow which had become inevitable, I apprehend she would be right. If, on the other hand, that act tended to produce the collision, instead of preventing it, of course she is to blame.

With respect to the steamer, she was proceeding on her voyage, according to her account, N. by W., the wind being N.N.E., instead of, as alleged on the other side, N.N.W. I do not conceive that this is a question of great importance, but the balance of evidence is in favour of N.N.W. The first point with regard to the steamer will be this—whether she had a good look-out on board, and whether she kept it. It is unfortunate for the "Clyde" that she has examined a person of the name of Gibson, whose memory, I presume, has altogether failed, or he was in a state of confusion when examined. I am not prepared to say that he has been guilty of deliberate false-swearing. The misfortune of the "Clyde" is, she has no evidence as to the look-out. It was not a particularly dark or greasy night; and it is a matter of great importance for you to consider whether you are satisfied that there was a good look-out kept on board the "Clyde."

The next question is, as to the mode of the collision. Is that which is stated on behalf of the "Clyde" consistent with possibility or probability? It is a matter on which I will not give an opinion, but I will lay the facts before you, and you will determine the point for yourselves. According to the evidence, the schooner was proceeding about three knots an hour—in what precise direction there is great difficulty in ascertaining. If I am to take the evidence of those on board the schooner, it was N.E., whereas those on board the steamer say it was S.E; but in either case I apprehend she was on the larboard tack. Assuming it to be either course, let us consider what the steamer was doing. She was proceeding N. by W., and was going, according to her own statement, seven knots an hour. It is said that when the two vessels descried each other, the schooner was two points on the port bow of the steamer. It is further said, that the steamer went off, in consequence of porting her helm seven points. That would bring her head to about E. by N. Assuming that the schooner was coming, as stated by the master of the steamer, S., what would be the effect of starboarding her helm? I cannot conjecture to what extent it would bring her round. It is a purely nautical question. There is another

point, which must not be left out of consideration, namely, **[30]** whether the steamer, in addition to easing and stopping her engines, ought to have reversed them?

Dr. Lushington and the Elder Brethren having retired for consultation, on their return—

*Dr. Lushington* said: We are of opinion that the schooner was perfectly justified in standing off the land during the night, in the manner represented by her. With respect to the next question, whether there was any important delay in showing the light, we think that there was delay, but it was exhibited as soon as it was known that the light previously seen was that of a steamer. Was the schooner wrong in starboarding her helm? We think she was right in so doing. It is not proved to our satisfaction that the steamer had a sufficiently good look-out. With regard to the mode of collision as represented in behalf of the steamer, we think it did not take place as she represents, but that she mistook the course which the schooner was on, and in consequence of that the collision took place. It is unnecessary to pronounce an opinion as to the last question, as to the reversing of the engines.

I pronounce for the schooner against the "Clyde."

Proctors: for the schooner, Rothery; for the "Clyde," Toller.

THE "GRAFF ARTHUR BERNSTORFF." High Court of Admiralty, Oct. 20, 1854.

The Court has no power, at the suit of a British part-owner of a foreign ship, to arrest her until bail is given for her safe return to her own port abroad.

Motion. This vessel belonged to the port of Rostock, in Mecklenburgh. Messrs. Lotinga & Son, merchants and shipbrokers of Sunderland, were the owners of four sixty-fourths of her. Mr. A. A. Lotinga having made an affidavit thereon, and that the value of such shares was about 350l., that Johann Neuendorff and others, whose names he did not know, were the owners of the remaining shares; that the said ship was then about to be employed by the said Johann Neuendorff and the other persons in a certain voyage, without his (Mr. Lotinga's) or his partner's consent or concurrence; and that he verily believed that, unless the ship were restrained from proceeding to sea by warrant of the Court until good security were given for the proper care and management of her, and for the safe return thereof to the port of Rostock, in the value of the said four sixty-fourth shares, such property would be greatly endangered.

Dr. Curteis thereupon moved the Court to decree a warrant **[31]** of arrest of the said vessel for bail for her safe return to her port of Rostock.

*Dr. Lushington.* There is no doubt as to the jurisdiction of the Court, at the suit of a part of the owners, to arrest a vessel which is going on a voyage of which they disapprove, until security is given for her safe return to port; but, to the best of my recollection, this is the first time where a British owner of a part of a foreign vessel has sought to apply the remedy; and I am of opinion that I have no power to grant it. If a British merchant thinks proper to embark his property in a foreign vessel, he is at perfect liberty to do so, but this consequence must necessarily follow:—he becomes subject to the law of the foreign State to which she belongs for her government and management. I cannot say what that law may be with respect to the present case: for aught I know, the remedy which exists in this country with respect to British ships may exist in the country to which she belongs. But to arrest a foreign ship about to proceed on a voyage, until bail is given for her return, appears to me to be not only without precedent, but contrary to all principle.

If, indeed, I was assured by competent information, that such was the law of the country to which this vessel belongs, then upon that ground the Court might perhaps be induced to take it into consideration. As the matter stands, however, I must reject the motion.

Proctor: Engleheart.

THE "ELIZE," otherwise "ELISE WILHELMINE" (Petersen.) Admiralty Prize Court, Nov. 22, 1854.—A customs' officer having wrongfully seized a neutral vessel on her arrival at Leith, on the ground of an alleged breach of the blockade of Archangel, condemned in damages and costs.

[S. C. Sp. Pr. Cas. 88; 2 Eng. Pr. Cas. 327; 1 Jur. (N. S.) 95. Referred to, *The "Zamora,"* [1916] 2 A. C. 86.]

This vessel, belonging to a Danish merchant, and sailing under Danish colours,

arrived at Archangel on the 10th of August last On the 13th, the commanders of the English and French squadrons sent in a flag of truce, and officially announced that, from that day, Archangel would be effectively blockaded, and that any vessel attempting to enter that port would be seized for a breach of the blockade; but that all vessels which had already entered would be allowed fourteen days from such date to load their cargoes and depart unmolested. On the 20th this vessel, in company with many others, sailed from Archangel with a cargo of mats and tar, passed unmolested through the blockading squadron, and arrived safely at Leith. She had **[32]** there discharged about half her cargo, when, upon the 11th of October, she was seized by the Custom-house officers for breach of the blockade of the port of Archangel.

The usual examinations in preparatory having been taken were brought in, together with the ship's papers on the 20th of October, when the Judge directed them to be opened; and, at the petition of the Admiralty Proctor, decreed the usual monition. On the 4th of November a proctor appeared and claimed the vessel on behalf of her owner, a Danish merchant. On the 8th of November, the proctor for the seizor offered to restore the vessel, which offer the proctor for the claimant refused to accept without damages and costs.

The case now came on for argument simply upon the question of damages and costs.

The Queen's Advocate (with whom was the Admiralty Advocate) for the seizor.

Restitution having been offered, the sole question is, whether the seizor is to be condemned in costs and damages. There is no ground for such condemnation. This vessel sailed from Archangel after the commencement of the blockade, which was duly notified at that port, and was subsequently announced in the Gazette. As soon as it was found that license had been given to vessels to come out for fourteen days, the offer of restitution was made,—four days only after the claim had been given in.

The seizure, too, was justifiable on another ground. There was, among the ship's papers, no Danish sea-pass,—a most essential document to foreign neutral ships, and the absence of which would alone justify the seizure; Story's Prize Practice, p. 193. It is difficulty to conceive upon what principle, or upon what case, the complainant can rely after the decided opinion which the Court has already expressed in other cases, with respect to giving costs and damages against captors. *The "Ostsee."* (*a*)

**[33]** Dr. Addams for the claimant.

No case need be cited. On the broad principles of justice, where one party has suffered damage by the wrongful act of another, he is entitled to compensation. It is his right ex debito justitiæ. Unless it is to be the rule laid down by this Court with respect to neutrals trading with this country, that every Custom-house officer is to be at liberty to arrest their vessels and cargoes, and to interrupt their trade, without being liable to make good the losses they may occasion by a wrongful act, the seizors in this case must be condemned in costs and damages. There was not a shadow of a pretence for seizing this vessel. There was clearly no breach of blockade; and if there had been, the delictum was purged by the termination of the voyage, and the discharge in part of the cargo. But it is said this ship had no Danish sea-pass on board. That matters not: there is no question as to the Dutch character of the vessel; and the having a Dutch sea-pass on board is a matter belonging to the domestic regulations of Denmark, of which this Court does not take cognizance. On the principle laid down

---

(*a*) Aug. 13, 1854.—The "Ostsee," a Mecklenburgh Schwerin vessel, was sent to England for condemnation as for breach of the blockade of Cronstadt, but was restored by consent of the Crown. The owners applied for costs and damages against the captors.

The Queen's Advocate and Dr. Deane appeared for the captors; Dr. Addams and Dr. Twiss for the claimants,

Dr. Lushington refused the application, and said, that out of the many thousands of cases which came before Lord Stowell for adjudication, there were only ten or twelve in which he accompanied the restitution of the ship with costs and damages. The learned judge then said: "Without venturing any opinion as to what I may feel it my duty to do in future cases, I think, looking at the confusion which has arisen respecting ports being blockaded, and the difficulties which captains of Her Majesty's vessels must experience in forming their own opinion upon it, it would be going too far to condemn the present captors in costs and damages; and I therefore decline to do so." [See p. 170, post.]

by Lord Stowell, the claimants are clearly entitled to full costs and damages. The "*Actæon*" (2 Dods. 48).

Dr. Twiss on the same side cited the "*Welwaart*" (2 C. Rob. 130), and the note appended to that case from Bynkershoek (*c*), "*Juffrow Maria Schrœder*" (3 C. Rob. 147), "*Hurtige Hane*" (Ibid. 327), "*Lisette*" (6 C. Rob. 395), "*General Hamilton*" (Ibid. 61), "*Actæon*" (2 Dods. 48), "*Mentor*" (1 C. Rob. 179), and *The* "*Nemesis*" (Edw. 50).

The Queen's Advocate and Admiralty Advocate replied.

*Dr. Lushington.* The question for the decision of the Court is, not whether this ship should be restored, because that is assented to on behalf of the seizors, but whether she ought to be restored with costs and damages.

**[34]** It may be expedient, in the first instance, before considering this question, to state what voyage this vessel has been engaged in, and how far that was a legitimate proceeding. It appears by the memorandum of charter-party, that, at the time of its date, this vessel was lying at Leith, and it was agreed that she should proceed to Archangel, there load a certain quantity of tar and mats, and bring them to this country. Amongst other things, it was stipultaed that, if Archangel should be blockaded, the charterers guaranteed to the master 100l. sterling. This charter-party is dated on the 21st of June 1854; and I apprehend that this was a perfectly legitimate undertaking, because it entirely corresponds with the Order in Council of the 15th of April 1854, which is to this effect:—"That all vessels under a neutral or friendly flag, being neutral or friendly property, shall be permitted to import into any port or place in Her Majesty's dominions all goods and merchandize whatever, to whomsoever the same may belong." Now, the effect of that clause undoubtedly is this,—that a neutral vessel might import into this country the property of the enemy, and no inquiry should be made into the ownership of the cargo. The Order in Council further provides "that save and except only as aforesaid, all the subjects of Her Majesty, and the subjects or citizens of any neutral or friendly state, shall and may during and notwithstanding the present hostilities with Russia, freely trade with all ports and places wheresoever situate, which shall not be in a state of blockade." It was therefore perfectly competent to this vessel to sail to Archangel, and to bring back a cargo, provided that port was not blockaded, whether the property in that cargo belonged to a neutral, or a British subject, or an enemy,—certainly a very great change from the state of things which existed in all former wars.

This being so, I will now, before I consider the subsequent facts of the case, address myself to the law of costs and damages. That law, as a general principle, though subject to many modifications, I apprehend to be precisely what is laid down by Lord Stowell in *The* "*Actæon*" (2 Dods. 48). He there says,—"The natural rule is, that if a party be unjustly deprived of his property, he ought to be put as nearly as possible in the same state as he was before the deprivation took place,"—that is, he is entitled to restitution with costs and damages. This is a proposition which, I apprehend, no person would be inclined to dispute generally; but error versatur in generalibus, and it is very difficult to collect from all the cases that have been decided any very definite **[35]** principle by which we may determine what is to be considered an unjust deprivation of property. With regard to the practice, however, I repeat what I said on a former occasion ("Ostsee," note (*a*), p. 32), that within my knowledge and recollection there have been but very few cases in which costs and damages were given; certainly not more than ten or a dozen. It was a rule laid down by Lord Stowell, that restitution was to be granted on the ship's papers and depositions, and that the captor was not to be condemned in costs and damages without having the

(*c*) Bynkers. Quæst. Jur. Pub. lib. I. ch. 11., commenting on the order of the States-General in 1630, says: "In tertiâ sanctione eleganter distinctum est, in quem portum naves exeuntes fuerint compulsæ, ut nempe in ipso actu deprehensæ videantur, nam si in eum portum in quem destinarant pervenerint, absolutum iter intelligitur et cessat publicatio. Sed ait disjunctim: "haar eigen of daar de reyse gedestineert was," de quorum sensu et jure dubitari posset. Sane, si proprius portus, et in quem destinatum erat iidem sint, res caret omni dubio: Sed si Anglus, qui ex Flandriâ destinarat in Daniam in portum Anglicum compellatur et enavigans, iter suum prosecuturus deprehendatur, antequam portum Danicum subierit, mihi quidem in itinere et ipso actu videretur deprehendi, nec quicquam interesse portus proprius sibi, nec ne, quem ante subierat, si non iter, quod institutum erat, plane fuerat finitum."

opportunity given him of showing that the seizure was justifiable, for which purpose he would be entitled to produce evidence, if he thought fit.

I must determine, in each individual case, by reference to its own particular circumstances, whether the seizure was just or unjust, and decide accordingly with respect to the liability to costs and damages. One observation, however, I think I am justified in making, viz., that there is, in my opinion, a wide distinction between commissioned and non-commissioned captors. It is the bounden duty of persons acting under the commission of Her Majesty, namely, officers in the navy, to seize all vessels whatever to which a hostile character might reasonably be attributed; and, when they fairly discharge that duty, the Courts have been astute in discovering reasons to release them, as far as possible, from any liabilty. That was clearly the principle upon which Lord Stowell acted in the case of *The "Actæon,"* though it ended in a condemnation in costs and damages. That was a very peculiar case, and not at all like an ordinary one. In consequence of a scarcity of wheat, the British Government, in the year 1812, very anxious that the port of Cadiz should receive a constant supply of American flour, this country being at that time at war with America, granted numerous licences, authorizing any vessels, except French vessels, and bearing any flag, except that of France, to import into Cadiz from any port of the United States of America cargoes of grain, meal, flour, or rice, without molestation, on account of any hostilities which might exist between this country and the United States, notwithstanding such ships and cargoes might belong to any American citizens, and to return to any port not blockaded. These licences were to be in force for nine months. Under one of these licences the "Actæon" imported a cargo into Cadiz, and there received from the British minister a further licence, permitting her to ship a cargo of lawful merchandize, and to return with it to any port in the **[36]** United States of America. In the course of the voyage she was boarded by several British ships, but on her licence being shown was permitted to proceed. But on the day before her original licence would have expired she was captured by one of Her Majesty's ships, the commander of which, for certain reasons, being unable to retain her as prize, on the same evening set fire to and destroyed her. Under these circumstances Lord Stowell, though he expressed a belief that the captor had acted from a sense of duty, held that the American claimant was entitled to costs and damages.

I now come to the question whether, in the present case, the seizors, who were non-commissioned captors, mere Custom-house officers, were justified in making the seizure in a port in this country, for I must observe that this circumstance also makes an essential difference. Where a vessel is captured at sea, the captor has very little opportunity of forming his judgment as to the course he should adopt beyond a few interrogatories addressed by him to persons who would naturally be unwilling to give him information; and a mistake under such circumstances would be infinitely more venial than when committed in a British port, where there is ample opportunity of obtaining advice, and of ascertaining the truth with respect to all the circumstances of the case.

Now this vessel, it appears, left Archangel on the 20th of August last, laden with a cargo of tar and mats, bound for Leith, where she arrived on the 29th of September. She was seized by the Custom-house officers on the 11th of October, part of her cargo having been discharged. She was claimed on behalf of the present claimants on the 4th of November, and on the 8th there was a proposition to restore her. I speak of the ship only: with the cargo I have nothing to do at present. That proposition, it appears, was refused, except upon payment of costs and damages.

Let us see, then, what was the original ground of seizure. As I understand it, the justification is now placed upon two facts; first, that this vessel had violated the blockade of Archangel; secondly, that she had no sea-pass. It has also been urged that the master in his depositions will not speak to the property of the cargo; but this argument can, I apprehend, have no weight, except upon the supposition that this was Russian property, because the Order in Council allows neutral vessels to import into any place of Her Majesty's dominions all goods and merchandize whatsoever, to whomsoever the same may belong. It would not follow that the cargo, though Russian, ought to be condemned also, even if the vessel were **[37]** condemned, because, if it were clear that the vessel was a neutral, it would not follow that the Russian merchant who had put his property on board in the bonâ fide belief

that it would be protected by the Order in Council of the British Government, should lose that property through the act of the neutral.

With respect, then, to the first point, how must I deal with the blockade of Archangel? The Court must refer to the Gazette, a public document which it is bound to notice, and also to the evidence given by the master. The Gazette states that the blockade had been imposed on the 12th of August last on the port of Archangel, and upon divers other ports of that part of Russia, and it makes no exception whatever. It must be observed that from the date of that notification, as we all know, the blockade would be considered as announced to all neutral States; but it does not follow because this notification was so made, that therefore it is to be taken as an absolute fact that the blockade was actually imposed at that period. The Gazette is only primâ facie evidence of the blockade, and not conclusive. What is the master's evidence on this point? He says, in answer to the thirty-sixth interrogatory, "While I was lying in the port of Archangel a Custom-house officer boarded my ship, bringing with him a notice of communication from the Russian Governor of the district, containing a notification from the officer commanding the combined men-of-war—English and French—in the White Sea, to the effect that from the 1st of August (old style), or of the 13th of August (new style), "the blockade of Archangel and other Russian ports in the White Sea was to commence and come into operation as respects ships coming into those ports; and, as respects ships leaving those ports, the blockade thereof was to commence fifteen days afterwards. The Custom-house officer called upon me to sign my name to that notice, and to a certificate thereon of my having read it, and become aware of its contents, which I did, and he then took it away with him. I passed the blockading squadron while lying at anchor behind Cross Island, on the 24th of August last, and shewed my colours to them on passing." He then says, he did not receive any instructions from any one else regarding any blockade established or about to be established.

There cannot exist a doubt that, supposing this evidence true, this master committed no breach of blockade at all. He came out of port with the permission of the blockading squadrons, and sailed direct to the port of Leith. He is perfectly innocent, and consequently the owner is entitled to stand as perfectly innocent also. This seems to be admitted by the **[38]** proposition to restore, as well as by the arguments in the case; but it is said that the non-commissioned officer was entitled to avail himself of the Gazette, and that he was not bound to know whether there was any such permission given to the master or not. I confess I entertain very grave doubts as to the truth of that proposition. I very much doubt whether, after a vessel has performed a voyage from a blockaded port by the express permission of the blockading squadrons, and has arrived and delivered part of her cargo in a British port, it is competent to a non-commissioned seizor to say, "I relied upon the Gazette; and, though it turns out that the master was innocent in all his conduct, yet I was justified in the seizure." I am much inclined to think, that if those in command of the British force gave full permission to certain vessels to come out of a port which appears from the Gazette to have been blockaded, the seizor must take the consequence if he did not get information as soon as possible from the Government; the loss is not to fall on the innocent owner.

Before, however, I come to that conclusion, I must notice another argument on the part of the claimant, viz., that, even supposing there had been a breach of blockade, still that breach has been purged. That is a question of very great difficulty, and one which I am not inclined to dispose of unless it is necessary so to do. As far as I am aware, that question never arose in the former war. It did not arise even during the whole of that period when all the coasts of England were under what is called a paper blockade. I think it is not incumbent on me to decide it now, because I am of opinion that the seizure of this vessel by a non-commissioned officer for a breach of blockade was not a justifiable proceeding.

Another argument has been pressed by Her Majesty's Advocate, which is entitled to consideration, viz., that a captor is entitled to avail himself of all the evidence which comes out upon examination, though unconnected with the pretence or ground upon which the vessel was originally seized. But though this may be true of an officer commanding one of Her Majesty's vessels on the high seas, who has seized a neutral vessel and brought her in for adjudication, yet I am not so clear that it lies in the mouth of a non-commissioned captor, after it is not denied that it is a neutral

vessel, to say, "You should condemn her because she has no sea-brief. I did not seize her on that account, but having found out that she had no sea-pass, therefore you shall condemn her." Clearly this was not the ground on which the seizure was made: it is ex post facto. Let us see to what weight this is entitled. It may be true [39] that, according to the laws of Denmark, she is not entitled to carry the flag of that country; but there is no doubt about this being a Danish vessel, for she has an admeasurement bill, wherein she is described as being of the custom district of Flensburg, and as belonging to Mr. Andersen of Flensburg; and it is further stated, that her tonnage, as also the initials of the royal names, and the words "Danish property," had been branded on the deck-beam at the mainmast. That document bears date the 29th of December 1848, but it shews that at the time she was entitled to the character of a Danish vessel. It has never been customary to interfere with the domestic law of other countries; but at the same time I am bound to say this, that the sea-pass is not only a document constantly required by the municipal law of other countries, but by the Court of Prize also, in certain cases, where there is reason to believe that the vessel proceeded against is not a neutral. Under such circumstances the absence of the sea-pass is highly important, if not fatal.

I do not apprehend, however, that that principle can be strained to the case of a Custom-house seizure of a vessel, manifestly, from all the circumstances, possessing a Danish character, manned with a Danish crew, having been engaged in a legitimate voyage, chartered by a British merchant, and bringing home a cargo on his account.

On these grounds I am strongly inclined to think that the claimant has made out his claim to some extent; but there has been a mistake on the part of these proceedings for the restitution. Restitution was offered on the 8th of November; this was refused, unless accompanied by costs and damages. This was an error; it ought to have been accepted, with the reservation of the question of costs and damages. Unfortunately, that was not done, and the ship has remained as she was up to the present period.

I must condemn the seizor in costs and damages, but the damages must cease on the 8th of November, at the time when the claimant might have had the vessel restored to him.

No claim had been given in for the cargo until the 16th of November, and on the part of the owner restitution was offered upon the 22nd. The claimants, however, desired to be heard on the question of costs and damages.

The only difference between the cases of the claimants for the ship and the claimants for the cargo was, that the latter were British subjects, and had neglected to claim until the 16th [40] of November. It was stated in the course of the argument that they had mistaken their course of proceeding, and had commenced an action for damages against the seizor in a Scotch Court.

The same counsel appeared.

*Dr. Lushington.* This is a question as to the restitution of the cargo, the Court having on a former day restored the ship, with costs and damages. This vessel and cargo having been seized as prize, I conceive it to be a proposition perfectly evident in law, that the sole and exclusive jurisdiction of the whole matter belongs to the High Court of Admiralty, under the commission that has been issued by Her Majesty in prize matters, and that no other Court whatsoever within these kingdoms is entitled to exercise any jurisdiction at all. Supposing that an action had been brought in any other Court for costs and damages, it would be a good and sufficient defence to say that this was a matter of prize. That was a lesson which I learned early in life, and I believe I was correctly taught.

The Court has already expressed its opinion that there was no sufficient ground for this seizure, and that it ought never to have been made. The seizure took place on the 11th of October, but the claim was not made till the 16th of November. The Court is disposed to make a distinction between the claimants of the cargo and the claimants of the ship, on this ground; the ship was Danish property, and it appeared consistent with equity, and the ordinary practice of the Court, that more time should be allowed to a foreign claimant to prefer his claim than to a British subject resident on the spot, who had every opportunity to acquire a knowledge of the course to be pursued.

Now it appears that the present claimants of the cargo were either misinformed as to the course of proceedings which they ought to adopt, or were in utter ignorance

of it; and it appears to me that, whichever was the case, it would not be just for the Court to lay the burden on the party who originally made the seizure. I cannot, therefore, direct the costs and damages to begin before the claim was made, viz., on the 16th of November. With respect to their continuance, it appear that on notice being given of a motion for restitution, with costs and damages, the claimants were informed that the restitution would not be opposed. They might, therefore, have taken possession of their property on the 22nd of November. Where it is intended to prefer a claim for costs and damages, restitution should be accepted, praying that the question of costs and damages may be reserved. If restitution were declined until the ques-**[41]**-tion of costs and damages was discussed, great delay might take place, and very large expenses be unnecessarily incurred. The parties in this case are fairly entitled to restitution, with damages from the 16th to the 22nd of November, with costs.

Proctors: for the seizor, Townsend; for the claimant, Clarkson & Son.

ANDERSON *v.* LANEUVILLE. Privy Council, Nov. 30, 1854.—Domicil of origin lost. English domicil acquired, and held, affirming the judgment of the Prerogative Court, to have been afterwards abandoned, notwithstanding the testator made annual visits to England, and left 35,000l. in the English funds.

[S. C. 9 Moore P. C. 325; 14 E. R. 320 (with note).]

This was an appeal from the Prerogative Court of Canterbury. The circumstances were these:—William Anderson, the deceased, was born in Ireland, in 1774, and succeeded to a considerable estate there, upon the death of his father, in 1830. He died in Paris on the 23rd of December 1849, leaving behind him William Anderson, party in this cause, his lawful nephew, only next-of-kin and heir-at-law, and the sole person entitled to his estate and effects in case he had died intestate. From the year 1835 to the time of his death, in 1849, he resided principally in France, but came to England for a few weeks every year. During one of these visits in the year 1843 he made a will principally in favour of his nephew, whom he appointed executor. In the year 1848, when in France, he made a holograph will, valid by the French law, whereby he gave the whole of his property to Madame Laneuville. He possessed, besides his estates in Ireland, about 35,000l. in the English funds, and some property in France.

The later will was propounded on behalf of Madame Laneuville, in an allegation which, when finally admitted, pleaded merely sufficient to raise the question of domicil. The nephew, the other party in the cause, having asserted and then waived an appeal against the admission of the allegation, then, contrary to the practice of the Court, brought in an act on petition, alleging briefly the circumstances above stated respecting the deceased, and submitting that "if the will of 1848 was of any force or validity, still that if the very facts pleaded in the allegation were admitted, and, on the face and appearance of the two documents of 1843 and 1848, the latter would be of no force or validity to revoke the former, which was, therefore, under any circumstances, a good and valid will, so far as regarded the testator's estate, both real and personal, in Great Britain and Ireland." Sir Herbert Jenner Fust rejected this act on petition, saying that it was a novel and unprecedented attempt, which ought not to be encouraged; and that the only question which **[42]** he was called upon to decide was, whether the deceased was a domiciled Frenchman, which would be determined on the allegation (15 Jur. 850). A responsive allegation was afterwards brought in on behalf of the nephew, pleading a variety of facts to show that the domicil was English. One article therein, pleading that "the death of the testator was concealed from his relations and friends in this country, and that no communication with respect thereto was made until after an attempt had been made to get possession of the property in this country," was rejected by Dr. Lushington who was then sitting for Sir H. Jenner Fust, on the ground that the conduct of the parties after the death of the testator was totally irrelevant to the question respecting his domicil at the time of making his will. In answer to certain parts of this, a further allegation, with exhibits, was given in and admitted on behalf of Madame Laneuville.

On these allegations numerous witnesses in France and England were examined, and publication having passed, the case was argued in the Prerogative Court of Canterbury by Dr. Jenner and Dr. Bayford for Madame Laneuville, and by Dr. Addams and Dr. Twiss for Mr. Anderson.

March 21 1853.—Sir John Dodson having taken time to consider his judgment, delivered it on the 21st March 1853, to the following effect:—

Mr. William Anderson, the deceased in this cause, died at Paris on the 23rd of December 1849. He was possessed of real estate in Ireland of value, though to what amount is not very precisely ascertained, but ranging from 1000l. to 3000l. a year, or thereabouts. He was also possessed of the sum of 35,000l. stock in the English funds, and of some property of very small value in France.

The question which the Court is now called upon to decide is whether the legal domicil of Mr. Anderson, the testator, is to be deemed a French or an English domicil.

The parties to the suit are, first, Madame Laneuville of Nogent-sur-Marne, in France, claiming to be universal legatee under a will dated the 26th of January 1848, and made conformably to the law of France, namely, a holograph will in the handwriting of the testator, and signed by him; and, secondly, the other party to the cause is Mr. William Anderson, the nephew of the testator, and his sole next-of-kin, and he claims under a will bearing date in the year 1843, and duly executed in England in the presence of two witnesses as required by the English law.

**[43]** That the law of the place of domicil regulates the succession to intestates' effects no one seems to doubt: that was admitted by the counsel on both sides; as little doubt, I think, there can be, after the decision of the Superior Court in the case of *Stanley* v. *Bernes* (3 Hagg. Ecc. 373). The same rule is applicable to cases of testacy and intestacy.

The counsel for Mr. Anderson took a distinction as to that, and contended that it did not apply to cases of testacy, but to cases of intestacy only. But it appears to me the case of *Stanley* v. *Bernes*, which I have mentioned, is quite decisive upon that point, and shows that the law of domicil must govern, whether there is testacy or intestacy, and of this opinion the learned Judge, my predecessor, Sir Herbert Jenner Fust, seems to have been, for he so expresses himself in the case *De Bonneval* v. *De Bonneval* (1 Curt. 863). I am also borne out in this view of the case by what fell from Mr. Baron Parke in a case that was before the Judicial Committee (*Marquis of Hertford's case*, 4 Moore's Rep. P. C. 348). Mr. Justice Williams, in his very accurate work on the law of Executors, states precisely to the same effect. I think, therefore, there can be no doubt whatever on that point, and the conclusion then is, that the validity or invalidity of a testamentary instrument must be governed by the law of the place of domicil; the lex domicilii must prevail both in cases of testacy and intestacy.

A distinction was taken by counsel that this is not a case of intestacy on the one side and testacy on the other, but it is a case of testacy against testacy. But I do not see what possible difference it can make whether it is a contest between testacy and testacy, or between testacy and intestacy. The same rule must prevail.

Then with respect to the law of domicil. A domicil may be obtained in various ways. There is the domicil of origin, the domicilium originis, which is the domicil of birth. The residence of parents and the domicil of the parent is the domicil of the origin. There is another domicil by operation of law with respect to the marriage of a female, who thereby becomes domiciled in the same place with her husband; but there is no question as to that. There is likewise the domicil of choice, and that is the material domicil for the consideration of the present question. All that we shall have to consider here is, first, the domicilium originis, and then the domicil of choice. These are the two points which will be for consideration.

Now, first of all, let us see what constitutes a civil domicil, **[44]** because there are domicils for different purposes. There are political purposes, the domicil for forensic purposes—the purposes of the forum; but this comes under the class of civil domicil.

Now the definition or description of domicil which has been given by various authors is in some of them to this effect: that the domicil is where a person has his home; and Mr. Justice Story, in his "Conflict of Laws," describes it in this way:—"His true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning." The animus revertendi is necessary. That is stated by Mr. Justice Story (Story's Conf. of Laws, c. 3, § 41). Voet describes it in this way: "Proprie dictum domicilium est quod quis sibi constituit animo non discedendi si nihil avocet." That is the definition or description by Voet, which is cited by Mr. Justice Story, and which is fully acceded to by him.

Again, in some of our own cases, that of *Balfour* v. *Scott* (House of Lords, 11th April 1793), which was referred to by counsel, and which was cited in the case of *Somerville* v. *Somerville* (5 Ves. 765), where the Master of the Rolls uses these words: "In *Balfour* v. *Scott*, I admit, Mr. Scott was the son of a gentleman of property; but during the latter part of his life he did clear acts of desertion of the domicilium originis, selling off his establishment, dismissing his servants," &c. So the two things concur in the case now before the Court, viz. selling the furniture, dismissing his servants, &c.

So, again, Lord Cottenham, in *Munro* v. *Munro* (7 Cl. & Fin. 877) says: "To effect the abandonment of a domicil of origin and substitute another in its place, is required the concours de la volonté and du fait—animo et facto—that is, the choice of a place and actual residence in the place then chosen, and that it should be the principal and permanent residence." In point of fact, all the definitions or descriptions come very nearly to the same effect.

The place of death, it was said, is to considered as decisive, or nearly decisive, on this point, but that, I think, has been ruled quite otherwise. Primâ facie it certainly is, but it may be repelled like any other circumstances; the presumption arising from the place of death is not very strong of itself; it is only in a case of doubtful domicil that that would have effect.

Again, as to the lex loci rei sitæ, that was very strongly pressed by the counsel. It was urged that there was very little property to be passed in France in this case, whereas the pro-**[45]**-perty in Ireland and England was to a very large amount; but that again has been considered as not decisive upon this matter, and is not a very important point. Now in the case of *Somerville* v. *Somerville*, the learned Judge thus expressed himself upon the point of the money in the funds (5 Ves. 789). "The next consideration is, whether, with reference to the property or conduct of Lord Somerville, there is anything showing he considered himself as an Englishman. It was said, for the purpose of introducing the definition of the domicil in the Civil Law, 'ubi quis larem rerumque ac fortunarum suarum summam constituit,' that the bulk of his fortune was in England, and the description in the bank books was relied on." Just so in this case; and it was contended that the bulk of the property was here; that there was 35,000l. in the English funds, and that he was there described as of England. But the learned Judge says: "I lay no stress whatever on that description in those books or in any other instrument,"—that is, in the books of the bank, "for he was of either place; and most likely to make use of that, to which the transaction in question referred. It was totally immaterial which description he used. It is hardly possible to contend that money in the funds, however large, preponderate against his residence in the country and his family seat. It is hardly possible that should be so annexed to his person as to draw along with it this consequence." There are other passages to the same effect, which it is unnecessary to discuss.

These, then, are the rules as to domicil collected from the authorities that I have mentioned. Then to apply these rules, keeping them as steadily in view as I can, to the facts of the present case.

Mr. Anderson, the testator—I call him the testator because, at all events, he has made a will both in England and in France—was born in July 1768, in Ireland, where his father had real estate, which afterwards descended to him—either he inherited it, or it was by will that it descended to him—and having been resident there at the time, it was quite clear that the domicilium originis of this gentleman was Ireland: it was an Irish domicil. In the year 1787, he was sent to France for his education. He was then a minor, about nineteen, and being sent to France for education, that of course would not effect any change in domicil.

Whilst he was in Paris in the year 1789, or thereabouts, at the commencement of the French Revolution, he became acci-**[46]**-dentally acquainted with Mademoiselle Burthé, now Madame Laneuville, the party in this cause. It seems he got acquainted with her accidentally at a public spectacle in the Champ de Mars in Paris. A storm came on, he offered her civilities, and conducted her home. An acquaintance commenced between them, and afterwards a mutual attachment took place. This being the time of the French Revolution, and a war being subsequently declared with England, he was in great danger of being guillotined. The evidence is, that he was preserved through the means of this Madame Laneuville, then Mademoiselle Burthé, that she concealed him for a length of time, and that she afterwards obtained a

passport for him from the wife of the Minister of Marine, and by which assistance he escaped from France, and arrived safely in England.

It is said that she did this at the peril of her own life; and it is in evidence in the cause, that her father and brothers, I think, all suffered from the guillotine; one of her sisters likewise was guillotined, and she ran the risk of suffering the same punishment for the favour which she showed to this gentleman whose case is under decision. However, a mutual attachment took place between them, and they promised not to marry till they had seen each other again. In point of fact, they made a mutual promise of marriage. Having escaped to England, it does not precisely appear at what period, whether 1789 or 1793, but early in the French Revolution, when the war commenced, he joined his father, at that time resident at Bristol or Bath, or somewhere in that neighbourhood; and in 1821 his father died. At that period this gentleman was resident at a place called May's Hill, Gloucestershire, where he lived with a person named Harriet Laurance, whom he kept as a mistress. There he had a house, and they passed by the name of Williams. With this lady he lived till 1823, when she died; and then afterwards he lived with Eliza Lang at a place called Huntspill till the year 1832; and then at Bedford Villa, near Bristol. The latter lady, during the former residence, passed as his adopted daughter, and she was buried by the name of Anderson. He thus established himself in Gloucester, shire, and afterwards at Huntspill; and there can be no doubt that he acquired an English domicil. His Irish domicil seems to have gone by altogether: he never returned to Ireland: so far as I can make out from the evidence, he never went back. He had a home in Gloucestershire, afterwards at Huntspill, and then at Bedford Villa, and some other place near Clifton; therefore there can be no doubt that he had at that time acquired a clear English domicil. Having thus lost his adopted **[47]** daughter, he afterwards, in the year 1835, advertised in the French papers for Madame Laneuville by her maiden name of Burthé, in the hope of ascertaining where she was to be found, in order that he might go and see her, and rejoin her. These advertisements were inserted in a provincial paper, or papers, published at Nancy, from which this lady's family came; therefore it was likely he should get information.

These advertisements were seen by Madame Bony, the daughter of Madame Laneuville. Mademoiselle Burthé had married, and had become a widow; in the meantime, Madame Bony, by desire of her mother, wrote to Mr. Anderson, to inform him where she was, and where she was to be found. In consequence of this, he addressed a letter to her, which has been read to the Court, and commented upon by counsel, stating how happy it made him to have discovered her. It is written in the most affectionate terms: "Ma chere, chere Catharine," and so forth, saying he should rejoin her; he would go to Paris to visit her; and, in consequence of this, he did go to Paris afterwards, and did visit her.

Now when he arrives in Paris, according to her evidence, he states his great happiness at meeting with her again, his full intention of returning to England, selling his furniture, breaking up his establishment, and coming to reside with her. Having made this statement, he returns to England; and then there is other correspondence, which relates to the sale of the furniture, and his intending to rejoin her again. There is a letter, dated the 14th of April 1836, in which he speaks of having arrived in England yesterday—that is the day before—and at the end of this letter he says: "Keep up your spirits, my dear little Catharine, as much as you can, the day will soon return; I am for life your dear friend, William Anderson."

It is true, that in this letter and some of the others, he talks of his arrival at home, speaking of England as his home, and, perhaps, that observation would not have much weight if it was confined to this letter, because this was a letter before he sold his furniture, before he had dismissed his servants, before he had gone to reside in France. But, in point of fact, in some of the later letters, he uses the same expression; it is not arrived at home—that is the translation of it—but it is arrived chez moi. In some of the later letters he speaks of going chez vous, and not chez moi, as was observed by counsel; but I think this, even in the later letters, must not be pressed strongly in this case, because it must be borne in mind, that he was not a good French scholar; he does not seem to understand the idiom of the language very well, or express himself as a French-**[48]**-man would do in that respect: "quand Je partirai pour chez vous," which is hardly French.

But he arrives in England,—because it is better to look at facts, and see what he

does,—he arrives in England, and a sale of his goods takes place, and they are advertised to be sold on account of his going to reside on the Continent. Perhaps no very great reliance is to be placed on that; it is said these things are frequently inserted in advertisements for the purpose of bringing bidders, or some other purpose; but here, in point of fact, he was going to reside on the Continent, and he did go and reside on the Continent.

It is also in evidence that he dismissed his servants, because Harriet Bowden, one of these servants, says: "He gave me and all the servants warning, saying he was going to live abroad, and we all left his service together before the sale."

In one of his letters to Madame Laneuville, he says, "I must quit my house now; I must quit before the sale." In point of fact he does dismiss his servants, he has his furniture sold, and then he does go to France and lives with Madame Laneuville, and never returns to England except periodically for purposes of business, but never having any home in England.

Then, having done this, he goes to Paris in 1836, and there finds Madame Laneuville in lodgings; larger lodgings are taken, and they are taken in her name it is said, but he is the person who pays for them. He resides in the same lodgings with her in Rue de Paradis, and afterwards in Rue de Echignier, or perhaps vice versâ; however, the lodgings were exchanged, they were taken in her name, larger apartments than he had had before, and he paid the rent for them.

Now, I think if the case had stopped there, it would have afforded pretty strong evidence of his living in France, and of his intention to stay there. The declarations and intention combined would leave, I think, little doubt on the point, but the matter does not at all end here.

In 1838, he quits Paris, and goes to Nogent-sur-Marne. In the following year, 1839, he purchases a house at Nogent-sur-Marne, and in that house he continues to reside till within a very short time of his death, when he went to Paris for the sake of advice when he was ill. I say he continued to reside in that house, except during the periods when he came to England for the purpose which I must presently advert to.

When he got into this house there were numerous declarations coming from a number of French witnesses of his intention to remain there. The fact of his purchasing the house, I think, strongly implies an intention of remaining in that spot.

**[49]** But there is another circumstance that tends, I think, still more strongly to show that the deceased meant to pass the remainder of his life at that place, and in that house. The purchase of the house was made in this way: Madame Laneuville advanced from 1000 to 2000 francs, and the deceased paid all the rest. What she advances seems to be enough, according to the evidence, to pay for conveniences, and other little matters, but the bulk was paid by himself. He, not being very conversant with the French language, and French law, did not take any active part in it, except advancing money, leaving it to other parties to see to the conveyance. It does so happen, that through error,—through mistake, I presume,—whatever it was, without his knowledge it was conveyed to Madame Laneuville for life, and then to her grandchildren.

Now, this being discovered by the deceased, he immediately said: "This will not do; because if you pre-decease me, if you die before me, I shall not have a life interest in it. I want to reside here, and I shall have no life interest in the house." In consequence of that, Madame Laneuville transfers the house to him, in order that he may have a life interest, in order that he may live there notwithstanding her decease. It was conveyed to him, then, and that having been done, he conveys the house in trust to himself for life, then to Madame Laneuville, and afterwards to her grandchildren, but he preserves a life interest in the house. I say this is a very strong circumstance indeed to show that he purchased that house with the intention of living there and remaining during the rest of his life.

There are other circumstances which show that he was attached to this place, and likely to remain there; for upon two several occasions he endeavoured to make a purchase of adjacent grounds,—a house called the Shepherd's House, and some land attached to that, and some land attached to the garden, where some trees were planted. He was exceedingly desirous of adding to the premises which he had purchased at Nogent. He always expressed his delight at living there, and his intention of remaining there.

Now, in letters, after coming to England, as I before observed, he speaks of the house as if it was hers. He talks of chez vous—chez toi—avec toi—quand je partirai pour chez vous, and so forth, as if he intended it was her house; but in point of fact he had taken care that it should be his own house; and he had conveyed it in such a way that he having a life interest in it, he might remain there during the whole period of his existence. Therefore I think there is no great reliance to be placed on ex-[50]-pressions of this sort, coming from a man so ignorant as he appears to have been of the French language.

But he does not always speak of it as if it were his separate and distinct home, as if he was a mere lodger or mere boarder with her. Not at all; for in speaking of one of the servants in his letters he says: "She is not at all the servant for us or for our service." There it seems to have been conjoint between the two. Though it is true from these letters it appears Madame Laneuville was in the habit of hiring the female servant or servants—for they generally kept more than one; still, on the other hand, he was the person who hired the men servants. He hired the gardener. This was by no means an uncommon division, that the master should hire the men servants, agree what the wages were to amount to, and the mistress should hire the female servants. I do not think there is much in that. Then, again, as to his being a mere boarder or lodger with her; so far as can be made out from the evidence, the expenses of the house were paid in this way: she contributed whatever was convenient to her out of her income,—what she could spare out of her income,—and he supplied all the rest. It was not a fixed sum he paid her for board and lodging; they kept house together, that is, he, having the larger income, of course supplied any deficiency, and probably expended the much larger amount. It seems he expended money likewise in the improvement of the place, in the improvement of the grounds, in a piece of water there was in the grounds, and expended not a very inconsiderable sum on the premises which they jointly occupied

But then about this constantly retiring to England every year on matters of business. It seems it was but for a very short time he did return. He did return, because he considered it necessary for matters of business; but still, Nogent-sur-Marne was the place of his abode at all other times; that was the home of his choice, and the evidence of the French witnesses is very strong as to the reasons he assigns for it,—that it agreed better with his health, that the air was more salubrious, that it suited him better, that the atmosphere was clearer, that the wine was cheaper, and that he enjoyed his health more there than in England. These are all reasons and all motives for going there and fixing his home at that place. But it is said that the mere going for health, or the mere going for purposes of that sort for better climate, cannot have the effect of fixing his domicil. If persons go to places merely for the benefit of their health—for a temporary purpose, such as going to watering places, going to Cheltenham or Bath, or on the Continent, that can be but a mere temporary purpose; but where anybody fixes their home [51] on account of its being more beneficial to their health, that is as good a motive—that will have as good effect, I apprehend, as any other good cause for being desirous of remaining in the same place.

But can these periodical returns to Bristol be considered as retaining a home in this country? He had sold his furniture; he had dismissed his servants. It is said he always returned to the same lodgings, at least to the same house; but he did not retain those lodgings; he did not have them kept, using the same rooms, or any other rooms in the same house; because I find on looking at his letters, especially those written immediately after his arrival—for it was his habit to write immediately after his arrival—he says in several of them, "Direct to me at the Post Office;" and in one of his letters he says, "Direct to me at the Post Office, for I have not been out yet to see whether I can have my old lodgings or not." Therefore, there was always a doubt about that; he had no home at all there.

But it was said and pressed by counsel that he had his lares there; that is, the muniments, as it is interpreted. I take it that is quite a new interpretation of the word lares.

So far as his title deeds are concerned, I apprehend they must have been in Ireland; there was but one portmanteau there, or a second sent afterwards by the nephew; therefore, I think the whole of the title deeds certainly were not there. But in point of fact it is not where the title deeds were, the estate being in Ireland; that would apply to the Irish domicil, and it is quite impossible to say that this

gentleman had an Irish domicil, for he left that country in early life when he was a minor, and he never returned to it, so far as I can discover from the evidence now before me.

It is said that though he continued to live in France all these years, since 1813 or 1814, it cannot be said to be his domicil; it was a mere habitation, as shown by the circumstance that he concealed it from his friends in England, and only promulged to them that he might be travelling about the Continent—had no fixed home. But that will not alter the fact; it is clear he had a fixed home—he was constantly at Nogent-sur-Marne.

You do not find him going to Switzerland or travelling about the Continent; it is to Nogent he goes, and nowhere else, except to Paris during his illness.

Then it is said that though he had a desire to live in France, it was only because Madame Laneuville was there, and that if she had died he would then have been desirous of quitting France. The testimony of a witness called Kirbihla, who was the gardener, to that effect, has been relied upon.

**[52]** Now, Kirbihla, it appears, only went into the service of the deceased in August 1849, I think, just shortly before he went to Paris, where he died. Kirbihla's evidence is very strong as to the attachment of this gentleman to the place, as to the improvements of which he was speaking, as to his being exceedingly fond of the garden, and so forth; and also very strong as to the declarations of always remaining in France, spending the whole of his life in France, though the deceased did afterwards say on one occasion, that if Madame Laneuville died, then he should return to England. But even supposing that declaration to have been made precisely as stated by the witness, I think it could not outweigh all the other circumstances, all the other declarations of the deceased, all the other acts of the deceased when resident at Nogent-sur-Marne. Even if proved to the utmost, and if spoken with sincerity, it would only come to this,—he had an intention just at that time—just at the latest period of life, of returning to England, in case Madame Laneuville should die before him; but that would not change his domicil if he had gone there with the intention of remaining there,—this intention of going back in order to recover his former domicil. It must be done facto as well as animo.

This is the only declaration; it is contrary to the witness in other parts as to remaining there, and is contrary to all the declarations which he made to all the other witnesses in the case, as to the superiority of the climate, as to the cheapness of the wine, and other circumstances. All that, of course, must have its weight in inducing him to remain there.

In point of fact, however, after this declaration, which is made to Kirbihla, and which is the sole declaration of that character to be found, he goes to Paris for the benefit of his health, for the benefit of advice, and there consults a medical man, Dr. Vignal.

Dr. Vignal, seeing the state of health in which he was, that he was not very likely to recover and live, recommends him to go to England, and to go to Bath for his health.

But this he declines to do; he says he is better taken care of there. He prefers living in France, because he is better taken care of there. From all the other reasons he states at other times it is quite clear that almost down to his dying day he had no intention of giving up his French domicil, which it appears he had acquired, and returning to England, or if he had such an intention he never completed it by the fact of return.

Therefore, from all these circumstances, and the rules and principles which I adverted to at the commencement of what I have said, I am of opinion that this gentleman having lost in **[53]** the first instance his domicilium originis—having acquired an English domicil—having afterwards given up that, sold his furniture, dismissed his servants, when he gave up his home in England and went to France, and that for many of the last years of his life he never gave up that home—there was no return to England, consequently the domicil of France remained—I must, therefore, pronounce that this gentleman at the time of his death was domiciled in France.

From this judgment Mr. Anderson, the nephew, appealed. The case was argued before the Privy Council (*a*), by the Solicitor-General and Dr. Addams for the appellant, and Mr. Rolt, Q.C., and Dr. Jenner for the respondent.

---

(*a*) Present, The Right Honourables Lord Justice Knight Bruce, Lord Justice Turner, Dr. Lushington, and Mr. Pemberton Leigh.

Their Lordships declined hearing the counsel for the respondent, and *Dr. Lushington* delivered their Lordships' judgment to the following effect.

This is an appeal from a decree of the Prerogative Court of Canterbury. The decree is in these words: "The judge having maturely deliberated, by his final interlocutory decree, having the force and effect of a definite sentence in writing, at petition of Rothery, pronounced that William Anderson, the deceased in this cause, was, at the time of making and executing his last will and testament, bearing date the 26th day of January 1848, and at the time of his death, domiciled in France."

The sole question raised on the proceeding was this, whether the testator at the period of his death was domiciled in France or in England. It is not necessary to consider why the learned Judge who then presided in the Prerogative Court thought fit so to narrow this question, though one reason is apparent, that if the domicil turned out to be England, in that case the French will, not having been executed according to the statute, would have been altogether void, and there would have been an end to the whole contest. If, indeed, the domicil should be ultimately established to be a French domicil, then the Prerogative Court would know by what law to grant probate,—what would be the form is another question, on which their Lordships express no opinion.

Now, the leading facts of this case are these. What is called the domicil of origin of the testator, was Ireland; he was born in Ireland, of Irish parents. The domicil of origin was lost, and an English domicil acquired, by long residence in England, principally in the county of Gloucester. It further appears that the deceased became acquainted with Madame Laneuville **[54]** sometime about the commencement of the French Revolution. We shall not stop to consider whether the early history set forth in this case is true or is not; for his attachment to that lady, whatever be the cause, whether arising from her having rescued him at that period from impending danger be true or not, is a fact proved beyond all controversy; it is admitted in this case, and has been argued upon by both parties.

In the year 1835 it appears that the testator, having been estranged from Madame Laneuville during the intervening period, again discovered her; that fact clearly appears from a letter in his own handwriting. He addresses her, "My dear, dear Catharine, I have received your letter, and am now the happiest man in the world, in knowing that you are well, alive, and I hope happy." Then he goes on to state a variety of other circumstances, which it is not necessary for me to recapitulate at present. At this period it appears that the testator was residing at Bedford Villa, Clifton, and immediately after, having discovered her residence in Paris, he determined to visit her. Either in the end of 1835, or the beginning of 1836, he sells off his goods and quits his residence at Bedford Villa, Clifton, and after that—but at what precise period does not appear from any of the evidence that I have been able to discover in this case—after that, and not before, he takes lodgings in Trinity Street, Bristol. For what period he was there, there is no evidence in this case. It is to be observed that he was not permanently resident there.

From that period, 1836, until his death, in 1845, he continues to reside in France, with the exception of such intervals as presently it will be necessary to notice. He remains in Paris till the year 1839, and after that he resides at a house at Nogent-sur-Marne, a few miles from Paris. Not to enter into a discussion of the particular form and manner in which the house was purchased and furnished, it is sufficient to say that he had a life interest in this house; that he visited England every year, according to the evidence of Mrs. Price, and he remained seven or eight weeks at Trinity Street, Bristol; but all his letters show this, that he came there, not from choice, but upon business, and was always anxious to return as quickly as possible, after that business was disposed of, to his residence in France.

Here, then, is a residence in France from 1836, with only intervals of short duration, and they were for the purposes of business. I think that an observation was made by the Lord Chancellor, in the case of *Bempde* v. *Johnstone* (3 Ves. 201), which **[55]** strongly applies to this case. Speaking of the deceased the Lord Chancellor said, "Wherever he had a place of residence that could not be referred to an occasional and temporary purpose, that is found in England and nowhere else." So in the present case. So far as he had a residence for a permanent, and not for an occasional and temporary purpose, that residence must be found in France, and nowhere else. We apprehend, looking at the state of facts, primâ facie, the domicil in England

would be abandoned, and there would be enough to constitute a French domicil; though if this was properly speaking to be called the domicil of origin, it is necessary to have very strong facts to change such domicil.

Looking at this state of things, what are the facts, and what are the arguments which have been adduced in opposition to the conclusion which such a residence, under such circumstances, induce their Lordships to come to?

The facts were short, and the argument was this: it was contended that the testator intended only to remain during Madame Laneuville's lifetime. Assuming that to be the fact, assuming that he intended to quit when Madame Laneuville died, it does not at all follow that that will tend to establish the conclusion that he had not acquired a domicil in France; because what is it that takes off the acquisition of domicil by long residence in a country? It is being there for a temporary purpose. It never can be said that residing in a country till the death of a party was a temporary purpose. Residence in India, in the East India Company's service, has long since been established to constitute domicil, yet there is in civil cases always the animus revertendi at some period, though very remote; if the residence be merely of a nature temporary, and not likely to last long, then it would not constitute domicil in itself.

It has also been contended that all the property of the deceased was in this country. No doubt it was; the property was situated in this country; but that argument has been long disposed of. The learned Judge who gave judgment in the Court below, has particularly adverted to the authorities, therefore it is not necessary to turn to them.

With regard to any declarations made by the deceased, the Court is not desirous of following these declarations in detail, because they are not entitled to great weight. In the case of *Stanley* v. *Bernes* (3 Hagg. Ecc. 447) there were an ample number of declarations of the intention of the testator to return to this country. The delegates were clearly of opinion, in that case, that the **[56]** declarations of the testator could not prevail against his domicil in a foreign land.

We do not propose to enter further into a consideration of the evidence, though there are many parts of it tending strongly to the conclusion to which their Lordships have come; we do not allude to it, because we are of opinion that the learned Judge of the Court below has stated the law with perfect accuracy. Their Lordships are perfectly satisfied that all his conclusions were justly founded from the facts and circumstances of the case. Approving as we do of the judgment in toto, we think it unnecessary to go further. The appeal must be dismissed, with costs.

Proctors: for the appellant, Wadeson; for the respondent, Rothery.

WHITING *against* DEAL AND ORCHARD, IN THE GOODS OF THOMAS CLEVERLY, Deceased. Prerogative Court of Canterbury, Nov. 6, 1854.—T. C. left an autograph will with a perfect attestation clause, and the names of two witnesses subscribed. The signatures of the witnesses appeared to be in the handwriting of the deceased, and no such persons could be anywhere heard of. The parties interested having declined to propound the paper, the Court decreed administration of deceased's effects as dead intestate to the next of kin.

[S. C. 18 Jur. 1122.]

Thomas Cleverly, late of Croydon, died on the 6th of May last, leaving Richard Whiting, his lawful cousin-german, and only next of kin, the only person entitled to his estate and effects in case of an intestacy.

After his death, a document, purporting to be his last will, bearing date the 1st of April 1850, was found in his possession, whereby he appointed Edward Deal and Nicholas Orchard the executors, and bequeathed the whole of his property (about 1500l.) save a legacy of 10l. to each of his executors, to William Whitcombe, of Croydon, at whose house he resided.

The will is in the deceased's handwriting, was signed by the testator, had a full and perfect attestation clause, and the names David Pearson and John Barnes appeared at the foot thereof as attesting witnesses.

The word "fifty" in the date of the will being on an erasure, an affidavit from one of the attesting witnesses was required by the Prerogative Office. Strict inquiries were made for the witnesses, but nothing whatever could be learned respecting them. It could not be ascertained that any such persons ever existed, and from the similarity

of the handwriting of the names of the two witnesses to that of the testator, it was believed that he had himself signed two fictitious names as witnesses to his will.

A decree having been issued at the suit of the next of kin against the executors, calling upon them to bring into the Registry the said will, and propound and prove the same in [57] solemn form of law, if they or either of them should think it for their interest so to do, they executed proxies by which they declined to propound the paper. The principal legatee also declined to propound it, and, together with the executors, made an affidavit that "they do not believe that there are any such persons as the said David Pearson and John Barnes, and that from the great similarity of the handwriting of the deceased's signature to the said testamentary paper, and the handwriting of the signatures of the said David Pearson and John Barnes as subscribed witnesses, they are of opinion and have no doubt that the signatures of the said witnesses are of the proper handwriting of the said Thomas Cleverly, deceased."

Dr. Hughes moved the Court to decree letters of administration of the effects of the said deceased as dying intestate, to be granted to the said Whiting, his lawful cousin-german and only next of kin.

*Sir John Dodson.* Looking at the decided similarity between the three signatures, and the fact that no persons bearing the names of the attesting witnesses can be heard of, I think there can be very little doubt that the deceased, for his own amusement, I suppose, wrote the names of the witnesses himself. As the executors and the legatees have declined propounding the paper, I can, under the circumstances, have no hesitation in granting the motion.

Proctor for the next of kin: Toller.

IN THE GOODS OF WILLIAM OLLIVER, Deceased. Prerogative Court of Canterbury, Dec. 2, 1854.—A witness inadvertently, instead of writing his name John Edmunds, under that of the other witness, a solicitor, wrote "John Clerk, his clerk."—Held, a sufficient subscription.

On the 26th of November 1853 the deceased duly executed a codicil to his will in the presence of two witnesses, Richard Edmunds, a solicitor, and John Edmunds, who was at that time acting as his clerk. Richard Edmunds immediately took possession of the codicil, and retained it until after the deceased's death, when he discovered, for the first time, that John Edmunds, instead of signing his name correctly as witness, had inadvertently and by mistake written under the name Richard Edmunds, solicitor, "John Clerk, his clerk." These facts were deposed to by both the attesting witnesses.

Dr. Deane moved the Court for probate of the codicil as duly executed, and cited *Re Ashmore* (3 Curt. 760).

[58] *Sir John Dodson.* I have no doubt at all in this case. The case cited would be sufficient authority; and there is nothing in the wording of the statute to prevent it. The statute says the witnesses "shall attest and subscribe the will"; it does not say shall write their own names, so that a mark is held to be a good subscription. Indeed, if the language of the statute had been stronger, I should have been inclined to grant this motion, as it was clearly a mistake, for which the child who is interested under the codicil ought not to suffer.

Probate granted.

Proctor: Puckle:

IN THE GOODS OF EDWARD HERRINGHAM BUTTS, Deceased. Prerogative Court of Canterbury, Dec. 2, 1854.—A duly executed will, having been sent by the testator himself in a box, which never reached its destination, and has not since been heard of, limited probate of a draft was granted to the executors.

The deceased, who was formerly of Whitehall, Parliament Street, but late of Orthez, Basses Pyrénées, in France, died on the 26th of July 1853, leaving personalty in England of the value of about 850l.

It appeared, from the affidavits in the case, that in the month of May 1853, just previously to his leaving Orthez, where he was then residing, on a visit to England, he drew up a will, which is all in his own handwriting, and subscribed by him, but without date or attestation. This the deceased at first intended to execute in the presence of witnesses, but afterwards determined to recopy it in consequence of the several alterations he had made.

He accordingly made a fair copy, which was examined and found to agree with the original, which the deceased looked at whilst his wife read the fair copy aloud to him. The deceased and his wife arrived in England in June 1853, and on the 14th of July he duly executed the said fair copy, and never afterwards executed any other testamentary paper.

The will, when executed, was deposited by the deceased in a box with other papers and some pictures, and the box, properly fastened up, was, on the 15th of July, taken by the deceased and his wife with them to Paris, where it was deposited in a warehouse in order to be conveyed by carrier to the deceased's residence at Orthez. The deceased left Paris on the 21st and arrived on the 23rd of July at Orthez, where he was accidentally drowned whilst bathing on the 26th of the same month.

The box containing the will was never delivered at the deceased's residence at Orthez, but was lost, with all its contents. Mrs. Butts subsequently brought an action and recovered [59] damages for loss. She also caused advertisements to be inserted in the *Times* and *Galignani's Messenger*, offering a reward for such information as would lead to the recovery of the lost will, but without effect.

Dr. Middleton moved the Court to decree probate of the will as contained in the said draft, limited until the original will, or a more authentic copy, should be brought into and left in the Registry, to be granted to the executors named therein.

*Sir John Dodson.* In this case it is quite clear that the deceased intended that the will should operate. The draft is in his own handwriting, and there is sufficient evidence that the will which the deceased executed was exactly copied from that draft. He never revoked that will; but the box in which it was deposited never arrived at its destination, and appears never to have been heard of. Every endeavour seems to have been made for the discovery of the will, but without success. Under these circumstances I have no hesitation in granting probate of this draft, limited as prayed.

Proctor: Middleton.

IN THE GOODS OF WILLIAM MOBBS, Deceased. Prerogative Court of Canterbury, Nov. 23, Dec. 11, 1854.—The name of one witness who could not write being written at his request by the other witness, and then traced over with a dry pen, and acknowledged by him, is not a good attestation of a will, no mark having been made by the witness himself.

The deceased left a will bearing date the 22nd of September 1850, whereof he appointed his wife executrix and residuary legatee in trust.

It appeared from the affidavits produced that the execution took place in the following manner: The deceased signed his name at the foot in the presence of two witnesses, William and Reuben Wills; the former then subscribed his name, but Reuben, being unable to write, requested William to write his name for him; William accordingly wrote the name Reuben Wills under his own, and Reuben then immediately traced over his name with a dry pen, and acknowledged the subscription to be his name, and himself to be a witness to the will in the deceased's presence.

Dr. R. Phillimore, on moving for probate, endeavoured to distinguish the case from *Playne* v. *Scriven* (1 Rob. 772), and cited *Harrison* v. *Elvin* (3 Q. B. 117), relying particularly upon the interlocutories of the Judges during the argument, which, he contended, asserted a principle under which the case might fairly be brought.

[60] *Sir John Dodson.* The question raised in this case may not have been exactly decided, because there has been no case that the Court is aware of in which the circumstances were precisely similar; but there is a case which bears very closely upon it, and which must, in my opinion, regulate the Court's present decision. I allude to the case of *Hannah Cope* (2 Rob. 336), deceased. In that case the testatrix signed her will in the presence of Emily Taylor and Martha Cæsar, whom she requested to be witnesses, but it appeared that Emily Taylor could not write: the testatrix therefore requested another person, who was also present, to write Emily Taylor's name for her, which was accordingly done. Upon these facts Sir Herbert Jenner Fust remarked, "The paper was signed by the testatrix by placing her mark in the presence of two witnesses. It turns out, however, that the paper was not subscribed by one of the witnesses, as she could not write; she might, however, have made her mark,"—as Reuben Wills might have done in this case. "The desire that another should sign for a witness cannot be construed to be a subscription by that witness. I cannot grant probate of this paper."

This seems to me a case which cannot be easily distinguished in principle from the present, and, therefore, one which I am bound to follow. It has been argued that in this case the witness who could not write requested the other to write his name for him; but this does not appear to me to be a very material distinction. The statute expressly requires that the witness should subscribe, and I cannot see that his request that another should do it for him would be a compliance with that requirement; and it has been again and again decided that tracing a name over with a dry pen is not a subscription of the will. In the case of *Harrison* v. *Elvin* it is clear that the witness did at least make his mark, for although he could not write himself, yet the other witness took hold of his hand, and guided his hand so as to write his name. This case was clearly distinguished from the present, and although the remarks of the learned Judges in the course of the argument seem to enlarge the principle, yet the judgment of Lord Denman does not; he merely says upon the point,—"It was suggested as a difficulty, that the signature of a witness unable to write for himself could not be proved if brought in question after his death. But this is only a kind of inconvenience which is inseparable from all modes of attestation. We must take the signature here to be that of Galer."

The learned counsel has said that this seems to allow of [61] signature by deputy, but I cannot go with him to that extent after the clear decisions that have been given in this Court that there must be a mark of some kind by the witness. I do not say what I might have done if there had been no previous decisions under the statute; but, as it is, I think I am bound to reject this motion.

Dr. Adams (amicus curiæ) stated, with reference to this question, that an eminent counsel had informed him that he once gained a verdict under circumstances similar to those of the present case, by cross-examining the witness as to the fact of some ink remaining in the pen, until he elicited from him that he believed he did see a mark upon the paper after the witness had traced the name with the pen.

The parties availing themselves of this suggestion, obtained further affidavits.

The attesting witnesses swore "that immediately after the testator had signed his name to the will in their joint presence, the deponent, Reuben Wills (being unable to write) requested his son, William Wills, to write his (Reuben's) name, which deponent the said William Wills, did, and then wrote his own name underneath, and afterwards placed the pen back into the ink, in a small ink bottle standing on the table. That the testator then took the pen out of the said ink bottle, and gave the pen unwiped, and, as these deponents verily believe, with ink in it, to the deponent, Reuben Wills, and asked him to trace over the letters of his previously written names, and cautioned him at the same time in so doing to be careful not to blot the same, and, as deponent was no scholar, to take his time in doing so; and that the deponent, Reuben Wills, did then touch several letters of his said previously written name, with the said pen so given to him out of the ink bottle, and which deponent's son had a moment or two previously used in so writing the said names; and deponents, referring to a former affidavit made by them on the 22nd of November 1850, in reference to the attestation of the said will, lastly made oath that when they were sworn to the truth of the said affidavit, they did not understand the precise meaning thereof, and particularly that they were deposing to the fact that the pen with which Reuben Wills traced over his name was without any ink in it, for deponents are perfectly satisfied that the said pen was moist with ink at the time, for there was no other pen made use of in the execution of the said will."

The widow, and two other persons who were present at the execution, also made oath "that the testator took the pen out of [62] the ink pot or bottle, and gave it to Reuben Wills, being, as the deponents verily believe, moist with ink at such time, telling him to mark with the said pen carefully over the previously written name of Reuben Wills, adding that he was to take his time, and not to blot the names in so doing"; and further, "that there was no other pen in the room on the occasion aforesaid, save the quill pen which the deceased and witnesses had used in writing their names as aforesaid."

Dr. R. Phillimore renewed the motion for probate, and submitted that there was sufficient in these affidavits to justify the conclusion that the witness had actually marked the paper, and that the will was sufficiently attested under the statute.

Dr. Addams (amicus curiæ). As this motion seems to have been renewed in consequence of what I stated on a former day, I think I ought to state that in the

case which I mentioned, the witness swore, not only that he believed the pen was moist, but that he saw a mark on the paper from the pen.

*Sir John Dodson.* William Mobbs, the deceased in this case, died on the 29th of September 1850, having made his will, which bears date the 22nd of that month, and which appoints his wife executrix and residuary legatee in trust. In the month of October 1850, the widow came to prove the will, and swore the effects to be under the value of 20l.

It appears that there was the signature of the deceased and the names of two witnesses subscribed, but as there was no attestation clause, it became necessary to have an affidavit as to the due execution. The attesting witnesses then made an affidavit, to the effect "that William Wills, having subscribed his own name, and also the name of Reuben Wills, his fellow witness, who was unable to write, and requested him to do so, and he, the said Reuben Wills, having thereupon, with a dry pen, traced over his name, so previously subscribed for him, acknowledged such subscription to be his name, and himself to be one of the witnesses of the said will."

On a former day the Court held this to be insufficient, it having been frequently decided that although the statute allows the acknowledgment of a signature by the testator, it does not allow it by a witness, and that the witness must actually subscribe his name or his mark at the time of execution. It turned out, however, that there had been a case at Common Law, in which Mr. Serjeant Wilde had succeeded in obtaining a verdict in favour of a will, made under similar circumstances, by closely cross-examining the witness, whereby he at length elicited **[63]** from him that he believed there was some ink in the pen, and that he saw a mark of fresh ink on the paper after the witness had traced over his name.

After being informed of that case, these parties now, in the year 1854, come forward and swear to their belief that the pen with which Reuben Wills, the attesting witness, traced his name, was moist with ink; and they profess to remember all the circumstances of the execution,—that the testator took the pen out of the ink bottle, and charged the witness to take particular care not to blot the names. This affidavit is in direct contradiction to that sworn by these same witnesses in the year 1850, wherein they expressly swore that the witness traced his name with a dry pen. The affidavits now produced are hardly evidence; certainly they are not evidence to which I can give such implicit credence that I should pronounce for this will upon mere motion.

It is said that the children of the deceased are ready to sign a proxy of consent, but that has not been brought in; it is said again that notice has been given to them of the renewal of this motion, but I find that notice is very imperfect; it is merely a notice of application for probate. Non constat that the children know anything about the difficulty as to the defective execution. If the executrix chooses to propound the paper, those interested in opposing it will then have an opportunity of cross-examining the witnesses. It is quite impossible for the Court to grant probate on motion, when the same witnesses have given such contradictory evidence as to the execution; more especially when I find so much mystery respecting the withdrawal of this will by the widow in the year 1850. I must reject this motion.

Proctor: Brooks.

IN THE GOODS OF WILLIAM HAY WISEMAN, Deceased. Prerogative Court of Canterbury, Dec. 11, 1854.—A purser in the navy, being at sea, made two testamentary papers in his own handwriting, and signed by himself, but not attested. The first was complete; the second, though signed at the foot, was incomplete. Probate granted of the complete paper only.

The deceased, a paymaster and purser in the Royal Navy, died at Haslar Hospital, on the 3rd of March 1853. He left an autograph will (A) signed by himself, but not witnessed, bearing date the 12th of December 1849, whereof he appointed his mother, Marian Wiseman, widow, James Clarke, and William Sturgess executors, and which purported to have been written by him whilst "serving on board Her Majesty's ship 'Centaur' **[64]** off Kellett's Island." He also left two half sheets of letter-paper (B and C) filled with various legacies in his own handwriting, signed by himself, and dated "H.M.S. 'Centaur,' off Cabenda, the 3rd of August 1850." These two half sheets formed a continuous disposition, but neither of them formed a complete testamentary instrument, inasmuch as the first ended with the words "the amount

whereof," and the second with the words, "I am not sufficiently rich to leave a —." At the bottom of each of these papers the deceased had written, "Witness my hand to this $\frac{\text{first}}{\text{second}}$ sheet, WM. H. WISEMAN."

It appeared from the affidavit of the deceased's mother, that within an hour or two after his death these testamentary papers were delivered into her hands by the nurse at Haslar Hospital, and that notwithstanding that diligent search had been made in every possible place for the continuation of the papers B and C, no further testamentary paper had been found.

The Court having been moved some time ago to grant probate of the papers A, B, and C, as the will and codicil of the deceased, rejected the motion on the ground that B and C appeared to be incomplete, and, therefore, not entitled to probate, even as the codicil of a "seaman being at sea."

Proxies were now brought in from the parties interested under B and C, consenting to the grant of probate of the paper A only.

Dr. Jenner moved the Court accordingly.

*Sir John Dodson.* The testator in this case, being a seaman actually at sea at the time the will was made, was exempt from the operation of the Wills Act. The will is in the deceased's handwriting, was signed by himself, and appears to be a complete testamentary disposition. It is therefore clearly entitled to probate. The second paper does not appear to have been intended for a codicil, but rather as the draft of a fresh will; the second sheet is on entirely different paper, and even if written at the same time as the other, is clearly imperfect. The deceased appears never to have completed it.

Under all these circumstances, especially as the consent of those interested has been obtained, I think I may pronounce for the first paper as being the will of the deceased.

Proctor: W. G. Clarkson.

**[65]** BREMER *against* FREEMAN AND BREMER. Prerogative Court of Canterbury, Nov. 23, Dec. 2, 1854.—Practice. Where there are two co-defendants to a suit, one of whom has similar interests to the plaintiff's, he is nevertheless entitled to cross-examine the plaintiff's witnesses.

[For further proceedings see Deane, 192. Reversed, 10 Moore P. C. 306; 14 E. R. 508.]

Motion. This was a business of bringing into and leaving in the registry of this Court the probate of the pretended last will and testament of Fanny Allegri, widow, heretofore Calcraft, spinster, late of No. 17 Boulevard des Capucines, in the city of Paris, deceased, heretofore granted to Daniel Alexander Freeman and James Grignon Bremer, the pretended executors named in the said will; and of showing cause why the said probate should not be revoked and declared null and void, and the said pretended will be pronounced null and void; and why letters of administration of the goods of the deceased, as being dead intestate, should not be granted to Susan Catherine Bremer, spinster, the lawful cousin-german, and one of the next of kin, and one of the parties entitled in distribution to the personal estate of the deceased, promoted by the said Susan Catherine Bremer against the said Daniel Alexander Freeman and James Grignon Bremer.

The probate was brought in; the executors appeared by different proctors. Mr. Bremer declined to propound the will, but Mr. Freeman propounded it in a condidit. Both Miss Bremer's and Mr. Bremer's answers were taken to this allegation. An allegation was subsequently brought in on behalf of Miss Bremer, and witnesses, principally French advocates, as to a point of French law, were examined thereon in Paris. To these witnesses the executors, Mr. Freeman and Mr. Bremer, administered separate interrogatories. Publication not having yet passed, an application was now made to the Court on behalf of Mr. Freeman, "to direct the examiner to expunge the evidence taken by him on the interrogatories administered by James Grignon Bremer to the witnesses examined on Fielder's (Miss Bremer's) allegation, and to admonish him not to administer interrogatories to any witnesses hereafter to be produced and examined in this cause."

The motion was founded on an affidavit of Mr. D. A. Freeman, to the effect "that James Grignon Bremer is the natural and lawful brother of Susan Catherine Bremer; that they claim to be the sole next of kin of the deceased; that if the said will be

held invalid, J. G. Bremer and S. C. Bremer will take the whole of the personal estate equally between them as such next of kin; that if the said will be held valid, they will share the personal estate with him (Mr. D. A. Freeman); that J. G. **[66]** Bremer carried on correspondence both with him and with Mr. Potier, the notary at Paris, with whom the will of the deceased was deposited after her death, the said J. G. Bremer stating in such correspondence that the letters were written in the name of himself and of his sister. That on or about the 23rd of January 1854, he (Mr. Freeman) received a notice in the affairs of the deceased in the handwriting of the said J. G. Bremer, though signed by his sister, the said S. C. Bremer. That he has been informed and believes that other notices in the affairs of the deceased have been given to other parties in the handwriting of the said J. G. Bremer, though signed by his said sister. That he (Freeman) believes that this cause is the suit of the said J. G. Bremer, carried on by him in the name of his sister; that the suit has been, in fact, conducted throughout, and is now conducted and promoted by him under her name, and that the same is apparent from the answers of the said J. G. Bremer given in this cause. That he (Freeman) has been informed and believes that on the execution lately in Paris of the commission for examining the witnesses of the said S. C. Bremer in this cause, Mr. Jones, of Paris, a French advocate, who acted upon the said commission, as the substitute for the proctor in this cause for the said J. G. Bremer, also acted in concert with the proctor for the said S. C. Bremer, in getting up the evidence adduced under the said commission; that he acted as the agent and interpreter of the said proctor in his communications with some of the witnesses; and that the said Mr. Jones and the said proctor acted in concert in the preparation of the interrogatories administered to the witnesses under the said commission on behalf of the proctor for J. G. Bremer. That he (Freeman) has been informed by his agent, Mr. Digweed, in Paris, and verily believes, that the said Mr. Jones called upon him in company with the proctor for S. C. Bremer, on the 27th of October last, for the purpose of ascertaining whether the said Mr. Digweed held any power of attorney from him (Freeman) to proceed with the inventory of the deceased's effects in Paris. That he (Freeman) verily believes that great injustice will be done to him if the said J. G. Bremer be allowed to administer interrogatories in this suit, for that he will be in fact cross-examining his own witness, and acting as co-plaintiff as well as defendant in a suit in which he is co-defendant."

The Queen's Advocate and Dr. R. Phillimore supported the application, and contended that it was perfectly clear that Mr. Bremer was only nominally defendant, that his interests were in every respect identical with those of his sister, and that under these circumstances it would be a violation of justice to allow **[67]** him to cross-examine witnesses which were, in fact, his own; but being asked by the Court whether they had any case where any such objection had been raised, they admitted they had not, and contended that the absence of any decision on the point was in their favour, as showing that no such unjust advantage of the forms of the Court had been attempted before.

Dr. Deane for Mr. Bremer. This application is quite unprecedented; no case whatever has been cited in support of it. It must be rejected unless the Court is prepared to alter the established practice, and to declare that in no case shall there be three parties to a suit. If a person is made a party to a suit, he must have all the rights of a party as well as the obligations. Mr. Bremer has given his answers as a party to the allegations of both the other parties, and no objection was raised. He has now administered interrogatories, and that he has a perfect right to do so is proved by the terms of the Act to lead the requisition for the examination of the witnesses, which expressly says, "and also on the interrogatories to be administered on the part and behalf of the said Daniel Alexander Freeman (Lawrie's party) and James Grignon Bremer (Deacon's party) if they shall think fit to administer any." This Act was signed by all the proctors and the commission under the seal of the Court issued in accordance with it; yet the Proctor for Mr. Freeman ignores his own act, and asks the Court to stultify itself by directing evidence to be expunged which it has before commissioned the examiner to take. The motion must be rejected with costs.

Dec. 2.—*Sir John Dodson.* It appears that Fanny Calcraft, or Fanny Allegri as she is described in the will propounded in this cause, died in Paris on the 28th of April 1853, having made a will in which she appointed Daniel Alexander Freeman and

James Grignon Bremer executors; probate was granted by this Court on the 24th of June 1853, and on the 28th of October following a decree was taken out by Miss Susan Catherine Bremer, calling upon the executors to bring into and leave in the registry this probate, and to show cause why it should not be revoked, and the deceased pronounced to be dead intestate.

Mr. Fielder appears as proctor for Miss Bremer, Mr. Lawrie for Mr. Freeman, and Mr. Deacon for Mr. Bremer, the other executor.

Mr. Freeman at first denied Miss Bremer's interest, but Mr. Bremer of course admitted it. An allegation was then given in by Miss Bremer setting forth her interest. This allegation was admitted without opposition, but with the [68] direction of the Court that no witnesses should be examined thereon as Mr. Freeman withdrew his opposition to Miss Bremer's interest, and was, according to the usual practice of the Court, condemned in the costs incurred by his having denied it.

Mr. Freeman then propounded the will, and Mr. Bremer, the other executor, declared he did not. The answers both of Mr. and Miss Bremer were taken. Witnesses were examined. An allegation was then given in by Miss Bremer, to which the answers both of Mr. Freeman and Mr. Bremer were taken; witnesses were examined both in London and Paris, and interrogatories to be administered to those witnesses were given, both by Mr. Freeman and Mr. Bremer.

The present complaint is that Mr. Bremer did administer interrogatories to these witnesses. It is said that he had no right to do so, inasmuch as his interest was identical with that of Miss Bremer, whose witnesses he cross-examined; and the Court is asked to direct the examiner to expunge the evidence taken by him on these interrogatories, and to direct that in future no such interrogatories shall be put.

As to the first part of this prayer the Court had no hesitation whatever, as it was clearly impossible for the Court to direct the examiner to strike out the evidence he had taken, inasmuch as the examiner has no access whatever to the papers, the commission having been returned into Court, and the depositions sealed up until publication shall have been decreed. This part of the prayer the Court rejected at once.

It was then prayed that the Court would direct that for the future no interrogatories should be put by Mr. Bremer to any witnesses produced by his sister; this was resisted by the learned counsel for Mr. Bremer, who took his stand upon the broad ground of the general practice of the Court, and cited the language of the Proctorial Act, which leads the commission, and the commission itself, to show that by the practice of the Court co-defendants have a right to put separate sets of interrogatories to the plaintiff's witnesses. I declined giving my decision at that time, and have since endeavoured to ascertain what has been the practice in the case of parties having similar interests. I have found that the practice has been for the parties to put questions if they thought proper, and that, as far as I can discover, they have never been denied the privilege of doing so. I can find no case where the point has been contested, but I understand that *Hyde* against *Hyde and Cates* (Prerog. Court, 27th May 1852) was a case [69] similar to the present. I shall, therefore, decline making any such order.

At the same time, I must observe that it may be a very dangerous practice to allow parties to act in concert with one another, and to prepare interrogatories exactly suited to the evidence which they know the witnesses can give. It is said that it is really and truly the allegation of Mr. Bremer; if the Court should find that to be the case, and that his administering interrogatories to his sister's witnesses was a mere trick to defeat justice, it would then, I apprehend, be in the power of the Court to reject the evidence that been given on those interrogatories.

I should have liked it quite as well if the parties, instead of taking the high ground of their strict right, had given some denial of the circumstances which are alleged to have taken place in Paris, as they cannot but make an unfavourable impression on the Court. I reject this motion.

Proctors: Fielder, Lawrie, and Deacon.

FYLER *against* FYLER. Consistory Court of London, Dec. 6, 1854.—Practice. Evidence. When one party prays that the evidence in a suit may be taken vivâ voce, the Court will allow it, unless good cause be shown to the contrary. In cases where the evidence is taken vivâ voce, the pleadings must be completed before any witnesses are examined.

This was a suit for divorce by reason of adultery, promoted by the wife against the husband.

Dr. R. Phillimore, on the admission of the libel, moved the Court for permission to examine the witnesses vivâ voce, under the statute 17 & 18 Vict. c. 47. (*a*)[1], and asked the direction of the Court as to the course of proceeding that should be adopted with reference to the pleadings.

The Queen's Advocate said he had no notice of the application.

*Dr. Lushington.* I have considered this subject, and have taken an opportunity of consulting the Dean of the Arches, as to the practice that should be adopted with reference to this statute. We are both of opinion that, in cases where the evidence is to be taken vivâ voce, the pleadings on both sides should be completed before any witnesses are examined, otherwise great injustice might be done, by the one party being enabled **[70]** to shape his plea to meet the evidence given by the witnesses on the other.

With regard to the exercise of the discretion given to the Court, I propose to adopt the following rule; whenever an application for permission to take the evidence in a cause vivâ voce is made by one party, I shall grant the application, unless very good cause to the contrary is shown by the other party, otherwise the statute might become a dead letter, if it were in the power of either party to prevent its adoption.

The application, in the present case, must stand over until the Queen's Advocate has considered whether he opposes it or not.

No objection having been made, the pleadings will be completed before any witness is examined, and the evidence will then be taken vivâ voce.(*a*)[2]

SILVER BULLION. The High Court of Admiralty, Dec. 8, 1854.—Under 9 & 10 Vict. c. 99 the Court is empowered to award remuneration for salvage of life. Coast-guardsmen are entitled to salvage reward; for although it is a part of their duty to save life and property, it is a duty for which they should be paid.—An ignorant salvor receiving a sum utterly inadequate to the services performed, and signing a receipt in full of all demands, is entitled to relief in the Court of Admiralty, and is not barred of his suit for fair and proper remuneration for such services.

[Referred to, *The "Dictator,"* [1892] P. 323.]

This was a proceeding for salvage reward under 9 & 10 Vict. c. 99. s. 19. (*b*)

---

(*a*)[1] "Be it enacted that in any suit or proceeding depending in any Ecclesiastical Court in England or Wales, the Court (if it shall think fit) may summon before it and examine, or cause to be examined, witnesses by word of mouth, and either before or after examination by deposition or affidavit; and notes of such evidence shall be taken down in writing by the Judge or Registrar or by such other person or persons, and in such manner as the Judge of the Court shall direct."

(*a*)[2] Thus two great objections to the Ecclesiastical Courts are removed, viz., the delay and the want of vivâ voce evidence. Parties have now the option of trying their case by deposition as heretofore, or by examination of the witnesses in open court, and they are no longer compelled to wait between each plea in the cause until the witnesses on the previous plea have been examined and publication has been prayed. The term probatory upon each of the several pleas, is the principle cause of the length of time occupied by a suit in these Courts.

It is apprehended that the advantage to be derived from thus expediting causes is so great, that the practice will be, ere long, extended also to pleadings upon which the evidence is to be taken by deposition, and that the assignations to plead in plea and proof cases will be almost as rapid as in those conducted by act on petition.

Such an alteration in the practice of the Courts seems desirable in all cases except the proving of a will in solemn form of law. It is notorious that at least four out of five cases of disputed wills turn at last upon the evidence of the attesting witnesses, and it is highly probable that if that evidence were published before the opposing party was required to give in his plea, many lengthy and expensive suits would be prevented.

(*b*) Sect. 19. "That every person (except receivers under this Act) who shall act or be employed in any way whatsoever in the saving or preserving of any ship or vessel in distress, or of any part of the cargo thereof, or of the life of any person on

There were two distinct actions; one promoted by John Armstrong, mariner, the other [71] by John Miller, chief officer of her Majesty's coast-guard at Tynemouth, and four other coast-guardsmen.

The facts of the case appeared to be these. On the 4th of January 1854 there was a storm off the coast of Northumberland, by which several vessels, and amongst others, the barque "Sir Robert Peel," a part of whose cargo was silver bullion, of the value of about 4500l., were wrecked on the rocks at Tynemouth. Between eight and nine A.M. Lieutenant Miller, chief officer of the coast-guard, with four of his men, brought down Manby's apparatus from the Spanish Battery, where it was usually kept under their charge; a warp was passed to, and secured on board the "Sir Robert Peel," the cradle hauled on board, and the people on shore, including the parties proceeding in the cause, commenced hauling the crew, man by man, on shore; but as it appeared that those on board were tardy in getting the men into the cradle, as if they did not understand the apparatus, John Armstrong, a mariner, either volunteered or was requested to go on board in the cradle to assist in saving the crews. He went, and having assisted all the crew on shore except the mate, was engaged with him in endeavouring to save the clothes and other effects on board, when the master and second mate returned, and said that some specie in the cabin had been forgotten. They thereupon got up ten bars of silver bullion, and sent them safely on shore, when it was conveyed by the coast-guardsmen to their station at the Spanish Battery, and continued in their charge fourteen days. All having got to shore in safety, the vessel went to pieces about six hours afterwards.

On behalf of Armstrong it was further alleged, that after having so assisted in saving the master and men and silver bullion from the said barque, he went and put on dry clothes, and, at the request of Lloyd's agent, remained on the rocks [72] assisting in recovering and preserving the property which was arriving on shore from the various wrecks, by which he was occupied during two tides, receiving for the same the sum of 5s. 6d. for each tide; that those on board the barque, at the time they were assisted on shore and saved, were in a state of very great danger, and that in assisting and saving them and the said bullion, he (Armstrong) displayed very considerable courage, activity, perseverance, and skill, and incurred great personal risk.

The owners of the bullion, in answer, denied that John Armstrong performed any salvage service of or in respect to the said bullion; and moreover alleged that he duly accepted and signed a receipt for a remuneration for his services whatsoever to or in respect of the said barque and her crew, and the bullion in question, in the words following: to wit, "North Shields, 13th of January 1854. Received of Robert Popplewell, Lloyd's agent, the sum of 11s., for two tides' work in attending to the 'Sir Robert Peel,' and assisting in saving crew, silver, &c., in full of all further demands. £0, 11s. 0d. John Armstrong. Witness, Wm. Coxon." They further denied that the coast-guardsmen rendered any service whatever to the crew of the said barque, or in landing the said silver bullion, and expressly alleged that all which they did in relation to the said bullion was done by them in the discharge of their

---

board the same, &c., whether such person shall have so acted at the request of or on application by any person in authority, or by the master or owner of any ship or vessel, or otherwise, shall, within fourteen days, &c., be paid a reasonable reward or compensation by way of salvage for such service, and in default thereof the said ship or vessel, or any part of the cargo remaining on board thereof, so saved as aforesaid, shall remain in the custody of the High Court of Admiralty; and the said goods or other article (and also until warrant issued from the High Court of Admiralty, the said ship, vessel, or cargo) shall remain in the custody of the receiver or officer of the customs until the person so acting or employed in the preservation of such ship or vessel, goods, or other article shall have been reasonably compensated for his said assistance and trouble, or reasonable security given for that purpose, to the satisfaction of the said receiver or officer of the customs, or High Court of Admiralty."

Similar provisions respecting salvage in the United Kingdom will be found in sect. 453 of the new Merchant Shipping Act, 17 & 18 Vict. c. 104. By sect. 459 priority is given to the claims for the salvage of life over all other claims for salvage; and in the case of the ship being lost, or insufficient in value to remunerate the life salvors, the Board of Trade may award them compensation out of the Mercantile Marine Fund.

duty to the customs, and consisted in their demanding that the said silver bullion should be deposited where it would be under their control, until a proper authority was obtained for allowing it to be at the disposal of the owners.

On the part of John Armstrong, it was replied, that the said 11s. was paid to him, as he verily believed, for the two tides during which he had worked after the landing of the silver.

Dr. Haggard and Dr. R. Phillimore appeared for the salvors.

Dr. Addams and Dr. Twiss for the owners.

*Dr. Lushington.* The office of the Court on the present occasion is to determine whether the claimants are entitled to salvage or not; and it is no part of my business to investigate the question, whether other persons might or might not be entitled to prefer a claim for salvage in this case. In order to determine this question I must look at the facts, and consider what is the law in relation to salvage, and what is the construction which ought to be put on the 9 & 10 Vict. c. 99. The facts of this case appear to me to be capable of being enumerated very briefly.

There was a very severe storm on the 4th of January last on **[73]** the north-east coast of England, which was productive of great destruction to many merchant vessels. Upon that occasion the "Sir Robert Peel," as well as others entering the harbour of Tynemouth, were placed in a state of considerable jeopardy—jeopardy not only to the vessels, but to the lives of those on board. It is true that the opinion might be entertained by some that the vessel would not break up speedily, but it is impossible to say that with perfect confidence. The measures adopted in regard to a brig close by, show, that in the opinion of everybody on the spot, there was a certain degree of danger. This being so, the officer of the coast-guard, with some of his men, comes down with Manby's apparatus, for the purpose of using it if necessity required. Mr. Popplewell, Lloyd's agent, employed other persons to save the cargo, and, of course, to save the lives of those on board. Manby's apparatus seems to have been kept in the house of the coast-guard; and the first object in employing the apparatus was to throw a line over in case of necessity, to form a communication between the land and the ship; and then, if practicable, to use the cradle for the purpose of bringing the crew safe to shore. So far as I can make out, the apparatus was used to communicate with a brig, but not with this barque. The persons on board the brig were conveyed on board the "Sir Robert Peel," and ultimately to the shore; and so were other individuals, comprising nearly the whole of the crew of the barque. A communication having been already effected with the barque, the apparatus was employed to effect the transfer of the people and of the bullion from the barque to the shore.

In the course of performing that service, it appears that a man of the name of Armstrong, who was employed to assist on the occasion, went, by means of the cradle, from the shore on board the vessel, in consequence, as it is said, of the crew being exceedingly dilatory. It appears to me of no great importance whether he volunteered or not, because the question would be, what was the service he performed, and what was the risk he incurred? The bullion having been landed, it was taken charge of by the coast-guard, and placed in a state of safety.

The answer on behalf of the owners is, that this was not a salvage service; that the coast-guard only fulfilled the duty they were bound to discharge. With regard to Armstrong, they say that there was little risk or difficulty in going on board the vessel, and whatever it was, he was well paid by the sum of 11s. for two tides' work; and, moreover, he has given a receipt in full of all demands.

What is the primary duty of the coast-guard? No doubt it **[74]** is to prevent smuggling; but I apprehend it to be perfectly true that it is also to assist vessels in distress. But is it a duty not to be paid for? It is the duty of Her Majesty's vessels of war to assist vessels in distress, and they have positive orders to do it; but we know it is the every-day practice of the Court to remunerate them. With regard to the general principles of salvage, it would be ludicrous at this time of the day if I were to enter minutely into them. They are not only well known here, but by the public at large.

The statute, however, to which I have referred, does not often come under the notice of the Court, and I ought not altogether to pass it by. Before the passing of that statute, the law stood in a very peculiar predicament, because this Court had no power to give any remuneration whatever for the salvage of life. Certainly that was a gross anomaly, and one that ought to have been corrected; but I apprehend that it was

for that purpose that the Wreck and Salvage Act was worded as it is. [The Court, having read section 19 (vide note (*b*), p. 70), continued.] The simple question is, whether, when the coast-guard brought down this apparatus of Manby's, and went to work for the purpose of bringing the crew safe on shore, and afterwards saving the bullion, they come within the terms of the Act. It appears as clear as any proposition can possibly be, that if they were employed in saving life, they were employed in saving cargo, quite independently of what was done in that respect; for if the lives of the crew had been lost, there would have been no chance of the cargo being saved. I am clearly of opinion that they come within the meaning of the statute, and that the Court is bound to allot to them such remuneration as their services require; but when persons stay on shore and merely interfere, as they did, without any risk to themselves, or of any great merit, a small sum will be perfectly adequate.

I think the services of Armstrong were very meritorious, because it is impossible to suppose that in a storm of this kind volunteering to go by a cradle to a ship, where there is a chance of the rope breaking, is to be classed as an ordinary tide service. I think he was of great use; that he accelerated the landing of the crew and of the bullion. But it is said that he is barred by his receipt (vide p. 72); I will assume, for the present, that when he signed the document he comprehended it. Then, what is the opinion of the Court of Admiralty? That he formed an erroneous opinion of his own services. Is this the first time the Court of Admiralty has acted as it proposes to do now? Lord Stowell did infinitely more than this; for he actually stated that **[75]** the salvors had formed so erroneous an opinion of their services that, though the action was entered at a certain sum, he gave more and directed a fresh action to be entered, considering that ignorant persons of this description were not competent judges.

Now, I have always a certain suspicion of these papers. I do not mean to say that this receipt was not honestly obtained, but the inclination of the Court is to look at the circumstances of the case, and not allow a paper to operate as a bar. And upon that principle I shall continue to act. All I have to do is to assess the amount. I shall give Armstrong 50l. I think the coast-guardsmen rendered but a moderate service, and I shall give them 30l. It is to be regretted that the owners, instead of giving in an opposition to the claim, did not make a reasonable tender, and so save these expenses, which now, indisputably, they must pay in costs.

Proctors: for the salvors, Stokes; for the owners, F. Clarkson.

THE "SYLPH." The High Court of Admiralty, Dec. 14 and 15, 1854.—Construction of 14 & 15 Vict. c. 79. Two steamers came into collision in Halfway Reach in the Thames. Both to blame; one for not being on the side of the river directed by the statute, notwithstanding it appeared there was a usage for vessels to follow the course she took, the other for having one of her lights out, and for not having stopped and reversed her engines when she saw the other vessel, notwithstanding she had a right to expect that no steamer would be in that part of the river, and that if there should be one she would port her helm.

This was an action brought by the owners of the steam-vessel "Meteor," against the "Sylph," for the loss and damage resulting from a collision between them on the evening of the 18th of December 1853.

The "Meteor" was proceeding between five and six o'clock in the evening from Blackwall to Gravesend with passengers.

The libel in her behalf, besides giving her account of the collision, which is concisely stated by the learned Judge, pleaded that she had a lantern suspended in front of the funnel, and about twenty-five feet from the deck, and another lantern attached to the bowsprit, both lanterns containing large mast-head candles, which had been lighted, and were burning brightly when she left Blackwall; but that just before the collision in question, the flame of the candle in the lantern suspended in the bowsprit accidentally and accountably went out, and having been relighted while the snuff still retained a dead light, was in the act of being replaced when the collision took place. That the "Sylph" did not, previous to the collision, keep as far as was practicable under the circumstances on that side of the fairway or midchannel which lay on her starboard side; that she might, without any serious risk, have kept further to that **[76]** side than she actually did; and that she did not, on seeing the "Meteor," put her helm to port, or stop, or back her engines in sufficient time. That the "Sylph"

was kept nearer to the Kentish than to the Essex shore; and that her helm was put and kept to starboard previous to the collision. That those on board the "Meteor" did all in their power to avoid the collision, first, by keeping their vessel on that side of the fairway or midchannel which lay on her starboard side; and secondly, by putting their helm immediately to port, as soon as the lights on board the "Sylph" were seen and reported, and keeping it hard a-port up to the collision.

The allegation on behalf of the "Sylph," pleaded, inter alia, that by the rules and by-laws, made by the mayor, aldermen, and commons of the city of London, on the 13th of March 1851, in pursuance of an Act of Parliament passed in the tenth year of the reign of his late Majesty George the Fourth, it is ordered:—

"That every steam-vessel which shall be navigated in any part of the river Thames within the port of London, at any time between sunset and sunrise, shall have two bright and sufficient lights, placed in conspicuous parts of the said steam-vessel during the whole of such navigation, that is to say, one bright and sufficient light placed at the bowsprit end, and one other bright and sufficient light placed at the masthead of such steam-vessel; and that in case any such steam-vessel shall be without a mast, such second light shall be placed at the front of the funnel of the said vessel, or upon a staff in the forepart thereof, at a height in either of the said cases of not less than fifteen feet above the deck."

That the "Meteor" was, &c., and at the period in question had only one white light exhibited, and that at her funnel; that she had no light at her bowsprit end; that the lantern suspended as alleged on her behalf, on her bowsprit, was not in the act of being replaced when the collision took place, but that it had been taken down by one of her crew into the fore cabin, to have a fresh candle put into it, and was still down in the fore cabin at the time of the collision.

That in Halfway Reach, in the said river Thames, the whole force of the ebb tide lies over on the north or Essex shore, and thence to midchannel; that, in the bight of that reach, it is nearly slack water during such ebb tide on the south or Kentish shore, and thence to midchannel; that, as with reference to such the well-known state of the said reach during an ebb tide, it is the usage (*a*)[1] that all vessels, whether steam or sailing-vessels, coming down the reach during an ebb tide, shall keep to the north or Essex shore; and that all vessels, whether steam or **[77]** sailing-vessels, going up the said reach, shall keep to the south or Kentish shore, that the said usage is for the safety, as well as for the convenience of all vessels passing up and down the said reach; that sailing-vessels going up the said reach during an ebb tide, when the wind is not sufficient to force them over the tide, are commonly for safety brought to anchor in the said bight; that, in accordance with such usage, the steam-ship "Sylph," on entering Halfway Reach from Erith Reach, steamed slowly and carefully up the bight of the said reach, as near to the south or Kentish shore, as the vessels, of which there were several brought up for shelter in the said bight, would permit, &c.

The responsive allegation on behalf of the "Meteor" pleaded that there is not any invariable legal usage whatsoever that all vessels, &c.; that many vessels in the said reach during ebb tide do not comply with any such usage; that any such usage is not and would not be for the safety of all vessels passing up and down the said reach; that when, during an ebb tide in the said reach, vessels coming down keep to the north or Essex shore, and when going up, keep to the south or Kentish shore, they do so only for the purpose of obtaining increased speed, and not for any purpose of safety whatsoever, either as regards themselves or others; that vessels not pursuing such a course do not either cause or incur any additional danger whatever; that it is perfectly practicable for all or any steam-vessels going up Halfway Reach during an ebb tide to keep to that side of the fairway or midchannel which lies on their starboard side, &c.

The Queen's Advocate and Dr. Dasent appeared for the "Meteor"; Dr. Addams and Dr. Twiss for the "Sylph."

*Dr. Lushington*, addressing the Elder Brethren.(*a*)[2]

Gentlemen, The Court feels greatly indebted to you for the long and patient attention which you have paid to this case, and I regret that it is a part of my duty

---

(*a*)[1] As the allegation originally stood, it was, "it is the rule," which the Court directed to be altered.

(*a*)[2] Captain Probyn and Captain Piggott.

still further to trespass upon your patience. The case in itself not merely involves property to a considerable magnitude, but it also involves considerations with regard to the construction of a statute, and the observance of that statute, which may be of very great importance to the interests of navigation.

I will endeavour to comprise, in as short a compass as possible, the questions which it will be my duty to put to you, and premising only as much of the facts of the case as are absolutely necessary to be stated, in order to enable me to put those questions with adequate perspicuity.

**[78]** The facts of the case are shortly these:—The collision took place between two steamers, the "Meteor," of 104 tons, and two engines of forty horse power, employed in the conveyance of passengers between Blackwall and Gravesend, and the "Sylph," of the burden of 255 tons, with two engines of thirty-five horse power, engaged in trading between Dublin and London, and drawing fifteen feet water. The collision occurred about six o'clock on Sunday evening, the 18th of December last. As to the particular place where the collision occurred, it may, or it may not, be very important to ascertain; all that I shall attempt to do is, to state to you the different allegations on each side upon that point. On the part of the "Meteor" it is said to have taken place above Halfway Point; and on the part of the "Sylph" it is said to have been a little below. The tide had at that time ebbed, as far as I can make out from the evidence, about two hours; the wind was about E.S.E., blowing up the reach or thereabouts. The night was dark, but not particularly so.

The "Meteor" charges that she kept as close to the Kentish shore as she could; that on seeing the "Sylph" she ported her helm, and that the "Sylph" either starboarded her helm or kept her course, not porting, and hence the collision; or, in other words, that the collision arose from the "Sylph" being upon the wrong side of the river, and from not having complied with the directions of the Act of Parliament to port, when there was a chance of collision.

The defence of the "Sylph" is, that she kept along the Kentish shore, for that is not denied either in plea or in the evidence, but the words of the plea are, she kept along the Kentish shore, as near to the shore as she safely could—and I mention this more particularly to you because she does not allege that she kept along the Essex shore as near as she could, which would have been a very different averment—she kept as close to the Kentish shore as she safely could. She admits she did not port her helm, but alleges she kept it steadily; and she charges the "Meteor" with being a little to the north of midchannel and improperly porting her helm.

It is, therefore, an admitted fact that the "Sylph" was on the Kentish side of the river, and not on the Essex side. I must now direct your attention to the Act of Parliament, and I shall endeavour, having so done, to point out to you what I apprehend to be the true construction; we shall then see whether the facts and circumstances of this case offer a justification in not having complied with this enactment.

The Act of Parliament by which this case must be governed **[79]** is the 14 & 15 Vict. c. 79; and it is not the Act of Parliament which applied to the case of *The "Nimrod"* (*a*), but at the same time, a reference to that Act (the 9 & 10 Vict.) will very much tend to explain the construction of the present statute.

The questions respecting the "Sylph" are, first, as to her being on the Kentish side of the river. The Act of Parliament enacts that "The master of any steam-vessel navigating any river or narrow channel," which this unquestionably was, "shall keep as far as is practicable"—these are the words—"to that side of the fairway or midchannel thereof which lies on the starboard side of such vessel." This is the present Act of Parliament; the other Act of Parliament had these words added: "Due regard being had to the tide, and to the position of each vessel in such tide." These words no longer remain in the present statute; they have been removed on purpose; and they now stand in the statute, not applicable to the course which the vessel is to steer, but applicable only to the case of porting the helm, and this is a very important consideration, because, if I had now to construe the Act of Parliament, the 9 & 10 Vict. c. 100, I should tell you, gentlemen, that you would have

(*a*) Not reported. Admiralty Court, December 18, 1851. The case was referred to by Dr. Dasent, as deciding a similar question as to usage in the navigation of the Mersey.

to consider this case with due regard to the tide, and to the position of each vessel, in any such tide. Now, you will not have to take that case into your consideration, for the Legislature has left it out. This being so—these being the words of the Act of Parliament, and I conceive it to be an admitted fact in this case, that the statute has not been complied with, the question then will be, whether the usage which has been pleaded, custom, or whatever else it has been called—rule it could not be, because a rule could only be made on adequate reason, and there can be no rule in contradiction to an Act of Parliament—whether this circumstance will or will not offer a justification for being on the wrong side of the river? The consequence of being on the wrong side of the river I reserve for consideration after you have disposed of the previous question.

What is stated as to this usage is, that it is customary for convenience, and, as it has been alleged, for safety; for convenience no one can doubt, but it would be a most important element in this case to consider whether the Legislature has not thought fit to prefer safety to ease. No man can doubt that any vessel coming up the river Thames, and every other river, with an ebb tide, would naturally, if left at liberty, seek that part where the tide was slackest, or, going down, would be [80] glad of the assistance of the tide, and go down where it was strongest, and vice versâ if it was a flood tide, merely altering the circumstances. You must take it for granted, and we must give the Legislature credit for having known such simple facts and circumstances as these.

Then the usage set forth is, there was a greater facility; but we must go a little further. I apprehend it to be true that there are certain parts of all rivers in which the ebb tide flows with less strength than in others, and it may be on the one side or on the other. It may be so in the river Thames, it may be so in the river Mersey, and in other rivers which we sometimes have to consider here. The result, then, of this usage would be, if carried to its full effect, that vessels would always change their side in the river, backwards and forwards, so as to avail themselves, if going up the river, of the slackness of the tide, and, going down the river, avail themselves of the strength and rapidity of the tide.

When this case came before me in another shape, namely, on the admissibility of the defensive allegation, I said I could only admit the defence of usage so far as it went to show that the course which was usually pursued tended to the safety of the vessel; because I said this, and I now repeat it, no Act of Parliament can be violated for convenience, or for the purpose of accomplishing a voyage with great celerity. The Act of Parliament clearly foresaw there might be a usage of this description, and clearly intended that it should not prevail, because the Legislature altered the words of the statute which I have just referred to, and left no latitude whatever of construction with regard to the state of the tide.

The Legislature must have known, and any man of common sense must have known, that the mere convenience and celerity of a vessel navigated in an ebb tide, must be regulated, not by the usage now in evidence, but with regard to the safety. This is a most important question. If this usage conduces to the safety of vessels, I must consider in what way. If there is danger in following, in particular cases, the directions of the Legislature, that would be an adequate reason for not complying with them. But of what kind must the danger be if the safety consists in this, that you are safer in violating the law of the land than obeying it, because a great many other persons do it, and therefore it will avoid the chance of collision? Why it is an argument that never can be listened to for one moment in a Court of Justice, namely, that because other people violate the law, therefore, those who navigate the river Thames are at liberty so to do. A man might as well say, when indicted at the Old [81] Bailey for violating an Act of Parliament, Do not indict me, because I will produce fifty cases, within three months, of others who have done the same. That must be self-evident to the minds of you, Gentlemen, and I need not enlarge upon it.

But there is a danger to which you have a right to look; supposing for want of means sufficient to navigate with safety—suppose from the vicinity of shoals—suppose from the state of the vessel, being disabled, she then seeks to take that course which the Legislature has prohibited—under such circumstances she would unquestionably be relieved from the punishment affixed by the Legislature.

But there is nothing in the evidence of the kind; the evidence simply states that

it is a mere matter of convenience; but it may be within your knowledge that there are other reasons.

Then, again, supposing a vessel, coming up the river, in order to avoid Dagenham Flats, kept away from the north shore to a reasonable distance from it, no man would say that the Act of Parliament was violated; it would be absurd so to do. But looking at the distance which this vessel was from Dagenham Flats, I cannot say, subject to your better judgment, that that has anything to do with this collision.

If that be so, are there any other reasons—nautical reasons—which can operate on your mind, in order to enable you to tell me that this course along the Kentish shore, which is pleaded to have been kept as close as it safely could, was right?—any reasons, nautical reasons, which in your judgment would lead you to say that, to have kept the course prescribed by the Act of Parliament, namely, near the Essex shore, was not safe?

In considering this question, do not let us drive the matter too far; looking at the words of the Act of Parliament, "as close as possible," if it were a question of a few yards on the one side or the other, and you should happen to be of opinion that the vessel might have been kept fifty yards closer to the Essex shore, or *vice versâ*, fifty yards closer to the Kentish shore, I by no means say that you should ever look to such minutiæ. That would be construing the Act of Parliament too strictly. The question for you to determine is, whether—it being admitted that this vessel was keeping as close as possible to the Kentish shore, in violation of the Act of Parliament—she was justified in so doing by any danger, arising from local circumstances, from circumstances which she could not overcome, or danger arising from the misconduct of others. I put that question to you.

That will be in substance the first question, but I would [82] rather read it to you, for it is important that I should do it as accurately as possible: "It being an admitted fact that the 'Sylph' was proceeding, at the time of the collision, on the south side of the river, apparently in violation of the Act of Parliament, the question is, whether she was justified in so doing from considerations of safety, or necessity, such as avoiding a shoal, or a wreck, or any cause of a similar kind, such as want of sufficient water—for safety, not for convenience?"

Now, when that question is answered, then will arise the time for the Court to state what are the consequences in point of law. That, I apprehend, can hardly fall within your department, but whatever may be the difficulty attending it, it will be my duty to meet it, and give my solution of what must be the consequences if you determine it was not justified.

The next question is this—"When the 'Meteor' was first seen by the 'Sylph,' was there, if both vessels pursued their respective courses, a risk of collision?"

That I must do also, in obedience to the Act of Parliament, which enacts, "That if, upon both vessels continuing their respective courses, they will pass so near as to involve any risk of a collision, each vessel is to put her helm to port, so as to pass on the port side of the other vessel."

As a matter of fact, it is perfectly clear that the "Sylph" did not port her helm; whether she starboarded or not has been a matter of great discussion, but that she did not port her helm is admitted on all hands. Upon this question I should wish a clear decision. When this vessel, the "Meteor," was first discovered by the "Sylph" to be a steamer coming down the river, was there at that time a risk of collision if both vessels pursued their respective courses? I have some difficulty, I tell you fairly, as to the facts of this case, and I tell you why—it is not stated by either side how the vessels bore from each other when first discovered. I have no such evidence. The only evidence that I find on this is, a question put to the master of the "Sylph," who says, the "Meteor" was seven or eight points on his starboard bow, and finally brings it down to four or five points—very loose evidence. I regret to say, there is not in plea or in evidence, satisfactory testimony of the precise bearing of the vessels from each other, either at the time the "Meteor" was first discovered by the "Sylph," or at the time when the "Sylph" first ascertained that the "Meteor" was a vessel in motion.

This chance of collision is not to be scanned by a point or two. We have held, over and over again, that if there be a reasonable chance of collision, it is quite sufficient. It is so [83] difficult to ascertain whether a vessel is coming right on, or bears two or three points on the starboard or the larboard bow, that we have always

held, if there be a reasonable chance of collision, the Act of Parliament applies, but we have never got to this—and I hope we never shall—that it applies when two vessels are sailing properly, and there is no chance of collision. I should observe that the words of the Act of Parliament apply to two vessels meeting each other, but not crossing each other. If you should be of opinion that there was a reasonable chance of collision, then I ask you to tell me whether you are satisfied that the law of porting the helm, which was imperative upon the "Sylph," was departed from under justifiable circumstances. That will be a very important question for your decision, inasmuch as we all know the very great danger that there is in making an exception to positive laws, which, if they are carried out, generally constitute the safety and advantage of navigation.

Upon this head I will draw your attention to a case that has been mentioned to you, and which occurred some years ago. The case was that of *The "Friends."* (*a*) The question was, whether the steam-vessel, being on the wrong side of the river, as we now call it, namely, being in this very spot, Halfway Reach, and being on the Kentish shore, was or was not bound to have ported her helm; and that stood, at that time, entirely upon your rules; there was no Act of Parliament, and your rules were then as follows—they were in these words: "When steam-vessels, on different courses, must unavoidably or necessarily cross so near that, by continuing their respective courses, there would be a risk of coming in collision, each vessel shall put her helm to port, so as always to pass on the larboard side of each other." Then your other rule is, "A steam-vessel passing another in a narrow channel, must always leave the vessel she is passing on the larboard hand." Now, I put it rather strongly to you, Gentlemen, on that occasion, that you should not make an exception to your own rules unless it was strongly founded on necessity; for after having said, "Upon these points I must be guided by your professional skill and experience"—this was as far back as the year 1842—I added, "All I can say is this: if you are about to make an exception to your own rules, an exception which is not to be extracted from anything to be found in the rules themselves, but to be founded upon the reasons which have been alleged for the sake of the safe navigation of the river Thames, and the great interests which are daily and hourly there at stake,"—there was the same evidence as to usage—"let your exception be clear, **[84]** definite, and intelligible, in order that it may at the first glance be known to the mercantile and maritime world. If, instead of a clear and direct rule, there is to be any exception, let it be as distinct and definite as the rule itself." Your brethren whom I had the pleasure of being attended by on that occasion, were of opinion that there was no exception to the rule in that case.

I do not use this case for any other purpose than illustration, because I can form no opinion—I venture to form none at all—whether it was or was not the duty of the "Sylph" to port her helm. I know nothing but the Act of Parliament—the decision of the propriety of the line of conduct rests exclusively upon yourselves; but if you should hold that the "Sylph" was not bound to port her helm in the first instance, nor even afterwards, when she discovered it was a vessel in motion, I must thank you to give me clear and distinct reasons why she was justified in departing from the rule.

These are the considerations that apply—so far as I can go at this late hour—to the case as made against the "Sylph," the vessel proceeded against.

I have now several questions to put to you as to the "Meteor."

The first question will be a matter of fact—whether the "Meteor" was in her right course, namely, the course dictated by the Act of Parliament, to the south side of the river; and you will give me your opinion on this question with reference to the explanation I gave you of what is practicable, namely, a fair interpretation of the term. And, Gentlemen, the solution of that question may depend on two things; upon the direct evidence given in the case, and upon the indirect evidence. The former is exceedingly contradictory. All the evidence from those on board the "Meteor" states that they kept to the south side of midchannel; several witnesses examined on the part of the "Sylph" state that she must have been to the northward of midchannel prior to the time of collision. The indirect evidence, however, may be as satisfactory to your minds, namely, the inferences which you can draw from nautical facts, and which I cannot do. If the "Meteor" equally violated the law, we all know

(*a*) 2 Notes of Cases, 92, cited by Dr. Addams.

that other consequences follow than if she is free from any such charge; and you will also take into your consideration whether it was not necessary in rounding Halfway Point for the "Meteor" to go a little further towards mid-river than if there had been no such point in the way. That will be the first question.

The next question will be this. The fact is the "Meteor" ported her helm, and if there was a risk of collision at the time, she obeyed the statute. But it is possible that she may have [85] obeyed the statute, and yet not have done that which is strictly right, because the statute may not have provided for the peculiar circumstances of the case. I want therefore to ask you whether she was wrong in so porting her helm according to the statute, and if wrong, why? There is an important question which arises from this, and which has been very much argued and pressed by her Majesty's Advocate; it is this, that when the "Meteor" descried this vessel, the "Sylph," coming up on the Kentish side, she had a right to expect that this vessel would port her helm. If there was a risk of collision, I am of opinion that her Majesty's Advocate was right in that argument; and unless there was some circumstance overreaching it, and which would prevent the adoption of that rule, which the law has laid down, I think she had a right to expect it.

Again, was the "Meteor" wrong in going on as she did? She was going at full speed. What she did was this: she first ported her helm, then eased her engines, and then went on at full speed, and, as the master states in his evidence, for two reasons, in order to get, if he possibly could, ahead of the "Sylph" coming up, and in order, for his own safety, to get into shallow water, where the "Sylph," by no possibility, could strike him, the water being so shallow that the "Sylph," drawing fifteen feet, could not, by possibility, come up to him. That is his excuse. I shall ask you whether you are not of opinion that this was erroneous conduct on the part of the "Meteor," and whether, instead of putting the engines on, and increasing the speed, she should not rather have stopped her engines and reversed them?

Finally, there is one other question—as to the lights.

I think, Gentlemen, we must take it for granted that the "Meteor" had two lights originally when going down the river, and that one of these lights went out shortly before the collision. I do not think there is sufficient evidence to enable you to say that the light never was lit, but quite enough to say—it is an admitted fact—that the light at the bowsprit had gone out. What might have been the consequence of that? This is again a question entirely for you. Was that, in your opinion, a sufficient reason for those on board the "Sylph," if they had kept a good look-out, to believe the "Meteor" to be a vessel at anchor, and not in motion? That is a most important question, because, though the "Meteor" may not be in any degree to blame for the light going out—for I apprehend lights will go out at sea as well as elsewhere; it might be an accident, yet it is the same as regards the other party as if it had arisen from negligence—she must suffer the consequences of the light going out if she [86] misled the "Sylph," and the consequence was that the "Sylph" kept her helm steady, or starboarded her helm with the intention of going in nearer to the shore.

This, too, Gentlemen, is a question on which I must request your opinion; and I think it will be expedient, in a case of this kind, that we should adjourn in order to consider it.

After a long consultation with the Elder Brethren,

*Dr. Lushington.* With regard to the conduct pursued by the "Sylph" on this occasion, the gentlemen are of opinion—and I entirely concur with them—first, that she was not justified in keeping the course she pursued, reference being had to the statute.

Secondly, that the "Sylph" is not to blame for not having ported her helm, as we think she was misled by the bowsprit light of the "Meteor" having gone out, consequently she was mistaken for a vessel at anchor.

With regard to the "Meteor" we think, first, that the "Meteor" did not keep as close to the Kentish shore as the statute directs, but that such deviation did not occasion the collision.

Secondly, we do not impute blame to the "Meteor" for porting her helm, though under the circumstances we think that the so doing contributed to cause the collision.

The last question is this: the question was in these words:—Was the "Meteor" to blame for not stopping and reversing her engines, remembering she had a right

not to expect a steamer there, or, if she met a steamer, that the steamer would port? The gentlemen are of opinion, and clearly so, that the "Meteor" was to blame.

It follows that both parties are to blame; the "Sylph" being on the wrong side of the river, and the "Meteor" for not having stopped and reversed her engines. The damage, therefore, must be divided.

Proctors: for the "Meteor," Rothery; for the "Sylph," F. Clarkson.

[87] THE "ERNST MERCK," (Krüger). Admiralty Prize Court, Nov. 22, 25, Dec. 1, 6, 1854.—Sale of enemy's ship shortly before the war. The onus of giving complete and satisfactory proof thereof lies on the claimant; without it the Court cannot restore. The Court is not called upon to pronounce affirmatively that the transfer was fictitious or fraudulent.

[S. C. Sp. Pr. Cas. 98; 2 Eng. Pr. Cas. 338; 1 Jur. (N. S.) 119.
Referred to, *The "Daksa"* [1917] A. C. 388.]

This vessel sailed from Pillau to England under Mecklenburg colours, and was seized in Hull on the 1st of June 1854, by the custom-house officers. She had a cargo of wheat and hemp on board, which was restored.

On the 11th of August, a claim was given in by Mr. Gustav Menkow, of Schwerin, in the Grand Duchy of Mecklenburg Schwerin, on behalf of himself and Mr. Frederic Albrecht, of the same place, as the sole owners and proprietors of the said ship. On the 30th of August, the Court ordered further proof, which being brought in, the case came on for hearing.

The Queen's Advocate and the Admiralty Advocate appeared for the seizors; Dr. Haggard and Dr. Bayford for the claimants.

Dec. 6.—*Dr. Lushington.* In order to state clearly the opinion which I have formed upon this case, it will be necessary to specify the alleged facts with more than ordinary minuteness, and with equal care to notice the evidence by which such facts are supported.

The principal persons concerned in these transactions are—first, the house of Knock and Company, Russian subjects resident at Riga, the alleged vendors of the vessel claimed; secondly, Messrs. Albrecht and Menkow, subjects of the Duke of Mecklenburg, and resident at Schwerin, said to be the purchasers; thirdly, Krüger, the master, a Prussian born, afterwards having the national character of a Russian, and now alleged to have the national character of an inhabitant of Mecklenburg; fourthly, Mr. Charles Bolsche, described in the document marked 2 A. as of Riga, merchant, the undoubted agent of Knock and Company of Riga, and the asserted agent of Albrecht and Menkow, for certain purposes; fifthly, the house of Merck and Company, of Hamburg, bankers, who are stated to have been bankers both to Albrecht and to Knock and Company, and through whom it is alleged certain payments were made. The ultimate decision of this case will depend principally upon what has been said and done by these parties, taken in connection with the documents herein produced.

The history of the voyage is as follows: this vessel sailed from Pillau to England, under Mecklenburg colours, and was seized in the port of Hull, on the 1st of June last, by the custom-house officers. She had a cargo of wheat and hemp on board, which has been restored.

[88] On the 11th of August 1854, a claim was given for this ship by Mr. Menkow, whereby he claimed her as the property of himself and Mr. Albrecht of Schwerin. On the 30th of August the Court ordered further proof to be given in support of this claim; that further proof has now been brought in and fully discussed.

It is now necessary for the Court carefully to inquire what is really and truly the history of this ship antecedent to the voyage. First, she was built at Libau in 1853; and she was built for the joint account of Knock and Company, and Krüger, the master. It has been argued that by the law of Russia, the master had a peculiar right with respect to this vessel, which did not entitle him to be what we call in this country a registered owner, but that he was placed in this peculiar position, that he had a right to have some given share in the profits of the vessel, and was subject to any losses arising to the concerns of the vessel, and could sell such right, but that Knock, the principal owner, could transfer the vessel without Krüger's consent. It is sworn that such right exists by custom both in Russia and Germany. How, in such case, Krüger was to be paid for his interest in the vessel when sold, whether by

the purchaser, or by Knock, the vendor, is left wholly in the dark; in some way or other, of course, he was to be indemnified, either by retaining his proportionate share, or by payment from some one. I can well understand how such a right as I have now described may exist, but I cannot so well comprehend how a transfer can be made of this vessel without some distinct provision for the securing such a master's interest. I can easily conceive that there may be a share in a brewery and not in the premises, or in a newspaper, and not in the house where it is printed and sold; but it appears to me that a perpetual share in the profits and loss of a ship cannot be separated from the ship, though a share in the profits and loss of a voyage may. The case put by Dr. Haggard, viz., that of a whaling voyage, in which the master shares the profits, is entirely different; it is confined to the voyage, and is not, as in this case, a perpetual lien remaining on the ship.

Now, the claim is, as I have said, for the ship, as the property of Albrecht and Menkow. It is exceedingly important that no doubt or obscurity should be allowed to hang about the law as administered in the Courts of Prize with respect to such claims. First, I apprehend that I cannot restore the ship to the claimants unless they show that they are the sole legal owners; and secondly, that though in the case of an enemy's ship, or a ship condemned by the Court of Prize, I cannot take [89] notice of any lien of interest, yet, in the case of a claim and restitution asked for, I cannot restore, if there be any interest in the ship belonging to any one else, for which no claim has been given. This proposition, perhaps, requires some elucidation. If A. B. claims a ship as his property, and it should turn out that he is a trustee for shares in that ship belonging to another person, I cannot restore that ship to A. B.—I will not say in no case—but certainly not unless the cestui que trust is himself entitled to restitution. There ought in such cases to be a claim for a person equitably interested. This will render it necessary for me presently to examine and determine whether the master has any, and what, interest in the ship. For the present I will proceed with what I will call the history of the claim.

The representation on the part of the claimant is, that Bolsche, by virtue of a power of attorney, which was general and not special, as the agent of Messrs. Knock and Company, did, on March the 13th of the present year, transfer to Mr. Albrecht, his father-in-law, all his right, interest, and title to this vessel; and it is represented that at such time Mr. Albrecht had one tenth, Mr. Menkow another one tenth, the master, Krüger, an undefined right to four tenths, and the remaining four tenths belonged to Mr. Knock—I say the remaining four tenths, because such would be the whole interest remaining in Mr. Knock, supposing the agreement with the master has been fully carried out. It is, then, an indisputable proposition, that as this vessel sailed under Russian colours up to the 13th of March, and was to all intents and purposes a Russian vessel, if she had been seized before that date, whatever had been the right of Albrecht, Menkow, and Krüger, it would have been condemnable as Russian property.

This being a sale by a merchant, now become an enemy, very shortly before the war, is a transaction requiring to be very narrowly investigated, and respecting which the Court must exercise great vigilance lest the property of the enemy should be sheltered under a fictitious sale. A real bonâ fide sale is, no doubt, within the bounds of lawful commerce—of commerce lawful to the neutral; but if a neutral merchant chooses to engage for the purpose of extraordinary profit in dangerous speculations of this kind, he must be bound to satisfy the Court of the fairness of the transaction by the clearest evidence, complete in all legal form, and not only in legal form, but in truth and reality. If he does not produce such proof, or produces it in part only, when the res gestæ shew that better proof might have [90] been adduced, he must not expect restitution upon such incomplete evidence.

[The learned Judge then examined with great minuteness the evidence of the transfer, and the master's alleged interest, and having pointed out numerous discrepancies and deficiencies, continued.]

I now come to the payment; we all know that one of the most important matters to be established by a claimant is undoubted proof of payment. It is alleged and it is argued that 8000 dollars have been paid to Mr. Knock, through the house of Merck and Company of Hamburg; and it is said that this money was paid in the following manner; that Knock and Company drew bills upon Albrecht for larger sums, which included this 8000 dollars; that Albrecht accepted those bills, and sent them to Merck and Company, and which they promised to do by their letters, "after recovery."

I was very anxious to get some solution of these words, "after recovery"; it is to be observed that this transaction is by bill of exchange, i.e., a promise to pay, but not a bill made payable at their house. What, then, is the meaning of "after recovery"? If we look at the German, we find that what is translated "after recovery," is literally "after receipt," or "after payment." I apprehend that they retained the bills for the benefit of Knock and Company, and that when put in cash for the amount of the bills, they would place the amount to Knock's account. It is singular that Mr. Albrecht does not swear to this payment at all; Mr. Menkow, indeed, swears that the payment was made by drafts, dated the 30th of March and the 6th of April; but is this payment, according to the established rules of this Court, satisfactorily made out? First, there is no proof whatever that these bills were ever paid, or the proceeds transferred to the account of Knock and Company. This might easily have been given by extracts from the books of Merck and Company. Secondly, there is not a syllable coming from Knock and Company as to the receipt of payment.

It appears to me that there are deficiencies in this case which can scarcely be accounted for; there must have been some correspondence between Knock and Albrecht antecedent to the sale, and subsequent also; but only one letter is produced, and that not from Knock, but from Albrecht. The master says he received a letter from Knock informing him of the sale—that is not produced. There is no affidavit from Bolsche, none from Knock, nor is there any attempt to explain the want of a proof so manifestly necessary in a transaction of so suspicious a nature.

**[91]** But to proceed with the facts of the case. I will consider the acquisition of the national character of the master, and also the obtaining for the ship the rights of the Mecklenburg flag together.

With respect to the national character of the master—a Prussian by birth, a Russian by national character up to the 4th of April 1854—it may be as well to say a few words on the doctrine so strongly insisted on by the learned counsel for the claimants, and which I think is founded on sound principles. It is this—that a national character, acquired by occupation only, may be changed with greater facility than a national character arising from birth or from long domicile; but, though I admit this to be true, yet I hold that it is also true that a national character, acquired by occupation, must remain until another is bonâ fide acquired. How has such domicil been acquired in the present case? By a residence of two days afterwards, and the payment of a few dollars. It must be observed, moreover, that this was not a return to the national character of origin, but the acquisition of a new national character in a state to which the master was altogether a stranger.

The master is said to have been naturalized on the 4th of April, to have been made a burgher on the 5th of April, and to have had four shares transferred to him on the 6th of April, on which day, also, the passport is dated; he admits that he was resident in Schwerin for two days, not before, but afterwards; he acquired, therefore, his right, if indeed he acquired any, to a citizenship at Mecklenburg by purchase, and not by residence. If this be a legitimate mode of changing a national character, then such change may take place in twenty-four hours.

But is this new acquisition of national character of the master connected with change of character of the vessel, and how was this effected?

First, there is a paper, No. 6, admitted to be false, that the vessel was built at Rostock; secondly, there is a pass, equally false, permitting the vessel to sail from Rostock, where she had never been. What, then, is the necessary inference from these facts? Either that the Mecklenburg Government was deceived by false representations as to this vessel, or that the Government granted Mecklenburg papers, knowing that they were granted upon false grounds.

The Court is disposed, as it is its duty, to protect the just rights of neutrals and the proper exercise of municipal powers by independent states within their own dominions; but if, for its own advantage, any state will sanction, either in form or reality, such measures as these, it is also the Court's bounden **[92]** duty to take care that they do not operate as an infringement on the just rights of belligerents.

Let us now see what was the course followed with respect to the employment of this vessel. Who was the agent employed to have the conduct of and the control over her? Mr. Bolsche, the agent of Knock and Company. Whither was she going had not accident prevented it? To Riga, to resume her former trade. Riga, the residence of Knock and Company.

Under these circumstances, can it be seriously contended that the national character of the master was changed, and that the ship became a bonâ fide Mecklenburg ship?

There are other facts, however, in this case which the Court is bound to notice. There has been a suppression of important papers in no degree accounted for by the master, though he has had ample opportunity of so doing. There are grave deficiencies in this case. The law requires, where a vessel has been purchased shortly before the commencement of the war or during the war, clear and satisfactory proof of the right and title of the neutral claimant, and of the entire divestment of all right and interest in the enemy vendor. The onus is upon the claimant to produce this proof; if he does not do so, the Court cannot restore. The Court is not called upon to say that the transaction is proved to be fraudulent; it is not required that the Court should declare affirmatively that the enemy's interest remains; it is sufficient to bar restitution if the neutral claim is not unequivocally sustained by the evidence. This being the law, how then does this case stand? First, a purchase, where what was bought, and what was sold, and what was the interest of the master, is wrapped in impenetrable mystery, and this even if the alleged custom as to the interest of the master should be admitted to be true; a custom not argued to extend to Germany, though it is sworn so to extend in the affidavits. Secondly, no previous correspondence between Knock and Albrecht, though the papers point to it; the bill of sale and the letter of Albrecht being inconsistent with each other, inasmuch as the bill of sale declares the transfer to have taken place at the desire of Albrecht and Menkow, whereas the letter states it to have been at the desire of Knock. This letter is the only one produced, and proves nothing, though it is evidently one of a correspondence which might have proved all. Thirdly, no satisfactory proof of the payment. Fourthly, no evidence from Knock or from Bolsche, and no correspondence after the sale. Fifthly, the acquisition of Mecklenburg papers upon false grounds. Sixthly, the suppression of papers. **[93]** Seventhly, the continued employment of the vessel under the agency of Bolsche, and the intended destination to Riga.

Under these circumstances, having carefully weighed all the arguments so industriously urged on behalf of the claimants, I have no hesitation in saying that, according to my understanding of the law and practice of the Prize Court, restitution cannot take place, and I therefore condemn the vessel.

Proctors: for the seizors, The Admiralty Proctor; for the complainants, Stokes.

THE "ATLANTIC." Admiralty Prize Court, Dec. 6, 1854.—Parties knowingly making a fraudulent claim condemned in the costs of the proceedings.

[S. C. Sp. Pr. Cas. 104; 2 Eng. P. C. 345. Referred to, *The* "*Zamora*," [1916] 2 A. C. 86.]

This vessel was seized by the custom-house officers at Leith, on suspicion of being Russian property. A claim was given in for her by a firm in Liverpool, who made an affidavit that no enemy had any direct or indirect interest in her. The claim, however, was withdrawn before the hearing.

The Court, being of opinion that there had been an attempt to practise a great fraud upon the Court, not only condemned the ship, but condemned the claimants in the costs of the proceedings.

THE "JOHANNES CHRISTOPH." The High Court of Admiralty. Dec. 8 and 29, 1854.—Foreign ship having been sold by decree of the Court in a cause of salvage, the proceeds were insufficient to meet all the claims. The Court refused, under the circumstances, to enforce a monition against the consignees of the cargo to bring in the balance of the freight at the suit of the foreign master, though by the foreign law the master had a lien thereon. Importation of foreign law is in the discretion of the Court. It should never be imported to work injustice. Though the lex loci contractus governs contracts and their construction, yet the lex fori, where they are enforced, governs the remedy.

This was originally a suit for salvage. The usual defaults having been granted, and no appearance given on behalf of the owners, the brig was condemned for salvage and costs. She was then sold, and the proceeds brought into Court.

A proctor then appeared for Dirk Clasen, the late master of the brig, which belonged to Hamburg, proceeding for wages, board, primage on freight, and sundry

payments made and liabilities incurred by him on the ship's account; also for the mates, carpenter, and seamen on board the brig, proceeding for wages; also, for the owners of the steam-tug "Powerful," proceeding for towage services; and also for James Morrison and another, shipchandlers, proceeding for necessaries supplied; and exhibited affidavits of the several parties; whereupon the Judge, at his petition, directed these claims to be included in one action, but without prejudice as to the priority of payment.

[94] A warrant, arresting the proceeds remaining in the Registry of the Court from the sale of the brig, was subsequently served upon the Registrar.

An affidavit of Dirk Clasen, with a schedule annexed, having been brought in, a monition was then decreed on behalf of the above parties, against Messrs. Frederick Huth and Company, to bring into the Registry to abide the judgment of the Court concerning the claims of the said parties, the sum of 516l. 16s., the amount of freight due on a cargo of logwood, and also the amount due on certain specie brought by the said brig on a voyage from Mazatlan to Liverpool, or to shew cause to the contrary; and to bring in an account of freight on the said cargo and specie.

A proctor appeared for Messrs. Frederick Huth and Company, and showed cause in an act on petition, which alleged that they were the consignees of the said cargo; that on the brig's arrival at Liverpool, in January 1854, the logwood was delivered to them; but that, of the specie laden on board the brig, to wit, 10,456 dollars (about 2207l. 6s. 9d. sterling), only 2523¾ dollars (about 531l. 6s. 7d. sterling) were delivered to them, the difference (about 1676l. sterling) having been applied by the said master, according to his own statement, in the repairs and other necessary disbursements of the brig at Valparaiso, where, in the course of her voyage, she had been constrained to put in; that inasmuch as they have, in effect, paid the whole freight on the whole cargo of which they were the consignees three times over, they are not compellable by law to bring in the balance of freight which would otherwise be due from them on account of the said cargo, as they are now monished to do. It further alleged that Messrs. Frederick Huth and Company have already paid the master 100l. on account of the freight on the logwood, leaving a balance of 516l. 16s. on such freight; that the freight on the specie delivered to them amounts to the sum of 5l. 6s. 9d. only; and that the proceeds of the brig sold under the decree of the Court, brought into, and now remaining in the Registry, amount only to the sum of 670l.; and prayed that Messrs. Frederick Huth and Company might, therefore, be dismissed with costs.

The answer on behalf of the claimants alleged, that the brig was obliged to put into Valparaiso, and, under the advice of surveyors, to have her cargo discharged, in order to undergo the necessary repairs; that she was thereby necessarily detained three months, and incurred heavy expenses, of which a considerable part would fall upon the cargo in the nature of general average; that the master being without funds to pay for the [95] same, advertized in the public papers of Valparaiso for money on bottomry on the ship, freight, and cargo, but received no offer; and as the firm of Messrs. Huth and Company, at Valparaiso, the correspondents of the said Messrs. Frederick Huth and Company, also declined to assist him, the said master, as a last resource, and in the interest of the cargo as well as of the ship, and acting under the advice of the consul for Hamburg at Valparaiso and in his presence and that of a clerk of the said Messrs. Huth and Company, took a portion of the specie consigned to Messrs. Frederick Huth and Company, and therewith raised money at par, and appropriated the same in the payment and discharge of the expenses so incurred; that by so doing, the master avoided the heavy premium of 75l. per cent. then charged on bottomry advances at Valparaiso; that on the brig's arrival at Liverpool, Messrs. Frederick Huth and Company paid the said Dirk Clasen the sum of 100l. on account of the freight due from them, and promised him that if he would deliver the cargo to them they would pay his then balance of freight; and that the master, relying on such promise, delivered the cargo to them, instead of detaining it, as he might have done, until payment of the freight.

It further alleged that shortly after the brig's arrival at Liverpool, she was arrested at the suit of the owners, &c., of the steam-vessel "Prince of Wales," in a cause of salvage; that no appearance being given to such action, she was sold by authority of this Court, and the sum of 671l. 1s. 1d. was brought into, and now remains in the Registry, as the produce of such sale, subject to the payment of salvage, and costs, not yet taxed, but amounting together to the sum of 157l., or

thereabouts; that on payment thereof, the amount in the Registry will be reduced to 514l., or thereabouts; and that the said sum is not nearly sufficient to pay the wages due to the crew of the said brig, independent of the claims of the said master and the other claimants in the suit; wherefore it prayed the Judge to order Messrs. Frederick Huth and Company to bring into the Registry 516l. 16s. in respect of the freight for the cargo of logwood, of which they were the consignees, brought by the said brig on her last voyage, and delivered to them in Liverpool; and a further sum in respect of freight for certain specie, of which they were also the consignees, &c.

The reply alleged in contradiction that the firm of Messrs. Hünicken, Bahr, and Company were the agents at Valparaiso of the owners (residing at Hamburg) of the said brig, and the persons to whom the master applied for assistance and advice, both on her outward and homeward voyage, of which firm one [96] of the partners, Julius Bahr, then was and still is the consul for Hamburg at Valparaiso; that the firm of Messrs. Huth, Gruning, and Company, at Valparaiso, were never applied to by the said master, either as to the repairs of the brig, or as to the raising of the necessary funds by bottomry, or as to the appropriation for that purpose of any part of the bullion forming a part of her cargo; and that although a clerk of the said firm happened to be present when a part of the bullion was counted out, he attended thereto as a mere witness of the transaction, and not by direction, or in any manner on behalf of the said firm; and further, that the average premium then charged at Valparaiso on bottomry advances was from 25l. to 35l. per cent. at the outside, and not 75l., or any sum approaching that amount. It then admitted that on the brig's arrival at Liverpool, Messrs. Frederick Huth and Company of that place paid the said Dirk Clasen (unadvisedly) the sum of 100l., as on account of freight, intended, as by them understood at the time, to have been paid by him by way of salvage to the steamer which had brought the brig into port, but it denied that the said Messrs. Frederick Huth and Company, either at such or any other time, promised the said Dirk Clasen payment of the balance of freight, and that it was or could be in reliance on any such promise that he delivered the cargo to them, their only promise in respect to such delivery being the promise of paying what proportion should fall on the cargo on the account of general average.

The master's claim for wages, extra pay, primage, &c., amounted to 368l. 16s., in support of which an affidavit of an advocate of Hamburg, with respect to the law there, was brought in, to the following effect: "That, by the law of Hamburg, the master of a ship has a lien or charge upon the vessel under his command, and upon the freight thereof, for the wages due to him from the owners in respect of services performed on board such vessel, and that he is also entitled to such lien for primage on freight, if any such be payable to him, in addition to his monthly wages, and also for all moneys expended by him in disbursements for the vessel; that seamen, if left abroad without their sanction, in consequence of the vessel being sold, are entitled to recover from the owner extra wages, &c.; that if the proceeds of the ship and freight are not sufficient to pay the seamen and the captain, the latter is entitled to be paid his wages rateably with the seamen; that the seamen are not entitled to be paid first; and that the captain is not personally liable to them."

Dr. Addams appeared for Messrs. Huth, the consignees of the [97] cargo, and stated that they were desirous to act liberally, and would bring into Court so much as might be required to discharge the seamen's wages, the tradesmen's accounts, and the towage; but he contended that the master could not maintain his claim against the freight.

Dr. Twiss, for the master, relied upon the law of Hamburg, which, he contended, should govern the judgment of the Court.

Dec. 29.—*Dr. Lushington.* The present is a proceeding instituted by the late master of this vessel for his wages, board wages, primage on freight, and for sundry payments made and liabilities incurred by him on account of the vessel; action is also brought by the chief mate and the rest of the crew for wages, by the owners of a steam-tug for towage, and by some merchants for necessaries supplied. The proceeding is against the proceeds of the vessel now remaining in the Registry of the Court, she having been sold, by the decree of the Court, in an action for salvage, in which action no appearance was given. The ship belonged to Hamburg.

On the 8th of September an affidavit was brought in on behalf of the master,

stating the facts of his claim, and a monition was prayed against Messrs. Huth and Company, of Liverpool, to bring in 516*l.* 16*s.* the amount of freight on a parcel of log-wood and the freight on a certain quantity of specie, to answer the demands of the parties suing. This monition was issued and served. Soon afterwards an appearance was given for Huth and Company, on whose behalf an act on petition was entered into, in which Huth and Company set forth the circumstances on the ground of which they contend that the monition ought not to be enforced against them; but at the hearing they expressed, through their counsel, their willingness to bring in so much of the freight as might be necessary, together with the proceeds of the ship, to discharge all the demands except those of the master.

The question, then, is narrowed to this single point, whether I shall compel them to bring in the freight for the benefit of the master.

How does the claim of the master stand? It is certified by a learned counsel of Hamburg, to which the ship belonged, that, by the law of that country, the master has a lien upon the ship and freight for all the demands sought to be recovered by this suit. I have no reason to doubt the correctness of this opinion, and I, therefore, with confidence, assume it to be the law of Hamburg. The law of England, however, is different. By **[98]** that law no such lien exists, and this Court is authorized to take cognizance of a master's claim for wages only, in the event of the owner being bankrupt or insolvent (*a*). No such circumstance exists in this case, consequently, if I am to be governed by the law of England, I must dismiss the claim.

This renders it necessary to consider in what position the Court is placed; and I apprehend that it is in some cases in the judicial discretion of the Court to adopt the foreign law, should the Court think it just and right so to do; or, in other words, I conceive that this being a Hamburg ship and the master being a Hamburg master, I may enforce the law of Hamburg if I deem it consistent with justice to adopt that law, even though, if this were an English case, I should have no authority so to proceed.

This, however, is a question which might admit of much discussion, it having been decided in the House of Lords, in the well-known case of *Don* v. *Lippman* (*b*), that though the contract must be construed according to the law of the foreign state where it was made, the remedy can only be according to the lex fori where the suit is brought.

With regard to foreign seamen, the Court is in the habit of giving them the benefit of their own laws; and if there be no **[99]** countervailing objection, I see no reason why the master should be excluded from a similar advantage when unfortunate circumstances have thrown the ship and freight on which he has a lien by his own law

---

(*a*) This is altered in the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, which will come into operation 1st of May 1855. The 191st section enacts that "every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages which, by this Act, or by any law or custom, any seaman, not being a master, has for the recovery of his wages; and if in any proceeding in any Court of Admiralty or Vice-Admiralty, touching the claim of a master to wages, any right of set-off or counter-claim is set up, it shall be lawful for such Court to enter into and adjudicate upon all questions, and to settle all accounts then arising or outstanding and unsettled between the parties to the proceedings, and to direct payment of any balance which is found to be due."

(*b*) 5 Clark & Fin. 1. Lord Brougham says, p. 13, "The law on this point is well settled in this country, where this distinction is properly taken, that whatever relates to the remedy to be enforced must be determined by the lex fori, the law of the country to the tribunals of which the appeal is made. This rule is clearly laid down in the *British Linen Company* v. *Drummond* (10 Barn. & Cres. 903), *De la Vega* v. *Vianna* (1 Barn. & Adol. 284), and in *Huber* v. *Steiner* (2 Scott, 304; 1 Hodges, 206; 2 Bing. N. C. 202; 2 Dowl. Prac. Cas. 781; and 4 Moore & Scott, 328), though the reverse had previously been recognized in *Williams* v. *Jones* (13 East., 439)." Again, p. 20—"But governing all these cases is the principle that the law of the country where the contract is to be enforced must prevail in enforcing such contract, though it is conceded that the lex loci contractus may be referred to for the purpose of expounding it. If, therefore, the contract is made in one country, to be performed in a second, and is enforced in a third, the law of the last alone, and not of the other two, will govern the case."

into its hands; though there might, perhaps, be some difficulty in deciding which forms part of the contract and which is to be considered the remedy.

I conceive, however, that the importation of foreign law is not a matter of course. but that the propriety of so importing it must depend on divers considerations.

This brings me to look at the facts of this case,—to examine and determine whether the statement of Messrs. Huth and Company affords sufficient reason why I should not proceed according to the law of Hamburg. It is alleged by Messrs. Huth and Company that this vessel came from Mazatlan to Liverpool; that a part of the cargo, consisting of logwood, was delivered to them; that there was also consigned to them 10,456 dollars (about 2207l. 6s. 9d.), but that 2523¾ dollars only (about 531l. 6s. 7d.) was delivered to them. The loss amounts to about 1676l., which sum they say was applied by the master to pay for repairs and other disbursements of the ship at Valparaiso.

The answer to this act does not deny that the master so appropriated the dollars, but alleges that he rightfully so employed the money, and that a part of it was expended to pay expenses, of which a considerable part would fall upon the cargo, in the nature of general average; and it is alleged that, as money could not be obtained on bottomry, such appropriation was a wise measure, and for the benefit of all on board.

Whether the measure was a wise and prudent one, I have no means of determining; it is not denied on the part of Messrs. Huth, and I think it fair to presume that the master's statement may be true.

Then, what will be the consequence, according to his own statement, that the appropriation of these moneys will become the subject of general average? I have no means of enforcing a general average; I have no means of judging what the effect of such an adjustment of accounts would be; indeed, I have no means to conjecture how Messrs. Huth could enforce from the owners of the ship, and other owners of the cargo, if such there be, a just and equitable settlement of accounts.

If this be so, ought I to take from Messrs. Huth the freight which, under ordinary circumstances, they would be bound to pay, when they have already had their property appropriated for the use of the owner to treble the amount of the freight; **[100]** when, for aught I know to the contrary, they might be entitled themselves, not only to the amount of the freight, but to much more? I think these considerations ought to make the Court hesitate before it adopts such a measure. Again, at whose suit am I asked to adopt this course? At the suit of the master, who has another remedy, viz., the right to sue his owner for all that may be justly due to him.

I have said that it is sometimes at least in the judicial discretion of the Court to import the law of a foreign state into its proceedings or not, according to the circumstances of the case. For this position there is no lack of authority. I will only refer to Huber, who, in the second part of his celebrated work, amongst other reasons for not adopting the foreign law, states that a Court should decline to do so, if such an adoption would work injustice to others.(*a*)

---

(*a*) Huber, Prælect. pars. ii. lib. i. tit. iii. De conflictu legum, § 2, gives these three celebrated axioms. "(1.) Leges cujusque imperii vim habent intra terminos ejusdem reipublicæ, omnesque ei subjectos obligant nec ultra. (2.) Pro subjectis imperio habendi sunt omnes, qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorentur. (3.) Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium prejudicetur." "Ex quo liquet," he says, "hanc rem non ex simplici jure civili, sed ex commodis et tacito populorum consensu esse petendam; quia sicut leges alterius populi apud alium directo valere non possunt, ita commerciis et usu gentium promiscuo nihil foret magis incommodum, quam si res jure certi loci validæ, mox alibi diversitate juris infirmarentur, quæ est ratio tertii axiomatis: quod, uti nec prius, nullum videtur habere dubium."

Of these maxims Mr. Justice Story says, "His two first maxims will, in the present day, be scarcely disputed by any one; and the last seems irresistibly to flow from the right and duty of every nation to protect its own subjects against injuries resulting from the unjust and prejudicial influence of foreign laws; and to refuse its aid to carry into effect any foreign laws which are repugnant to its own interests and polity."—Conflict of Laws, ch. ii. § 31, where the subject is fully discussed, and the authorities collected.

I am of opinion that in a case so circumstanced, I cannot, from want of power to reach all concerned, do justice, and I might work injustice. Therefore, I decline enforcing the monition against Messrs. Huth and Company with respect to the claims of the master, founded on the law of Hamburg; though I would have enforced it against the owner had he been before the Court. I think it right to add that I think Messrs. Huth have acted with liberality in consenting without opposition to bring in so much of the freight as may, with the proceeds of the ship, satisfy the other demands.

Proctors: for Messrs. Huth, Heales; for the master, Tebbs.

[101] THE "SOGLASIE" (Fischer). Admiralty Prize Court, Dec. 16 & 29, 1854.—A vessel belonging to a Russian, said to have been transferred by virtue of a power of attorney to a Dane at Messina, then resold by virtue of another power of attorney to her master while at Copenhagen in the course of her voyage, condemned as never having been bonâ fide transferred. The Court looks rather for the natural evidence of a transaction, such as correspondence, than for formal documents. The Court can restore to the claimant only in the character in which he claims, and the onus of full and complete proof lies upon such claimant.

[S. C. Sp. Pr. Cas. 104; 1 Jur. (N. S.) 47.]

This vessel sailed from Cronstadt with a cargo of wheat, on the 17th of May 1854, bound to the port of Leith, where she arrived on the 22nd of June, and was there seized by the customs officers.

A claim was given in on the 1st of August by Johann Fischer, the master (who described himself as of Copenhagen), as the sole owner. On the 11th he made an affidavit to the effect, "That on the 14th May last (*a*) he took on board a cargo of wheat at Cronstadt, and cleared out on the said day; and that the said vessel was towed out to the roads at Cronstadt, but that owing to adverse winds she was not able to sail until the 17th of the said month."

As to the ground of his claim, his own evidence upon the 11th interrogatory was, that he was master of the vessel, and in October 1853, when in St. Petersburg, received from the owner, Mr. Elizè Jeff, a power of attorney to sell the schooner to whomsoever—a general power of attorney; that in virtue thereof, he sold her to Johann Saraow, a Danish merchant, residing and trading at Messina, in Sicily, when he was there with the vessel in February 1854, for 26,000 francs; that he then assumed the Danish flag; that on the 7th of June, when he was at Copenhagen, Messrs. Broberg sold the schooner to him by virtue of a power of attorney from the said Mr. Saraow; that he gave about 9700 rix banco dollars, equal to about 1100*l*., &c.

The case came on for argument on further proof.

The Queen's Advocate and Admiralty Advocate appeared for the seizors; Dr. Haggard and Dr. R. Phillimore for the claimant.

Dec. 29.—*Dr. Lushington.* The Court has to decide, in this case, whether the claim given in by the master of the ship can be sustained; and consequently two questions immediately present themselves for its consideration.

First, whether the master has proved himself to be the bonâ fide owner and proprietor of the vessel.

Secondly, whether he is entitled to recover as a Danish subject, that being the national character under which he claims.

I need hardly repeat what I have availed myself of prior [102] opportunities to say,—that the Court can only restore when the affirmative proof is satisfactory; that, according to the accustomed doctrine of the Court, founded in justice and equity, as the case must first be heard on the claimant's own evidence, namely, the ship's papers and the examinations in preparatory, the onus probandi must lie upon the claimant, who is to establish the affirmative.

I consider that, in all these cases, there cannot be said to be any presumption on either side; the Court ought to commence its investigation with perfect impartiality, and all relevant circumstances must be duly weighed. It is from those circumstances, undoubtedly, that a presumption may arise in favour of or against any particular claimant.

---

(*a*) This affidavit seems to have been intended to bring the vessel within the protection of the Order in Council of the 15th of April, upon which point see the remarks of the learned Judge, p. 107.

I think that, in this case, I shall not satisfactorily discharge my duty unless I deliver an opinion upon both the questions which have arisen, namely, property and national character; in truth, they are somewhat connected together.

This ship was originally Russian, and sailed under the Russian flag; the owner, Elizè Jeff, resided at Cronstadt; in the month of October 1853, he gave the master a power of attorney to sell this vessel; that power of attorney is not produced, but I think the circumstances account for its nonproduction, or might account for it, if all the rest were fair.

I allude especially to the circumstances of the probability of its having been transmitted to Russia, with other Russian papers, which it appears were sent by the direction of the Russian consul.

Considering the threatening state of international relations at that period, and the danger to the Russian flag from the preponderance of the naval power of Great Britain, it is not a matter of surprise that a Russian shipowner, as a matter of prudence, should be anxious to divest himself of a property which might soon become comparatively valueless, though at the same time the experience of the Court, as well as other probabilities, combine to show, that frequently such transfers are rather nominal than real, and that the advantage is sought of uniting the benefit of a neutral flag and Russian ownership.

Weighing all these circumstances, the Court relies on no conclusion from the fact of the power of attorney to the master; indeed, I ought rather to say that, in almost all these cases, it is not from an isolated fact, but from a view of all the circumstances taken together, that the Court can form its judgment.

Before I travel farther into the history of this case, I think it meet, though at the hazard of repetition, to make two or three [103] obervations upon the general nature of the evidence adduced in transactions of this kind.

I almost repeat the very words of Lord Stowell when I say that the Court never inquires whether an individual is perjured, or a document forged; the inquiry is, whether he is satisfied by the whole evidence. With regard to documents of a formal nature, though when well authenticated they are to be duly appreciated, it does not follow that they are always of the greatest weight, because we know, without attributing blame to the authorities under which they issue, they are instruments often procured with extraordinary facility. What the Court especially desires is, that testimony which bears less the appearance of formality,—evidence natural to the transaction, but which often carries with it a proof of its own genuineness; the Court looks for that correspondence and other evidence which naturally attends a transaction, accompanies it, or follows it, and which, when it bears upon the face of it the aspect of sincerity, will always receive its due weight. But, on the other hand, when such means of information, which might naturally be expected, are wanting, and further proof has been allowed, the Court is led to suppose that that which is almost indispensable to a just case, either does not exist, or, if produced, would be detrimental to the cause of the producent.

This vessel was captured on her arrival at Leith on the 22nd of June 1854. She had brought a cargo of wheat from Cronstadt to Leith; at the time of the capture she carried the Danish flag; but it is admitted that a short time previously she sailed under the Russian flag, and was the property of a Russian merchant.

The master, under the 11th interrogatory, states that in October 1853, when he was at St. Petersburg, the owner, Elizè Jeff, gave him a power of attorney to sell the vessel, and that, being at Messina in February last, he sold her to a Mr. Saraow, a merchant residing at Messina, but who, it was alleged, was a Danish subject; that the price paid was 26,000 francs, whereupon he ceased to use the Russian flag, and assumed the Danish colours.

Assuming these facts to be true, they naturally give rise to some observations. First, I apprehend it is clear beyond all doubt that Mr. Saraow, as a merchant resident at Messina, was not entitled to a Danish character—as a trader he was a subject of the King of the Two Sicilies; and secondly, though the Danish colours were hoisted under the authority of the Danish consul, I apprehend that such transaction could neither be sanctioned by Danish law, nor by the law of any other country whatever. [104] Where a person really entitled to a Danish character purchases a ship in a country foreign to Denmark, it might be consistent with the Law of Nations and with Danish law if there was no ordonnance to the contrary, that Danish papers should be

given to the vessel—either an interim admeasurement bill, or something of that kind, to be in force till the vessel reached a Danish port, and in consequence thereof the Danish colours be lawfully assumed; but it is not consistent with the law of Denmark, as I collect from these papers, nor, indeed with the law of any other country, that the Danish character should be stamped upon a vessel belonging to one who, for all commercial purposes, was to be considered a foreigner.

I cannot but regard such a sale as this, at such a period, as giving rise to some suspicion; it is a circumstance in the case which, though alone it might not be decisive, must be borne in mind in conjunction with all the other facts.

The proof of this transaction wholly depends upon the evidence of the master and formal documents. Upon the absence of other proof I shall have occasion to observe hereafter.

It is important next to consider whether the employment of this vessel, subsequent to the sale, is proved to have been in accordance with this asserted transfer; and here I have to complain of a great want of adequate explanation. I am justly entitled, and indeed bound, to inquire with what instructions, and on what voyage the ship proceeded from Messina; but all I can collect from these papers is, that she did go viâ Copenhagen to Cronstadt, the port of her former owner, the clearance being for Copenhagen only, and not for the port of her original owner. It does not appear how long she remained at Copenhagen, and I have no evidence to show that she got any ship's papers there, that anything was done at Copenhagen in virtue of her Danish character, or that the price that the master swore he received was ever paid to the former Russian owner. I have no explanation why or wherefore the vessel left Cronstadt at all, it being the very identical port to which she would have gone if there had been no transfer at all.

I want an account of the voyage, of the arrival at Copenhagen, of the arrival at Cronstadt.

In the month of May this vessel leaves Cronstadt on this voyage to Leith; by whose orders, by whose direction—the vessel belonging to Mr. Saraow, in Messina—I am not told; and yet, if the vessel really was the property of Mr. Saraow, something must have passed with him relative to her voyage.

If this account of the sale at Messina be true, the money, the price of the vessel, must have been paid to the former owner, [105] Elizè Jeff. Yet, as I have said, I have not a shadow of evidence that it was so paid.

In the next place, I have no evidence as to the voyage to Copenhagen and Cronstadt, nor as to whom the freight was paid on the arrival at Cronstadt, though it must have belonged to Mr. Saraow; then, again, I know not what is become of the charter-party, nor by what authority a charter-party was made, nor how the freight was settled, on the voyage from Cronstadt to Leith; and though letters must have passed as to this part of the transaction, I have not one.

Some time in the month of May, this ship reached Copenhagen, or Elsinore, and the next step in the transaction is the production of a power of attorney, by Messrs. Broberg, from Mr. Saraow, dated the 22nd of April.

It is somewhat strange, indeed, that Mr. Saraow should have made such a purchase, and be ready to make such a sale; and in that power of attorney, I do not find any price is mentioned for which the ship is to be sold. However, on the 8th of June, Messrs. Broberg, according to the documents, do transfer this ship to the master for the price therein mentioned.

Now, if these transactions were real, beyond all controversy, there must have been letters pass between Mr. Saraow and Messrs Broberg, but I have neither a letter nor affidavit of these two persons, nor have I heard any tenable argument in the slightest degree accounting for the absence of that proof which must have existed if the transaction had been bonâ fide, and which there has been ample opportunity to produce, and which opportunity has been wholly neglected.

And how was this sale by the master brought about, he being a Prussian by birth and a Russian by national character, save so far as the Messina sale may operate? In some two or three days after his arrival at Elsinore, previous to the purchase of this ship, he is converted into a Danish subject and a burgher of Copenhagen. All of a sudden he is transferred into a Danish subject, and all at once, in two or three days, a petition certificate, burgher's brief, and oath of allegiance is out,—all done in two or three days.

How far such proceedings, if bonâ fide, would, by Danish law, entitle him to own and command a Danish ship, I think it unnecessary particularly to investigate, because the decision of this case will depend upon many after considerations, besides the municipal law of Denmark. With regard to the Law of Nations, I hardly conceive that it would be competent to any state to work such a change of national character in so short a space of time by merely a formal instrument.

There was another argument strongly pressed by the Queen's **[106]** Advocate, to which I heard no answer whatever. He stated, and truly, that this sale was, if a sale at all, a transfer in transitu. The fact cannot be denied, for the voyage was from Cronstadt to Leith, and the sale was, flagrante bello, at Copenhagen. All the authorities denounce such a transaction as illegal. Passages to that effect will be found in 1 Robinson's Report, 112 (*The "Danckebaar Africaan"*), 116 (*The "Herstelder"*), 336 (*The "Vrow Margaretha"*), and many more if it were necessary to give them.

Assuming for the moment that the master really did, with perfect bonâ fides, purchase this vessel, is he, in a Court of the Law of Nations, entitled to claim her as a Danish subject? This is not a question of municipal law; it is not competent to any state by its own particular regulations, at once to change a national character, to the detriment of other states; it may give local rights and privileges, it may confer all those benefits which are within its own jurisdiction, but I am of opinion that it cannot alter the rights of others. From constant employment in the Russian trade, continuing in the same course after the supposed transfer to Mr. Saraow, the Russian national character was impressed upon this master. There was no change of residence, there was nothing to alter that national character, save these formal documents,—documents which, as it now appears, according to the promulgation of the law of Denmark by its constituted authorities, would be ineffectual to confer a national character upon the ship, and, consequently, upon the master.

I am of opinion that the claimant has wholly failed to substantiate his claim by reasonable proof, and that such proof as has been produced is utterly inadequate to satisfy that demand which the practice of the Court and the rules sanctioned so repeatedly by Lord Stowell justly require. I found my judgment in this case mainly upon the entire absence of the proof natural to the transaction, upon the absence of any letter from Mr. Saraow, from Mr. Jeff, and from Messrs. Broberg, and of any affidavit from these gentlemen, and on there not being a single atom of proof that Mr. Jeff was paid for the ship which was purported to be sold. I consider it my duty to condemn this vessel, adding, however, that even had the proof of ownership been more stringent, I am not satisfied that I could have restored the property to the master as entitled to a Danish character. No evidence having been given with respect to the cargo, that likewise must be condemned.

Dr. R. Phillimore. The Court will allow me to say that no notice has been taken of what was mentioned in argument, that **[107]** the vessel sailed from Cronstadt before the 15th of May, and might be therefore considered within the protection of the Order in Council of the 15th of April.

The Court. I perfectly remember it. I thought I had disposed of it long ago in another case, *The "Johann Christoph,"* antè, p. 5.

Dr. R. Phillimore. That was probably the reason why nothing was said; but the parties wished that I should mention it.

The Court. Then I do distinctly say, if a man chooses to clothe himself fictitiously with a Danish character, and attempt to get restitution under that pretence, and the Court detects the falsehood, from all the evidence, of the character which he pretends to assume, I think it is not very consistent with law or justice that he should then be entitled to turn round and say, "I played the rogue—I tried to persuade you I was a Dane, but I am in reality a Russian; give me the benefit of that Order in Council which I should have been entitled to if I had acted as an honest man."

Proctors: for the seizor, The Admiralty Proctor; for the claimant, Glennie.

THE "SWANLAND." The High Court of Admiralty. Feb. 16, 17, 20, 1855. Alteration of practice. Vivâ voce evidence, and pleadings completed before the evidence commenced. Two steamers in collision in the Humber; the A. charges that the B. improperly starboarded. B. replies that A.'s lights were not those required by statute, and misled him to believe it to be a vessel at anchor, and that he was therefore right in starboarding. Both held to blame; A. for not having his

lights burning brightly; B. for starboarding at all, whether misled by A.'s lights or not.

This was a suit promoted by the owners of the steamship "Jupiter" against the steamship "Swanland," to recover for a total loss, resulting from a collision between them in the Humber, about 3 A.M. of the 17th of August 1854.

On the libel being brought in, Dr. Bayford prayed the Court to allow the evidence in the case to be taken vivâ voce, whereupon the Judge expressed himself to the same effect as he had done when a similar application was made in the case of *Fyler* v. *Fyler* (antè, p. 69), in the Consistory Court. Accordingly, the pleadings were completed before any evidence was taken, all the witnesses were examined vivâ voce in open Court, and one counsel only on each side addressed the Court.

The libel on behalf of the "Jupiter" pleaded, inter alia, that in pursuance of the Admiralty regulations, three lights were placed, &c., all of which were burning brightly from the time when so placed, and up to the collision.

Upon this point the "Swanland" joined issue, and pleaded that the lights carried by the "Jupiter" on the said occasion **[108]** were, and are not, and never were, from the time they were first placed on board the said vessel, such lights as are required by the regulations issued by the Commissioners of the Admiralty in pursuance of the 14 & 15 Vict. c. 79, and could not in any weather be seen at a quarter of the required distance; that at the time of the collision the masthead light of the "Jupiter" was not visible at a greater distance than about a quarter of a mile, and that neither of the other two lights was visible at a greater distance than about 200 yards, &c.

It was admitted that the "Swanland" starboarded her helm, which she justified on the ground that she was misled by the light of the "Jupiter" into the belief that she was a vessel at anchor.

Dr. Addams and Dr. Twiss appeared for the "Jupiter"; The Admiralty Advocate and Dr. Bayford for the "Swanland."

*Dr. Lushington*, addressing the Trinity Masters (Captain Ellerby and Captain Redman). Gentlemen, though several years have elapsed since an Act of Parliament was passed authorizing this Court to proceed by vivâ voce evidence, this is the first instance in which the attempt has been made so to examine all the witnesses. I am satisfied, after having heard the evidence of the witnesses who have been examined at the bar, that a considerable advantage arises from the opportunity of seeing the witnesses, of forming your opinion of the degree of credibility which ought to be attached to the testimony of each.

It now becomes my duty to make some observations to you upon the evidence. I do not purpose to go through the whole of the evidence in the same manner in which a Judge at Nisi Prius would sum up the evidence of the jury; and that for obvious reasons—first, because I am addressing two gentlemen who are more conversant with the subject than I could possibly be, who have paid great attention to the whole of the evidence, and who would think that the mere detailing the evidence would confer no benefit on them, and would not enable them to give a better opinion. At the same time I am placed in a very peculiar position. When a Common Law Judge has summed up the case to the jury, his duty is discharged; the jury give their verdict. But, unfortunately for me, I have not only to state the evidence to you, but whatever decision or opinion you may give to me, to that opinion I must be an assenting party, in order to found a judicial decision thereon. I will observe, however, that if, in the performance of this duty, **[109]** it should happen that I omit any facts which may appear to the counsel of importance, I shall very readily attend to any suggestion that counsel on either side may make, and shall endeavour to supply that deficiency.

Here, then, are two steamers, one quitting the port of Hull, the other entering it. The Act of Parliament in such a case steps in, and says that you shall, under such circumstances, each carry certain lights of given capacity and burning brightly at the time; that you shall each keep as near as practicable to the starboard side of the mid-channel; and that if meeting another vessel with a probability of collision, each shall port her helm. There are universal rules, not the rules of navigation, but they are what the Legislature has chosen in its wisdom to direct, and what we must obey, whatever may be the consequences.

Now, to come a little closer to the circumstances of this case, the main question is, whether, at the time of the collision, the "Jupiter" was provided with such lights

as are required by the statute. The proof of the affirmative lies upon the owners of the "Jupiter." By section 28 of the Act the onus probandi is thrown upon the vessel proceeding in the case—wherever there are not proper lights—to show that there were circumstances that justified her in not having them; and—wherever steamers do not put their helms to port as prescribed by the Act—to show that some incidental circumstances rendered it impossible to comply with that direction. The onus probandi is also thrown upon the plaintiff for other reasons: first, because he alleges the affirmative; secondly, because the state of the lamps, their original condition and construction, and their state at the time of the collision, are matters peculiarly within his knowledge; and it is a maxim and rule of law, which may be, and has been in well-known cases carried to the very greatest extreme, that the burden of proof should, under all circumstances, be thrown on those who have a peculiar knowledge of the subject, and peculiar means of proving it, which do not belong to the other party. In this particular case there is another reason; the plea given in on behalf of the "Jupiter" expressly states that she was sailing with proper lights, which were burning brightly at the time of the collision. The plea, therefore, undertakes to prove the fact. We must consider whether these matters are proved.

It is perfectly true that in the defence which has been given in, the principal ground is that the lights of the "Jupiter" were not those required by the regulations of the Act of Parliament, and could not in any weather be seen at one quarter of the distance required; that the masthead light was not visible at a greater distance than a quarter of a mile, and that neither of **[110]** the side lights was visible at a greater distance than about 200 yards. In point of fact, the plea states that the lamps were so constructed that they never could throw the light to the distance required by the statute, and, at the time of the collision, could only be seen at a very short distance, and that, instead of burning brightly, they were burning dimly.

I will now state as clearly as I can the question which we have to discuss. Assuming —but only for the purpose of putting the proposition—that you should be of opinion that the "Jupiter" was not provided with proper lamps, then the next question will be, whether the collision was occasioned by the want of proper lights. If you should be of opinion that it was so occasioned, then, according to the statute, the owners of the "Jupiter" cannot recover, even though the "Swanland" was in any respect to blame. If the "Jupiter" had not the proper lights, but that deficiency was not the occasion of the collision at all, she may recover—I do not say the whole of the damage—but she may recover, because what the statute has done is to inflict a penalty of 50*l.* upon the master for disregarding its enactment. In truth and fact, the operation of the statute was never perceived. In a case tried at Common Law the statute would have no effect whatever, because the owners of a vessel at all wrong never can recover; but here we proceed on different principles, and if both parties are wrong the damage will be divided; each shall pay one half. That is the law of Admiralty Courts here and in Scotland, and it was affirmed, thirty years ago, in the House of Lords.(*a*)

(*a*) *Hay* v. *Le Neve*, 2 Shaw, Sc. Ap. Ca. 395, where the law was fully discussed, and all the authorities cited. Lord Gifford, in addressing the House of Lords, said he had been furnished by Lord Stowell with a note of a case in which he and Sir John Nichol were counsel, in 1789—*The "Petersfield"* against *The "Judith Randolph,"* in which Sir James Marriott (assisted by Trinity Masters), "pronounced that both ships were in fault, and that the 'Judith Randolph' was most in fault; and decreed that the whole damage sustained by the owners of the ship 'Petersfield' and her cargo, which was sunk and lost, as well as the 230*l.* damages and expenses given against the ship 'Petersfield' and the costs of suit here on both sides, be borne equally by the parties in this suit." "So that," said Lord Gifford, "this case shows most clearly that my Lord Stowell was right in one of the cases[1] to which I have referred, in saying this was the ancient rule of the Admiralty." Again, "I apprehend that what was laid down in the case of *The 'Woodrop—Sims,'* is established to the law of the Court of Admiralty, and has been acted upon by the Court; and, my Lords, I have the less difficulty in asking your Lordships to

[1] *The "Woodrop—Sims."* 2 Dod. 84. *The "Lord Melville,"* Adm. Court, 1816—not reported.

[111] A third question, however, may arise: Was the "Swanland" to blame for the collision in any way?

Let us now consider the evidence upon the first question—whether, on the night of the collision, the "Jupiter" was carrying proper lights. What is the nature of the proof to be required? I apprehend there are two things necessary—first, that the lamps should be of the capacity required by the statute, by which I mean capability and power; secondly, that they were burning brightly at the time. It does not appear to me to appertain to this question, though witnesses have been produced upon the point, what was the state of the lights at other times, and certainly it does not signify, in the slightest degree, what were the lights on board other vessels belonging to the same owners.

[The learned Judge having carefully summed up the evidence upon the point, continued.]

Now, in the case of the "Swanland," as I understand it, looking at the pleadings, and the argument of counsel, is to this effect: that no light was visible from the "Jupiter" but the white light; that they were thereby justified in believing her to be a vessel riding at anchor, and that in that belief they were right in starboarding their helm.

It is not unimportant, looking at the state of the morning and the place where the vessels were, to consider how far off they ought to have seen each other, and at what distance they actually did so. It is important for two reasons: first, the distance at which they were seen is some evidence of a good look-out or a bad one; secondly, the mere discovery of a white light only does not, in all cases—though, perhaps, it may in this—justify the conclusion that it proceeded from a vessel at anchor. I apprehend a white light is much more powerful than the side lights, and the former may be seen when the latter are not visible; therefore, it is unsafe to lay down the rule, that because the one is seen and not the other, the vessel must be at anchor. As to the distance at which the two vessels respectively saw each other, there is, as might be expected, much discrepancy in the evidence; but it appears to me on the whole, that it was an extraordinarily short distance. A great deal was said as to the "Swanland" not being able to see the "Jupiter" in consequence of the town lying behind, and the smoke of the furnaces. The evidence given as to the smoke of the furnaces [112] surprises me, but you will form your own opinion as to whether it is deserving of great weight or not.

The evidence from on board the "Swanland" is in substance brought for the purpose of establishing two points: first, that she had a good look-out; and secondly, that the lights of the "Jupiter" burned so badly that they were justified in believing her to be a vessel at anchor, and in starboarding their helm. Twelve witnesses depose to both these facts. The evidence is very conflicting; but I see no reason to impute to the witnesses on either side any deliberate intention to forswear themselves. No doubt, on both sides, the witnesses have a considerable bias; we meet with it every day. There is less flagrant contradiction in this vivâ voce evidence than you, Gentlemen, have had the misfortune to witness on many occasions, when the evidence has been on paper.

The safest guide to any conclusion is to take admitted facts. The facts beyond all doubt are, that it was a fine clear morning, that the "Jupiter" was discovered at a comparatively short distance, and that the "Swanland" starboarded her helm. You are intimately acquainted with the locality, and know the state of the Humber under any circumstances that could occur. We will now adjourn, if you please, and take these facts into consideration.

After conference with the Trinity Masters,

---

come to a decision of equally apportioning the loss in this case; for your Lordships must have seen, I think, that it would be extremely difficult in this case to balance the degree of negligence in the one and the other. I think they were, perhaps, equally culpable; and I have no difficulty, therefore, in recommending to your Lordships to apply the judgment of Sir James Marriott, in the case of *The 'Judith Randolph.'* If your Lordships were to take any other rule, one cannot conceive any mode of properly apportioning the loss which the Court of Session have found to have occurred. It might be extremely difficult to regulate the quantum of neglect on the one side and the other, and to apportion the damages by any other rule."

*Dr. Lushington* said: We have come to the following conclusions:—We think that the lamps of the "Jupiter" were of the proper construction and power, but that it is not proved to our satisfaction that they were burning brightly and properly at the time of the collision, though, at the same time, we do not think that any deficiency of the lamps occasioned the collision; we are also of opinion that whatever was the state of the lamps of the "Jupiter," the "Swanland" was to blame for starboarding her helm, and that the collision was thereby occasioned.

Both parties are, therefore, to blame, and the damage must be divided.

Proctors: for the "Jupiter," Coote; for the "Swanland," Gostling.

**[113]** THE "FRANCISKA" (Mechelsen.) Admiralty Prize Court, Dec. 20, 1854; Jan. 27, 1855.

[S. C. Sp. Pr. Cas. 111. Reversed, ibid. 287. 10 Moore, P. C. 74; 2 Eng. Pr. Cas. 347; 416; 14 E. R. 417.]

Blockade is a high act of sovereignty, and cannot be imposed by a commander unless invested with authority for the purpose, p. 115.—On distant stations he is presumed to be so invested; in Europe it may be different, ibid.—Subsequent adoption by his own Government legitimates the acts of a commander, p. 116.—It is necessary to the due maintenance of a blockade that ingress and egress cannot take place without imminent risk of capture, p. 120.—The testimony of a commander-in-chief is the best, and sometimes conclusive evidence, as to the sufficiency of the blockading force, ibid.—The legality of a blockade is not affected by the distance of the blockading force, which may be at any distance convenient for closing the port blockaded, pp. 122-4.—A blockading squadron would invalidate the blockade by capriciously permitting ingress or egress, p. 126.—And by an unjustifiable absence from the locality, p. 129.—A blockade having been recently established, neutrals may come out with a cargo laden before the blockade or in ballast, p. 127.—Occasional elusion of the blockading force does not invalidate the blockade; it is violation, but not invalidation, p. 130.—A blockade de facto needs no notification, p. 131.—The subsequent publication of a Gazette cannot affect the legality of a blockade de facto previously established, ibid.—Early notification is desirable, but not essential to the validity of a blockade de facto, p. 133.—In interpreting documents relaxing belligerent right, the most liberal construction should be adopted, p. 134.—One belligerent cannot concede to another, nor assume to himself, a privilege of commerce prohibited to neutrals, p. 135.—A grant of licences which might have such an effect would invalidate a blockade, p. 136.—The acts of a subordinate officer cannot affect the character of a blockade, though an individual claimant might plead such acts as his own special justification, p. 137.—Notice to neutrals of a blockade de facto is indispensably necessary, but whatever brings it credibly to their knowledge is sufficient, p. 139.—Unless the blockade is notorious, individual warning is requisite. Knowledge is presumed from notoriety, ibid.—Notoriety precludes neutrals from approaching the port on any pretence whatever, p. 141.—Knowledge of the blockade, and not the mode in which such knowledge was communicated, justifies capture, ibid.—The Prize Court receives every kind of evidence unfettered by the municipal law of evidence, ibid.—Neutrals are bound to make inquiry, and cannot plead ignorance which is wilful, p. 145.—The blockade of Riga and the coast of Courland was sufficiently notorious to throw the onus of proving his ignorance on the neutral merchant in each case, ibid.—**[114]** Ignorance for which the neutral Government is responsible is no excuse to the individual, p. 155.—When the blockade is notorious, and no special ignorance proved, the ship must be condemned, p. 156.—The treaties with Sweden of 1661, and with Denmark of 1670, confer some specific privilege upon those countries, and remain unrevoked, p. 155.—Revocation of one treaty by another can only be inferred when the two cannot reasonably coexist, p. 148.—The interpretation of treaties belongs to the Court of Admiralty, but their variation to the Government, p. 151.—A treaty conferring on one neutral a right to trade with blockaded ports would be unjust to other neutrals, and violate the Law of Nations, pp. 151-4.—The restrictions of blockade are justifed only by necessity, which applies to all neutrals equally, ibid.

This was the first of a class of cases arising out of the blockade in the Baltic.

The "Franciska" sailed in March 1854, under Danish colours, from Tarragona, in

Spain, with a cargo of wine and salt, bound to Elsinore for orders, and having arrived there, proceeded on the 14th of May towards Riga. On the 22nd she was captured by Her Majesty's ship "Cruizer," about ten miles E.S.E. of Lyser Ort, on the ground of an intention to violate the blockade of Riga.

A claim was given in on behalf of Mr. J. P. Arboe, of Copenhagen, the owner of the vessel, for her restitution. It was alleged that the master had orders to proceed to Riga if it was not in a state of blockade; that to ascertain whether it was so or not, he made inquiries at Copenhagen, and also of Her Majesty's ship "Rosamond," but without effect; and that on descrying the "Cruizer," he made sail towards her with a view of making the same inquiry.

The Court had allowed further proof to be brought in in this and the other blockade cases, and decided to hear the arguments in all before deciding any. The arguments occupied many days, but as they were noticed seriatim in the course of the judgment, it is not thought necessary to give them separately.

The Queen's Advocate, the Admiralty Advocate, Dr. Jenner, and Dr. Deane, appeared in the different cases for the captors; and Dr. Addams and Dr. Twiss for the claimants.

Jan. 27.—*Dr. Lushington.* In the judgment I am about to pronounce upon the question relating to blockades in the Baltic, it will be my earnest endeavour to found my decision upon the principles laid down by Lord Stowell in the numerous cases which it fell to his lot to determine, and, in adducing reasons for the conclusions to which I may come, I shall be anxious to resort to none which would not be in strict conformity with **[115]** the principles forming the foundation of those great judgments —judgments which have been the delight and admiration of the world; and I adopt those principles and reasons not solely on account of their authority or intrinsic merit, nor because the decisions of the Court of Admiralty were, with scarcely an exception, upheld by the Court of Appeal, and, more especially, were sanctioned by that most eminent Judge, Sir William Grant, but also because, so far as I know, they were adopted as a part of the Law of Nations by the most celebrated jurisprudents in the United States. Indeed, I am content to take the law of blockade in the words of Chancellor Kent (1 Kent's Com. § 7, p. 145.) I do not read these passages, because they are familiar to all, but I repeat that they contain the doctrine by which I intend to be guided.

I purpose, in the first instance, to address myself to the general questions, which may, possibly, affect all or most of the cases; having disposed of them, I shall then, so far as may be necessary, consider each particular case, and what distinctions ought to be made.

Assuming, for the moment only, that certain blockades were established or attempted to be established by Sir Charles Napier in the Baltic, the first question which has been raised is, whether Sir Charles Napier was invested with adequate authority to establish blockades in those seas.

What is the law? Lord Stowell states it in *The "Henrick and Maria"* (1 Rob. 148) and in *The "Rolla"* (6 Rob. 365), where he says, a declaration of blockade is a high act of sovereignty. The doctrine is this, that it appertains to the Government of a belligerent country to declare blockade; that no commander, of his own authority, can declare a blockade; he must be directly or indirectly empowered by his Government so to do by adequate instructions according to the circumstances of the case. It is not necessary for a commander on a distant station to have a special authority to impose a particular blockade. He must be supposed to carry with him such a portion of the sovereign authority as may be necessary to provide for the exigencies of the service. With respect to stations in Europe it may be different.

In all this I fully concur, and it comes to this, that Sir Charles Napier, in order to declare a valid blockade, must have had adequate instructions from his own Government. These instructions are not before the Court, and why? Because, when the objection was first taken, and afterwards, when repeated, I offered to cause a letter to be written to the Admi-**[116]**-ralty requesting to be informed how far the instructions given to Sir Charles Napier authorized the imposition of blockades (*a*),

(*a*) Dr. Twiss submitted that that would not affect the question, which was, whether, by the Law of Nations, neutrals were bound to conclude, without notice, that Sir Charles Napier had such authority; that such authority, or subsequent confirmation by his own Government, might legitimate a commander's acts as between himself and them, but not as respects neutrals.

and this offer was not accepted. I must say that the objection comes with a bad grace from the claimants, who, if doubts there were, had an opportunity of having them cleared up by the most competent authority.

But apart from any such information, I am of opinion that the Court has satisfactory proof that the blockades imposed by Sir C. Napier were imposed by competent authority.

In the case of *The "Rolla,"* Lord Stowell distinctly lays down the doctrine that the adoption by the Home Government of an enterprise which included blockades, though originally undertaken without appropriate instructions for that particular purpose, would have the effect of legitimating all the acts done by the commander, so far, at least, as the subjects of other countries are concerned; and on that principle he affirmed the blockade of Monte Video.

There is conclusive evidence in this case that Her Majesty's Government not only adopted all that Sir Charles Napier had done, but that those acts were done by virtue of due authority previously conveyed. The Gazettes (*b*) of June 16, July 12, **[117]**

---

(*b*) Numb. 21562. 1855.

THE LONDON GAZETTE.—PUBLISHED BY AUTHORITY.

Friday, June 16, 1854.

Foreign Office, June 16, 1854.

"It is hereby notified, that a communication has been received by the Lords Commissioners of the Admiralty, from Vice-Admiral Sir Charles Napier, commanding Her Majesty's naval forces in the Baltic, dated Hangö Bay, 28th May, 1854, informing their Lordships that the ports of Libau and Windau, on the coast of Courland, and other ports, roads, havens, or creeks, from lat. 55° 53′ north, to as far north as Cape Dager Ort, including the ports of Riga, Pernau, and all other ports, roads, havens, or creeks in the Gulf of Riga were then in a state of blockade by a competent force:"

"That all ports, roads, havens, or creeks, eastward from Cape Dager Ort, including Hapsal, Wormsö Island, Port Baltic, Revel, and other intermediate ports on the coast of Esthonia, as far as Ekholm Light [situated in lat. 59° 43′ north, longitude 25° 48′ east]; and from thence in a north-west direction as far as Helsingfors and Sveaborg, on the coast of Finland; continuing westward, Barö Sound, Hangö Head, Orö, and Abo, including the Aland Archipelago and intermediate ports; from thence north, including Nystad, Biorneborg, Christinestadt, Vasa, Walgrund Islands, Little Carleby, Iacobstad, Great Carleby, Lahts, Kalawki, Brahestad, Uleaborg, Karle Island, Tio, Gestila, Tornea, Ned. Tornea, [situated in lat. (about) 65° 50′ north, longitude 24° 15′ east,] and all intermediate Russian ports, roads, havens, and creeks in the Gulf of Bothnia, and all the before-mentioned ports and places, are and were then in a state of strict blockade by a competent force."

"And it is hereby further notified that all the measures authorized by the laws of nations and the respective treaties between Her Majesty and the different neutral powers will be adopted and executed with respect to all vessels which may attempt to violate the said blockade."

Numb. 21571. 2189.

*Supplement to the "London Gazette" of Tuesday the 11th of July.—Published by Authority.*

Wednesday, July 12, 1854.

Foreign Office, July 12, 1854.

"It is hereby notified, that the Lords Commissioners of the Admiralty have been informed by Vice-Admiral Sir Charles Napier, K.C.B., commanding Her Majesty's naval forces in the Baltic, that, on and from the 26th of June last, a strict and effective blockade was actually established by the combined fleets of Her Majesty and of his Imperial Majesty the Emperor of the French, of the various ports in the Gulf of Finland as hereafter specified; that is to say: The whole of the ports in the Gulf of Finland to the eastward of Helsingfors and Sweaborg, on the Finland shore, including Borgo, Lovisa, Pythis, Frederikshamn, Werolax Bay, Viborg, Biörkö Sound, and all intermediate ports, roads, havens, and creeks, to Cape Lubovki, in lat. 60° 5′ north, and long. 29° 56′ east."

"From Cape Lubovki the line of blockade crosses to Tolboukin Light, immediately off Cronstadt, then across southward to off the town of Borki, in the province of Saint Petersburgh, in lat. 59° 57′ north, long. 29° 28′ east."

and August 11, all distinctly recognize, adopt, and enforce the measures of blockade instituted by Sir Charles Napier. That [118] is more than enough to dispose of this objection; besides, this Court cannot pronounce itself ignorant of what all the world knows, viz., that one of the primary objects of the great arma-[119]-ment entrusted to Sir Charles Napier was the institution of blockades against the coasts and towns of Russia. This Court has uniformly acted upon such notoriety, and has never deemed [120] itself under the necessity of asking for strict proof of that which no one reasonably doubted.

---

"That a complete blockade of Cronstadt and Saint Petersburgh has been effected by the combined fleets, which anchored off Cronstadt on the 26th instant."

"Proceeding westward, the line of blockade extends from Borki to Karavalda Island, thence to Dolgoi Ness, and from Dolgoi Ness to Kolgenpia Point, which includes the Bight of Koporia, from thence to Kourgoulo Point, which includes Louga Bay, then the river Narva, and the whole coast of Esthonia and adjacent islands to Ekholm Light, situated in lat. 59° 43′ north, long. 25° 48′ east."

"And it is hereby further notified, that all the measures authorized by the laws of nations, and the respective treaties between Her Majesty and the different neutral powers, will be adopted and executed with respect to all vessels which may attempt to violate the said blockade."

Numb. 21582. 2507.

*Supplement to the "London Gazette" of Friday, the 11th of August.—Published by Authority.*[1]

Monday, August 14, 1854.

Foreign Office, August 11, 1854.

"With reference to the notifications of blockades of certain Russian ports in the Baltic Sea, published in the Gazettes of the 16th of June last and of the 12th of July last, it is hereby notified that the Lords Commissioners of the Admiralty have received further information from Vice-Admiral Sir Charles Napier, K.C.B., commanding Her Majesty's naval forces in the Baltic; from Captain Key, R.N., of Her Majesty's ship 'Amphion,' senior officer off the coast of Courland; and from William James Hertslet, Esq., British Vice-Consul at Memel, relating to such blockades, which information is as follows: viz., Sir Charles Napier states, that

"'On and from the 17th of April last, all Russian ports, roads, harbours, and creeks, from lat. 55° 53′ 0″ N., long. 21° 3′ 0″ E., to Cape Dager Ort, in lat. 58° 55′ 0″ N., long. 22° 5′ 0″ E., including especially the ports of Libau, Windau, Riga, and Pernau, were placed in a state of strict blockade by a competent force of Her Majesty's ships.'

"'On and from the 26th of April last the Russian ports of Helsingfors and Sweaborg, and all Russian ports, roads, havens, and creeks to the westward of Helsingfors, as far as Hango Head, in lat. 59° 48′ 0″ N., long. 22° 53′ 0″ E., were in like manner blockaded.'

"'On and from the 20th of May last the Russian ports of Hafsal, Warmso Islands, Port Baltic, Revel, and all Russian ports, roads, havens, and creeks on the coast of Esthonia, from Cape Dager Ort to Ekholm Light (situate in lat. 59° 43′ 0″ N., and long. 25° 48′ 0″ E.), were placed in a state of strict blockade by a competent force of Her Majesty's ships.'

"'On and from the 26th of June last, the Russian ports of Agö, the islands of Orö Onto, and the Aland Archipelago, Nystad, Bjorneborg, Christinestad, Wasa, the Walgrund Islands, New Carleby, Jacobstad, Old Carleby, Lohto, Kalajoki, Brahestad, Uleaborg, Carlon Island, Ijo, Gestila, Kemie, and all Russian ports, roads, havens, and creeks, from Hango Head, in lat. 59° 48′ 0″ N., long. 22° 53′ 0″ E., to Ned Tornea (included), situate at the head of the Gulf of Bothnia, in lat. (about) 65° 50′ 0″ N., long. 24° 15′ 0″ E., were placed in a state of strict blockade, by a competent force of the allied fleets.'

"On being joined by the French squadron, in the Gulf of Finland, on the 13th June, the duties of blockading in the Gulf and elsewhere were henceforward conjointly carried into effect."

---

[1] These cases were heard on the admission of claim on the 15th of August. The publication of this Supplement on the 14th was strongly commented upon by counsel.

I pronounce that this objection is wholly untenable.

II. The next questions have reference only to the blockade of Riga, Windau, and Libau, and therefore my observations will at present be confined to the blockade of those places; or, perhaps it may be said, to the coasts of Courland.

It was objected that the force destined to perform this service was inadequate to maintain the blockade. This is a question distinct from the due maintenance of the blockade; and I intend to consider them as separate matters.

I need not now state with perfect accuracy what is a legal maintenance of a blockade. As a general description, the places asserted to be blockaded must be watched by a force sufficient to render the egress or ingress dangerous; or, in other words, save under peculiar circumstances, as fogs, violent winds, and some necessary absences, the force must be sufficient to render the capture of vessels attempting to go in or come out most probable.

---

1.—"Copy of an Official Communication from Captain Key, R.N., of Her Majesty's ship 'Amphion,' to W. J. Hertslet, Esq., British Vice-Consul at Memel."

"Her Majesty's ship 'Amphion,' Memel Roads,
"May 12, 1854."

"Sir,—I have the honour to request you will inform Her Britannic Majesty's consuls at Riga, Libau, and Windau, that those ports are now strictly blockaded, and that any vessel leaving them, after the 15th of May, with a cargo, or part of a cargo, on board, will be detained and sent to England or France for condemnation."

"This information is to be publicly made known at those ports."

"(Signed) "A. COOPER KEY,
"W. J. Hertslet, Esq., Captain and Senior Officer."
"British Vice-Consul, Memel."

2.—"Copy of an Official Communication from W. J. Hertslet, Esq., British Vice-Consul at Memel, to Captain Key, R.N., Her Majesty's ship 'Amphion.'"

"British Vice-Consulate, Memel,
"June 8, 1854."

"Sir,—I have the honour to inform you, that immediately on receipt of your letter of 12th May, which I received on the same day, I communicated the contents of that letter to

"Mr. Grisler, Hanoverian Consul at Memel."

"Mr. Schiller, Swedish and Norwegian Consul at Memel."

"Mr. Schröder Sund, Danish Consul at Memel."

"Mr. Hoeftmann, for Holland, Consul at Memel, and likewise to a number of merchants on the Exchange of this town, and to several Riga and Libau merchants who were there."

"I likewise informed His Excellency Lord Bloomfield, that I had communicated the subject of your letter to the Consuls of Neutral Powers at Memel."

"Captain Cooper Key, "(Signed) "W. J. HERTSLET."
"Memel Roadstead."

3.—"Copy of an Official Report from Captain Key, R.N., Her Majesty's ship 'Amphion,' to Vice-Admiral Sir Charles Napier."

"'Amphion,' off Windau,
"June 14, 1854.

"Sir,—Her Majesty's ship under my orders having detained several vessels belonging to neutral nations for attempting to violate the blockade established on this coast, and sent them to England for legal adjudication, in accordance with Articles 9 and 10 of the Admiralty instructions on the subject, I have the honour to report, for your information, the circumstances under which the said vessels have been captured, the manner in which the blockade has been carried out, and other points which may be of importance to the Court of Admiralty commissioned to take cognizance of this question."

Is it proved, by satisfactory evidence, that, on the present occasion, the force appointed for the duty was competent to the performance of it?

That the testimony of the commander on the station is admissible evidence for such purpose, there is an authority to which, even if my own opinion differed therefrom, I am bound to defer—the judgment in the Court of Appeal pronounced by Sir W. Grant in *The "Nancy"* (1 Acton, 64). But the authority of that case goes much further; for the opinion of the commander-in-chief on the station, that the force employed was adequate to **[121]** maintain the blockade, was considered by the Court of Appeal as a sufficient ground on which to form their judgment. Sir W. Grant said:—"As it appears the commander on the station considered the force employed completely adequate to the service required to be performed, we feel it necessary to rely on his judgment, and condemn the vessel as prize to the captors."

I must then first examine what the commander-in-chief has deposed on oath upon this point. Sir C. Napier, in his affidavit dated Sept. 9, 1854, amongst other things, deposes that on the 17th of April he placed the ports of Libau, Windau, and the Gulf of Riga under strict blockade, and the "Conflict," the "Cruizer," the "Archer," and the "Desperate" were stationed off that coast, with orders to maintain the blockade; that on the 9th of May the "Amphion" was added; that he has received from the

---

"Three points must be proved to condemn these vessels as lawful prizes:"—

"1st. That an effective blockade has been established."

"2nd. That the vessels detained attempted to violate this blockade."

"3rd. That they were aware of its existence."

"Regarding the first point, I have the honour to inform you that since May 9th, when I was first entrusted with the blockade of this coast (at which time I found Her Majesty's ships 'Conflict' and 'Cruizer,' on the station, which vessels had been blockading since April 20th) two ships have been ordered to cruize off the entrance of the Gulf of Riga, a passage limited by the shoals to a breadth of three miles, this entrance has never been left without one vessel. Two other ships have been continually passing between Windau and Memel within sight of the coast."

"No doubt, in a few instances, vessels have succeeded in evading the cruizers under cover of the night and the fogs, which have been so prevalent, that the number of vessels boarded is of itself a proof that vigilance has been exercised."

"The second point is readily ascertained by a reference to the definition which has been sent in each vessel by the Captain of the ships detaining her, in which the locality, the course the vessel was steering, and the direction of the wind are stated."

"With respect to the third point, the knowledge of the blockade, great care has been necessary to prevent injury to innocent vessels. The captured vessels come under two heads—those attempting to enter the blockaded ports, and those leaving them. As regards the former, the captains of Her Majesty's ships received orders, that if the slightest reasonable doubt existed as to the captain or the owner of the vessel being informed of the blockade, she was to be sent away with a notification to that effect on his papers."

"Under these orders, 154 vessels have been warned off since April 20th, although nearly all of them passed through the Sound, communicating at Elsinore, which scarcely allows a doubt to exist of their knowledge of the blockade. Nevertheless, I deemed it my duty to show as much leniency to neutrals as was compatible with the interests of the Allied Powers. Four vessels only have been detained for attempting to enter the ports. Two of these contained coal, and were without proper papers; the others were from Copenhagen, and confessed their knowledge of the blockade."

"To insure that the residents in the blockaded ports should not plead ignorance of their condition, I wrote the accompanying letter (Enclosure No. 1) to the British Vice-Consul at Memel, the contents of which were published in the Berlin Gazette, and were publicly made known at Riga, Libau, and Windau. Mr. Hertslet's answer (No. 2) I enclose."

"Notwithstanding this, several vessels have taken in cargoes and left Riga; they have therefore been detained, and sent to England for adjudication."

"(Signed) "A. COOPER KEY,

"Captain and Senior Officer on the Coast of Courland."

"Vice-Admiral Sir Charles Napier, K.C.B.,

"Commander-in-Chief, &c. &c. &c."

officers in command their logs, and has been officially informed that the blockade has been strictly maintained, and that he verily believes such information to be true.

It is true that Sir C. Napier does not in so many words assert that the blockading squadron was sufficient for the purpose, but the inference that he considered it so to be is irresistible; for he never could have deposed that he believed that the coast had been strictly blockaded by the force he despatched for such pnrpose, unless at the same time he believed it was capable of doing what was reported to have been done.

I am of opinion, therefore, that I have the same evidence of the adequacy of the force appointed to maintain the blockade as existed in the case of *The "Nancy,"* and was deemed by the highest authority sufficient proof of the averment.

I am not only bound by the authority of *The "Nancy,"* but my own opinion entirely concurs with it; still, that case must not be pressed too far. I am of opinion that if the declaration of a commander-in-chief on a station, that the blockading force is adequate for the purposes intended, is not met by conflicting evidence, it ought to be received as conclusive; unless, indeed, I could conceive a case in which the commander-in-chief would so certify; yet it should appear, even to a landsman, that such certificate could not meet the exigencies of the law, or, in other words, that the commander was mistaken in his notion of what was, in law, an effectual blockade. Where there was conflicting evidence, though I should pay the attention justly due to the testimony of the commander-in-chief, yet I should not hold myself absolutely bound by it; I should draw my conclusion from a consideration of the whole evidence before me.

I cannot think that the facts of the case raise any suspicion; **[122]** I can see no reason to suppose that a force of three or four steam-vessels was not perfectly adequate to blockade the coast of Courland, from Libau to Lyser Ort, a distance of about eighty-five miles. Indeed, I am satisfied that evidence to establish the fact according to precedent and the law of this Court has been adduced to justify the conclusion that the force appointed to blockade that coast was adequate to an efficient discharge of that duty.

III. I shall now consider the question whether the port of Riga, and, I may say, all the Russian ports within the Gulf of Riga, Pernau, and others, could be legally blockaded by a force stationed off Lyser Ort. Let me first consider the facts, and then see how the law will bear upon them.

Captain Key, after having stated that he was appointed to command four ships, and that he stationed two between Memel and Libau, goes on to say, "that the two other ships were ordered to remain off the entrance of the Gulf of Riga and near Lyser Ort, where is the only passage for ships passing in and out of the Gulf of Riga; that the said passage is limited by shoals to the breadth of three miles; that the said position is the best and most efficient which can be taken by a ship or ships blockading the Gulf of Riga and the ports which are within the Gulf of Riga, the only approach to which it entirely commands, as the northern passage is impracticable for sailing ships, and is, in fact, never used by vessels of any description except fishing and other small boats, and ships so stationed off Lyser Ort are also within sight of the port of Windau."

It follows, then, that it is perfectly practicable for a vessel of war, especially a steamer, stationed near Lyser Ort, at the entrance of the Gulf, to prevent the ingress and egress of vessels into and from the Gulf, and, consequently, to and from all places within it. Indeed, the distance of three miles is so short, that the practicability of so closing the entrance is self-evident.

It is true, that in this mode of blockade there are no ships regularly stationed immediately close to the towns of Riga or Pernau, or any other town in that vicinity; and it is also true, that all the coast within the Gulf forms a part of the Russian dominions.

As such a blockade is, beyond all question, a justifiable measure of warfare against Russia, the question is, whether neutral nations have a right to complain thereof? In what respects are they aggrieved more by a blockade of this kind than by one where the blockading force is stationed more immediately off the coast or town blockaded?

It is not a question of efficiency, for it is obvious that such a **[123]** blockade as this of the Gulf of Riga may be more completely maintained than that of many other towns or coasts, because the distance to be guarded is less. Then, what is the distinction? Why, that the blockading force, though performing its office with equal

efficiency, is stationed at a greater distance from the place blockaded. I confess that I do not perceive how any ingenuity of reasoning can conjure up a grievance to neutrals from a blockade of this description. Can the grievance depend upon the comparative distance which, in different cases, the blockading force may be stationed from the place blockaded? If so, at what distance would the blockade be valid, and at what not? Where is the arbitrary limit, and why should an arbitrary limit be fixed? To me it is abundantly manifest that the true criterion whereby the legality of a blockade shall be established is not the place where the blockading force is stationed, nor its distance from the place blockaded, but the capability of the force, wherever stationed, to maintain the blockade.

I will examine whether there is any authority on this question, remembering always the terms of the proposition, that the whole of the coast purported to be blockaded is part of the dominions of the enemy. What are the words of Chancellor Kent?—"The squadron allotted for the execution of the blockade must be competent to cut off all communication with the interdicted place or ports" (1 Kent's Com. 146). This is the true test, and not the distance of the blockading squadron.

All Lord Stowell's definitions are the same in substance. He tells us that a blockade, to be legal, must be efficient; and if efficient, it is enough.

No authority to the contrary has been or can be cited.

This, too, is the doctrine to be collected from the case of *The "Nancy"* (*b*), already cited. The inquiry of the Lords of Appeal was not whether the place blockaded was an island, or a part of a gulf, or the distance the ships were stationed, but whether the force employed was completely adequate to the services to be performed.

There is another case which came under the consideration of Lord Tenterden, when Lord Chief Justice of the King's Bench. It was the case of *Naylor and Others* v. *Taylor* (1 Moo. & M. 207), and related to the blockade of Buenos Ayres. It was contended by the present Lord Campbell, then counsel in the cause, "that no breach was proved. It does not appear that there was any **[124]** port to which the notified blockade applied nearer than Buenos Ayres itself, which was one hundred miles distant and more from the place of capture. A blockade cannot properly exist at such a distance; or at least vessels cannot understand that it does so, and are not guilty of a breach of blockade."

Lord Tenterden's observations were these:—"The distance of the blockading fleet from the port declared in blockade is certainly considerable; but I know no precise limit of distance which can be fixed. I should say, as at present advised, that the blockading fleet may be at any distance convenient for shutting up the port blockaded, not obstructing any other,"—that is, a neutral port,—"and that was the case here; for Monte Video was open, and we do not learn that there were any ports not in a state of blockade higher up the river. I think, therefore, that the blockading fleet might lawfully be stationed off Monte Video." Therefore, compare the river Plate, the breadth of that river, and the point where the blockading squadron was stationed with the passage off Lyser Ort, of not more than three miles, and see whether the case to which I have now adverted is not an authority even much stronger.

In the course of the argument reference was very properly made, as I think, to the blockade imposed by Great Britain on the coasts of Holland in 1799. That blockade was deemed just and legitimate, though many of the squadron maintaining the blockade were necessarily stationed at great distances from the ports intended to be affected by the blockade, and large spaces of sea intervened between them.

I am satisfied, both on principle and authority, that the requisites to a blockade are only two: 1st, that the ports to be blockaded shall be hostile territory; 2nd, that the blockading force could so act as efficiently to maintain it. Both these requisites existed in the present case, and therefore I say that the blockade of Riga was legitimate.

I next proceed to consider what was done to constitute the blockade, and whether the blockade was maintained with that strictness which is necessary for its legal maintenance. For this purpose I shall consider the evidence, both affirmative and negative; premising, however, that I reserve for subsequent investigation the whole question of notice.

I will first observe that, asssuming the force deputed to perform the duty was

(*b*) 1 Acton, 64; vide also *The "Frederick Molke,"* 1 Rob. 86.

competent, a point already disposed of, some presumption fairly follows that the officers did discharge their duty, unless, indeed, it should appear that they either misconceived their duty or neglected it.

Sir Charles Napier deposes that on the 17th of April he **[125]** placed the coast of Courland under blockade, and he mentions the four ships appointed to that duty. On the 9th of May the "Amphion" was added to the squadron. The "Desperate" may have been withdrawn.

As none of the ships now brought before me for adjudication were captured before the 21st of May, it does not appear to me necessary at this moment to endeavour to fix the precise day before that time when the blockade might actually have commenced; but I will examine the evidence as to the actual maintenance of the blockade.

Captain Douglas, one of the first who joined the blockading squadron, deposes that he is the commander of the "Cruizer," and joined the squadron then blockading the coast of Courland on the 15th of April. He remained on that station till the 25th of August, but with very considerable absences,—no less than about 38 days. Where the "Cruizer" was during that interval I have no means of knowing. Captain Douglas then deposes that during all the time he was on the station he rigorously maintained the blockade, and he subjoins a list of 69 vessels which he boarded.

Captain Heathcote, commander of the "Archer," joined the squadron on the 9th of May, and he deposes having assisted in maintaining the blockade from that period till the 12th of September, also with certain intervals, amounting only to 14 days, or thereabouts; during that period he examined 41 vessels.

Captain Cumming, who succeeded Captain Foote in the command of the "Conflict" performed a similar duty from the 11th of May to the 14th of September. He was absent during 33 days. He examined 42 ships.

Captain Key, in the "Amphion," had the command of this squadron, which he assumed on the 9th of May. He states that two of the squadron were stationed off Lyser Ort, two between Windau and Memel, and that they so remained until the 11th of July, "with such intermissions only as were necessary for coaling, watering, or other exigencies of the service."

What were the positions of the blockading ships after the 11th of July does not so distinctly appear from this affidavit; but Captain Key swears that the blockade was maintained up to the 19th of September, the date of the affidavit.

To this affidavit is attached a list, not of all the vessels boarded by the "Amphion," but of those bound to Russian ports, nearly all to Riga, being eighteen in number.

Without attempting with any accuracy to ascertain the whole number of vessels so searched, it appears from this statement **[126]** that they exceeded 150 searched;—some proof that the squadron were not wholly negligent of their duty.

But there is a much more competent judge than I can pretend to be, who has had under his consideration all the logs and all the official dispatches of the officers employed in this service. Sir Charles Napier deposes, "that he has from time to time, in the course of their public duty, received from the officers in command of the said ships the logs of the proceedings of such ships, and has been officially informed by the said officers, and fully believes, that from the said 17th of April up to the present time, to wit, the 9th day of September, 1854, the said blockade has been strictly maintained."

If Sir Charles Napier, with this evidence before him, with his means of forming a correct judgment, has come to the conclusion that the blockade was duly maintained, I think that a Judge sitting in this chair would, in the absence of conflicting testimony upon such evidence, feel himself compelled to come to a similar conclusion; and I think so also, more especially because if Sir W. Grant deemed the opinion of a commander-in-chief adequate evidence of the competency of a squadron to execute a blockade, à fortiori, multum à fortiori, such opinion would be of force when the question was of its actual maintenance, and when the evidence from which the conclusion was to be drawn consisted of logs and other statements, upon which none but a nautical person can form a very satisfactory judgment.

I am of opinion, therefore, judging only from this evidence and the opinion of Sir Charles Napier, that I must, primâ facia, consider the blockade to have been adequately maintained.

But this is a primâ facie opinion only; I must now examine the opposing evidence

in these cases, to see whether any facts or circumstances are proved which ought to lead to the conclusion that those officers are mistaken in their notions of the maintenance of a blockade, or that in truth the blockade was not adequately enforced.

Many objections of this kind have been raised. I will notice them in order. First, it has been said that many ships were allowed to go in and some out of the port of Riga, with the consent of the blockading squadron, or one of them.

What is the law, and what is the proof of the fact? I apprehend the law to be, that when a blockade has been established by notification, or de facto, for so long a space of time that all neutral nations must be taken to be cognizant thereof, it is not legally competent to the blockading squadron to allow ingress or egress at their pleasure, and that if they do so, the blockade [127] cannot be enforced against other neutral vessels. But when a blockade de facto has been recently constituted, then it is the privilege of the neutral trader to come out of the port blockaded with a cargo laden before the blockade was imposed, and the duty of the blockading ships to allow such vessel to pass. The officer of the blockading vessel must, from a consideration of time or other circumstances, form the best judgment he can as to whether the cargo was taken in before the blockade commenced or not. They have no very satisfactory means of investigating such questions, because all they can do when they examine a vessel coming out of a blockaded port is to make inquiry of the master, who is clearly a person greatly interested in making a representation to his own advantage. Should the commander of any such blockading ship occasionally miscarry in his judgment it could not be seriously contended that the blockade was thereby invalidated.

Of course, neutral vessels in ballast might leave the port.

Then as to ingress. To allow any vessel to enter would clearly be a breach of duty and an illegal relaxation of the blockade; but it by no means follows that because a cruizer may not allow a vessel to enter that he is therefore bound to detain her. On the contrary, it is his duty, if he has reasonable ground to believe that the master had no knowledge of the blockade, to warn her off, and not detain her. If such be the law, what are the facts? Is there the slightest proof that the vessels composing the blockading squadrons at any time voluntarily relaxed the blockade by permitting egress or ingress contrary to the law regulating such questions? That no such neglect of duty or omission to perform it took place, the affidavits of all the officers commanding all the cruizers fully prove. They state, one and all, that no vessel was allowed to come out except in ballast, or because they had adequate reason to believe that the cargo was taken on board before the blockade took place; that no ingress was allowed to any vessel whatever; but that they did as they were bound to do—warn off every vessel intending to enter which they conceived might be approaching the blockaded ports in possible ignorance of the blockade, detaining only those which from circumstances they deemed knowingly and wilfully to be attempting to violate the blockade.

The Court listened with the attention justly due to the many able arguments which were advanced on the part of the claimants, but I confess I marvelled much that so little notice was taken of this, the most important evidence on the part of the Crown—most important, because if neither discredited nor con-[128]-tradicted, it established a great leading fact, viz., that there was maintained a blockade de facto.

But what evidence is there to the contrary? Direct evidence of neglect of duty, or of inefficiency to perform it, there is none. There is no evidence of any ships being allowed to go in or come out with the permission of the squadron contrary to law. There is, however, evidence brought in on the part of the claimants, showing that a certain number of ships did enter the port of Riga notwithstanding the blockade. Assuming the fact to be so, such fact furnishes no evidence against the affidavits of the captors, that they permitted no violation of the blockade; it is not even said or contended that a single one of those ships which entered Riga did so with the consent or connivance of the captors.

Then to what point can this evidence tend? To one only; it is legitimate evidence, not to prove but to tend to prove, that the blockading force was not adequate to the full discharge of the duty entrusted to it; and this brings me to the consideration of the question, whether, seeing what was done and what was not, the Court ought to hold that the blockade was adequately maintained, or that the port of Riga was so insufficiently invested that ingress might take place without evident danger.

This is a mixed question of law and fact. To decide it properly, the whole evidence on both sides must be weighed and contrasted, and not only the evidence as to facts showing the number of vessels which entered the port, and the number prevented, warned off, or captured, but all the peculiar circumstances of the blockaded port must be borne in mind.

What, then, is an efficient blockade, and how has it been defined, if, indeed, the term definition can be applied to such a subject? The one definition mentioned is, that egress or entrance shall be attended with evident danger; another, that of Chancellor Kent (1 Kent's Com. 146), is, that it shall be apparently dangerous.(*b*)

All these definitions are and must be, from the nature of blockades, loose and uncertain; the maintenance of a blockade must always be a question of degree—of the degree of danger attending ships going into or leaving a blockaded port. Nothing is further from my intention, nor, indeed, more opposed to my notions of the Law of Nations, than any relaxation of the rule that a blockade must be efficiently maintained; but it is perfectly obvious that no force could bar the entrance to absolute **[129]** certainty; that vessels may get in and get out during the night, or fogs, or violent winds, or occasional absence; that it is most difficult to judge from numbers alone. Hence, I believe that in every case the inquiry has been whether the force was competent and present, and if so, the performance of the duty was presumed; and I think I may safely assert, that in no case was a blockade held to be void when the blockading force was on the spot or near thereto, on the ground of vessels entering into or escaping from the port, where such ingress or egress did not take place with the consent of the blockading squadron. I asked if there was such a case; none has been produced.

A very elaborate argument was addressed to the Court to prove that the blockading force was not, at certain periods, upon the station, or, rather, was not off Lyser Ort; and most certainly, if the fact could be established, that from incompetency or neglect of duty that force was not present in its proper place at times and seasons when there was no legal exception to justify its absence, the validity of this blockade could not be sustained. But what was the evidence resorted to for the purpose of establishing so important a position of facts? Reference was made in some detail to entries in the logs of the cruizers; for many reasons I consider myself incompetent to form any such sweeping conclusion from the entries in the logs. First, the logs, at times, contain expressions wholly unintelligible to me, and, I apprehend, to all who are not possessed of nautical experience. Secondly, I do not know at what particular part of the coast, how far off Lyser Ort, or how close to Filsund, would be the best station to maintain the blockade. Thirdly, I apprehend that, according to circumstances, places at a considerable distance from each other may be selected, and that winds and currents may have much to do with the situation. Fourthly, that there must be winds which prevent at one time ingress, at another egress, to sailing-vessels, and that the position of the blockading force will be altered accordingly.

I fully admit, however, that the fact of vessels entering the blockaded port is evidence always to be considered.

For these reasons, I think that any judgment I could form from such data would not be warranted by former practice, and most liable to error. To this I may add that I should act against authority in entirely overthrowing the evidence of those persons who were on the spot and are possessed of nautical knowledge; and I will also observe that that opinion given by Sir Charles Napier, has been again notified through the act of **[130]** the Admiralty; thereby showing that, in their judgment, the force was competent for the purpose.

Again, take the list which is found on the one side and on the other. Assuming the list produced by the claimants to be a correct list, I find that according to that, from May 22 to June 13, seventeen vessels entered Riga; from May 22 to July 26, nine vessels went out of Riga, of which several were captured. Now, take the other list; from April 15 to May 31, not less than 103 vessels were examined, that is, during a period of about six weeks—a fact I shall hereafter advert to again.

---

(*b*) In the convention between Great Britain and Russia, on the 17th of June 1801, a blockaded port was declared to be "that where there is, by the disposition of the power which attacks it with ships stationary or sufficiently near, an evident danger in entering."

Now, it does appear to me to be very difficult to say, even from these statements, that egress from and ingress to this port was not a matter of evident danger.

But allowing for a reasonable number of these vessels escaping by night or during fogs, all which would not, in the slightest degree, affect the validity of the blockade, how many came out in broad daylight and were not exposed to examination? There is not one iota of proof that a single vessel did come out, and, indeed, it was very improbable that any would make such attempt; but assuming that a third of the number did so, can it reasonably be contended, looking at the number boarded, that there was no danger to such vessels in effecting their egress? Is a mere violation of a blockade, against the consent of the blockading force, to invalidate it? Is there any case or authority for such a position? In the case of the blockade of the coasts of Holland in 1799, can it be supposed that many, very many vessels did not evade that blockade? When we see the cases which came before the Court of Admiralty in that day, does it not almost follow as a matter of certainty that there were numerous cases in which that blockade was broken?

If such a doctrine as this could be maintained, the right of a belligerent to establish a blockade would become a nonentity. No port could be hermetically sealed. I then am of opinion that I have ample evidence that the blockading force was adequate to the duty to be performed; satisfactory proof that all the officers of the squadron did their duty, and nothing to oppose it but the escape of some ships, all of which might be accidental, and one which unquestionably did not take place with the consent or by permission of the blockading squadron.

I cannot think that this blockade is invalidated by reason of the circumstances I have just investigated.

I will now consider the argument that the blockade could not have a legal existence until after stated periods; and I wish, so **[131]** far as may be, not to mix up this part of the case with another most important division of the subject, viz., whether and when it became, to use a short expression, a matter of notoriety.

It has been contended that this blockade could not be in existence before a given time, and that by reason of the publication in the Gazette.

[The learned Judge then stated the contents of the three Gazettes (antè, p. 116).]

What are the inferences to be drawn from these facts? First, it is clear that any blockade constituted by Sir C. Napier would acquire no legal validity in addition to what it originally possessed, or by way of confirmation and approbation of the exercise of the authority given to him, before the actual publication in the Gazette; or, in other words, the Gazette cannot convert a blockade de facto into a blockade by notification from the State itself before such notification be published. Up to the date of such notification, a blockade de facto must depend on its own legality, and be subject to all the rules attending a blockade de facto, as distinguished from a blockade by notification; but I am at a loss to comprehend on what reasoning it can be maintained that a blockade de facto is, either as to the time it commenced or its validity, dependent upon the period of its notification by the Government.

If a commander-in-chief imposes a legal blockade de facto, and maintains it, does the law require that it should be affirmed or confirmed or notified by his Government?

I am not aware that any such proposition was advanced before the hearing of this case, nor that any authority can be found for it. No doubt it is much more convenient that every blockade de facto should be communicated as soon as possible to the Home Government, and by the Government be duly notified; and for obvious reasons. Such blockade immediately becomes a blockade by notification, and obtains also the advantage of such a blockade over a blockade de facto. But suppose a blockade de facto is not notified at all, is it less a legal blockade? Is there any authority for contending that a blockade de facto, of however long continuance, must of necessity, and, to maintain its vitality, be notified by the Home Government at all? And have there not been blockades de facto, and many never notified by the Home Government, and that, ex confesso, from all the authorities?

Lord Stowell said, in *The "Vrow Judith"* (1 Rob. 152), that though a formal public notification would always be most desirable, yet **[132]** it is sometimes omitted in practice; and he added, that it might commence de facto; and went on to state some of the requisites of such a blockade.

If, then, it be not necessary to have any such notification from the Home Government at all, how can a late notification have any retrospective effect to invalidate a

blockade with respect to neutrals? If a blockade de facto, with all its provisions for the protection of neutrals, be valid, how can they be injured by the delay or absence of notification?

I really doubt if it has been intended that such delay of notification is a proof that there was not a blockade de facto actually imposed before; but if such was the drift of the argument, the answer is the fact itself proved by the affidavits of Sir Charles Napier, and the other evidence to which I have referred.

Even supposing that Sir C. Napier omitted to make due communication, or that the Home Government thought fit to delay the publication of the notification, or, if you please, neglected it—I cannot rationally put the proposition stronger—what right has a neutral subject to complain of this? Has he a right to say, why did you not sooner convert a blockade de facto into a blockade by notification? Is not a blockade de facto fenced, for the protection of neutrals, by stringent and more rigid rules, to prevent injustice being done? and can it be averred that he is more sorely pressed by a blockade de facto than by one by notification from home? In how many cases can there be no such notification, such as the China Seas, the Pacific, and even the coast of the Brazils? In how many cases nearer home may the communication be delayed from a variety of circumstances?—from misapprehension, as supposing Sir C. Napier thought that the communication of his intention immediately to blockade was sufficient, or delayed to do so till his other measures were more advanced, or for any other reason? Suppose all this or any other similar reason, would not a blockade de facto be valid from the commencement, and would it be rendered null because the commander did not communicate the fact, and cause it thereby to be notified? If this were so, a blockade de facto would not depend on the authority to institute or its maintenance, but on the fact of communication—a proposition hitherto unknown and totally without foundation in law or justice, for it proceeds on the supposition that a blockade de facto is not just as lawful as a blockade by notification, or is more onerous to neutrals; whereas it is a fact that in a blockade de facto a severe operation upon neutrals is guarded against by **[133]** regulations so stringent that it cannot affect them even to the same extent as a blockade by notification.

The same reasoning applies supposing that the Home Government, for causes by it deemed sufficient, should for a time delay notification, or omit it altogether.

Let me, however, not be misunderstood. I consider that it is, for the sake of greater certainty and the observance of strict regularity, advisable that the Home Government should, at a due season, make a notification; but that it is not incumbent upon it to do so at any particular time, and that such notification is not essential to the validity of a blockade de facto, in all other respects duly established.

I proceed to an argument, which has been urged with great force, and which presents considerations of serious importance.

By the Order in Council of the 15th of April (1 Ecc. & Adm., App. x.), any Russian merchant-vessels which, prior to the 15th of May 1854, shall have sailed from any port of Russia in the Baltic or White Sea, bound for any port in Her Majesty's dominions, shall be permitted to enter, discharge her cargo, and go to any port not blockaded.

It is then argued that the true construction of this Order is to permit any Russian vessel to leave, until the 15th of May, any blockaded Russian port, and consequently the port of Riga, and therefore to allow the trade to be carried on from a port prohibited to the neutral.

If this be so, the alleged inference in law is said to be that the blockade is invalidated, because it is contended to be contrary to the Law of Nations for a belligerent to permit a trade by one belligerent from which neutrals shall be excluded.

Three questions arise hereupon. First, the construction of the Order of April 15. Secondly, what is the law? Thirdly, will the validity of the blockade be affected, and if so, how and when?

On the part of the Crown, the construction put on this Order is denied.

I will first observe that this Order of April 15 is an extension of the Order of March 29, with certain alterations. By the Order of March 29, all Russian merchant-vessels which had sailed from any foreign port prior to the date of that Order bound for any port in Her Majesty's dominions were protected. The Order of the 15th of April made great alterations; it limited the place from which Russian vessels might sail to the Baltic and White Seas, and extended the time from the 29th of **[134]**

March to the 15th of May. The reason of the extension was manifestly to give time to leave the Russian ports after they were free from the ice.

It is apparent that at the date of issuing the Order of March 29, there could not possibly be any reference to blockade, or egress from a blockaded port, for that order is cotemporary with the declaration of hostilities. Although Her Majesty by another Order specially reserves the right of blockade, yet it is in no degree adverted to in the Order to which I am referring, and which applies to a period when there was no war, and consequently no blockade; but with respect to the return voyage, there was an exception of blockaded ports.

When the Order of April 15 was issued, the Government could not have known of any blockade, for none could have been imposed and made known to them at that period; but they did know what instructions had been given to Sir C. Napier, and they might have conjectured that some of the Russian ports would be blockaded before the 15th of May. Then the question is this, whether the original order not having purported or probably intended to allow Russian vessels to sail from blockaded ports, such permission is conferred by the Order of April 15. Now that Order makes no exception whatever; in form it applies to all Russian ports in the White Sea and the Baltic. Am I at liberty to engraft an exception upon it? It was urged that the British Government never could have intended to cripple its right over the power of blockade; to have granted an indulgence to the enemy, though also for its own advantage, which might possibly invalidate a blockade as to neutrals.

It appears to me that this is a strong argument to prove that the British Government never intended to allow Russian ships to come out of a blockaded port, but I think that that is not the true question; the Order in Council of the 15th of April gives in certain words a privilege to Russian ships, and the question is not what the Government intended, but what is expressed by the words which they have used. In cases of great doubt and difficulty it is true that surrounding circumstances may be resorted to, to ascertain the meaning of given words; but if the words themselves contain a clear and definite meaning, it is exceedingly dangerous to resort to circumstances dehors the instrument; and not only is this so, but it must be recollected that in a concession given by one belligerent to another, relaxing the strict rights of war, it is a principle sanctioned by high authority, and in my judgment to be sacredly maintained, that the most liberal interpretation should be given to the terms used declaring that relaxation.

**[135]** I am, therefore, of opinion that no restriction can be engrafted upon the words giving permission to Russian vessels to quit Russian ports; that even if doubt there were, that doubt ought to be decided in favour of the hostile power; and that, consequently, if any question were to arise as to any Russian vessel coming out of Riga prior to the 15th of May, that port being blockaded, such Russian vessel ought not to be subjected to condemnation.

Again, if I am right in this conclusion, the subjects of neutral powers would be justified in contending in this Court, that so far as their interests could be concerned, such was the true construction of the Order in Council of the 15th of April.

For these reasons I am disposed to give to all the claimants in this Court the benefit they can be justly entitled to derive from such a construction; but it remains to be considered to what benefit they could justly make a claim, and to what extent and in what way the consequences of a blockade would be affected. This statement, I am well aware, opens a very wide and all-important theme for discussion, and requires the Court to go back to the first principles by which the rights of belligerents and of neutrals shall be governed.

The argument stands thus: by the Law of Nations a belligerent shall not concede to another belligerent, or take for himself the right of carrying on commercial intercourse prohibited to neutral nations, and, therefore, that no blockade can be legitimate that admits to either belligerent a freedom of commerce denied to the subjects of states not engaged in the war. The foundation of this principle is clear, and rooted in justice; for interference with neutral commerce at all is only justified by the right which war confers of molesting the enemy—all relations in the nature of trade being by war itself suspended. To this principle I entirely accede, and I should regret to think if any authority could be cited from the decisions of any British Court administering the Law of Nations, which could be with truth asserted to maintain a contrary doctrine.

One authority was mentioned, in the case of *The "Fox"* (Edw. 311.) That case is most essentially distinguished from the present; it refers solely to blockades, if so they may be called, established on the principle of notification only. The observations which have been cited from the judgment in that case were called forth by an argument that even the blockades of those days might be vitiated by a grant of licenses. In answer to such arguments Lord Stowell asserted a fact, but he did not maintain a principle; he said, with great truth, that it had **[136]** never been considered that the validity of blockades was vitiated by the grant of licenses; but to give just weight to his words, we must bear in mind the circumstances of the case that he was then discussing. Lord Stowell was not speaking of blockades according to the ordinary custom of nations; he was discussing another and a very different question. He had to decide whether Great Britain was justified, in consequence of the celebrated Berlin and Milan decrees, in imposing, by declaration only, blockades against a very large portion of the coasts and towns of Europe—blockades which it was never intended, and, indeed, impossible for the naval forces of Great Britain to maintain according to the ancient laws. These were called paper blockades, and their justification depended wholly and entirely upon reasoning foreign to the present case. With regard to the observation of that learned Judge, that the grants of licenses had never been held to invalidate a blockade, I must observe, first, that the relaxation contained in the Order of the 15th of April is not merely a grant of licenses to individuals, but, though limited to a class, is a permission to the whole of the Russian mercantile navy destined upon voyages to Great Britain to complete such voyages, and I think that this fact alone forms a distinction between the present case and the grant of licenses. And secondly, with respect to the grant of licenses, I concur with Lord Stowell as to the fact (though I believe the question was never raised), that the grant of licenses had never been held to vitiate a blockade, and I am of opinion that where such licenses were granted upon peculiar and special occasions, and for such only, the doctrine is true, and for this reason, because special occasions might arise, which might call for the grant of such licenses, and be productive of no perceptible injury to the subjects of neutral states or their commerce; but I think it my duty to declare that, if in the case of blockades, according to the accustomed Law of Nations, licenses should be granted indiscriminately and with such profusion, with liberty to violate that blockade, as to throw the whole trade into the power of the belligerent state imposing the blockade, and thereby excluding neutral commerce, I am not prepared to say that such a blockade under such circumstances could be justly enforced against neutral states with a due regard to the principles of the Law of Nations. I think that if the relaxation of a blockade be, as to belligerents, entire, the blockade cannot lawfully subsist; if it be partial, and such as to exceed special occasion, that to the extent of such partial relaxation neutrals are entitled to a similar benefit. To a certain extent this also was the course of reasoning adopted by Lord Stowell in *The "Fox,"* upon the **[137]** fact that licenses had been granted as numerously to neutrals as to British subjects.

With respect to the present question, I therefore have come to the conclusion, that as Russian vessels might have left the ports of Courland up to the 15th of May, the subjects of neutral states ought to be entitled to the same advantage, and if there be any vessel so circumstanced, I should hold her entitled to restitution. I think the remedy should be commensurate with the grievance.

A question then arises whether any and what further consequences could result with regard to this blockade. Upon what principle could it reasonably be maintained that after the 15th of May, when the privilege of Russian vessels had ceased, neutral subjects could claim a right to be emancipated from the ordinary law of blockade? At that period all the reasons which a neutral might justly urge on account of the advantage conferred upon the enemy, or the benefit given to British commerce had vanished; and how can it be fairly contended that the effect shall continue, when the cause has disappeared? To me it seems that I have conceded to the utmost limit all that can be justly demanded on the part of a neutral nation.

I must now briefly refer to another matter: in the course of the argument, the letters which have been written by the officers commanding different ships composing the squadron were adverted to, and it was contended that the legal operation of a blockade could not be maintained at times earlier than those mentioned in the letters. Though I am prepared to admit that so far as relates to the interest of any individual

ship affected by the letters or actions of the commander of one of Her Majesty's ships of war, the claimant would be entitled to the full benefit of any results fairly emanating therefrom, yet I think it right to guard myself against the supposition that the acts or conduct of such an officer can be held to alter the character of such a blockade, such officer at the time being under the command of a superior. To elucidate what I mean I will refer to the case of *The "Henrick and Maria."* (1 Rob. 146.) There the officer commanding the capturing vessel erroneously stated to the master of the neutral ship that the blockade was of greater extent than in reality it was, and this Court decreed restitution; and most just was such an administration of the law in protecting the party misled; but it would have been a most extravagant conclusion to have administered a remedy wholly beyond the disease, and to have held that the character of the blockade was changed, and its efficiency impaired with respect to other **[138]** vessels, where there was no misleading, and no mistake. This also was precisely the course pursued in the three cases reported in the notes to *The "Juffrow Maria Schrœder."* (3 Rob. 158.)

In the case of *The "Vrouw Barbara,"* the vessel was taken on her voyage from Havre to Hamburg; she had been stopped and examined on going to Havre, and had been informed, in effect, that she might do so. The master knew of the blockade, and understood that it had been relaxed. Lord Stowell restored the vessel, and very properly, because she was permitted to go in. So in the case of *The "Henricus,"* the Court held that the permission to go in with a cargo included the permission to that ship to come out with a cargo. So in *The "Venscab";* but mark what Lord Stowell said—"I beg it may be understood that I hold that the blockade existed generally, though individual ships, in some few instances, are entitled to exemption from the penalty, in consequence of the irregular indulgence shown to them by the blockading force. It has never been held by the Court that no blockade existed from November 1798 to September 1799." And such, in fact, was also the case of *The "Juffrow Maria Schrœder."*

I apply that doctrine to the present case; and it is on that doctrine I undoubtedly shall act. Wherever any vessel, with regard, for instance, to the Order in Council of the 15th of April, has gone in, I shall give to every neutral vessel coming out of Riga at the period so named, i.e., the 15th of May, the benefit of restoration. If it can be shown that any vessel has been permitted improperly to enter, or come out, I shall confer the same benefit on such vessel; and even if there were—as at present there is none—any vessel that had been permitted so to do, I should still hold with Lord Stowell, that such an unfortunate relaxation of the blockade by negligence does not at all impair its general validity.

I must now examine the law attending blockades generally, and especially blockades de facto; I do not mean to state the authorities; we all know where they are to be found. If these doctrines do not stand in the decisions of Lord Stowell, and the books referred to, there is no firm foundation. We all know that there are blockades by notification, and blockades de facto; we must bear in mind the attributes belonging to each, and the distinctions between them.

And first let me observe with respect to the word notification, I am not sure that that word, as applied to this subject, has ever received any clear definition; indeed, I believe that the cases show that even Lord Stowell is reported to have used these **[139]** expressions in a very lax sense; to have used the expressions notify and notification without its being possible to affix to them their peculiar strict meaning; I refer particularly to the case of *The "Rolla"* (6 Rob. 364.) Notification in its strict sense was, I think, well defined by Dr. Twiss, when he stated that it was a communication of a blockade by the Government of a belligerent to the representatives of foreign courts in a belligerent country, or by the ministers of the belligerent country resident abroad to the respective Governments to which they were accredited. Thus far is clear; but I am inclined to think that a similar effect has been ascribed to similar communications made by commanders-in-chief even to a hostile Government. The case of *The "Rolla"* appears to me to exemplify this proposition. It will not, however, be necessary for me to determine whether any promulgation short of a state communication will carry with it the consequences belonging to a notification strictly so called. The legal attributes belonging to a blockade by a notification have been so clearly defined I need not expend time in discussing them.

The questions which I am about to discuss relate principally to a blockade de facto.

All authorities, as well as common justice require that the subjects of neutral states should not be injuriously affected by such a blockade, without previous intimation of its constitution. Notice, therefore, is indispensably requisite; but it is another and a different question what shall constitute notice. It is, indeed, incapable of accurate definition. Lord Stowell (*The "Rolla,"* 6 Rob. 367) thus expresses himself: "All that is necessary to make a notification"—whether we take notice or notification will not signify—"effectual and valid is, that it shall be communicated in a credible manner; because, though one mode may be more formal than another, yet any communication which brings it to the knowledge of the party, in a way which could leave no doubt in his mind as to the authenticity of the information, would be that which ought to govern his conduct, and will be binding upon him."

It is clear, therefore, that to answer its end and purposes the notice must be, of whatever it may consist, adequate to convey a knowledge to all concerned of the danger of approaching a blockaded port. Notice to each individual vessel or to each merchant concerned is impossible; but unless the notoriety of the blockade be so great that, according to the ordinary course of human affairs, the knowledge thereof must have reached all engaging in the trade to the ports so blockaded, a warning is indispensably requisite; and we shall presently see what dis-**[140]**-tinctions in this respect necessarily exist with respect to egress and ingress.

I concur with Lord Stowell in thinking that, by lapse of time and other circumstances, a blockade de facto may become so notorious, that knowledge must be generally presumed. In some cases the notoriety may be so great as to amount to a presumptio juris et de jure, in others it may only throw the onus of proving ignorance on the claimant. If there be room for reasonable doubt, the subjects of neutral states are entitled to the benefit of it.

Though the term notoriety may not be precisely the expression of all I wish to convey, yet, upon the whole, it is the best I can use for the purpose of declaring my views upon this subject. What shall constitute notoriety, I repeat, is incapable of definition, but we may make some approach to giving that term its due effect, by seeing what materials necessarily must exist to form notoriety.

I apprehend that they are the following: first, facts belonging to the blockade itself; secondly, communications, howsoever made, of the blockade having been established; and thirdly, all the circumstances peculiar to the case.

Under the first head, the continuance for a time more or less long of a blockading squadron off the port blockaded, the prevention of vessels entering and departing, the indorsement upon the papers of vessels turned back and the fact of capture, must necessarily tend to constitute notoriety; for these are facts so deeply affecting the interests of the commercial world, that it would be contrary to all human experience to suppose that they are not circulated at least with the ordinary rapidity with which mercantile communications are made.

Under the second head will be comprised all verbal or written communications made by officers or other persons in authority to persons engaged or likely to be engaged in commercial transactions connected with the blockaded ports. These will have their weight towards establishing the requisite publicity according to the clearness with which, and the times when, they occurred, and the number and condition of persons who were made cognizant thereof.

Thirdly must be taken into consideration the whole circumstances which may be said to be component parts of the history of the transaction; for instance, the locality of the places blockaded, the probability—a probability known to the public—of the blockade being imposed, the facility of communication of the fact of the blockade to all persons accustomed to trade with the port blockaded; and especially due considera-**[141]**-tion must be given according to these facts of the time that has elapsed between the establishment of the blockade and any attempt to trade with that port. Nor must we forget that the residence of the parties who may embark their property in such commercial undertakings may require in justice to be duly considered; for it is obvious to all, that intelligence which must become known to countries in the neighbourhood of blockaded ports may be utterly unknown to the inhabitants of distant states, where all communications of facts must occupy a longer space of time, and in some instances be less likely to take place at all. Hence the well-known distinction in favour of the United States of America and of the Brazils.

Let me now, before proceeding to the evidence on the point, say a word as to

the consequences of complete notoriety when once proved to exist. In such case I apprehend that every vessel seeking to trade in whatever way with the blockaded port must be taken to be cognizant of the blockade, and that, generally speaking, under such circumstances, no vessel is permitted to go to the mouth of the blockaded port itself on any pretence whatever; that the sailing with intent to enter such a port is itself a breach of blockade; and that warning off is only necessary where there does not exist a notification or such a notoriety as I have endeavoured to describe. This I apprehend to be the law, and in both cases to be founded upon the same principle, viz., that what is necessary to justify a blockading force in capture, is that the captured had, or might have had, a knowledge of the blockade. And whether this knowledge be acquired through the medium of notification or notoriety, is one and the same thing; it is the knowledge that affects the party, and not the mode in which that knowledge was conveyed.

Having endeavoured, with as much perspicuity as the nature of the subject admits, and is within any limited power, to notice what constitutes notoriety, I will now examine the evidence in the case.

With regard to the evidence to be produced in the Admiralty Courts with respect to blockades, and, indeed, I may say all other questions of prize, I believe the practice to have been, not to entertain objections to the admissibility of the evidence offered, but to receive all that might be tendered; and certainly we have in this case the license of evidence of every kind and description which could well be offered to the consideration of the Court.

I apprehend that this, so far as I know, the universal practice of the Court, was founded on several reasons. First, be-[142]-cause the Prize Court being not a Municipal Court, but a court for the administration of public law, was not restrained, with regard to evidence, by those rules which are applicable to questions of municipal law.

Secondly, it would be most difficult, even if possible, to have laid down any rules of evidence; because this Court having to concern itself with the transactions of various nations, could never construct a code in conformity with all their various rules, and consequently injustice might be done by excluding, in transactions in which they were interested, proofs recognised by themselves.

Thirdly, because of the extreme difficulty of procuring what we are accustomed to call the best evidence, when such evidence is to be obtained from distant countries.

Fourthly, because, though the Court may receive all, it will form its own judgment according to the circumstances of the case, of the weight to be attributed to each species of evidence, and is not supposed to be liable to the error of giving undue importance to any evidence, merely because it does not exclude it.

Lastly, though not least, because as all its judgments may be exposed to the test of an appeal, the Superior Court may, with greater facility, correct any error arising from too great force being attributed to any species of testimony, than it could remedy an evil arising from exclusion.

Now, then, as to the facts of this blockade, it is beyond all doubt true that from the 15th day of April there were four vessels of war stationed on or about the coast of Courland, and at least this may be said without the risk of contradiction, that these vessels did, during that period, perform some of the duties, if not all, of a blockading squadron. We have a list of 103 vessels bound to Russian ports, boarded or spoken to by these vessels during a period of six weeks; every one, or nearly every one, of these vessels had her papers indorsed with a notice of the blockade.

Beyond all possibility of doubt these facts must have been known in the blockaded ports, and in their vicinity; for can it be imagined that the masters of all these vessels did not make known, wherever they went, the circumstances of their having been boarded, and of notice of the blockade being given to them? It would be contrary to the course of human nature if it were otherwise. The interests of the masters and their employers would induce them to make these facts as public as possible. [143] To suppose publicity was not given would be to raise a conjecture in defiance of all probability.

There were other facts, too, of which the whole world was immediately cognisant; the unfortunate death of Captain Foote in April, then in command of the squadron; the attack and capture of the vessels at Libau; the presence of Sir C. Napier in the Baltic, with the largest fleet that ever had been despatched to those seas, and where

for years a British man-of-war had not appeared. All these and many other facts must have given rise to inquiry, and must have produced knowledge. Indeed, it is not too much to say that the eyes of all Europe were fixed upon the proceedings in the Baltic; and least of all is it to be supposed that the eagle sight of commercial men was blinded upon an occasion so deeply affecting their interests.

Leaving, then, the consideration of the facts which tended to render the blockade notorious, let me now advert to the communications, to use as appropriate a term as I can, distinct from the notification of the blockade itself in the strictest sense of that term.

Sir C. Napier deposes that on the 11th of April he requested Her Majesty's Ministers at Berlin, Copenhagen, Stockholm, and Hamburg, to give notice to the British Consuls and Vice-Consuls that he intended immediately to place the whole of the Russian ports in the Baltic and the Gulf of Finland and Bothnia under blockade.

What was done thereupon? Lord Bloomfield deposes that on the 14th of April he received such communication from Sir C. Napier, that on the 15th he communicated it to the British Consuls in the various parts of Prussia—Memel and Stettin—desiring them to give publicity to such information; that he communicated the same intelligence to the Prussian Minister for Foreign Affairs, and he subjoins a copy of that Minister's answer. That answer is dated the 28th of April, and it encloses a copy of an official declaration to the merchants of Prussia annexed to it.

It bears date the 21st of April. It informs the merchants that Sir C. Napier was about to take measures for establishing the blockade in question, and it apprises them that confiscation is the penalty attending a breach of blockade, and that the Prussian Government will not be able to intercede in consequence of any vessel being captured for attempting a breath of blockade. That is the notice given by the Prussian Government to their own subjects. Lord Bloomfield concludes his affidavit by deposing that the blockade of Libau, Windau, and the Gulf of Riga, was matter of public notoriety, referred to in all the **[144]** newspapers, and a matter of general conversation in political and commercial circles, in Berlin as early as the 1st of May.

Mr. Buchanan, Her Majesty's Minister at the Court of Denmark, deposes that on the 12th of April he received from Sir Charles Napier the following despatch:—

"Duke of Wellington, in Kioge Bay, April 11, 1854.

"Sir—I have the honour to acquaint your Excellency, for the information of the foreign ministers, consuls, vice-consuls, and consular agents residing in the kingdom of Denmark, that Her Britannic Majesty's fleet will sail this day for the Gulf of Finland, to place in a state of blockade the whole of the Russian ports in the Baltic, and in the Gulfs of Finland and Bothnia."

Upon receiving this notice Mr. Buchanan immediately addressed a note to the Minister for Foreign Affairs to the Court to which he was accredited, giving him information thereof, and he received a letter acknowledging the receipt of that communication.

Mr. Buchanan, having ascertained that Sir C. Napier had sailed with the fleet on the 12th of April, made an express communication of that particular circumstance to the Danish Minister of Foreign Affairs, and to all the foreign ministers, and other foreign diplomatic and consular agents at Copenhagen. On the 14th of April a notification of such information was made in a public journal.

Mr. Hodges swears that on the 14th of April he made similar communications to the Governments of Lubeck, Hamburg, and Brunswick.

It is true these are not notifications by Sir C. Napier himself of an actual blockade having been established, or to be established on a given day, but these communications do make known to foreign Governments the intention to constitute this blockade immediately. It is, therefore, a fact, proved beyond all shadow of doubt, that Prussia, Denmark, and the Hanse Towns were apprised of what was about to take place; and the public notice taken shows their sense of such communications, their conviction that as soon as practicable, the intention of Sir C. Napier would be carried into effect, and that their Governments—the Prussian more especially—duly apprised their subjects of what would be the consequence of violating the blockade.

Now, of the perfect notoriety, and, I will add, the legal notoriety of such intention to blockade, no human being can entertain a doubt. The least that can

be said is that the subjects of these neutral states knew what was about instantly to be done.

What, then, is the legal effect of such an authorised communication? I admit that it is not the publication of a notice of **[145]** an actual blockade, or that it will be imposed on a certain day. Had a day or time been fixed such a communication would in effect have been a notification. The communication, however, is as nearly as possible an approach to such notification—was so received by the Prussian Government, and was treated as such by them in the documents which they published to the mercantile classes. What was the consequence? The attention of all mercantile classes was roused to the subject; their most important interests were at stake; and it is inconceivable that they did not from that time use every endeavour in their power to obtain information on the subject, and avail themselves of every channel of knowledge to ascertain when the blockade was actually imposed.

It was not only their interest but their bounden duty to pursue such measures, for it never can be reasonably contended that, having received such information, the subjects of neutral states had a right to shut their eyes and to stop their ears against the reception of that knowledge which such a state of circumstances would naturally generate. They had no right to say, because this is not a notification of a blockade at a particular time or hour, present or to come, we will consider this intimation of what is about to take place of no consequence, and we will contend that we are entitled to be placed in the same situation as if no such knowledge had been conveyed to us—as if the purpose and intention of Sir C. Napier had been kept secret from us.

I am therefore of opinion that these communications are strong evidence tending to prove the notoriety of this blockade; for if, as I have already said, the blockade was established in fact, these circumstances must have led to inquiry, and inquiry to information.

[The learned Judge then, having examined with great minuteness the evidence of the officers of the squadron and of the consuls at the different ports as to the publication of the blockade, compared it with that produced by the claimants, and pointed out that the claimants' evidence, for the most part, tended to prove what was not disputed, viz., the absence of formal notification; but ignored the point at issue, viz., the general notoriety of the blockade de facto. He then continued.]

Can I believe that, after the evidence that I have recapitulated as to the fact of the blockade itself, as to the visiting so many vessels, and indorsing their papers—after all the communications made by the ministers, the consuls, the officers, the publications at Memel and at Riga—considering the facility of communication between all the ports of the Baltic, the earnest **[146]** desire which self-interest would prompt to acquire the best, the earliest information; can I believe, on a comparison of this evidence, that the fact of this blockade was not known, at least, at a very early period in the month of May? Lord Bloomfield says it was known prior to the 1st of May. Supposing it was not known before in other places, how long would the news be travelling from Berlin? I will not attempt to fix the day, because it is obvious that knowledge may have reached various ports at different times.

I cannot in my conscience entertain any rational doubt that the fact was so; and I hold myself bound, therefore, to pronounce that this blockade, by the period I have stated, was matter of public notoriety. But I wish to proceed with all the care and all the caution which an earnest desire to protect the subjects of neutral states can possibly dictate; and if there be a rational doubt, however small, I wish to give them the full benefit of it. I shall, therefore, limit my conclusion by stating that I consider this blockade to have been, at the time mentioned, a matter of notoriety, yet not of such notoriety as to bind the neutral merchant absolutely and without power of redemption, but sufficient to throw upon him—and I am well warranted by authority in taking this position—the onus of proving, if it should be in his power to do so, that he was pursuing his avocation in ignorance of that measure which had generally become so publicly known.

By these conclusions I shall be guided in determining the cases brought before me with respect to a breach of the blockade of the coast of Courland, and, I hope, with a just regard to the circumstances of each particular case.

I am happy to say I have arrived at the last part of this case which requires a separate discussion. The branch of inquiry on which I am now entering involves two questions:

First, whether the 16th article (*a*) of the treaty of Great Britain with Denmark 1670 be now in force, and if so, what is the construction to be put upon it?

Similar questions arise with respect to the 11th article (*b*) of the treaty of 1661 with Sweden.

**[147]** It is admitted that these treaties were made at the time they purport to bear date, and consequently were engagements binding upon the contracting powers. To prove, therefore, that the treaties themselves, or any part of them, are not operative at the present time must be an onus on those who assert such position.

The question of revocation of treaties is, I believe, almost novel in these Courts. I must therefore state what are the principles, which I presume ought to govern the Court in so important an inquiry. In one respect, states contracting with each other in forming treaties, dissolving treaties, or altering treaties, stand in a very different position from individuals. Independent Governments are not bound by any particular form, either in making contracts, or changing, or annulling them. Forms are indeed in use, but as to contracts affecting only the mutual interests of the contracting parties, they are not, I apprehend, bound to observe them.

Though some arguments were addressed to the Court, the aim of which might be to prove that these articles were obsolete, yet without entering into the question whether treaties can so fall into desuetude, I think the whole history of these treaties, and the discussion respecting them so late as 1793, demonstrate that such a position cannot in this case be maintainable.

The only question which has been substantially raised for my decision is, if I understand it rightly, whether the Danish and Swedish treaties before mentioned have been as to particular articles revoked by the convention of 1801. The terms in **[148]** which such a proposition is stated admit their existence up to that period.

If one written statement is to be revoked or altered by another there are only two means by which such effect can be wrought—direct revocation or necessary implication. Direct revocation is not alleged; in order to constitute revocation by implication the inference must be free from doubt; it must be proved that the provisions contained in the latter instrument are such as to be wholly irreconcileable with those of

---

(*a*) XVI. Alterutri Confœderatorum ejusque Subditis Populove cum alterius hostibus Commercium habere, atque Merces quascumque (prohibitis solummodo quas Contrabandas vocant exceptis) advehere et subministrare absque ullo impedimento licebit, nisi in Portubus locisque ab altero obsessis, quod si fecerint, liberum tamen ipsis erit, vel obsidentibus bona sua divendere, vel alium quemvis Portum, locumve non obsessum sese conferre.

(*b*) XI. Quamvis superioribus Articulis hujus Fœderis ac Amicitiæ Legibus prohibitum sit, ut neuter Confœderatorum alterutrius Hostibus auxilium atque præsidium præstet, subintelligi tamen nullo modo debet, Commercia et Navigationem illi Confœderato, ejusque Subditis ac Incolis, qui Bello non est immixtus, cum Hostibus illius Fœderati, qui in Bello versatur, omnino denegata esse. Cautum tantummodo sit interim ne Merces ullæ vocatæ contrabandæ et specialiter nec pecunia nec commeatus, nec Arma, Bombardæ cum suis Igniariis et aliis ad eas pertinentibus, ignes missiles Pulvis tormentarius, fomites alias Lunten, Globi, Cuspides, Enses, Lancæ, Hastæ, Bipennes, Tormenta, Tubi Catapultarii, vulgo Mortaria, Inductiles Sclopi, vulgo Petardæ, Glandes Igniariæ missiles, vulgo Granadæ, Furcæ sclopetariæ, Bandaliers, Salpetræ, Sclopeti, Globuli, seu Pilæ quæ Sclopetis jaculantur, Cassides, Galeæ, Thoraces loricatæ, vulgo Cuirasses, et similia Armaturæ genera, Milites, Equi, omnia ad instruendos Equos necessaria, Sclopethecæ, Balthei et quæcunque alia bellica Instrumenta uti nec Naves Bellicæ et Præsidiariæ Hostibus suppeditandæ devehantur ad alterius Hostes, sine periculo, si ab altero Confœderatorum deprehendantur, quod predæ cedant absque spe restitutionis. Neque Confœderatorum alteruter sinat ut suorum cujusquam opera Hostes aut perduelles alterius utantur, Navesque vendantur, commodentur, ullove modo usui sint alterutrius Hostibus perduellibus, ad ejus incommodum aut detrimentum; Alterutri autem Confœderatorum ejusve Populo Subditisve cum alterius Hostibus Commercium habere, iisque Merces quascunque (de quibus suprà exceptum non est) advehere licebit, idque sine ullo impedimento, nisi iis in Portubus, locisque, qui ab altero obsidentur: Quod si acciderit, vel Obsessoribus Bona sua divendere, vel ad alium quemvis Portum non obsessum libere se conferre permissum erit.

the former; that the two cannot reasonably co-exist together. The presumption is against such a revocation, because, if the contracting parties intend to alter a subsisting article, they would naturally so express themselves; they would use revocatory terms.

Now the articles to which I must more particularly address my attention are the 16th of the Danish, and the 11th of the Swedish treaty, which preceded it somewhere about nine or ten years. The 16th article is in these words:—

"It shall be lawful for either of the contracting parties, and their subjects or people, to trade with the enemies of the other, and to convey and supply to them any merchandize whatever, except only those prohibited goods which are called contraband, without any impediment, unless in parts and places besieged by the other; which, if they should do, they shall nevertheless be at liberty either to sell their goods to the besiegers, or to carry them to any other port or place not besieged."

This treaty, I should observe, was originally in Latin.

The convention of June 1801, is between Great Britain and Russia, but Denmark and Sweden afterwards became parties to it. It is mentioned that the intention was that all the former treaties should be renewed by this convention, when Denmark and Sweden acceded to it; for they say, "save and except the differences which result from the nature of the treaties and engagements antecedently subsisting between England and Denmark, of which the continuance and renewal are secured by the aforesaid convention."

I take it, therefore, that the convention of 1801, generally confirmed, revived, and brought into existence, the same as if there were no war, all the treaties previously subsisting between Denmark and England, and, amongst others, this identical treaty. That confines the consideration to the simple question whether anything is to be found in the convention of 1801 which will annul directly or indirectly the article in question.

I hardly know where to fix my attention in this case. Perhaps it is better to begin by observing that, beyond all doubt, there are no revocatory clauses, and that the question is one of necessary implication; whether, in fact, it was the intention of these parties, without stating it, to substitute the provisions in **[149]** the treaty of 1801 for the 16th article of the Danish treaty, and the 11th article of the Swedish treaty.

I am not quite sure whether I am correct, but I understood the argument of Her Majesty's Advocate to be founded upon the 3rd article of this treaty, and especially upon the division of it marked No. 4.: "That in order to determine what characterizes a blockaded port, that denomination is given only to a port where there is, by the disposition of the power which attacks it with ships stationary or sufficiently near, an evident danger in entering. That the ships of the neutral shall not be stopped but upon just causes and evident facts; that they be tried without delay, and that the proceeding be always uniform, prompt, and legal."

I have looked through the whole of this treaty very carefully, and have paid due attention to the argument of Her Majesty's Advocate, as I understand it, that because the convention of 1780 has been embodied in this, almost word for word, with the single exception of the two articles which were most objectionable to Great Britain, viz., that free ships made free goods, and the article of search, of notice, and of blockaded ports, therefore, by reason of the omission on the occasion in question, this treaty must be considered a substitution for, or revocation of, the 16th article of the treaty of Denmark of 1670.

On this point I would first observe that, beyond all doubt whatever, there are no revocatory words, and I must say that I cannot discover any terms in this treaty which I am justified in construing to be a revocation by implication, nor any intention to substitute this treaty, or any part of it, for the stipulations contained in the 16th article, and I must add that I do not perceive the slightest inconsistency in the 16th article of the Danish treaty and this treaty of 1801 subsisting together. I will add to this, that with regard to the Swedish treaty in 1803, that article which contained a provision as to contraband, was altered, and no notice was taken of the remainder.

In the documents themselves, I see no reason to pronounce a judicial opinion in favour of a revocation. There are circumstances, however, which, if I am correctly informed, tend to shew that some conception was entertained that a revocation was intended. I advert to the fact that the reservation as to Sweden and Denmark, inserted in the instructions from the Admiralty in 1793, were not inserted in any

instructions issued in the war commencing in 1803, and also, what appears still more extraordinary, I cannot find any trace of the articles in question becoming the subject of discussion in these Courts. [150] But if all I have now stated be correct, I do not perceive how such circumstances ought to influence my present judgment, for the omission to which I have alluded may possibly have been unintentional, or even, if intentional, it was the act of one of the contracting parties only. I am at a loss, indeed, to conceive how it happened that when so many Danish and Swedish vessels were captured, these articles were not brought into controversy; but the omission to seek a remedy cannot alter a contract.

For these reasons I feel myself bound to come to the conclusion that the 16th article of the treaty with Denmark of 1670, and the 11th article of the treaty with Sweden of 1661, are unrevoked and in full vigour.

The most difficult task remains; for admitting these articles to be in force, what is their true meaning, and how are they to be construed?

I apprehend that I must first look to the articles themselves, and if the meaning intended to be expressed is clear, I am not at liberty to go further.

If there be doubt, I should in an ordinary course seek elucidation by reference to the circumstances under which the treaties were concluded. I have used my best endeavours to obtain information, but I must candidly acknowledge that I am unable to refer to any auxiliary information of this description. I cannot find any information as to the peculiar circumstances attending the country at the time these treaties were made which would throw any light upon the present question. Contemporary exposition would be the next resource; I have none, and I have not heard that there was any contemporary exposition. In the very able argument addressed to the Court I was not apprised, and I do not know, whether these articles were carried into execution, and if yea, how, during any war prior to 1793, or if so, to what extent.

Again, with regard to modern exposition, this may be of two kinds:

First, an explanation solemnly agreed between the two states reconcileable with the terms of the articles. An interpretation of this kind, though it might not be quite in unison with my own opinion, I should hold myself bound to accept.

Secondly, an interpretation which the words of the article do not admit. Such an interpretation might be more properly called a substitute for the original meaning, but agreed to by both the contracting powers. Assuming this to happen, I must have the authority of the Government under which I sit that such an agreed interpretation has taken place. I should then receive it, not as a construction, but as an agreed settlement of a difficulty.

[151] It is quite right that the Court of Admiralty should decide whether one treaty has been revoked or altered by another; it is equally within its province to construe the meaning of a treaty; but if any change has taken place by diplomatic arrangements only as relates either to the subsistence and continuing effect of the treaty, or as to any alteration in its meaning, such is matter for the Government, and not fit for a judicial tribunal.

It has been contended that these treaties must have been intended to confer some peculiar privileges on Denmark and Sweden, otherwise why should such articles be framed? or, to express the same idea in other words, that in case of War, Denmark and Sweden should, as neutrals, have some advantage over other neutral countries.

First, I will observe that it may be not altogether unusual for a treaty to be made merely declaratory of the law, not giving any peculiar advantage to either of the contracting powers; and such is the opinion expressed by Mr Wheaton, with regard to the treaty with America in 1794.

Without any reference to these particular treaties, I must express my serious doubt whether the principle involved in such proposition can be maintained,—whether it was quite consistent with the Law of Nations to confer on one neutral rights as to blockades which did not belong to others. The true principle is, that the evils arising to neutral nations from war, and especially the exercise of the right of blockade, are evils which ought to fall on all according to the same rule; that it would be wholly contrary to law and justice to allow one neutral to trade with a blockaded port, and exclude others. So, in a less degree, but still equally in principle, it could not be consistent with justice to relax the precaution or diminish the safeguards against entering a blockaded port in favour of one or two neutral

states, to the prejudice of others; because so doing would be giving them facilities and inducements which others did not possess, and so confer upon them a special commercial advantage not warranted by other distinguishing circumstances; and moreover, that such a measure might justly be complained of on another ground, viz., that all restrictions with regard to blockades are only justifiable to the extent that they are necessary to effect their object; and that if a restriction is not necessary to be imposed on one neutral state, it is equally unnecessary to be applied to another.

I will illustrate the foregoing reasoning by reference to the subject of contraband. Now, we all know that there is contraband by the general law, contraband by special treaty, and articles excepted from contraband for special reasons, particu-**[152]**-larly as being the growth and produce of a country. Suppose France and Russia to be at war, and Belgium and Great Britain to be neutral countries, what would be said of a treaty whereby France agreed to allow the manufactures of Liege, being of the nature of general contraband, to go without let or hindrance to Russia? would not Great Britain have a right to say, The whole law of contraband depends upon the right of self protection; if necessary at all, it is equally necessary against all; and you have no right to keep the burden upon me, and relieve another to my disadvantage? For these reasons, without saying to what construction I may be compelled to come, I think strong objections in principle lie to the proposition contended for by Dr. Twiss.

To carry this matter a little further. When I am told that by these treaties extraordinary rights were conferred on Sweden and Denmark, I should have liked to have known what was the law governing blockades such as the present in those days when the treaties were framed, and in what particulars these treaties differed from that law. It would, perhaps, not be easy to shew what the law was. It is within the bounds of possibility, looking at the unsettled state of the law at that period, that the alterations supposed to have been made by those treaties were only an exemplification of the present law—a declaration of what should be taken to be the law.

On the other hand, however, it must be admitted that the circumstances of the exception from the Admiralty orders of 1793, and Mr. Keene's (*a*) negotiating about the same period, shew that, in the opinion of the British Government at that period, there was some peculiar privilege reserved by these treaties to Sweden and Denmark. That privilege was construed to be a right to warning.

These instructions are very short, and we must recollect that upon the occasion when they were issued, Great Britain and other European countries conceived that such was the state of warfare with France, that it was lawful to resort to the most extraordinary measures for the purpose of crushing the French nation, even to the attempt of endeavouring to starve them.

**[153]** The first object of these instructions is contained in article 1. The next is, all neutral vessels were to be detained, and the right of pre-emption exercised; and to the best of my recollection, I believe they received ten per cent. for freight. The second article was,—

"It shall not be lawful for the commanders of His Majesty's ships of war, and privateers that have, or may have, letters of marque against France, to seize all ships, whatever be their cargoes, that shall be found attempting to enter any blockaded port, and to send the same for condemnation, together with their cargoes, except the ships of Denmark and Sweden, which shall only be prevented from entering on the first attempt, but on the second shall be sent in for condemnation."

---

(*a*) Mr. Keene, Chargé d'Affaires from His Britannic Majesty, in a note addressed to the Cabinet of the King of Sweden, said, "The exception in favour of Sweden in the article of these regulations concerning blocked up ports, is founded upon the same treaty, the principles of which are perfectly consistent with the prescriptions given to the commanders of His Majesty's armed vessels. It can certainly not be imagined that the object of this treaty has been to permit to the vessels belonging to neutral powers to renew their attempts of entering into blocked up ports as many times till they succeed in throwing provisions into them; they have only been exempted from the punishment of confiscation on the first attempt."—Annual Register, 1793, p. 174.

Now, it is perfectly clear to my mind, and no person can deny, that it must have been intended by these instructions to have referred to treaties which were in existence, and that in consequence of these treaties this privilege was given to Denmark and Sweden. When we go to the third article, I must confess, that when one comes to construe the treaty itself, it does leave a court of justice in a great difficulty indeed. The third article, supposing that I understand it rightly, and that pains were taken in forming these articles, relates to blockade by declaration, in which case Danish and Swedish ships are all put on the same footing as others, and there is no exception at all. I must not call that a construction of the treaty, because that would be wrong; this was the step taken by His Majesty's Government at that time in consequence of the treaties between Denmark and Sweden.

There are several reasons which render it very doubtful whether I can take these instructions as my guide.

First, I can hardly consider them as a construction of the words of the articles, for I can find no words of the articles to bear them out. They can be made to bear them out only by putting words into the articles which appear neither expressly nor by implication. There is not a word as to warning off the first time to be found in any one of the articles, nor anything approaching to it.

Secondly, as an exposition of the article, they are loose and unsatisfactory; for the great question of all will still remain unsolved, viz., whether a Danish vessel would be entitled to a warning if she proceeded with a knowledge of the blockade de facto, and made an attempt to break it; that is not solved by these instructions nor by anything else.

Thirdly, this exposition, if such it may be called, or agreed construction, was temporary only, and, so far as I know its duration ended with that war.

**[154]** Fourthly, Mr. Keene's despatch justifies me in saying that this was not an exposition of the articles, but a substitution for them; and I apprehend that where such a substitute for explanation is agreed upon, I am not at liberty to engraft it into judicial proceedings, except under the authority of the Government under which I sit, and no such authority I have.

If, then, I am not authorized to take these instructions as the arrangement made between the two Governments, and as a permanent settlement, I must put upon those articles that interpretation which I think the words in which they are expressed require, and which they were intended to bear at the time of the contract; that is, if we ought, with our little means of judging, to say what the contracting parties intended in 1661 and 1670.

First, it is, I conceive, perfectly clear that these articles do not give any general right or liberty to go to blockaded ports.

The words of the 16th article are: they shall have freedom, of course, to go anywhere they please without impediment "unless in parts and places besieged by the other." Therefore, construing, as I believe I must, obsessum to be commensurate with the siege or blockade, or both, it was intended that Denmark and Sweden should not convey merchandize to blockaded places.

With regard to what follows, I might enter into some nice disquisitions with respect to the two treaties, because the treaty of Sweden, which perhaps I may call the mother treaty of the two, is in these words, "quod si acciderit," which is construed to mean, "if they happen to go to blockaded ports." The words are "quod si acciderit," the meaning may be, "unintentionally approaching them"; the words in the Danish treaty are "quod si fecerint"; these words are equally left without auxiliary explanation. They must, I grant, looking at the whole context, necessarily mean this—if they should in some way or other, but how nobody can tell, approach blockaded ports.

My opinion is, therefore, there was no general right to go to blockaded ports, and such a stipulation would not only have militated against the right of blockade, but would have been repugnant to the just rights of other neutral nations.

In what cases, then, were these articles to apply? There are insuperable difficulties to any literal interpretation of the words of the articles, arising most probably from our ignorance of the circumstances for which they were intended to provide.

It is my belief, though a belief I cannot act upon, that there was some particular commercial intercourse, a regard to which dictated these compacts, such as a supply of provisions, or some **[155]** similar commodity; for it is almost an absurdity to

suppose that these articles applied to cargoes of every description. Observe the alternative—you may take it, according to one construction, to a blockaded port, the blockading squadron must buy it, or you must take it to another port. Now, could it be supposed that a Danish or Swedish vessel should carry a cargo of silks and satins, or pig-iron, to the blockading fleet, and say, Buy my cargo, or send me to an enemy's port not blockaded? It must have been intended that the commodity offered to the squadron must have been a commodity possible to be bought; there can be no other meaning to that part of the treaty.

I incline to think that the only mode of arriving at a safe conclusion is, to determine what is not the meaning, or what is sometimes called the process of exhaustion.

It is agreed then first, that this article does not destroy the right of blockade generally. Does it mean that a Swedish or Danish vessel may, with a perfect knowledge of the blockade, sail with a cargo for that blockaded port, get in if she can without being stopped by the cruizers, and if stopped, say, "True, I was going to the blockaded port, but you have caught me; buy my cargo, or send me to another port not blockaded?"

Would that be a rational exposition? What would be the consequence? All Swedish and Danish vessels might sail for any of the blockaded ports, for Riga, get in if they could; if turned back, sail along the blocked coast, slip into Windau or Libau, or, if stopped by another cruizer, say, "I have been warned; I am in my course to some port not blockaded."

If this be the sort of warning claimed for a ship intending to violate the blockade, I say that such a construction is not only not to be found within the four corners of the treaty, but is repugnant to the spirit of it; destructive of all just rights belonging both to belligerents and other neutral states.

But there is another possible interpretation which I will put to the test. A Danish vessel, cognizant of the blockade, but without any intention to violate it, sails straight for the blockading squadron, says, "Buy my cargo, or let me go to an unblockaded port." I think this might be one of the meanings, and if such a case should occur, I would restore the vessel.

Take another state of things. A Danish vessel proceeding for a blockaded port in ignorance of the blockade. By the ordinary law of blockade she will not be condemned, unless the blockade had been notified to Denmark, or unless the blockade had become so notorious that knowledge must be presumed. Does the treaty make any difference in such a case?

In the case first supposed, of notification to Denmark, it could **[156]** not be argued that ignorance could be any excuse, when that ignorance arose from the fault of the Danish Government, in not informing her subjects, as Lord Stowell held it was the duty of every Government so receiving a notification to do.

Then consider the case of ignorance of a blockade de facto. There might be a case of general notoriety, and yet of particular ignorance; a case where, unless there was some stipulation by treaty, the presumption of knowledge ought to prevail against the fact of ignorance. Does this treaty provide for such a contingency? Possibly it might have been intended so to do. It is possible that, as this treaty is universal in its terms, and not confined to the Baltic, and as Denmark and Sweden were in those times difficult of access, this might have been the intention of the contracting parties.

Be it so, then, though circumstances have wholly changed; yet if such a case occur, Danish ships and property shall be protected.

Is there any other possible state of things in which Denmark or Sweden, (I speak of them indiscriminately) could reasonably claim a benefit under this treaty? I will exercise my ingenuity to find a case. Say a case of doubt as to the continuance of a blockade—of justifiable doubt. What is the extent of any reasonable demand on the part of the merchant-vessels in such a case? Liberty to approach the blockading squadron and make inquiries. Produce the case of reasonable doubt, and of directing the course of the vessel to the blockading squadron for such purpose I will release her.

Now, what cause of complaint has Denmark or Sweden? I have provided for every case that I can even imagine for the protection of their merchant-vessels, if their commerce be conducted with integrity and due regard to the rights of the belligerent. If there be any other state of things which could require a similar

remedy, I would provide for that also; but do not tell me that I have given to Denmark and Sweden no more than other nations could justly claim, until you have proved to me what the state of the law was prior to 1661—until you have shewn me that, either this treaty was not declaratory of that law, or, if it were not, that the Law of Nations, since 1661, has not grown up to the same proportions. Shew me, in short, that my construction is not consistent with justice, or with the fair import of the words of the treaty, and I will abandon it; but if no complaint can fairly be raised, and no grievance pointed out, I will adhere to my own interpretation, and not adopt that which the convenience of the moment or the incuria of states-**[157]** men, might have induced them to resort to, for the sake of temporary acquiescence.

Having now stated the various conclusions to which I have come with regard to this blockade and the treaties, I proceed to adjudicate upon this case of the "Franciska" in conformity with those conclusions, and, I hope also, with the true result of the evidence.

The present consideration is confined to the ship only.(*a*) The vessel is a Danish vessel, and, in the month of April, left Spain with a mixed cargo, destined for the Baltic, and bound to Elsinore for orders. Mr. Arboe, the owner of the vessel, was resident at Copenhagen. What were the precise orders the master received I have no means of knowing with accuracy. She left Elsinore on the 14th of May, and I must seek for his destination in the evidence of the master, the papers in general terms describing the voyage to be the Baltic.

The master's account on the 18th interrogatory is, that his owner's orders were to proceed to Memel, but, he says, "If there was no blockade, and if the English ships of war would permit, I was ordered to proceed to Riga, and I was sailing to ascertain this from the English when captured. The voyage was to have ended at Riga if not blockaded, and if permitted, to go in and out."

Now, it is of the last importance in this case to try the credit of the master.

First, then, he has sworn that his orders were to go to Memel, a neutral port, to which he was entitled to go, and so far well; he does not say he was to go to Memel to make inquiries there as to the blockade, but omitting all mention of what was to be done at Memel, he goes on to state that he was ordered to proceed to Riga if not blockaded.

On the 13th interrogatory he states the consignees of the cargo in Memel were Frederick Scheller; the Riga consignees he does not know. His evidence on the 3rd interrogatory is, "The place of capture was ten miles to the west of Lyser Ort; the day was the 22nd of May; the distance from the place of capture to Memel would be about 130 miles to the east of Memel, and beyond it."

I cannot easily reconcile this statement with his assertion that his orders were to proceed to Memel; but on the 30th interrogatory there is a further statement that the "Franciska" was steering her course towards Memel before the capture. Here, then, is a vessel said to be proceeding to Memel, when **[158]** she has already proceeded 130 miles beyond it towards the Gulf of Riga, and is sailing in a direction, according to the log, E.N.E. and N. and by E.; that, I confess, is a nautical question which I cannot solve with any advantage to the present claimant.

But is there a word of truth in this statement? Was this vessel sailing towards Memel at the time of capture, or shortly before? Let us look at the log: on the 21st of May, at 3 A.M., Libau was in sight E. and by N.; the course during the whole of that day was E.N.E. and N. and by E. On the 22nd she had advanced so as to get Windau in sight, and she steered N.N.E. and E. and by N., therefore she was never steering towards Memel at all, and this part of the statement is utterly false; it is not true that her course was altered to approach the cruiser when she descried her. In answer to this same interrogatory this master equivocates, and plunges still deeper into difficulty. He says her course was at all times when the weather would permit directed to the place for which she appears destined by the ship's papers. This is mere equivocation, because he knew that the clearance was for the Baltic generally, and it is utterly false to say that she was going to Memel at any time whatever.

The real truth is, that the master was going to Riga; that he was aware that the so doing might subject him to detention by a British cruiser; that he was embarrassed by the place of capture; that he could not determine what was the best course to

(*a*) On a subsequent day the cargo was also condemned.

make: so that at one time he swears he was going to Memel, which was not true, and at another that he was seeking a British cruiser for the purpose of making enquiries, which was equally false. I entertain no doubt whatever that this master was cognizant of the blockade, was seeking to violate it, and has invented a tissue of inconsistent falsehoods for the chance of escape.

There is nothing more to comment upon. The papers afford no information nor does the further proof. It was strongly urged by Her Majesty's Advocate that Mr. Arboe, the owner, had not made an affidavit deposing to his ignorance of the fact of the blockade. Perhaps that may be some confirmatory proof of the inferences I must draw from the evidence of the master and the log; but I respect Mr. Arboe for his abstinence; for sure I am from this evidence, as well as from the whole testimony regarding the blockade, that he could not have asserted his ignorance without sacrificing his conscience to his interest.

First, I condemn this ship, because I hold that the blockade was notorious at Elsinore on the 14th of May, the day this vessel sailed.

**[159]** Secondly, because the master has deposed falsely, and was proceeding to violate the blockade with a full knowledge thereof. Under such circumstances he can derive no benefit from the treaty with Denmark.

With respect to the other cases, I must postpone my judgment till I have had time to examine the peculiar circumstances belonging to each.

I am afraid it may be said with some truth that this judgment in parts may be diffuse, in others I may have been guilty of repetition; but when it is considered that I have had, in the space of one week, to make some inquiries, as far as my means extended, into the history of the treaties, to weigh and digest all this evidence, and to come to my conclusion, I think it would not be expected that I should be as concise or as accurate in my expressions as I otherwise might have wished to be. But I felt, from the great interest taken in these cases, and knowing what michief might accrue by delay, that it was better to pronounce my judgment, the substance of which I believe right, than, by taking further time, to expose those interests to deterioration.

Proctors: The Queen's Proctor; Deacon.

THE "STEEN BILLE" (Beck). Admiralty Prize Court. Feb. 3, 1855.
[S. C. Sp. Pr. Cas. 161.]

*Dr. Lushington.* The "Steen Bille" sailed from Elsinore with a cargo of coals and tar on the 18th of May, and the master swears that the voyage was to have ended at Stockholm. Adhering to the opinion I have already expressed, I must hold that the owners resident at Elsinore and the master were cognizant of the blockade, unless, indeed, it were possible to show a case of entire and not wilful ignorance. But if this vessel was really going to Stockholm there was no breach of blockade, and a knowledge of the blockade matters not. The master states the place of capture to have been about forty or forty-five miles off the coast between Memel and Libau; and also, that on the day before her latitude was 56° 8′ N., and her longitude 19° 59′ E. He says that he should guess, but that he could not say with any certainty, that at the time of seizure they had varied about 16′ to the north; "I am sure," he added, "we were further to the westward than the day before."

Much evidence has been adduced to show that the place of capture was in the proper course to Stockholm. I am not convinced by this evidence, but do not mean to decide as if I wholly **[160]** discredited it. This is abundantly clear, that though it might be a proper course for Stockholm, it was also a proper course for Riga.

How, then, am I to be satisfied as to which place the master was really conducting the course of his vessel? I must look to the whole of the evidence, and see whether it is true and consistent—whether the master is deserving of credit or not.

[The learned Judge having minutely compared the master's evidence with the log of the vessel, continued.]

Hence it is clear that the ship was not going voluntarily to the northward or the westward, but that her course was as near as she could possibly lie to Riga. Part of the day it was calm, but when she did move it was to the east, and not to the west; she made above twenty miles to the eastward, and not westward.

The master says that the vessel was not, before or at time of capture, sailing beyond or wide of Stockholm, only to this extent, that at the time of capture he was

standing in rather far to the east, as he expected the wind to be wearing easterly, and he wanted to make the most of it, when he again tacked. It appears to me that the vessel had the wind adverse from the east for some time. How could the master possibly be standing so far to the east at the time he was captured, if the fact was as he has represented it? He has stated that he had gone farther to the west than he had been the day preceding. I am of opinion that he is discredited by his own log and his own statement.

If I entertained any doubt as to the destination of this vessel, there are two papers in the case which satisfy my mind that she was proceeding to Riga. The first is a letter from the owner addressed to Mr. Hellesteen, Stockholm, and dated "Elsinore, May 18," the very day the vessel left; and it requests that gentleman to procure the captain a good price for his cargo, and a good out-freight, in case he should visit Stockholm. It was put in the alternative—"in case he should visit Stockholm."

There is another letter written the same day, after ten o'clock, by the owner to the master, in these words: "I have this moment remembered that you have not bills of lading of the twenty barrels of coal tar; I have therefore made out two bills of lading for the same, as if they were taken in at Elsinore,"—I could not rely upon that circumstance at all—"as they are not written on the land pass. These you must sign immediately, and take with you. God with you and luck to Riga. Yours devotedly, A. P. Andersen."

**[161]** It is impossible to doubt which is the real and genuine letter of the two—which is the letter intended to be carried into effect, and which not. There has been an affidavit made by the master with regard to an attempt to destroy this last letter, it having been stated by the captors that the master at first refused to give it up, and then endeavoured to destroy it. I will not rely on that circumstance; the case is so clear that it is not necessary to enter upon a consideration of the evidence of the master upon the point. The only fact upon which I will rely is, that the letter was found on board.

I cannot entertain any reasonable doubt that the vessel was going to Riga in breach of blockade; and the steps which have been resorted to in order to conceal the true destination perfectly satisfy me that all parties were cognizant of the blockade. Of course I must condemn the ship.

Proctors: The Queen's Proctor; and Rothery.

THE "UNION" (Barm). Admiralty Prize Court, Jan. 13, Feb. 3, 1855.—It is only under special circumstances allowable to make inquiries of the blockading force. The Court requires the clearest and most satisfactory proof of special ignorance of the blockade.

[S. C. Sp. Pr. Cas. 164. See *The "Franciska,"* 10 Moore P. C. 74; 2 Eng. Pr. Cas. 416; 14 E. R. 417.]

This was a Danish vessel, which left Flensburg on the 13th or 14th of May, and was captured off Lyser Ort on the 21st. The defence was that she was going to Lyser Ort to make inquiries whether Riga was blockaded.

Feb. 3.—*Dr. Lushington.* This vessel was captured off Lyser Ort, on the 21st of May 1854; she sailed under Danish colours. The voyage was de facto from Flensburg to Riga, but the master, in answer to the 5th interrogatory, says, "On the 8th of May I hired the crew for Riga or Memel, and back to Memel if Riga should be blockaded."

With the exception of the bricks on board, the cargo belonged to the master, who owned a part of the vessel. The ship had on board, besides its papers, two letters to be delivered at Riga, and two letters to be delivered at Memel. On the 30th interrogatory the master deposes that the "Union" was steering direct to Lyser Ort; at the time of her being first pursued and taken, her course was altered on seeing the ship, to ascertain if Riga was blockaded.

In answer to the 35th interrogatory the master says, "I was warned by my owners not to go to any place blockaded, but I did not know, nor had I ever heard, that any port, river, or coast was blockaded." In answer to the 36th interrogatory he says, "I heard there was to be a blockade of Russian harbours, **[162]** but I never knew any blockade was established. I remained at Flensburg three or four days to ascertain if there was a blockade, and as I could not ascertain, I determined upon going to Lyser Ort to inquire." The mate says she left Flensburg on the 13th or 14th of May.

With respect to the papers found on board this vessel, the first I will notice is No. 3, which is a bill of lading of the cargo for Memel, and is dated Flensburg, 13th of May. No. 4 is a letter from Flensburg to Riga, desiring the ship might be loaded for the writer's account. The log-book states that on the 14th she left Flensburg for Riga. The entry in the log at the time of capture is remarkable. The boarding officer asked if the captain did not know Riga was blockaded? to which he answered, Nothing to that effect had been published. The claimant's translation No. 1 is a letter from certain merchants at Flensburg to other merchants at Memel, desiring them to load hemp on their account; No. 4 is a letter from other merchants at Flensburg to merchants at Riga, to load hemp. No. 7 is the clearance; at the conclusion it says, "to Memel—event (between two queries)—to Riga."

This was the evidence produced at the original hearing; since that time, further proof has been brought in, both on behalf of the captors and of the claimants, and particularly in this case.

The Court was of opinion, after a full consideration of all the evidence, that the blockade was generally known in all the ports of the Baltic; I did not fix the precise day, nor the particular port where and when such blockade became known, because it was possible that circumstances might give rise to distinctions.

Abiding by that opinion, I see no reason to conclude that Flensburg ought to be excepted, or that the blockade was not known at that port on the 12th of May, the day this vessel sailed. If, then, a neutral vessel was proceeding from Flensburg to Riga, having sailed on the 12th of May, she would be subject to condemnation, according to the ordinary law.

But this is a Danish vessel, and, conceding to her the privilege of proving if she can, that, though the blockade was matter of public notoriety, yet that her owners, when they dispatched her, were in a state of special ignorance—how stands the evidence?

Assuming that I am to give entire credit to all that has been stated by the claimants, how stands the case? Was the master ignorant of the blockade according to his own statement? I am of opinion that the evidence proves that both the owners and master were cognizant of the fact of blockade, and **[163]** relied for their protection on there being no notification; and that they determined to make the experiment, though, as appears, with some hesitation.

Their own account is, that they chartered a vessel for Memel, and, being uncertain whether Riga was blockaded or not, they sent her to Riga; or, according to another version, to inquire of the blockading force whether Riga was blockaded.

Is this justifiable? Under particular circumstances, perhaps, it may be justifiable where information cannot be otherwise procured, to inquire of the blockading force; but how can that excuse prevail in the present case? Where was the difficulty of inquiring at Memel, a neutral port, which lay in the very track, and to which port this vessel was, according to one account, primarily chartered. The owner, indeed, swears that the vessel could not inquire at any neutral port without great expense and loss; but I must be excused from giving credit to a statement which is not justified by the undoubted facts of the case.

There are other circumstances in the case to which I must advert:

There are parts of the evidence of the master which appear to me not a little extraordinary, though important only as affecting his credit. He deposes, on interrogatory 13, that even if the ship had gone to Riga, the cargo would have been sent overland to Memel. Is this credible? Look at the description of the cargo, look at its value at Riga, and its value at Memel. Am I to believe that such a cargo would be sent from a port where it would fetch a high value, by an expensive land carriage, to a port where it would fetch much less?

The reason of the master so swearing is palpable. It was the hope of getting the cargo restored: but the story is utterly incredible, and the effect upon my mind is only to prove how little credit is to be given to him.

Then look at the log; his entry May 22 is, that when asked by the boarding officer if he did not know that Riga was blockaded, his answer was, "Nothing to that effect had been published." This appears to me almost tantamount in effect to an admission of knowledge of the blockade. This answer is a defence on the ground of there not having been an official publication, not a denial of knowledge of the fact, which in my judgment was the true issue.

Then, what are the documents on board this vessel—first, the public documents; secondly, the letters?

There is a bill of lading for Memel, and a mariners' contract for the Baltic; an admeasurement bill; a list of the crew; **[164]** and the clearance, which is too ambiguously worded to justify me in pronouncing any opinion as to its effect; it is "for Memel, event (or) between two queries—Riga."

But taking these papers altogether, supposing this vessel had been taken before she had passed Memel, what was there to prevent the master averring that he was going to Memel, and nowhere else? The master was not going to Memel; he disclaims it; he was going to Lyser Ort, according to his own account; there was no charter-party on board. Memel was, according to his own statement, in reality a false destination; it became so, taking his own statement, from the moment he determined—and that before sailing—to go to Lyser Ort and not to Memel. Even if justified in the course he adopted, he has not honestly pursued it; if candid, the destination on the papers ought to have been, "to Riga, and, if blockaded, to Memel." Such would have been honest, even if the law had not permitted it.

Again, look at the letters: No. 1 dated the 14th of May, the very day of sailing, is directed to merchants at Memel, and ordering a cargo from Memel; Nos. 4 and 5 are letters of a similar description to Riga. Can there be more palpable contradictions?

As to the further proof which has been brought in, the whole substance of it is, that there was no official publication, and a full admission of the notoriety of a blockade, though a denial of knowledge of particulars.

Can I say that the claimants have established an exception to the general rule—a case of ignorance of that which was publicly talked of? It is perfectly clear that the vessel was proceeding wilfully to violate the blockade, and I must condemn her.

I may add that, where it is intended to prove ignorance of a blockade, which was a matter of general notoriety, it must be proved by the clearest and most satisfactory evidence to the judgment of the Court.

Proctors: The Queen's Proctor; and Rothery.

**[165]** THE "JEANNE MARIE" (Kolle). Admiralty Prize Court. Jan. 13, 16, Feb. 8, 1855.—Ship and freight condemned. Cargo restored on payment of captor's expenses; because, 1st, purchased prior to the war; 2nd, the owners of the cargo were ignorant of the blockade when the ship sailed, and there was no means for owner to countermand its shipment; 3rd, the neutral owner is not strictly bound by the acts of his agent, an enemy merchant.

This was a Dutch ship, which left Amsterdam in ballast, on the 18th of April, and proceeded to Elsinore for orders. She cleared out from Elsinore on the 5th of May, entered Riga on the 16th, put a cargo on board in that port, cleared out on the 27th, and was captured by Her Majesty's sloop of war "Archer" on the 30th, about fifty miles from Riga.

Feb. 8.—*Dr. Lushington.* This is a Dutch ship which left Amsterdam in ballast on the 18th of April, proceeded to Elsinore for orders, cleared out from that port on the 5th of May, entered Riga on the 16th day of May, put on board a cargo in that port, cleared on the 27th, and was captured on the 30th.

As to the ship and freight, there is no question they must be condemned for breach of blockade; and I must add that all the evidence in this case, and all the conduct of Mr. Schrœder satisfies me—if, indeed, I had not been already satisfied—of the perfect knowledge which all the parties at Riga had of the blockade de facto, and of the fallacies they indulged in with respect to the absence of formal notification, and of a blockading squadron immediately off Riga. It is much to be lamented that persons filling such responsible situations should not exercise more caution.

The cargo, however, may stand in a different position; it does not belong to the owner of the ship, but to different persons, being Dutch subjects.

The master's account is as follows: he says that the cargo consisted of sixty lasts of hemp, and twenty-nine lasts of hempseed, that the laders are Messrs. Kruger and Company, of Riga, and the owner Mr. Schrœder, of Amsterdam, for whom the cargo had been purchased in 1853.

The charter-party was signed in Amsterdam, on the 14th of April; the master received it in a letter at Elsinore. He says it was a condition of the charter-party, and so it appears, to go to Riga to load seed for Amsterdam, and that it should be

void if the vessel should be prevented by blockade. At Elsinore, the master, according to his own account, applied to the Netherland consul for advice and information, and, acting upon his own judgment thereon, proceeded to Riga.

This is, as relates to the cargo, the substance of the master's evidence; and it appears to me to be substantiated by the further proofs. Then here is a Dutch merchant, with property in [166] a Russian port, bought in December 1853 and January 1854, three months before hostilities; he charters a vessel to bring it away as soon as practicable after the ice breaks up. Such charter is entered into, and the vessel sails before any knowledge of the blockade could be supposed to have reached Amsterdam. A blockade was expected, and that contingency was provided against by the charter-party being void if it took place.

The master of the vessel was not the agent of the owner of the cargo. Assuming him to have left Elsinore with a knowledge of the blockade, it does not appear to me that such act can be ascribed to the owner of the cargo or his agent. I think, therefore, that if any breach of the blockade by ingress has been committed, the owner of the cargo is innocent.

As to egress, the case stands in a different position. The shippers of the cargo were certainly the agents of the owners of the cargo, and they ordered the goods to be laden on board this ship, in breach of blockade. Of this the owners were most probably not cognizant.

The question is, whether they ought to be held responsible for the acts of their agents. We all know that as a general rule of law, principals must be bound by the acts of their agents; but this Court, as appears by many judgments, is not disposed to carry this rule to the full extent to which it might properly be applied in ordinary transactions. It looks with indulgence, and I think with a just indulgence, to those cases where neutrals, without any fault of their own, have had their property placed in jeopardy by the breaking out of hostilities, and the acts of agents over whom they could not, at the time, exercise control, and who might have an interest in the very act which endangered the property of their principals.

I will refer to two or three cases in order to see whether the present case fairly falls within the principle. *The "Neptunus"* was a case arising out of the blockade of Amsterdam; part of the cargo, belonging to Hamburg merchants, was condemned under the general rule respecting shipments in a blockaded port; but with respect to other parts belonging to residents in Portugal, the Court was prayed to allow them to shew that the shipments were made under orders given previous to the blockade, and Lord Stowell said, "It might be attended with great hardship to neutral merchants, if a responsibility for the acts of agents in the enemy's country was to be bound down, without any consideration on them, with the same strictness with which the law imputes the acts of agents in ordinary cases to their employers; it is obvious that such agents may have [167] private interests in shipping off the merchandise of their ports, whilst under blockade, without attending sufficiently to the risk of their principals" (3 Rob. 174). Accordingly, he permitted the orders to be produced, that it might be seen whether there had been time for counter ordering the shipments after the notification of the blockade, and whether due diligence had been used for that purpose on the part of the several claimants. Upon the production of the order and the subsequent hearing of the claim he said, "The claimant stands, therefore, fully justified as far as his own personal act can be considered. But then it comes to this general question, which I am not aware that the Court has yet fully decided, whether the owners are in all cases bound merely by the acts of their agents. The abstract rule is undoubtedly just, that persons are bound by their agents; but two or three considerations weigh much to induce me to limit the extent and application of this principle in these particular cases. In the first place, I cannot but recollect that the law of blockade is a thing rather out of the common course of mercantile experience; it is new to merchants and not very familiar to lawyers themselves. It might, therefore, be a little too rigorous to expect, in the very first instance, an exact compliance with the strict rule of law. A second consideration is, that the agents of foreign merchants in the enemy's country, that country being under blockade, do not stand in the same situation as other agents; they have not only a distinct, but even an opposite, interest from that of their principals, to fulfil the commission, at all risks, as rapidly as possible, for their own private advantage and for the public interest of their country, at that time under particular pressure as to the exportation of its

produce. This may fairly be allowed to impose a strong obligation on the candour of the Court not to hold an employer too strictly bound, on mere general principles, by an agent who may be actuated by interests different from those of his principal" (ibid. 176).

Lord Stowell again enunciates the same principle in *The "Adelaide"* (ibid. 284), where he also says, with reference to the shipment of a cargo by an agent, "There must be time to give the principal an opportunity of countermanding;" and he held in that case that there was not sufficient to affect the American merchant with culpable negligence, and that he was not to be held strictly bound by the act of his agent.

I will also mention the case of *The "Juffrow Maria Schroeder,"* not that in the third volume, but reported in a note to *The "Potsdam"* (ibid. 89), in the fourth volume. The note is to this **[168]** effect: "A quantity of goods sent into Havre in 1797, before the blockade, for the purpose of being sent on to Paris, and sold for the account of the consignor, but reshipped (as found unsaleable) by order of the neutral proprietor, during the blockade, was restored; the Court saying, 'As the truth of this representation is not impeached, these goods are, I think, entitled to restitution. The same rule which permits neutral merchants to withdraw their ships from a blockaded port, extends also, with equal justice, to merchandise sent in before the blockade, and withdrawn bonâ fide by the neutral proprietor.'"

The principle then is shortly this, that the goods of neutrals in a port before a blockade may be withdrawn. That case very nearly resembled the present—almost went upon all fours with it. Here the property belonged to the claimant, not only prior to the blockade, but prior to the war. These cases, however, admit of nice distinctions, and I must observe that neither this case which I have cited, nor any other that I know of, justifies, even where there was neutral property bought before the war in the enemy's ports, the sending in a neutral vessel in ballast to bring it out of this blockaded port. *The "Comet"* (Edwards, 32) shows what Lord Stowell held to be the law upon this point.

Under all the circumstances of the present case, I shall restore this cargo on the conviction that this property was bought before the war, that the owners of the cargo were ignorant of the blockade when the ship sailed, that the breach of blockade by ingress was not committed with their knowledge, and that the breach by egress, though committed by the shippers at Riga, who were their agents, ought not to work a condemnation under the circumstances, and especially as I think there was no fair opportunity of obtaining a knowledge of the blockade and countermanding the shipment. I shall therefore restore this cargo, first for the reasons stated in *The "Juffrow Maria Schroeder,"* and secondly, for the reasons stated in the other cases to which I have referred; but I must direct the expenses of the captors to be paid. The ship and freight must be condemned.(*a*)

Proctors: The Queen's Proctor; and Deacon.

**[169]** THE "NORNEN" (Dahl). Admiralty Prize Court, January 16, 18, February 3, 1855.—Plea of permission given to enter not proved. Ship condemned. Cargo purchased in the blockaded port by a supercargo sent by the owners also condemned.

[S. C. Sp. Pr. Cas. 171.]

This was a Norwegian vessel, which left Bergen with a cargo of herrings, with which she entered Riga on the 16th of May. On the 27th she left Riga with another cargo, which had been purchased by her supercargo, and was captured by Her Majesty's ship "Archer" on the 1st of June.

February 3.—*Dr. Lushington.* This is a Norwegian vessel which left Bergen on the 25th of April with a cargo of herrings for Riga, which port she entered on the 16th of May, and again quitted it on the 27th, with another cargo, and was captured off Lyser Ort on the 1st of June.

That the blockade was at such time notorious, and that a breach of blockade was committed, I have no doubt, and, therefore, this vessel must be condemned, unless there be established some peculiar excuse.

---

(*a*) On the 3rd of February, in the cases of *The "Vrouw Alida"* and *"Annachina Jantina,"* the Court condemned the ship and freight, but restored the cargoes, on the same principle as in this case.

At the hearing it was argued that this master received permission from an English steamer to go in and out of Riga, according to his evidence. I am of opinion that such an excuse, if valid in law (a question I do not discuss), can never be supported on the evidence produced in this case; the gross improbability of the statement alone is sufficient to deprive it of all credit; and I will add that had such statement been true, it is quite impossible, looking at the whole of this evidence, not to feel assured that the name of the steamer would have been remembered and carefully preserved.

If it is contended, on the part of a neutral vessel, that she is entitled to go to a blockaded port by reason of permission having been given to her by one of the blockading force, or one of Her Majesty's cruizers, it was her duty, if she meant the Court to place any reliance on such permission, to take care to have the name of the cruizer, that it might be contradicted if not true. A mere statement of there being a cruizer, without any name and without any definite place being stated where she was seen, never can be received.

The vessel must be condemned, and I can make no distinction in favour of the cargo, because it was purchased in a blockaded port by the supercargo—an agent sent by the owners of the cargo for the purpose; the ship and cargo must be condemned.(*a*)[1]

Proctors: The Queen's Proctor; and Rothery.

**[170]** THE "OSTSEE" (Voss). The Judicial Committee of the Privy Council.(*a*)[2] Feb. 23; March 29.—A neutral vessel, captured by one of Her Majesty's ships of war, and sent in for adjudication as for breach of the blockade of Cronstadt, when no blockade existed.—Held (reversing the decision of the Court below) entitled to restitution, with costs and damages.

[S. C. 9 Moo. P. C. 150; 14 E. R. 255; Sp. Pr. Cas. 174; 2 Eng. Pr. Cas. 432; 1 Jur. (N.S.) 554. Referred to, *The "Zamora"* [1916] 2 A.C. 86.]

This was an appeal from the Admiralty Prize Court.

This vessel, under Mecklenburg colours, took in a cargo of wheat at Cronstadt, in May 1854, and sailed therefrom on the 28th of that month, bound to Elsinore for orders. On the 1st of June she was captured about twenty-four miles from Dagerort, by Her Majesty's ship "Alban," as for a breach of the blockade of Cronstadt, and was sent to England for adjudication.

On the 3rd of July proceedings were instituted against the ship and cargo; on the 7th the examination of the witnesses in praeparatorio was completed; on the 10th a claim was given in by Mr. Schacht on behalf of Mr. Brockelman, whom he alleged to be the sole owner both of the ship and cargo, omitting the other part-owners of the ship. No affidavit accompanied this claim, and on the 31st of July an amended claim and affidavit were brought in.

On the 2nd of August the captors offered to restore on payment of their expenses; to this no answer was returned until the 10th of August, when the claimants rejected the offer, and expressed their expectation of 2000l. damages.

On the 19th of August the case was heard in the Court below, when the learned Judge decreed restitution, but rejected the prayer for costs and damages (ante, p. 32 note).

From this decision the claimants appealed.

Dr. Addams and Dr. Twiss appeared for the appellants; the Queen's Advocate and Dr. Bayford for the respondents.

March 29.—*The Right Honourable Thomas Pemberton Leigh* delivered the judgment of the Court.

On the 1st of June 1854, the ship "Ostsee," sailing under the Mecklenburg flag, on her voyage from Cronstadt to Elsinore, was seized by Her Majesty's ship "Alban," under the command of Captain Otter, and sent to London for adjudication as prize.

Upon the ship's papers, and the examination of the master, the mate, and another of the crew, on the usual interrogatories, there appeared to be no ground for condemnation; and with the consent of the captors, on the 19th of August 1854, an

---

(*a*)[1] On the same day, in *The "Johanna Maria,"* the cargo was also condemned, having been purchased by the master for his father.

(*a*)[2] Present: The Lord President of the Council, the Right Hon. T. Pemberton Leigh, Right Hon. Sir Edward Ryan, Right Hon. Sir John Patteson, and Right Hon. Sir John Dodson.

[171] interlocutory decree was pronounced, by which the ship and cargo were restored to the claimants, but without costs and damages.

From so much of the decree as refuses costs and damages to the claimants, the present appeal is brought.

It is agreed on all hands that the restitution of a ship and cargo may be attended, according to the circumstamces of the case, with any one of the following consequences:—

1. The claimants may be ordered to pay to the captors their costs and expenses; or,
2. The restitution may be, as in this case, simple restitution, without costs, or expenses, or damages to either party; or,
3. The captors may be ordered to pay costs and damages to the claimants.

These provisions seem well adapted to meet the various circumstances, not ultimately affording ground of condemnation, under which captures may take place.

A ship may, by her own misconduct, have occasioned her capture, and in such a case it is very reasonable that she should indemnify the captors against the expenses which her misconduct has occasioned.

Or, she may be involved, with little or no fault on her part, in such suspicion as to make it the right, or even the duty of a belligerent to seize her. There may be no fault either in the captor or the captured, or both may be in fault; and in such cases there may be damnum absque injuriâ, and no ground for anything but simple restitution.

Or there may be a third case, where not only the ship is in no fault, but she is not by any act of her own, voluntary or involuntary, open to any fair ground of suspicion. In such a case a belligerent may seize at his peril, and take the chance of something appearing on investigation to justify the capture; but if he fails in such a case, it seems very fit that he should pay the costs and damages which he has occasioned.

The appellants insist that the circumstances of this case bring it within the last of these rules.

The general principles applicable to this point are stated with great clearness in a document of the very highest authority—the Report made to King George II., in 1753, by the then Judge of the Admiralty Court and the Law Offices of the Crown, one of whom was Mr. Murray (afterwards Lord Mansfield), and they are laid down in these terms (Pratt's Story, 4):—

"The Law of Nations allows, according to the different degrees of misbehaviour or suspicion arising from the fault of [172] the ship taken, and other circumstances of the case, costs to be paid or not to be received by the claimant in case of acquittal and restitution. On the other hand, if a seizure is made without probable cause, the captor is adjudged to pay costs and damages."

This passage (with others) is cited by Lord Stowell (then Sir W. Scott) and Sir John Nicol, in their letter to the American Minister in 1794, as containing an accurate statement of the law of maritime capture.

These rules have been recognized and acted upon by all the chief maritime powers.

In France, a very early ordonnance provides that when a seizure is made "sans cause raisonnable, notre, dit Amiral fera dûment restituer le dommage" (Pratt's Story, 35).

The same rule is laid down by M. Pourtalis in two cases which came before the French Conseil des Prises in 1799. In one, the "Pigou," where a neutral ship (an American) had been captured by two French frigates, the rule was stated and applied, it may be thought with some severity, to the particular case.

An English translation of a rather imperfect report of the judgment is to be found in the notes in the case of *The "Charming Betsy"* (2 Cranch, 98), but the judgment is set out at length in a French work, published during the present year, entitled, Traité des Prises Maritimes.

After stating that in general a man is bound, as well by natural as by civil law, to make good the damage which he has occasioned, and that error on his part cannot relieve him from this reparation, the Judge proceeds in these terms:—

"En matière des prises l'imprudence des capturés, leur négligence dans l'observation de certaines formes, des procédés equivoques, peuvent souvent compromettre leur sûreté, et faire suspecter leur bonne foi. Il peut arriver alors qu'en examinant l'ensemble des faits on reconnaisse qu'une prise est invalide. Mais on peut reconnaître aussi que les capturés par leur conduite ont donné lieu à la méprise des capteurs. Dans

ce cas il serait injuste de rendre ceux-ci responsables d'une erreur que l'on ne peut raisonnablement regarder comme leur ouvrage.

"Mais quand l'injustice des capteurs ne peut être excusée, les capturés ont incontestablement droit à une adjudication de dommages-interêts" (vol. ii. p. 54).

In that case there would appear to have been some colour for the capture, for the Tribunal of First Instance had decreed **[173]** restitution; that order had been reversed by a superior Court at Morbihan, which decreed condemnation of the ship and cargo, and this sentence was again reversed by the Conseil des Prises, which decreed restitution, with costs and damages.

The same doctrine is laid down by the same eminent authority, about the same period, in the case of *The "Statira"* (2 Cranch, 93).

The cases in the American Courts fully bear out the statement of the law by Mr. Justice Story in the Treatise already referred to, which is in these terms (Pratt's Story, 35):—

"Every capture, whether made by commissioned or non-commissioned ships, is at the peril of the captors. If they capture property without reasonable or justifiable cause, they are liable to a suit for restitution, and may also be mulcted in costs and damages. If the vessel and cargo, or any part thereof be good prize, they are completely justified; and although the whole property may, upon a hearing, be restored, yet, if there was probable cause of capture, they are not responsible in damages."

It may be observed that there is a misprint in this passage in Pratt's Edition of Story, p. 35, where the words "possible cause" are substituted for "probable cause." On referring to the Appendix to 2 Wheat. Rep. 8, from which this part of the treatise is copied, the mistake appears, and, indeed, it is obvious from the context.

Mr. Justice Story then proceeds to enumerate a great variety of circumstances which have been held to constitute probable cause, but all of a character to throw suspicion on the ship or cargo, and all attributable, in a greater or less degree, to some act or omission on the part of the owners.

At p. 39 he lays it down generally:—

"If the capture is made without probable cause, the captors are liable for damages, costs, and expenses, to the claimants."

In the case of *The "Maria Schroeder"* (3 Rob. 152), in 1800, Lord Stowell says, "It is not necessary that the captor should have assigned any cause at the time of the capture; he takes at his own peril, and on his own responsibility, to answer in costs and damages for any wrongful exercise of the rights of capture."

In the case of *The "Triton"* (4 ibid. 79), in 1801, the same learned Judge expresses himself thus: "This being the case of a voyage between two neutral ports, without any doubt on the destination, and without any sufficient ground of seizure, I think the claimants are entitled to costs and damages."

**[174]** In the case of *The "William"* (6 Rob. 316), the same learned Judge states: "When a capture is not justifiable, the captor is answerable for every damage." And the same law is laid down in the case of *The "Actæon"* (2 Dods. 51), which we shall presently have occasion to state more fully.

In the case of *The "Elizabeth"* (1 Acton, 13), before the Lords of Appeal, in 1809, Sir William Grant—an authority upon such subjects second only, if second, to Lord Stowell—is reported to say: "We order the vessel to be restored, and, as we are of opinion there appears scarcely any ground for justifying the detention of the vessel, condemn the captor in costs."

There appears in that case to have been, in the opinion of the Court, some, though but little, ground for the seizure, and the decree is for restitution without damages; but the captor, who had obtained a decree in the Court below, is condemned in the costs of the appeal. We have referred to the original Order in the Minute Book, the case being loosely stated in the Report.

The result of these authorities is that in order to exempt a captor from costs and damages in case of restitution, there must have been some circumstances connected with the ship or cargo affording reasonable ground for belief that one or both, or some part of the cargo, might prove, upon further inquiry, to be lawful prize.

What shall amount to probable cause, so as to justify a capture, cannot be defined by any exact terms. The question was discussed before Mr. Justice Story in the case of *The "George"* (1 Mason, 26), when it was contended that, in order to exempt captors from costs and damages, the case against the ship at the time of seizure must be such

as primâ facie to warrant condemnation, or at all events that a restoration by a Court of Prize without further proof, is conclusive evidence of a defect of probable cause. Mr. Justice Story expresses his dissent from these propositions, in which we agree with him; and he then expresses himself in these terms:—

"If, therefore, there be a reasonable suspicion of illegal traffic, or a reasonable doubt as to the proprietary interest, the national character, or the legality of the conduct of the parties, it is proper to submit the cause for adjudication before the proper Prize Tribunal; and the captors will be justified although the Court should acquit without the formality of ordering further proof." In this case there was abundant ground of suspicion, and the demand of damages was rejected.

Neither in the texts, nor in the decided cases to which we **[175]** have thus referred, do we find it stated that, in order to subject captors to condemnation in costs and damages, vexatious conduct on their part must be proved (except as some degree of vexation is necessarily implied in the detention of a vessel without reasonable cause after she has been searched), or that honest mistake, though occasioned by the act of the Government of which they are subjects, can relieve them from their liability to make good to a foreigner and neutral—and with this case alone we are dealing—the damage which by their conduct he has sustained.

Nor is it easy to perceive upon what grounds of reason or justice such excuses could rest.

If costs and damages were inflicted as a punishment on captors, honest intention would be a consideration of the greatest weight; but the principle on which they are awarded is that of affording compensation to a party who has been injured. Vexatious conduct on the part of the captors has in some cases been alluded to as removing all reluctance on the part of the Judge to award costs and damages, as in *The "Nemesis"* (Edw. 50); or as forming a ground for what are termed vindictive damages; or for subjecting the captors to costs and damages, or depriving them of their expenses, when, but for such conduct, they might have been entitled to their expenses against the claimants, as in the cases of *The "Speculation"* (2 Rob. 293), and *The "Washington"* (6 ibid. 275), and several others; but no case was cited to us at the bar, nor have we been able to find any, in which wilful misconduct on the part of the captors has been stated to be a necessary ingredient in an ordinary condemnation in costs and damages.

So as to error occasioned by the proceedings of their own Government. The captors act as the agents of the State of which they are citizens, and which must ultimately be responsible for their acts. Prize Courts afford the remedy as between the individuals, which otherwise must be sought by the Government of the claimants against the Government of the captors, but the mode of proceeding cannot affect the right to redress, and if the State could not urge its own mistakes as a justification of its own wrong, neither, it should seem, should individual citizens be permitted to do so.

The Law of Nations upon these points appears to us to be settled by decisions both in the American and European Courts. In the case of *The "Charming Betsy,"* in 1804 (2 Cranch, 123), the captain of an American ship of war had seized, in America, a vessel which was held upon the evidence to have become Danish property. The Court was of opinion that the orders issued by the American Government were such as might well have misled the **[176]** captor; but it was decided (the judgment being delivered by a most eminent lawyer, Chief Justice Marshall) that the claimants were entitled to costs and damages against the captors (though not vindictive damages which had been awarded in the Court below), and that the officer, if he had acted in obedience to orders, or had been misled by his Government, must be indemnified by the State. Precisely the same doctrine, though without reference to this decision, was laid down some years afterwards by Lord Stowell in the case of *The "Actæon"* (2 Dods. 51).

There an American ship, sailing under a British license, had been captured by one of His Majesty's frigates, under the command of Captain Capel, who, being unable to spare men to take charge of her, had destroyed the vessel and cargo. It was a case, therefore, in which all possible suspicion of selfish or improper motives for the capture were out of the question, yet Lord Stowell decreed restitution, with costs and damages, and laid down the principles of his decision in these terms:—

"This question arises on the act of destruction of a valuable ship and cargo by

one of His Majesty's cruizers. On the part of the claimants, restitution has been demanded, and there can be no doubt they are entitled to receive it; indeed, I understand that it is not now opposed by the captor himself, but it remains to be settled what is to be the measure of restitution, and how far it is to be carried. The natural rule is, that if a party be unjustly deprived of his property, he ought to be put as nearly as possible in the same state as he was before the deprivation took place—technically speaking, he is entitled to restitution, with costs and damages. This is the general rule upon the subject, but, like all other general rules, must be subject to modification. If, for instance, any circumstances appear which shew that the suffering party has himself furnished occasion for the capture—if he has by his own conduct in some degree contributed to the loss—then he is entitled to a somewhat less degree of compensation to what is technically called simple restitution.

"This is the general rule of law applicable to cases of this description, and the modification to which it is subject; neither does it make any difference whether the party inflicting the injury has acted from improper motives or otherwise. If the captor has been guilty of no wilful misconduct, but has acted from error and mistake only, the suffering party is still entitled to full compensation, provided, as I before observed, he has not by any conduct of his own, contributed to the loss."

His Lordship then, after observing that the act of Captain **[177]** Capel in destroying the vessel might have been a very meritorious act, as regarded his own Government, and that he was not chargeable with any corrupt or malicious motives, but acted in all probability in obedience to orders, concludes his judgment in these words:—

"But this will not affect the right of the American claimant, whom I must pronounce to be entitled to restitution, with costs and damages; and I beg it may be understood that I do so without meaning in the slightest degree to throw any imputation on the conduct or character of Captain Capel, but merely for the purpose of giving a due measure of restitution to the claimant."

This judgment was pronounced by Sir William Scott in the month of April 1815, almost at the very close of the war, and it is in perfect conformity with the rules laid down at its commencement—in the paper already referred to—in the year 1794.

The same decision, on the same grounds, was pronounced by the same learned Judge immediately afterwards, in the case of *The "Rufus."*

It is needless to refer to all the other cases which were cited at the bar, but there is one large class which so strongly illustrates the principle, that it may be proper to advert it. We allude to what are called the Cape Nicola Mole cases.

In the early part of the last war a number of French and Dutch vessels and cargoes were captured by British ships, and sent in for adjudication to the Court of Admiralty of St Domingo. Several of the ships and cargoes were condemned and the proceeds of the captures distributed in the years 1797 and 1798.

It was afterwards discovered that although the Court of St. Domingo was properly constituted as a Civil Court of Admiralty, and His Majesty's instructions had been addressed to it as a Prize Court, yet, by mistake, no warrant had been issued to give it a prize jurisdiction against France or Holland, although there had been a prize warrant against Spain.

Some time afterwards some of the owners of the captured property, having discovered this error, the effect of which was that the Court had no jurisdiction, instituted proceedings in the High Court of Admiralty, calling upon the captors to proceed to adjudication. These proceedings were instituted nearly two years after the sentence, when the property had been distributed, the crews dispersed, the papers probably lost or destroyed, and when it was scarcely possible that the truth of the cases could be made to appear on the part of the captors. In one of these **[178]** cases (*The "Huldah,"* 3 Rob. 236) Lord Stowell, in 1801, overruled the protest of the captors against the proceedings; and in 1804, in determining a question upon the Registrar's report, he speaks of it "as one of that unfortunate class of cases in which this Court has felt itself under the necessity of decreeing restitution with costs and damages" (*The "Driver"* 5 Rob. 145).

In all these cases where restitution was ordered, we believe that, on reference to the Registrar's books, it will be found that the captors were condemned in the costs of the proceedings in the Court at Cape Nicola Mole.

Surely, if the absence of misconduct on the part of the captors; if honest error, occasioned by the blunders of the Government; or the consideration of hardship upon

individual officers acting in discharge of their duties, could in any case afford a protection against the claims of a neutral, such protection would have been afforded by the circumstances of these cases. Yet the captors were held liable by the Court of Admiralty, and were afterwards, we understand, indemnified at the expense of the public.

To apply, then, these rules to the facts of this case:

It appears that the ship was captured on the ground of some supposed breach of blockade. The mate, on his examination, says: "I did not hear of any port or place being blockaded until the 1st of June 1854, when we were taken. When they came on board they told us there was a blockade, and asked us if we did not know it."

The master says: "I did not know of any blockade whatever: I did not hear of any blockade. It is true I heard from Sir C. Napier, after the capture, that I had broken the blockade, but I did not knowingly enter or leave any blockaded port, place, river, or coast. I did not hear of it except from Sir C. Napier, on the morning following the day of capture. He sent a boat for me, and I was taken on board the Admiral's ship, and he told me of it."

This is all that appears upon the evidence with respect to the grounds of seizure; but the papers on board the ship distinctly showed the port from which she had sailed, and that to which she was addressed; and it may not be immaterial to observe that, although some of these documents were in languages of which English seamen might well be supposed ignorant, yet the material facts are stated in an English certificate, signed by the British Vice-Consul at Rostock. From these papers it appeared that she had sailed from Cronstadt, and was bound for Elsinore for orders. We took it for granted, therefore, that **[179]** it was for a supposed breach of blockade in sailing from Cronstadt that she was seized, and this is the only ground upon which the case was rested on the argument before us.

Now, in order to justify a condemnation for breach of blockade, three things must be proved: first, the existence of an actual blockade; secondly, the knowledge of the party; thirdly, some act of violation either by going in or coming out with a cargo laden after the commencement of the blockade (*The "Betsy,"* 1 Rob. 93).

The instructions to Her Majesty's commanders upon this subject for the present war are, that if any vessel shall be found coming out of any blockaded port which she shall have previously entered in breach of such blockade, or if she shall have any goods on board, laden after knowledge of the blockade, such ship and goods shall be seized and sent in for adjudication (Article X.).

Now, when the ship was seized, was there any reasonable ground for suspicion that she was liable to seizure under these instructions?

It appeared distinctly upon her papers, as the facts upon inquiry turn out to be, that on the 25th of March 1854, before the declaration of war against Russia, this ship was on her voyage from Leith to Cronstadt; that she was on that day chartered for a voyage with a cargo of wheat from Cronstadt to England, or countries in alliance or amity with England, according to orders which she might receive at Elsinore; that on the 10th of May the shipment of her cargo had been completed; that by the 16th she had complied with all the formalities required to enable her to leave Cronstadt: and that when she was taken she was on her direct course from that port to Elsinore.

Cronstadt was not blockaded at the time she entered that port; nor at the time when she took her cargo on board; nor at the time when she left Cronstadt; nor even at the time when she was captured; nor for more than three weeks afterwards; and no blockade of Cronstadt had been proclaimed, either by the British Government or by the Admiral.

It is said that the Admiral had, on the 16th of April, in Kioge Bay, proclaimed an intention of blockading all Russian ports, and that certain ports in the Gulf of Finland were actually blockaded on the 28th of May, and perhaps at an earlier period; but there was not the slightest ground for suspecting that this ship had left any other port than Cronstadt, or had any intention of entering any other Russian port.

**[180]** What colour of reason, then, could there be for seizing, under such circumstances, this vessel, which did not fall under any one of the conditions which are required by the instructions to concur in order to justify sending in the ship for adjudication?

It is said that there was a confusion with respect to the blockades in the Baltic, and the several Gulfs of Finland, Riga, and Bothnia. But, in the first place, with respect to the port of Cronstadt, we find no trace in the evidence of any confusion or doubt as to the period when the blockade commenced, and if there had been, it was a confusion created only by the acts and in the minds of Her Majesty's officers, and could not, therefore, according to the principles which we have collected from the authorities, have afforded any answer to a neutral perfectly innocent of all fault, and not by any act or neglect of his, voluntary or involuntary, exposed to any suspicion.

But, it is said that although there might be no ground for suspecting this ship of breach of blockade, yet a captor is not confined to the case upon which the seizure was made, and that a vessel sent in for adjudication upon one ground, may, if the facts warrant it, be subjected to condemnation on another.

Of this rule there is no doubt. Whether, when a ship is sent in for adjudication as a neutral, and there appears to be no reasonable cause for having sent her in as such, a captor can excuse himself from costs and damages by alleging irregularities in her papers, which might have led, but did not in fact lead, him to doubt her neutrality, is a question which it will be time enough to consider when it arises. This question, as regards non-commissioned captors, is discussed, and, in our opinion, most properly decided, by the learned Judge of the Admiralty in the case of the sloop "*Wilhelmine*" (2 Eccl. & Adm. Rep. 31).

In this case it is not open to doubt upon the evidence that the "Ostsee" was in truth a neutral ship, and nothing suspicious is found on board her. But it is said that she ought to have had on board a seapass from the Mecklenburg Government, describing and identifying her, and that no such pass is amongst the documents produced. It is very true that no such document is found there; but, unfortunately, in this, as well as in other respects, there has been some irregularity on the part of the captors. By the Act of 17 Vict. c. 18 it is enacted, and by Her Majesty's instructions in conformity with the Act it is ordered (Art. II.), that the captor shall bring into Court all books, papers, passes, sea-briefs, and other documents and **[181]** writings whatsoever, as shall be delivered up or found on board any captured vessels, and the captor, or one of his chief officers, or some other person who was present at the capture, and saw the said papers and writings delivered up, or otherwise, on board at the time of the capture, shall make oath that the said papers and writings are brought in as they were received and taken, without any fraud, addition, subduction, alteration, or embezzlement whatsoever, or otherwise shall account for the same upon oath to the satisfaction of the Court.

It is obvious that unless the papers are verified in the manner pointed out by these instructions, that is, by the oath of some person who saw them taken, there can be no security that the papers brought in are all the papers on board the ship.

Now, in this case, neither the captor, nor any person present at the capture, nor any person who can have any personal knowledge whatever on the subject, has made the affidavit. It appears that a gentleman named Huxham, one of the officers on board of the "Duke of Wellington," the flag-ship, was sent home in charge of this vessel, and he brings in certain papers, which he swears were all that were delivered to him by Captain Otter, with certain exceptions, which he specifies and accounts for.

On the other hand, the master, Voss, in his answer to the 7th interrogatory, states that the ship had a seapass on board from the Mecklenburg Government, and in his answer to the 28th interrogatory he says, it was on board when he took the command of the ship, and previously thereto. Now, when it is remembered that, from the nature of the case, Mr. Huxham's affidavit offers no contradiction to this statement, and that the supposed absence of this paper appears to have excited no remark at the time of the capture, and to have occasioned no doubt as to the ship's neutrality, it is impossible to attribute any weight to this circumstance.

We will now advert to the principal cases cited for the respondents, by which it was argued that the rules which we have above stated were modified, or exceptions engrafted upon them which are sufficient to protect the captors; but in doing so we must premise that unless the rule itself be qualified, its stringency is not affected by the circumstance that it may not always have been applied by the Judge who lays it down, to cases in which those who are bound by its authority may consider that it was applicable. The application, of course, must depend upon the opinion of the Judge in each particular case.

**[182]** The first case relied on was *The "Betsy"* (1 Rob. 93). There an American ship was found in the harbour of Guadaloupe, at the time when the island was captured by the British forces; there were circumstances which, in the opinion of Lord Stowell, threw great doubt upon the point whether she was neutral, or enemies' property, and made a seizure justifiable, for the purpose of further inquiry. The learned Judge, it is true, remarks that the question whether there was or not a blockade in existence when the ship entered the port, was one of nicety, which had only been recently decided by the Lords of Appeal, and required more legal discrimination than could be required from military persons; but he does not appear to have rested his judgment upon that ground.

The next case relied on was *The "Luna"* (Edw. 190), which is no doubt a strong decision; for in the case of a capture made from a neutral, under a mistaken construction, by the captors, of a British Order in Council, the learned Judge not only relieved the captors from costs and damages, but gave them their expenses out of the captured property.

It must be admitted that the mistake of the captors was not an unnatural one; they thought that an Order in Council of the 26th of April 1809, which declared a strict blockade "of all ports and places under the Government of France, together with the colonies, plantations, and settlements in the possession of that Government," extended to St. Sebastian, in Spain, which was then, and had been for two years, in the possession of the French.

The facts of the case are not stated in the report so fully as to enable us to form an accurate judgment of the degree of suspicion which might really attach to the ship. The question of expenses does not seem to have been argued, and Lord Stowell probably felt that he was going to the very verge of the law, for he declares that he will not allow the same indulgence in future cases.

This judgment was pronounced in the year 1810, during the conflict between the French, Berlin, and Milan Decrees on the one hand, and the retaliatory British Orders in Council on the other. Whatever may be thought of the particular decision, the general rule with its modifications is laid down five years afterwards, in the case of the "*Actæon*," by the same learned Judge in the terms which we have stated.

If, however, these cases be held to establish the principle that there may be questions of so much nicety in the construction of public documents, or the determination of unsettled points of **[183]** law, as to exonerate captors from what would ordinarily be the consequence of their mistake, they will not much assist the argument of the respondents here, where no questions of law of any kind appear to have existed.

The other authorities mainly relied on by the respondents do not relate to disputes between belligerents and neutrals. They are either cases in which the rights of belligerents only were involved, as where captures had been made by one belligerent from another in ignorance that peace had been restored, or where no belligerent rights at all were involved, as in the captures of ships engaged in the slave trade.

The rules laid down in these cases may have an indirect, but only an indirect, application to questions between belligerents and neutrals.

The case of *The "John"* (2 Dods. 336) was of the former class.

There, a capture of an American vessel had been made by a British cruizer in ignorance that war between Great Britain and America had ceased, and the prize having been lost by unavoidable accident, the captor was called upon for restitution.

The case was one which, as the learned Judge intimates, might be provided for by the Treaty of Peace between the two nations, and on which, as between them, there might or might not be a claim against the British Government according to its terms, and according as the British Government had or had not taken due means for giving notice of the peace to its officer, and he lays it down that the officer, being under invincible ignorance, and being in possession bonâ fide, was not responsible for the loss which had occurred.

In another case of the same kind, *The "Mentor"* (1 Rob. 183), Lord Stowell seems to have thought that when an act of mischief was done by the King's officers, though through ignorance, it would not necessarily follow that they would be protected from civil responsibility, but that the party injured might resort to a Court of Prize, and that the officer must look to his own Government for reimbursement. Whether all the doctrines laid down in these two cases are quite consistent with each other

may, perhaps, admit of some doubt; but they belong, as we have already observed, to a different class of cases from that which we have to decide, and if all the doctrines found in *The "John"* were applied to a case between neutrals and belligerents, they would afford no protection to the captors here, where there was no invincible ignorance, where everything depended on the Admiral's own acts whether he had or had not established a blockade of Cronstadt.

**[184]** It was then urged that the captors, having acted bonâ fide, ought to be indemnified by Her Majesty's Government, and that there are cases in which the Court of Admiralty has either made an order against the Government, or has refused to make an order against the captor unless the Government would undertake to indemnify him.

The cases relied on for this purpose are *The "Zacheman"* (5 Rob. 153), and *The "St. Juan Nepomuceno"* (1 Hagg. Adm. 265).

In the former the Crown having by treaty the right of preemption of certain goods seized as contraband, had improperly delayed to exercise such right. In the latter, the slaves, the value of which was sought to be recovered, had been liberated by the Crown.

In both these cases the Crown either had taken, or had the right to take, the property, the value of which was demanded from the captors. In neither was any order made against the Government, nor is it easy to see how any could have been made.

But it is sufficient to say that in the case before us, no blame of any kind appears to be imputable to the Government. They had contributed by no act or default of theirs to the capture. They had not at the time when it took place proclaimed any blockade of Cronstadt, nor done anything to mislead the naval officers in that respect.

Whether in any case where Her Majesty's naval officers may have acted wrongly as regards neutrals, but are liable to no imputation of wilful misconduct, it may or may not be expedient, with a view to the efficiency of the navy and the interest of the public service, to indemnify such officers at the public expense against the legal consequences of their acts, must be left to the consideration of those who are entrusted with the executive authority of the Crown. Sitting here judicially, we can only administer the law as we find it between the claimants and the captors.

It is then said that in this case the sending in the ship must be treated as the act of the Admiral, and not of Captain Otter. When a subordinate officer does an act under the immediate order of his superior, it may well be that the superior officer should be responsible for it. The principles applicable to this subject are discussed and explained in *The "Mentor"* (1 Rob. 183), already referred to, and *The "Eleanor"* (2 Wheaton, 357), before the American Courts, in 1817. But here we are dealing with the actual captor, who demands adjudication of the ship and cargo, **[185]** and who, for all purposes of this suit, must be treated as the party responsible to the claimant. With any rights or liabilities as between Captain Otter and Sir C. Napier we have here nothing to do.

It is then said that if the captors had been admitted to prove the circumstances of the capture the case might have worn a different aspect. But the principle of the Prize Court is that the case is in the first instance to be tried on evidence coming from the captured; and if upon such evidence no doubt arises, the property is to be restored instantly; to use the expression of Lord Mansfield in *Lindo* v. *Rodney* (2 Doug. 614), velis levatis. The liberty to enter into proof on the part of the captors is rarely granted, and is attended with great inconvenience, as is well explained by Lord Stowell in the case of *The "Haabet"* (6 Rob. 54). No doubt the circumstance that the case is decided exclusively upon evidence proceeding from the claimants is deserving of great attention when it is sought to condemn captors in costs and damages, and makes it fit that the Court should look with great jealousy at the evidence, with a view to see whether there might not be reasonable ground of seizure, before it pronounces such a decree. But we can see in the case before us nothing to excite any suspicion, or to induce us to think that if an application for liberty, to give evidence on the part of the captors had been made in proper time, it ought to have been complied with, or, if complied with, would have altered the complexion of the case. However that may be, we do not mean in any degree to affect the rules of law upon this point as they now exist. In the present case the captor was aware, before the cause came on, of the question which alone was to be discussed; if he thought his

case could be bettered by further proof, and that he was entitled to give it, he should have applied for such liberty before the case was heard, and he cannot reasonably make such an application after the hearing.

It is then said that there is a distinction to be made in these cases between officers of Her Majesty's navy and privateers; that the Court has a large discretion in such subjects, and ought not to press with severity upon men who are acting in the discharge of a difficult and important duty.

That for many purposes there is a clear distinction to be made between public and private ships of war, and that there are the strongest reasons for making such distinction, can admit of no doubt; but as regards the particular rule in question, that a capture without probable or reasonable cause exposes the captors to condemnation in costs and damages, we find it laid down [186] in the text-books and the decided cases, both foreign and domestic, as applicable to captors generally, to public and private ships indifferently.

In the case of *The "Lively"* (1 Gallison, 327), Mr. Justice Story states distinctly.

"Public and private ships must be governed by the same principle."

Again, as to the discretion to be exercised by the Court. When the application of a rule depends on the absence or existence of misconduct in both or either of the litigants, the greater or less degree of that misconduct, the existence or absence of suspicion attaching to a particular ship or cargo, the greater or less degree of it, and the causes to which it is, in whole or in part, to be attributed, it is obvious that there must necessarily be a very large discretion left to the judge, for scarcely any two cases can in all such respects be precisely the same. But when once, in the opinion of the judge with whom the decision rests, a particular case is brought clearly within a particular rule, it should seem that his discretion is at an end. It is not a question merely of costs of suit, but of reparation for a wrong which, when an accidental loss has afterwards occurred, may extend to the whole value of the ship and cargo.

Nor, if we were at liberty to relax settled rules upon our own notions of justice and policy, are we quite prepared to say that we should do so in this instance. The law which we are to lay down cannot be confined to the British navy; the rule must be applied to captors of all nations. No country can be permitted to establish an exceptional rule in its own favour, or in favour of particular classes of its own subjects. On the Law of Nations, foreign decisions are entitled to the same weight as those of the country in which the tribunal sits. America has adopted almost all her principles of prize law from the decisions of English Courts; and whatever may have been the case in former times, no authorities are now cited in English Courts, in cases to which they are applicable, with greater respect than those of the distinguished jurists of France and America. Whatever is held in England to justify or excuse an officer of the British navy, will be held by the tribunals of every country, both on this and the other side of the Atlantic, to justify or excuse the captors of their own nation.

By the usage of all countries, captors have a great interest in increasing the number of prizes. The temptation to send in ships for adjudication is sufficiently strong. Is it too much to [187] say that where no ground of suspicion can be shown, and all that the captor can allege is, that he did wrong under a mistake, he should make good in temperate damages the injury which he has occasioned? Ought a captor to be permitted to say to the captured, "True, nothing suspicious appeared in your case at the time of seizure, but upon further inquiry, something might have been discovered. I had a right to take my chance; you have nothing to complain of. I subjected you to no unnecessary inconvenience—go about your business, and be thankful for your escape."

We cannot think that this would be deemed a satisfactory answer to a British neutral seized by a foreign belligerent.

Upon the whole, therefore, after the most anxious consideration, having sought in vain for any circumstances which could afford in this case a probable cause for capture, we cannot hold the captors exempted from all responsibility, though the damage will, in all probability, prove to be but small. The amount must be referred to the Registrar in the usual way, but we shall advert to some circumstances which ought to be attended to in making the computation.

No complaint is made of any vexatious conduct on the part of the captors, or of any undue delay in sending home the vessel. London appears to have been one of the ports to which the charter-party provided that she might be sent. For any

delay which may be attributable to the claimants themselves, the captors of course cannot be held responsible.

The exact time of the ship's arrival in London does not appear. It was stated at the bar to have been on the 26th of June.

On the 3rd of July, a monition was taken out, and the ship's papers were brought in; on the 6th the monition was posted up at the Royal Exchange; and on the 7th of July the examination of the witnesses in præparatorio was completed.

It seems probable that as the ship had previously traded with this country, and one of her contemplated destinations was the east coast of England, the owners, or at all events Brockelman, the part owner of the ship, and the sole owner of the cargo, had agents in this country.

On the 10th of July, at all events, the present claimant came forward and gave bail; but his claim was not consistent with the fact, for he alleged Brockelman to be the sole owner, both of the ship and cargo, omitting the other part-owners of the ship, and no affidavit accompanied the claim: an amended claim and affidavit were afterwards brought in, but not till the 31st of July.

**[188]** On the 2nd of August an offer was made by the captors to restore, on payment of their expenses, and no answer was returned to this till the 10th, when the claimants rejected it, expressing their hope of obtaining 2000l. for damages.

On the 19th of August, the case was heard, and restitution took place.

We think that three weeks at least of the delay in this case must be imputed to the claimants, and that in respect of this period no damage or demurrage must be allowed to the ship or cargo.

We shall recommend that the claimants have their costs in the Court below, but that no costs should be given of this appeal.

We have thought it fit to enter so fully into the grounds of our decision, not only on account of the great importance of the general principles which have been brought into discussion, but out of the deference which we must always feel for any opinion of the learned Judge from whom we are compelled to differ, and to whose deliberate judgment, if it were consistent with our duty to do so, we should willingly surrender our own. But this case seems to have passed without much discussion in the Court below; certainly without that full examination of the principles and the authorities, both in this and foreign countries, for which we are indebted to the able arguments addressed to us from the bar. The cases in which, during the late war, restitution was attended with costs and damages, turn out upon inquiry to be more numerous than was supposed.

We have been guided to the conclusion at which we have arrived by what we consider to be established principles. They appear to us to be founded both in justice and convenience, reconciling as far as possible (what is very difficult to reconcile) the conflicting rights of belligerents and neutrals. We have adopted them, however, not upon any views of our own, but because we consider them to have been recognized and acted upon by the general consent of nations.

Proctors: for the appellants, F. Clarkson; for the respondent, The Queen's Proctor.

**[189]** THE "LANARKSHIRE." The High Court of Admiralty. Feb. 22, Mar. 3, 1855.—Seamen's wages. In a suit against the ship the owners pleaded that the men had commenced an action against the master for the same wages in Canada, which was still pending. Held, that although the suit here was in rem, and that in Canada was a personal action against the owner, yet the cause of action being the same, and the owner ultimately responsible in both suits, the plea would bar this action.

[Applied, *The "Mali Ivo,"* 1869, L. R. 2 Adm. & Ec. 359; *Walsh* v. *Bishop of Lincoln*, 1874, L. R. 4 Adm. & Ec., 253.]

On admission of allegation. This was a suit for wages, brought by Henry Wagner, late carpenter, and Thomas Bennett, late second mate on board this vessel.

Their summary petition alleged that in June 1853, the vessel being at Liverpool, designed on a voyage to Baltimore, or any port of British North America, and back to any port of the United Kingdom, William Paterson, the master, engaged H. W. and T. B. to serve on board during her then intended voyage, it being specially agreed and provided that such service should not extend beyond the period of twelve months

from the time that they were respectively hired; that accordingly they entered into the service of the ship, and signed the usual ship's articles, H. W. on the 29th of June, and T. B. on the 1st of July; that on the 4th of July, the ship sailed with a cargo of salt and coal for Baltimore, where she arrived about the 28th of August; and having discharged her cargo and taken in another, sailed on the 3rd of October for Quebec; but on the 25th was driven ashore in the Gulf of St Lawrence, where she remained until the 7th of November; that she arrived at Quebec on the 14th of November, and was there frozen up until May 1854; that she was then taken into the dry dock for repairs; that the said H. W. and T. B. remained on board performing their respective duties, and assisting in loading the vessel with timber until the 3rd of July 1854, when, the period of twelve months agreed upon having expired, they applied to William Patterson, the master, for their discharge, which he refused to give them; that they have made repeated application to the said master for the payment of their wages without success.

On behalf of the owners, a defensive allegation, consisting of eight articles, was brought in, which pleaded,

First, that T. B. and H. W. by the ships articles agreed and bound themselves to serve on board the ship on a voyage from Liverpool to Baltimore; from thence, if required, to any ports and places in the United States, British North America, or wherever freight might offer, and back to a final port of discharge in the United Kingdom, or for a term not to exceed twelve months.

Secondly, that on the 4th of July 1853, the "Lanarkshire" sailed from Liverpool to Baltimore, and from thence to Quebec, in order to take on board a cargo at that port, and return thence to a port of discharge in this country; that on the 3rd of July 1854 she was at Quebec, taking on board a cargo of timber for **[190]** conveyance to the port of Gloucester, where the voyage was to have ended, and which she had been prevented from completing at an earlier period by peril of the seas and accident only, to wit, by getting on shore, and being frozen up at Quebec.

Thirdly, that on the 3rd of July 1854, T. B. and H. W. refused to do any work on board, and quitted and deserted the ship, and thenceforth continued absent therefrom without liberty, and contrary to the orders of the master, whereby they respectively forfeited all wages due to them for their services during the said voyage; that in consequence of such their desertion, the master was obliged to and did hire and ship two other seamen to serve as second mate and carpenter on board during the remainder of her voyage, in their stead; that on the 23rd of July 1854, the vessel, having taken on board her cargo, sailed from Quebec, bound for Gloucester, and arrived there on the 11th of September 1854; that an entry of the desertion and absence from the ship without liberty of the said T. B. and H. W. was duly made at the time when the same occurred in the log-book of the "Lanarkshire," by Robert Matthews, the mate.

Fourthly, that on the 17th of July 1854, the said T. B., party in this cause, instituted a suit or action in the Superior Court of Quebec, against the said William Patterson, the master, for the purpose of recovering payment of the sum alleged to be due to him for wages; that an appearance was given to such suit on behalf of the said William Paterson, and bail was duly given on his behalf to answer the same; that the said suit was defended on the ground that the said T. B. had forfeited all claim to his wages by reason of desertion; that the evidence of the said master was taken in the suit prior to the "Lanarkshire" leaving Quebec; and that the said suit was depending and undetermined on the 23rd of December 1854.

Fifthly, that on the 17th of July 1854, the said H. W., also party in this cause, instituted a suit or action in the Vice-Admiralty Court of Lower Canada, against the said William Patterson, the master, &c.

Sixthly, that on the 19th of October 1854, an action was entered in this Court on the part of the said H. W., and on the 24th of October on the part of T. B., against the "Lanarkshire," for subtraction of wages, to wit, the identical wages for the recovery of which suits are now depending, brought by the same parties, in the Superior Court of Quebec, and the Vice-Admiralty Court of Lower Canada; that in pursuance thereof, the vessel was arrested by two warrants under seal of this Court at Gloucester; that on the 10th of November 1854, an **[191]** appearance was given to the said actions on the part of the owners; that the actions were consolidated; that the owners were not aware that the said suits against the said William Patterson were still depending

at the commencement of this suit, until after the summary petition had been given in in this cause.

Seventhly, That the cause of action in this suit is the same as in the suits instituted by the said T. B. and H. W. in Canada; that it is not competent to them to institute proceedings against the "Lanarkshire," or her owners, and that they and their bail ought to be dismissed.

The admission of this allegation was opposed.

Dr Haggard, for the seamen. This allegation is no answer to the action, though it sets up two distinct grounds of defence; first, the articles; secondly, lis alibi pendens. The correct construction of the articles is in favour of the seamen. They bound themselves to serve on board the ship on a voyage from Liverpool to Baltimore, from thence, if required, to any ports in the United States, British North America, or wherever freight might offer, and back to a final port of discharge in the United Kingdom, or for a term not to exceed twelve months; the alternative sets the limit to the engagement; the master might take them anywhere where freight might offer, provided the service did not exceed the year. Any other construction would put the men at the mercy of the master to take them all over the world before he brought them back to an English port. Seamen are to be protected against such a latitude of construction. It was so held with regard to the interpretation of the words "or elsewhere:" *The "Minerva"* (1 Hagg. Adm. 361) and *The "George Home"* (ibid. 375). Besides the object of the provisions in the statute upon the point was to protect seamen.

As to the plea of lis alibi pendens, that cannot be sustained. The suits, whatever may be their origin, are perfectly distinct; the actions in Canada are personal actions against the master; this is a suit against the ship. Besides, the steps taken in Canada are merely initiatory; when the seamen found the master immediately returning to England, they returned also, and commenced this suit, in fact, abandoning the other, though they may, perhaps, have neglected to take the proper steps to discontinue it. The suit has been virtually discontinued, as in *The "Bold Buccleugh"* (3 W. Rob 220).

Dr Addams, contrà, argued to the effect of the judgment.

Cur adv. vult.

**[192]** *Dr Lushington.* In this case there are two questions: the first, respecting those articles of the allegation which counterplead the statement of the seamen as to their agreement, and, referring to the ship's articles, allege that the seamen were guilty of desertion.

This is a question of some difficulty, because, possibly, something may turn upon the peculiar circumstances of the case. I do not think it would be prudent to decide it on the mere construction of the articles, without regard to the peculiar circumstances of the individual case; for instance, it might be that the delay occasioned by the ice was an ordinary contingency, such as both parties might naturally expect and provide for, and the second clause was expressly intended to guard against the long detention of the seamen by such an occurrence.

In case of doubt, as the owners are much more competent to take care that the articles are clearly expressed than the mariners, I should be disposed to lean against a construction the result of which would be to convict the seamen of desertion. But I shall admit the articles, and reserve my decision upon the construction until I am better informed of the circumstances of the case.

With respect to the second question, I am of opinion that the articles pleading lis alibi pendens must be admitted; and if proved to the full extent, would bar this action.

The distinction attempted to be drawn respecting the nature of the actions, does not appear to me to be substantial; first, it is clear that all these actions are for the same object, the recovery of wages; and that if the wages should be recovered in all the suits, the owners would have to pay the same demand twice, which would be wholly unjust.

I think this consideration alone would be sufficient to induce me to admit the articles; but when examined, all the distinctions merge in this. Take an action here at Common Law against an owner; should I allow a proceeding for the same cause of action and two judgments for the same demand? These two actions in Canada were certainly brought against the master, but necessarily as agents of the owner.

If I were to hold otherwise I should convert the right of proceeding against the

ship, the owner, or the master from a protection to the seaman into an act of injustice to the owner.

I shall, therefore, admit this allegation as it stands.

Proctors: Nelson; and Nicholl.

**[193]** IN THE GOODS OF WILLIAM MASON, Deceased. Prerogative Court of Canterbury, Nov. 6, 1854.—An executor, before the operation of the Wills Act, having renounced probate in order to become a competent witness of the deceased's handwriting, allowed to retract his renunciation, and to take probate.

The deceased died on the 26th of September, 1836, leaving a will and two codicils, all dated in that year. In the will, Thomas Newman was appointed executor and residuary legatee in trust; and in the second codicil, Sarah Mason, deceased's wife, was also named executrix. There was only one witness.

On the 29th of November, 1836, probate of the will and codicils was granted to Mrs. Mason. Mr. Newman having first renounced, as well the probate and execution of the said will and codicils as the letters of administration with them annexed, in order to become a competent witness, made the usual affidavit as to the deceased's handwriting.

Mrs. Mason being dead, and it being necessary to obtain a double probate of the will and codicils, merely for the purpose of passing the account at the Legacy Duty Office, the deceased's affairs being in other respects wound up, Mr. Newman, the surviving executor, was desirous of retracting his renunciation, for the purpose of obtaining probate.

Dr. R. Phillimore moved the Court to allow such retractation, and cited *Harrison* v. *Harrison* (1 Robert, 406).

*Sir John Dodson.* I have made inquiry upon this point, and I understand that this has been done in two or three cases. In the case of Queen Charlotte's will, the executor renounced for the purpose of becoming a witness, and was afterwards allowed to retract such renunciation; and shortly afterwards there was another case, in which the same thing was done. I think, therefore, I may grant this motion.

Proctor: Glennie.

HART *against* HART. Arches Court of Canterbury, Nov. 10, 1854, Feb. 7, 1855.—Suit for divorce by reason of cruelty. Cruelty fully condoned is not revived by subsequent desertion. In order to revive condoned cruelty the acts must be ejusdem generis.

This was a cause of divorce by reason of cruelty, promoted and brought by virtue of letters of request from the Chancellor of the Consistory Court of Worcester, by Emily Jane Hart against her husband Francis Hart, of Leamington Priors.

**[194]** The parties were married on the 18th of September, 1847, Mr. Hart being then a widower with two or three grown-up children, and the lady a spinster between twenty and thirty years of age. They lived together at various places until the month of June, 1848, when Mr. Hart, having taken his wife to the Hibernian Hotel, Clifton, and written to her brother at Hereford to take her home, left her, and for some time concealed from her his place of residence.

Mrs. Hart, having discovered her husband's residence, caused him, in April 1850, to be served with a citation from the Consistory Court of London in a cause of divorce, by reason of his cruelty and adultery. This led to an interview between them at the house of one of Mrs. Hart's trustees, which resulted in a formal reconciliation and the signature of the following document:

"I, Emily Jane Hart, having been separated, and not living for nearly two years with my husband, Francis Hart, who parted with me and from me on account of my violent temper, and conduct not pleasing to him, and now I come up to London, go to his lodgings and beg his forgiveness, and I appoint to meet him at Mr. William Fisher's, Doughty Street, one of my trustees, at 12 o'clock this day, and acknowledge my faults, and now ask him to forgive and forget, and take me again to his home, when I promise, and hope to keep my promise, to conduct myself quietly, soberly, and peaceably, in decent regard to him and his comfort, and who on the said account, and I expect from such alteration of my conduct that he will appreciate, love, and cherish me with that endearment that a wife ought to be treated with.

"This is my own offer of reconciliation, proposed by myself, and accepted of by him. Dated this 19th day of April, 1850.

"Emily Jane Hart.
"Francis Hart.

"Mr. Fisher not being at home, this is witnessed by Mr. Anderson, who came to Mr. Fisher's as the friend of Emily Jane Hart.

"Witness, Charles Anderson."

The suit for divorce by reason of adultery and cruelty being thus terminated, Mr. and Mrs. Hart resided together again until early in the month of July following, when Mr. Hart, having accompanied his wife to Bristol, took her to the White Hart Hotel, and having first ordered dinner, again disappeared, and for two or three years succeeded in concealing his place of residence from her.

In the month of July, 1853, Mr. Hart was served with a citation from the Consistory Court of Worcester, in a cause of divorce by reason of cruelty. The cause, however, was moved by letters of request, into the Arches Court.

On behalf of Mrs. Hart a libel consisting of twenty-three articles was brought in.

**[195]** The first sixteen articles pleaded divers acts of cruelty, and Mr. Hart's desertion of his wife at the Hibernian Hotel, Clifton.

The 17th pleaded that Mrs. Hart, having by the assistance of her friends procured the necessary funds, quitted the Hibernian Hotel, and returned to the house of her father at Hereford, where she continued to reside separate and apart from her husband, and without receiving any allowance or maintenance from him, until some time in the month of April 1850, when Mr. Hart, having been served with a citation from the Consistory Court of London, in a cause of cruelty and adultery, at the suit of Mrs. Hart, he had an interview with her, whereat he asserted his innocence of adultery, and his wish to make every reparation in his power for his former cruelty towards her, and when Mrs. Hart, influenced by his assertions and promises, consented again to live and cohabit with him.

The 18th pleaded that in the month of May 1850, Mr. and Mrs. Hart again went to Plymouth together, and took up their residence at the house of Mr. Hart's son-in-law, and that during such residence. Mr. Hart habitually ill-used and threatened his wife; that in so conducting himself towards her he often declared that it was for the purpose of driving her from his house; and it then pleaded two particular acts of cruelty, and that in consequence thereof she was unable from illness and weakness to seek the protection of a magistrate; and was, moreover, threatened by Mr. Hart, that if she made any complaint he would get old B. (the father of his son-in-law) to swear she was raving mad, and then place her in a madhouse for the rest of her life.

The 19th pleaded that about a fortnight after these occurrences, to wit, early in July 1850, Mr. Hart suddenly quitted her at the White Hart Hotel, at Bristol, leaving her there alone, very ill and penniless.

Upon this libel ten witnesses were examined, Mrs. Hart being examined on almost every article, and being the only witness to several of them, among which was the 19th.

Mr. Hart gave in no allegation, but closely cross-examined the witnesses, especially Mrs. Hart.

Dr. Addams and Dr. Robertson appeared for the wife; the Queen's Advocate and Dr. Spinks for the husband.

Feb. 7.—*Sir John Dodson.* This is a suit for divorce a mensâ et thoro by reason of cruelty, promoted by Emily Jane Hart against her husband Francis Hart. It is brought into this Court by virtue of letters of request from the Chancellor of the diocese of Worcester.

The marriage took place upon the 18th of September 1847, in the district church of Saint John, Notting Hill. Mr. Hart was at such time a widower; his age does not appear, but he was certainly not a very young man, for he had a daughter married, and had grandchildren; Mrs. Hart was a spinster twenty-six years of age, or thereabouts.

The parties cohabited together at Tunbridge Wells, at Margate, at Ladbrooke Villas, Notting Hill, at Leamington, and **[196]** other places, and continued such cohabitation until the month of June 1848, when, it is alleged, Mr. Hart deserted his wife, at the Hibernian Hotel, Clifton; he left her there, and deserted her. The

cohabitation, therefore, continued only about ten months—from September 1847 to June 1848. There was a subsequent cohabitation of about two months, in the spring and summer of the year 1850. The suit commenced in July 1853, when, in fact, the parties had been married about six years, but had cohabited only about twelve months, at two different periods of ten and two months. The final separation took place in the month of July 1850, when Mr. Hart left his wife at the White Hart Hotel, Bristol. It is said that Mr. Hart concealed his residence from his wife, and that as soon as she discovered it, she commenced her suit for a divorce; that was in the month of July 1853.

On the part of the wife, a libel consisting of more than twenty articles, and pleading some gross charges of cruelty, was given in. On this libel Mrs. Hart has been examined. No allegation has been given in for Mr. Hart, who has not thought proper to counterplead the charges brought against him, but contents himself with the cross-examination of her witnesses.

Mrs. Hart has been examined on all the articles of the libel. It has been described as a great improvement on the modern rules of evidence, that parties to suits are now competent witnesses in their own behalf, especially in cases of this kind. In some cases, certainly, it may be so; there may be no one but the parties themselves present at the occurrence which forms the ground of complaint; no one else can speak to it, it is within the knowledge of no other. Still it behoves Courts of Justice to receive such evidence with great caution, to see that it bears the stamp of truth, to consider how far it is consistent with itself and with probability. It must also be considered how far it is consistent with the admitted facts and circumstances of the case, and with the documents produced. The Court should also pay due regard to the tone of the evidence, and beware of exaggerated statements.

In the present case it is said that Mrs. Hart labours under a disadvantage in consequence of the omission of Mr. Hart to undergo an examination. It certainly is difficult to assign a good reason (*a*) why Mr. Hart should not have given in a plea and given his evidence upon it, but he has thought proper to confine **[197]** his defence to the interrogation of the witnesses produced against him, and I must say that such a course is not calculated to make a favourable impression upon the Court.

Mrs. Hart has certainly been examined upon every article, and deposes strongly to the various facts pleaded. Without imputing wilful perjury to her, the Court is bound to state that her evidence is not such as it can place implicit reliance upon. In some instances she is not corroborated at all, in others she is corroborated to a certain extent by other witnesses; but the evidence of those other witnesses falls far short of that given by Mrs. Hart, and, in fact, proves her statements to be highly coloured and exaggerated.

One instance of this is her evidence upon the tenth article of the libel; that refers to the averment that Mr. Hart compelled his wife to write to her trustee to give up the deed of settlement, and, upon the trustee's refusal, committed a violent assault upon her. Her deposition is to this effect: that one morning, at Mr. Hart's request, she did write to Mr. Fisher to give up the deed of settlement of the two houses which Mr. Hart had settled on her, on the occasion of their marriage, and that Mr. Fisher refused. She then describes Mr. Hart's violence towards her. She says: "I was standing on one side of the fire, and he on the other; he put his two hands, one on either side of my throat, and held me so tight that I could not speak; I was close by the bell, and rang it, and the maidservant, Mary Ann James, came up, and she took hold of my husband's hands, as I think, and removed them from my throat. She cried out 'What are you doing to my mistress? If you do not let her go, I will fetch a policeman'; and, as I have said, she either removed his hands or caused him to remove them." Such is the account given by her, and I must say it is scarcely consistent with the evidence of Mary Ann James, the vouched witness, who has been examined. Let us see her evidence upon the same article. She says: "One night, very shortly after I entered her service, at about eight o'clock in the evening (as nearly as I can remember the time) I heard the drawing-room bell ring violently. I went upstairs into the drawing-room; it is on the ground floor, and the kitchen,

(*a*) The reason assigned by counsel was, that Mr. Hart having to pay the whole expenses of the suit, was unwilling unnecessarily to increase them by pleading, when he felt satisfied that the case against him must break down of itself.

where I was when I heard the bell, was on the basement. As I entered I saw Mrs. Hart half sitting on the floor, with her back resting against the seat of an arm-chair, which was near the side of the fire-place. She was in such a position as she would have been if she had slipt from off the chair. She seemed very much agitated, and her hair was streaming down her back. Mr. Hart was stooping down or kneeling on the floor, very near to Mrs. Hart. He had in his hand a glass tumbler **[198]** not quite half full of some liquid which, from the smell and appearance, was either brandy or rum." The account given by Mrs. Hart is that he had his hands round her throat, strangling her, and that the maidservant took his hands away; it is not so: he was stooping or kneeling beside her, with a glass of spirits in his hands. The servant goes on to say: "As I entered the room Mrs. Hart exclaimed to me, 'Look here, Mary, he wants to strangle me.' His hands, however, were not in any way touching her at the time." This is very different; he was not touching her. She goes on to say that nothing was said by her or in her hearing about a policeman. This shews that Mrs. Hart cannot be implicitly relied on.

Again, on the 6th article she alleges that while they were at Miss Killick's boarding-house at Margate, Mr. Hart one day so violently assaulted her that her cries brought Miss Killick to her assistance, and that Miss Killick interfered to protect her from any further ill-treatment; but Miss Killick is not produced. The proof of this article depends entirely on Mrs. Hart alone. It is said that Miss Killick having so many persons continually residing in her house for a short time, and then going away, may have forgotten the circumstance; but surely if the averment be true, the circumstance is not of such an ordinary character as to leave no impression upon the mind of the lady in whose house it is said to have occurred.

So it is with a number of other accusations; the only evidence respecting them is that of Mrs. Hart herself, and those persons who are said to have been present are not produced.

But the Court is bound to say that some of the charges are corroborated, especially that of the violent assault at Hereford. It is confirmed in all essential points by the evidence of Mrs. Hart's sister. It was a gross act of cruelty, and fully sufficient, in my opinion, to entitle Mrs. Hart to a sentence of separation.

There are other acts of cruelty, with respect to which her evidence is confirmed to a certain extent. When residing at Ladbrooke Villa, Notting Hill, she says she was one night obliged to fly for safety to the house of her friend, Mrs. Hinchcliffe, who lived nearly opposite. No doubt she did fly at midnight, was let in, and remained there all night. To a certain extent she is confirmed by Clements, Mrs. Hart's servant at that time, and by Charlotte White, the cook of Mr. and Mrs. Hinchcliffe. She let Mrs. Hart into the house, and deposes to the state of alarm in which she appeared, and to the fact that her left arm was very red, as if it had been pressed by another person's hand.

**[199]** The Court is constrained to say that, notwithstanding it cannot give full credence to the evidence of Mrs. Hart, and many of the accusations are not proved to the satisfaction of the Court, yet there are others clearly amounting, in the opinion of the Court, to acts of legal cruelty, which are sufficiently established, and that Mrs. Hart is entitled to the relief which she prays, unless she is barred by anything which subsequently occurred, especially as Mr. Hart has not given any plea, nor offered any evidence to meet the charges made against him, but has contented himself with the cross-examination of the adverse witnesses.

The question then comes to this; these parties lived together, as I have said, for about ten months; the husband then left the wife, and they lived apart for two or three years; a reconciliation took place between them, and they cohabited together again for a period of about two months, and until the husband again deserted his wife; and the question comes to this, Does malicious desertion do away with the effect of condonation and revive the former cruelty?

There can be no doubt that there has been condonation; there is not only presumptive, but actual condonation.(*a*) The reconciliation was entirely of her own free

(*a*) In *Snow* v. *Snow*, 2 Notes of Cases, Supp. xii., Dr. Lushington says: "Condonation, though a technical term, clearly imports the forgiveness of an offence done, and is stated by Sanchez (De Matrim, l. 10, Disp. 5, No. 19), and in some decisions in these Courts (*Orme* v. *Orme*, 2 Add. 382; *Dunn* v. *Dunn*, 3 Phill. 9), to be of two

will, and at her own desire. Her letters, which have been annexed to the interrogatories, show this. Again and again she says she desires to be reconciled, and to live again with her husband; and uses strong expressions of endearment. The matter does not rest here; it seems that when he refused to live again with her, she instituted a suit against him for divorce, then called at his house, the result of which visit appears to have been an appointment to meet at the house of her trustee; they accordingly meet there, and Mrs. Hart signs a sort of confession, in these words, "I, Emily Jane Hart," etc. (vide p. 194).

So that at this time there was a perfect reconciliation and condonation; it was not merely presumptive; it was followed by cohabitation, which was only terminated by the desertion of Mrs. Hart by her husband.

**[200]** The question, then, for the consideration of the Court is, whether this malicious desertion will operate as a revival of former cruelty?

It is said that, in some countries malicious desertion alone is sufficient ground for a sentence of separation; that is certainly true. Mr. Bishop (*a*)[1] says that in some but not in all the States of America, malicious desertion is a sufficient ground of divorce. But certainly it is not so in England.

It is argued, however, that if it is not sufficient in itself to justify a sentence of divorce, it may be sufficient to revive former acts of cruelty; but I cannot find that such a doctrine has ever been held in the English Courts; and no case was cited by counsel to that effect. It is said that a less degree of cruelty is required to revive former cruelty, than would be required originally to found a sentence of divorce. No doubt that is so; but I apprehend the cruelty must be ejusdem generis; it must be of that kind which causes a reasonable apprehension of danger; it must be something to lead the Court to suppose that the husband would revive the former violence of his conduct. Desertion is not an act of cruelty per se; there is nothing to cause danger to life or limb, and I cannot consider it a revival of former acts.

I am not aware of any case precisely on this point, but there are some remarks of Dr. Lushington in the case of *Evans* v. *Evans*,(*b*) on the admission of the libel, which bear very closely upon it. He says, "Has anything occurred since March which can revive the cruelty said to have taken place previously? Now this is a subject which has been discussed over and over again in this Court, and on which it is very difficult to lay down any precise or general principles; to revive condoned cruelty there must be something of the same kind as would have supported a suit originally for cruelty, such as violence, or threats of violence; but the acts need not be of the same stringent kind; something short will be sufficient, provided it be shown that the husband continues in the same state of mind, and as incapable of controlling himself as when he actually committed the former acts of cruelty." Well, then, in the present case, there is nothing of the same kind; it is quite different; the husband withdraws himself from the wife's society; there is nothing that threatens a revival of danger to life or limb. In point of fact, throughout this case the husband seems to be the party **[201]** who wishes to avoid the wife, instead of the wife being in danger from the husband.

I am, therefore, of opinion that there is not, under the circumstances, proof of such cruelty as would call upon the Court to pronounce a sentence of separation; that there has been the clearest condonation, and that the subsequent desertion does not operate to revive the antecedent acts of cruelty. I must, therefore, dismiss the parties.(*a*)[2]

Proctors: for the wife, Nelson; for the husband, Pritchard.

---

kinds—the one remissio expressa, by express words of forgiveness, and succeeding reconciliation; the other remissio tacita; and the remissio tacita includes a return to connubial intercourse."

(*a*)[1] Commentaries on the Law of Marriage and Divorce, ch. xxiv. § 503 *et seq.*

(*b*) 7 Jur. 1046, cited at length in a note to Bishop's Commentaries on the Law of Marriage and Divorce, § 376.

(*a*)[2] In the case of *Turner* v. *Turner* (Arches, 19th June 1854, not reported) Sir John Dodson considered the question of condonation of cruelty, and held that returning to the husband's bed did not condone the previous cruelty. The circumstances were these: For two or three weeks Mrs. Turner had been sleeping with her children, and not with her husband; on Wednesday, the 2nd of February, the last

**[202]** IN THE GOODS OF MARY REED, Deceased. Prerogative Court of Canterbury, Dec. 28, 1854.—A will dated in 1795 (the testator dying in 1807), now brought to the Court for the first time, had a piece torn from the top of each sheet. The clause of attestation mentioned sealing, but no seal appeared. The Court, suspecting the seal to have been torn off, declined granting probate on motion.

The deceased died in 1807, leaving a duly executed will, dated in the year 1795, in which she appointed her son B. R. executor and residuary legatee. He survived her, but died without taking probate.

It was supposed that the deceased was not possessed of any property beyond a few articles of household furniture, and consequently no notice was taken of her will by the representative of her executor; but in the month of May 1854, it was discovered that there was standing in the name of the deceased, at the time of her death, in the 3 per cent. consols, the sum of 220l.

B. R. had died intestate, leaving a son, W. R., who was entitled to this fund; he had not taken administration to his father; but previous to so doing, and in order to see whether it was worth his while so to do, he now applied for administration with the will annexed of the deceased Mary Reed.

When the will was produced, it was found to be written on five sheets of paper, but from the middle of the top of each sheet something had been torn off, leaving a gap on each sheet, but none of the writing was affected. There was no explanation as to when or how this mutilation occurred. A witness, however, deposed that about the year 1834 the executor gave her the will for safe custody, and that it was then in the same state in which it now appeared. The attestation clause was to the effect that "the writing contained in this and the four preceding sheets of paper hereto annexed, was signed and sealed by Mary Reed."

Counsel moved for administration with the will annexed to be granted to W. R. upon his taking administration to his father, the executor named in the will.

*Sir John Dodson.* The circumstances of this case are very peculiar. Here is a will dated as far back as 1795; the testatrix died in 1807, and no steps have been

---

act of cruelty was committed, but on Sunday the 6th the husband, it was alleged, endeavoured to get into her bedroom, and being unable to do so, threatened her. It was then pleaded on the 11th article of the libel, that Mrs. Turner, fearing the violence of her husband in case she opposed his wishes, on the night of Monday, the 7th of February, consented to return to his bedroom; that she and her husband slept together on the said night; that on the next day (Tuesday) Mr. Turner having gone to London, Mrs. Turner communicated with her friends, and on the Wednesday left her husband's house and went to reside with her father.

On this part of the case Sir John Dodson said: "The question is, whether such return to her husband's bed amounts to condonation so as to bar this lady's right to relief. Miss Clements (her sister) knows nothing about condonation or reconciliation. Jane Wicks, the servant, speaks to the fact of reconciliation, and the wife's return to the husband's bed. The account she gives of it is this: in answer to the 15th interrogatory, she says, 'It is the fact, that after the quarrel Mr. and Mrs. Turner were reconciled and slept together. They slept together on the Monday night after the quarrel which took place on the Wednesday, and on that Monday night she did go to her husband's room dressed in a dirty polka. I heard her husband remonstrate with her about it, and tell her he would not sleep with her in that, but that if she would come to him as a lady ought to do he would sleep with her. I did on that night borrow a nightdress for my mistress from one of the servants, Mary Barber, the cook.' That is her account; and here I must observe that although this witness is produced by the wife, many of her answers are somewhat partial to the husband. Yet even on the statement of this witness I hardly think that this can be taken as a reconciliation between the parties. The interrogatory was intended to show that the return to the husband's bed was quite voluntary on the part of the wife, as if the husband had refused to receive her unless she conformed her dress to his taste. I must confess that I cannot give credence to this statement; I can hardly believe that this poor lady, after the treatment she had received, could have voluntarily, and without being under the influence of fear, returned to her husband's bed."

The learned Judge, referring particularly to the remarks of Dr. Lushington in *Snow* v. *Snow* (2 Notes of Cases, Supp. i.), granted the divorce.

taken to prove the will until now. The attestation clause states that the will was sealed as well as signed, and I am strongly inclined to think that the seal has been torn off; if that were done by the testatrix, it would in my opinion amount to a cancellation of it. There is no evidence before the Court as to when or by whom it was done. I cannot, therefore, take upon myself to pronounce **[203]** this paper to be a will upon motion. I must reject the motion, leaving those interested under it to propound it if they think proper.

Proctor: F. Clarkson.

SHAW *against* NEVILLE. Prerogative Court of Canterbury, Jan. 15, 1855.—A will entirely in the handwriting of the testator, with a perfect testimonium and attestation clause, with the seal and signature of the testator, and the signature of two witnesses, declared invalid on the testimony of the witnesses that they did not see the deceased's signature, or any writing whatever, upon the paper.

[S. C. 1 Jur. (N. S.) 408.]

This was a question as to the due execution of the will of Courtland Skinner Shaw, doctor of medicine, of the town of Cheltenham, deceased.

It was in the deceased's handwriting, was signed and sealed by him, had perfect testimonium and attestation clauses, and purported to be duly attested by two witnesses.

It was propounded by the residuary legatee substituted, and opposed by the widow who was universal legatee under a former will.

The attesting witnesses, the gardener and the butler of the deceased, who were both in the service of the widow at the time of their examination, deposed to the effect that the deceased asked them to sign a paper; that the paper was folded down, so that they saw no writing whatever upon it; and that the deceased did not write his name or acknowledge any signature in their presence.

Dr. Waddilove, for the will, endeavoured to distinguish this from former cases on the point, and contended that there was no case in which the will had been pronounced against on the ground that the signature was not acknowledged, when there was a perfect attestation and a perfect testimonium clause. He cited *Gaze* v. *Gaze* (3 Curt. 451).

Dr. Twiss, contrà, relied on *Ilott* v. *Genge*,(*b*) and *Hudson* v. *Parker* (1 Robert. 14).

*Sir John Dodson.* The statute is too strong; I must pronounce against this will, though I have no doubt it fully expresses the intentions of the deceased. It is the deceased's handwriting; there is a perfect testimonium and a perfect attestation clause, and the seal and signature of the deceased; but when he produced it to the witnesses, unfortunately they saw nothing of all this; according to their deposition, they saw nothing but a blank paper. The deceased does not say: "This is **[204]** my will," or ask them to attest his will; he merely says, "I want you to sign a paper." I cannot pronounce this will to have been duly executed.

Dr. Waddilove. The Court will give the costs out of the estate. If the witnesses were dead or could not be found, it would have been a good will.

Per Curiam. Yes; certainly it would. I think the party entitled to her costs. It was the deceased's own act, and upon that ground I give the costs.(*a*)

Proctors: for the widow, Gregory; for the residuary legatee, Longden.

---

(*b*) 1 Notes of Cases, 572; 3 Curt. 160; S. C. 4 Moo. P. C. 265.

(*a*) "The object of the law is said to be to give effect to the intentions of testators by assisting the proof of genuine, and detecting spurious, wills. The acknowledgment of signature before two witnesses is said to be in accordance with this object, inasmuch as it secures the evidence of two persons respecting a particular act, which proves the particular document to emanate from the testator's mind, and to express the record of his intentions. Yes, but are there not other particular acts that prove the same thing? Is not the act of taking a document from a desk and simply asking two witnesses to put their names thereto, or the actual acknowledgment that such a document is his will, as strong an evidence that the particular document expresses the intentions of the testator as the actual or virtual acknowledgment of his signature?—'non quod dictum sed quod factum est inspicitur.' Would not the proof of these particular acts be as much in accordance with the objects of the statute as the proof of the other? What evil could the admission of such proof produce? It would not

**[205]** IN THE GOODS OF ELLEN DIXSON, Spinster, Deceased. Prerogative Court of Canterbury, Feb. 12, 1855.—E. D., being domiciled in England, was married in Scotland to T. L. B., who was her deceased sister's husband, and also domiciled in England. After the marriage, E. D. made her will in her maiden name, but reciting the fact of marriage. The Court granted probate of the paper as the will of E. D., spinster.

The deceased died on the 18th of October 1842, leaving a duly-executed will in the following terms:—

"This is the last will and testament of me, Ellen Dixson, of the parish of Stone, in the county of Stafford. I devise and bequeath all my real and personal estate to Thomas Leicester Bladon, of Stone aforesaid, gentleman, now residing with me (and to whom I was married on or about the 16th day of March 1836, at Gretna Green, in the Kingdom of Scotland, according to the laws of the said kingdom) absolutely. And I appoint the said Thomas Leicester Bladon, sole executor of this my will, hereby revoking all other wills. In witness whereof I have hereunto set my hand and seal this 27th day of January 1840."

It appeared that the said Thomas Leicester Bladon was a widower; that his first wife was the deceased's sister, and that as Lord Lyndhurst's Act, which had recently come into operation, rendered such marriages in England null and void, the second marriage was celebrated in Scotland. As doubts were entertained as to the validity of the second marriage, the deceased was advised to make her will in the above form, under her maiden name, in order that Mr. Bladon might take the property thereunder, if the marriage were invalid, as he would take it jure mariti if valid.

The deceased died before Mr. Bladon; he died without having proved the will or taken letters of administration, and left a will, of which P. Smith and T. Myatt are the executors.

Dr. Middleton moved the Court to decree letters of administration (with the will annexed) of the goods of the deceased as Ellen Dixson, a spinster, to be granted to P. S. and T. M. the executors of the will of Thomas Leicester Bladon. He submitted that the marriage of the deceased with her sister's husband, after the passing of the statute 5 & 6 Gul. 4, c. 54, would be clearly a nullity according to the English law, and that whatever might be the law of Scotland with respect to such marriages, the English Courts would not recognise a marriage between domiciled English subjects who merely went to Scotland for the purpose of evading the English law, inasmuch as a personal disability attached to them which the law of Scotland could not remove. He cited *Conway* v. *Beazley* (3 Hagg. Ecc. 647, 652), and the *Sussex Peerage Case* (11 Clark & Fin. 85).

**[206]** *Sir John Dodson.* This marriage having taken place in March 1836, and Lord Lyndhurst's Act having passed in the previous year, I have no doubt that the marriage was a nullity, in consequence of the personal disability of the parties to contract the marriage. As far as this case is concerned, the question is quite un-

---

in the slightest degree assist the proof of spurious wills, but the reported cases prove that it would in numerous instances prevent the defeat of genuine ones. For it is remarkable that in all the cases where wills have been actually invalidated through non-acknowledgment of signature, or have narrowly escaped invalidation on that ground through the equitable inclination of the Judge, there was no suspicion of the identity of the document, and no doubt that it fully expressed the intention of the testator. The very witnesses, on whose testimony respecting signature or presence the testaments have been declared legally invalid, have proved them beyond a doubt to be genuine wills. It was formerly considered the very object and purpose of witnesses, by proving the capacity of a testator and the identity of the document to prove wills; but now-a-days, the principal use is to disprove them.

"The first inquiry of a next of kin is, who are the witnesses? and as soon as he finds them to be servants, waiters at hotels, or any others in the more venal and corruptible classes of society, he blesses the new Wills Act, and calculates the chances of an intestacy. For he knows the worthlessness of all the moral evidence in the world to prove the intention of the testator against the affidavits of the attesting witnesses respecting the act of execution."—Practical Remarks on the Injurious Operation of the Wills Acts, pp. 45, 46.

important, as the property would come to the same gentleman in either case, but he would take in a different capacity. I grant this motion as prayed.

Proctor: Middleton.

IN THE GOODS OF AGNES MARIA FOLEY, Deceased. Prerogative Court of Canterbury, Feb. 19, 1855.—Evidence of declarations by a testator before the execution of a will is admissible to rebut the presumption of law that alterations therein were made after the execution.

The deceased died on the 5th of January 1855, leaving an autograph will on half a sheet of letter paper, and dated the 3rd of March 1853. It was witnessed by L. M. Crawford and R. Barber, who proved its due execution.

There were several alterations and interlineations; one being the words "and appoint my son Thomas my executor and guardian to my grandchildren." The attesting witnesses could not state whether or not the interlineations were in the will at the time of the execution, but Mrs. Crawford, in her affidavit, stated "that, from what the deceased had previously told her, in a conversation regarding the disposition of her property, and that her son Thomas was alone to act in the settlement of her affairs, she had no doubt that the appointment of her son Thomas as executor was written by the deceased prior to the will being executed."

Dr. Deane moved the Court to decree probate of the will with the alterations and interlineations therein, to Mr. Thomas Foley, the sole executor therein named; and submitted that the presumption of law, that the alterations were made after the execution, was sufficiently rebutted by Mrs. Crawford's evidence of the declaration of the testatrix previous to the execution; that at least the interlineation of the appointment of the son as executor was so proved to have been made previous to the execution; that from the nature of the other alterations, and the appearance of the document, it was most probable that all the alterations were made at the same time; and that Mrs. Crawford's evidence respecting the declarations of the deceased previous to the execution was admissible to rebut the presumption of the law, or the authority of the Court of Queen's Bench in the case of *Doe* v. *Palmer*, where Lord Campbell said, "It [207] may be convenient first to consider the question whether, if in a will which is not in the handwriting of the testator an alteration appears, evidence might be received of previous declarations by him, that he intended to dispose of his property in the manner in which it is disposed of by the will in its altered form. If the draft of the will could be produced, corresponding with the will in its altered form, would it not be admissible evidence, and might not the jury infer from it, that, before the will was executed, the draft and the will had been compared, and the mistake rectified? Would not written or verbal instructions from the testator to his solicitor to draw the will in the altered form be equally admissible? In what respect do such verbal instructions differ, for this purpose, from a contemporaneous declaration by the testator to another person that he had determined in his will to dispose of his property in the manner carried into effect by the will as altered? What distinction can be drawn between the draft of the will, or the written instructions for the will, and the verbal declaration of the testator's intention, except as to the strength of the evidence which they respectively afford? As to admissibility, they all seem to rest on the same principle, and if the verbal declaration of intention must be rejected, so must the draft of the will with the initials of the testator affixed to it. It would not be very creditable to the law, if such evidence were to be excluded; as a logical inference might be fairly drawn from it respecting the priority of two events, that is to say, the making of the alteration and the execution of the will; and I am not aware of any principle, rule of law, decided case, or dictum against the admissibility of such evidence" (16 Q.B. 756).

*Sir John Dodson.* I cannot grant this motion as it is prayed. Indeed, I should have been inclined to reject it altogether if it had not been for the decision of the Court of Queen's Bench in the case cited by the learned counsel. On that authority I admit the evidence of the declaration of the deceased, previous to the execution of the will. But that declaration bears only upon one of the interlineations, viz., the appointment of her son as executor, and I think it would be going too far to infer, from the declaration of the testatrix, the making of one alteration before execution, and then upon that inference to ground another, viz., that the rest of the alterations were

made at the same time. Probate must go out as the will originally stood, without any of the interlineations, except that by which the son is appointed executor.

Proctor, Stokes.

[208] THE "TEMISCOUATA." The High Court of Admiralty, March 10, 1855.—In a collision suit the plaintiff entered the action and took bail for 250l. The plaintiff succeeded; it subsequently appeared that the damage and costs amounted to more than 250l. The defendant, however, tendered 250l. The Court, at the petition of plaintiff's proctor, decreed the defendant personally liable for the remainder of the plaintiff's costs, the defendant having unnecessarily compelled the plaintiff to proceed by the more expensive mode of plea and proof, instead of act on petition.

[S. C. 1 Jur. (N. S.) 479. Followed, *The "Freedom"*, 1871, L. R. 3 Adm. & Ecc. 498. Discussed, *The "Dictator,"* [1892] P. 318.]

This was a cause of damage, promoted by the owners of the "Lawrence" sloop against the "Temiscouata." The action was entered for 250l., and bail was given to that amount to answer damages and costs.

The Court pronounced in favour of the "Lawrence." It appeared, however, the damages and costs exceeded 250l. The defendants' proctor tendered 250l., which was refused.

The plaintiff's proctor, in an act on petition, alleged that on the day when the commission, with the usual bail on behalf of the defendants in the sum of 250l., to answer the action was returned, the surrogate, at the petition of the defendants' proctor assigned the plaintiff's proctor to libel; that the cause was thenceforth conducted in the form of plea and proof; that on the 26th of October 1854, the Judge pronounced for the damage proceeded for, and condemned the defendants, and the bail given on their behalf in such damage and in costs, and referred the same to the registrar and merchants; that the statement was brought in, but before it was reported upon, the plaintiff's proctor received from the defendants a letter to the effect that, having looked through the statement, he was willing to pay the sum of 173l. 2s. 5d. without a reference to the registrar and merchants; that there will be no dispute as to this amount; but that this amount, together with plaintiff's costs, will far exceed the sum of 250l., the amount in which the action was entered; that defendants' proctor has tendered the sum of 250l. in satisfaction of the whole claim of the plaintiff in respect both of damage and costs. The prayer was that the Court would pronounce the tender insufficient, and direct the costs of the plaintiff to be taxed, as usual, and decree when, and after the same shall have been so taxed, the defendants to be personally liable for the remainder of such taxed costs after the said sum of 250l. has been applied (as far as it would go) in liquidating the said damage and costs, and condemn the defendants in the costs of the petition.

The answer alleged, inter alia, that before the action was brought, the plaintiff demanded only 83l. 12s. 2d. in respect of the damage sustained by the collision, which the defendants refused to pay; that the "Temiscouata" was thereupon arrested and the action entered; that after the sentence was given by the Court the defendants' proctor duly tendered the sum of 250l. (being the sum in and for which the action had been entered, [209] and the vessel arrested, and which was accordingly the amount of the bail bond upon which the vessel had been released) in discharge of such bail bond, which was refused; that defendants' proctor, when he wrote the letter annexed to the act, was wholly unaware of the amount of the original demand, and was only apprised thereof by a letter received from his clients on the 22nd of December last, expressing surprise that the damage should now be estimated at 173l. 2s. 5d., when it was originally estimated at 82l. 12s. 2d. only; that the plaintiffs' original instructions to their proctor were to the effect that their claim upon the defendants in respect of the damage sustained by the "Lawrence," in consequence of the collision, was the sum of 83l. 12s. 2d., and no more; and that it was on the faith of such instructions that the plaintiffs' proctor, as he himself admitted, entered the action in the sum of 250l., as sufficient to cover both damage and costs.

To this a reply was brought in, admitting the averment respecting the original demand of 83l. 12s. 2d., but alleging in explanation that such the damage and loss of the plaintiffs were, on a rough calculation and estimate, considered at such time to amount to the sum of 149l. 4s. 11d., or thereabouts; that in making the original demand, they deducted from such sum the sum of 65l. 12s. 9d., inasmuch as such sum was due and payable to them by and from the consignees of the cargo (with which the "Lawrence"

was laden at the time of the collision) for general average; that in giving instructions originally, they did not state those circumstances to their legal advisers, but that afterwards the consignees of the cargo (as also their insurers) authorized and instructed the plaintiffs to claim and recover for them the said sum of 65l. 12s. 9d. in this suit.

Dr. Bayford appeared for the "Lawrence," Dr. Addams and Dr. Twiss for the "Temiscouata."

March 10.—*Dr. Lushington.* This was originally a cause of damage; and on the 7th of April an action was entered in the sum of 250l. On the 13th of April bail was given to that amount on behalf of the owners of the "Temiscouata."

The owners of the "Temiscouata" required that the cause should be by plea and proof; it was so conducted; and the party proceeded against was pronounced to blame. On the usual reference being made to the registrar and merchants, the proctor for the owners consented to pay 173l. 2s. 5d., the amount of damage demanded; and on December 30th brought in the sum of 250l., and tendered the same in satisfaction of the whole claim, both in damages and costs.

**[210]** Mr. Coote, not denying the damages would be paid by the sum of 173l. 2s. 5d., alleged that his costs, together with the damages, would exceed 250l., the sum in which the action had been entered; and he prayed the bill of costs might be taxed, and that for so much as exceeded the 250l. Mr. Clarkson's parties might be held liable.

The question, therefore, for the decision of the Court is this:—whether, where the action has been entered at 250l., and bail taken for that amount, the owners can be made responsible for any amount of costs exceeding the 250l.? Several cases have been cited, but I think it was admitted on all sides that none of them expressly applied to the present. In *The "Kalamazoo"* (15 Jur. 855), the vessel, an American ship, was arrested by the owner of the ship and cargo damaged, and bailed; the damage, as assessed by the registrar and merchants, exceeded the amount of bail. The ship was arrested a second time in a fresh action, and that action was dismissed with costs. I do not think that that case bears upon the present; for that was a question whether a second action in rem could be maintained, and for damages. The present question is, whether a personal demand can be enforced against the owners, and for costs.

The case of *The "Volant"* (1 W. Rob. 385) comes somewhat closer, but still is not, in all its circumstances, applicable. There the action was for 2200l., and bail was given for 825l., admitted to be the value of the ship; and the question was as to the liability of the owners to make good the damage beyond the amount of the value of the ship, for which bail had been given. There were other circumstances, respecting the misconduct of a part owner, foreign to this case. I was of opinion that I could not enforce the payment of damage beyond the amount of the bail; but then, bail was given for the whole value of the ship, and I considered myself to be restrained by the Act of Parliament. I, however, condemned the owners in the costs; but it must be remembered that in that case the action had been entered for more than double the amount of the bail, and I did so upon the principle enforced in many cases—that the owners are liable for the full amount of the value of the ship and freight, and also for costs.

I do not think *The "Nostra Signora del Carmine"* (1 Ecc. & Adm. 303), also cited, throws much light upon the question. It was a case of bottomry, where the owners of the cargo gave bail for 350l.; no costs were incurred by their conduct, as they did not dispute the bond, or make any opposition; they tendered the 350l., and I **[211]** thought I could not, with any justice, make them responsible for the costs occasioned by those interested in the ship.

I now come to *The "Mellona"* (6 Notes of Cases, 62), which is somewhat complicated. There the action had been entered in 1100l., and bail had been given in 540l. as the value of the vessel, and also 100l. to answer costs beyond the value of the ship. The ultimate decision of the Court in that case was, that it could not give more than 540l., together with the costs of the reference. That case is so complicated in its circumstances that I cannot rely upon it as entirely applying to the present, and I wish to observe that in reading over that case carefully, there is one expression in page 72 which either dropped from me inadvertently, or was misconceived by the Reporter; at any rate, it is ambiguous. I there state that the Court was bound by the Act of Parliament to reduce the amount of the bail to the value of the ship; and I said, on the other hand, that "supposing bail was given to an insufficient amount, the Court would raise it to the proper amount." Now, that is an ambiguous expression. I did

not mean that it was possible to compel the individuals giving bail to exceed the amount for which they had made themselves voluntarily responsible—that would be absurd ; but what I meant was that the Court would have a right to require further security from those who owned the vessel. I mention that for the purpose of preventing misapprehension hereafter.

The present case is, I think, distinguished from all that I have cited, and from all within my knowledge. There are two particular facts I will mention: first, the bail is not given for the full value of the property ; secondly, the amount of the damage and costs exceeds the amount for which the action was entered.

It doubtless was competent to the party proceeding to have entered his action for a large sum, and to have taken bail for a larger amount. The liability of the party proceeded against is defined by the statute ; it is the value of the property, and of the costs incurred. Has the party proceeding narrowed his remedy by the amount at which the action was entered and the bail taken, and I should add, bail taken for the damage and expenses? Had the bail been taken for the full amount of the value of the ship, and the damages and costs had exceeded that amount, I should certainly have made the owners pay the costs, as I did in one of the cases referred to. The difficulty is, that the party here has limited his own demand, and I think it would require peculiar circumstances to induce me to make the owner liable for any amount beyond that demand, and the bail taken. **[212]** I say peculiar circumstances, because I have not the least doubt of the authority of the Court so to do, and no question but that it would be within the limits prescribed by the Act of Parliament. In ordinary cases I should be disposed to think that the party proceeding had put the limitation upon himself, and that I ought not to extend it further.

This brings me at once to the consideration of whether there are any circumstances in this case which ought to form a distinction. I am disposed, however, to think that in this case the owner of the vessel proceeded against has exposed himself by his own conduct to further liability. A case of this small amount might easily have been settled by act on petition, and probably that was intended by the party proceeding ; but the owner of the vessel proceeded against availed himself of his undoubted right, namely, the expensive proceeding of plea and proof ; and it appears to me that such a proceeding could not have been anticipated in such a case, and that he ought justly to be made responsible for having adopted such a measure. There is another reason for this decision, and it is this, that were I to decide otherwise, it would be an encouragement to litigant parties upon all occasions to demand heavier bail, for the purpose of covering the expenses incidental to a proceeding by plea and proof.

I therefore comply with the prayer of Mr. Coote's petition.

Dr. Bayford. Will the Court give the costs of proceeding?

The Court. Yes.

Proctors: Coote ; and F. Clarkson.

THE IONIAN SHIPS. Admiralty Prize Court, Feb. 28, March 5, 7, 1855.—The status of the Ionian islands, and their relation to Great Britain, are regulated exclusively by the Treaty of Paris, of Nov. 5, 1815. That constitutes them a free and independent state, under the exclusive protection of G. B. The protecting sovereign has the right of making peace or war for them. But the intention to place them in a state of war must be clearly expressed, as they do not become so ex necessitate from G. B. being at war. G. B. has not declared war for them against Russia. Their trade, therefore, with Russia is not illegal, because they are neither British subjects nor allies in the war, nor enemies of Russia.

[S. C. Sp. Pr. Cas., 193 ; 1 Jur. (N. S.) 549.]

Some ships under the flag of the Ionian states were captured in the Black Sea by some of Her Majesty's cruizers, and brought in for adjudication, on the ground that the Ionians being British subjects they were illegally trading with the enemy. On the first case, *The "Leucade,"* coming on for hearing, the Queen's Advocate submitted that it was a case for further proof ; but the Court was of opinion that it would be useless to order further proof **[213]** until the preliminary question was decided, whether the inhabitants of the Ionian islands were to be considered as British subjects or not. That question was, therefore, elaborately argued.

The Queen's Advocate, the Admiralty Advocate, and Dr. Bayford appeared for the captors ; Dr. Addams and Dr. Twiss, for the claimants.

April 18.—*Dr Lushington.* It must be distinctly understood that all I am about to say on the present occasion applies only to the general question, and not to the particular circumstances of any individual case.

Before I enter upon the consideration of the question which has arisen in this case —a question of great difficulty, and perfectly novel in its character—I must express to the counsel on both sides my sense of the great industry, talent, and research which they have shown in the discharge of the duties entrusted to them. The Court has every reason to be satisfied with all they have done. I wish I could feel equal confidence in the result of my own labours; but I have seldom met with a case in which I have had to overcome greater obstacles.

It may be an easy task to state the propositions to be determined, and yet it is almost self-evident that very anomalous consequences must follow from my decision. I have had many misgivings in my mind whether this was a case for the solution of a Court of Justice at all; whether the question did not more properly belong to the executive Government; but however that may be, the task has devolved on me, and I must not shrink from it.

Having had the advantage of consulting the authorities which have been cited, and it is a great advantage, for which I am indebted to counsel, I shall not enter upon the task of commenting upon them. I find it would be a task of almost endless labour, and, as it appears to me, most unsatisfactory in its result.

So many distinctions may be drawn as to many minute points of difference existing, that I should be afraid to enter upon such an undertaking. General principles in the constitution of states, however just and true in themselves, bear but remotely when the question is the construction of the treaty, and upon the due construction of such solemn engagements I have satisfied my mind that the question I have to determine mainly depends. For the means of obtaining a true construction I must depend on principles too notorious to require particular statement.

**[214]** Now, what are the facts necessary to constitute the propositions for the consideration of the Court. They are few indeed. The vessel proceeded against is an Ionian vessel, under the Ionian flag, destined, for the purpose of the present inquiry at least, to Taganrog, a Russian port. The captors say that such a voyage by an Ionian ship subjects her to condemnation. The claimants say that neither by the Law of Nations, nor any other law, are they liable to condemnation; that the Russian port of Taganrog was not blockaded; that they did not carry contraband; that the expedition in which they were engaged was lawful, and that they are entitled to restitution. Such is merely a general statement of the averment of each party. I must now endeavour to set forth, as clearly as I can, the reasons and principles on which the prayers for condemnation and restitution are founded.

The counsel for the captors allege that all Ionian vessels are to be considered as British vessels; that as British vessels ars prohibited from trading with Russia during the war, so for the same reason are Ionian vessels; in other words, the British and Ionian vessels are to be placed in the same category; that as regards a power hostile to Great Britain, the Ionian islanders stand in the same position as British subjects.

If this proposition be true, it necessarily follows, as a corollary from it, that all trade with the enemy of Great Britain not allowed to British subjects is prohibited to the inhabitants of the Ionian islands. There is no doubt that a British vessel could not trade with this port of Taganrog; therefore, if British and Ionian vessels are in eâdem conditione, this vessel could not lawfully prosecute her enterprise, and the cargo must be condemned.

The claimants deny all these propositions; they say they were not British subjects, they are not at war with Russia, and they have a right to carry on with Russia any trade that the subjects of a neutral nation could lawfully be engaged in. Before I proceed further, let me consider what constitutes the title of a captor to condemnation according to the view Lord Stowell took of this matter, for I neither can nor ought to trust myself with any notions of my own not based on his decisions. During war, a British ship of war captures a ship on the high seas subject always to the risk of costs and damages—a question I need not now discuss—but is on the other hand entitled to demand condemnation if the captured vessel did not make out its title to restitution. I think I do not put the case more strongly than all the decided cases justify, when I say that the claimant must establish his title to restitution in the first instance. That **[215]** is, he must show that the property belongs to him; that he is entitled to claim

in the character he assumes; that he is not violating the ordinary laws of war. Such a claim, indeed, may be barred by showing a violation of blockade, or otherwise; that is a totally different matter.

I have mentioned these matters for this reason, that it may be a subject of inquiry on whom the onus probandi rests in this case, though I do not think, in any view I may take of the case, that such question will, in any material degree, affect the result. I will assume for the present that the onus probandi lies on the claimant. His case is this: I am a subject of the Ionian states; no war has been declared by them against Russia, or by any competent authority on their behalf; we are at peace, and the trade is lawful.

In the absence of any such declaration—and none has been produced—I think that the claimants are entitled so to rest their title, and to throw upon the captors the onus of proof.

But before I proceed further, I must notice the declaration of the Ionian Government making known the Queen's declaration of war. The senate publishes, for general information, a proclamation by Her Majesty the Sovereign Protectress of those states, dated London, March 28th, containing a declaration of war against His Imperial Majesty the Emperor of all the Russias. The senate warns all protected subjects of Her Majesty belonging to those states to be guided by the above royal declaration.

I think I may safely say that in this declaration of the 28th of March itself, there is not a word to be found which can by any ingenuity be construed directly or indirectly to place the Ionian states in the condition of warfare with Russia. The Ionian states are not by that declaration directed to do or to abstain from doing anything. Then what does the senate mean by directing all protected subjects to be guided by it? I have some doubt whether they knew themselves—whether they had any clear or distinct idea upon the subject, for if they had, I conceive it is hardly possible that they could, on so important a matter, have expressed themselves in terms so unsatisfactory and so ambiguous. I cannot venture to say what the meaning is, but this I think, that it cannot safely be held that this proclamation is equivalent to a declaration of hostilities against the Russian Government, or an annunciation that such had been made on behalf of the Ionian islands by the protecting power, or by any other authority. I think so for several reasons.

First, because I believe that so solemn an act as a declaration **[216]** that the Ionian states were at war ought never to have been expressed in terms so doubtful as these.

Secondly, because the terms in which the proclamation is couched are quite consistent with the simple notification that hostilities existed between Great Britain and Russia, and that the subjects of the Ionian islands must submit to the consequences which such a state of things would necessarily entail; in fact, the construction might be, as was argued on behalf of the claimants, such a proclamation as a neutral Government might have made, exactly in the same way as the Ionian authorities issued their proclamation.

And lastly, because, if the argument of the counsel for the Crown be well founded, it was not competent to that Government to declare war at all. So far, therefore, as the proclamation making known to the Queen's subjects the declaration of war of the 28th of March is concerned, I consider the question to be res integra.

But the question I have to decide assumes this shape, not whether Great Britain has power to declare the Ionian states in hostility with Russia, but whether, Great Britain being at war with Russia, it follows, as an inevitable consequence, that the Ionian states are placed at war with Russia also.

These are two very different propositions. I have not been told on behalf of the Crown—and officers of the Crown ought to have received the information if there had been any such to be had—that Great Britain has done any act whatever to place the Ionian states in hostility with Russia. So far as my own knowledge goes I know of none.

Therefore, and for the reasons I have now stated, I have only to consider the last proposition, whether Great Britain, being at war with Russia, the Ionian states are, ex necessitate, at war also, exactly in the same way as Jersey, Guernsey, Jamaica, and Canada would be placed in hostility by a declaration of war against Great Britain by any other power. This view of the case opens a very wide question; for if I

should hold that the declaration of war by Great Britain against Russia would at once place the Ionian islands in a state of war with Russia, then it follows, as it appears to me, as an inevitable consequence, that if war be declared by Great Britain against China, against the United States of America, against any other power, the subjects of the Ionian states must be constituted, ipso facto, enemies of such nation, for it has not been and cannot be contended that the empire of Russia stands in any peculiar relation, so as to make war with her an exception.

The political history of these islands was traced from an early [217] period with great care by the counsel on both sides; it will not, in my view of the case, be necessary for me to recapitulate it. I proceed upon the assumption which I believe to be accurate, for it matters not if it be not precisely accurate in all its particulars, but to this effect that all these islands were conquered by Great Britain during the war ending 1815. I proceed on that assumption;—whether Corfu surrendered at that time, or some other, I need not inquire. I proceed on the assumption that Great Britain dealt with them as conquered. Had they continued after the peace in the same state, they would have been a part of the dominions of Great Britain, governed as other conquered territories were governed, by the Crown and Acts of Parliament.

Great Britain, however, did not retain these islands in the ordinary course of conquered territories, but she exercised a right indisputably belonging to her of making, in conjunction with other powers, a new and different status for these islands. Great Britain ceded her original rights, and merged them in the new settlement. I am of opinion that no right remained in Great Britain after the treaty to which I am about to refer, except the rights conferred by that treaty; that, from the nature of that transaction and from the terms of the treaty itself, Great Britain can at this period exercise no rights whatever that are not to be found within the four corners of that treaty; that there does not remain a scintilla of the original right of conquest; that, for reasons with which I have no concern, Great Britain laid at the feet of the contracting parties, as she had a right to do, the power and authority she had previously acquired. Henceforward the treaty is the sole guide; from this document must be derived all the rights of the contracting parties, and all the rights and the obligations of the Ionian states.

The treaty of Paris of the 5th of November 1815 (*a*) was made between Great Britain, Austria, Russia, and Prussia. I apprehend it is a mere truism to say it was equally binding upon all and each of them.

The first article declares that these islands shall form a free and independent state. My province is simply that of construction—of ascertaining to the best of my ability what the contracting powers intended by the contract into which they entered, and that with reference in the first instance to the words of the contract itself; but I must look to the whole of the instrument and not to a part. Terms, however strong and clear in themselves, whatever meaning may be attributed—necessarily attributed—to them, standing alone, may be modified by other [218] parts of the same instrument. The construction, therefore, I put on the first article is that the Ionian islands shall form a single free and independent state, according to the plain meaning of those terms, subject to and liable to be controlled by the rest of the treaty; the whole treaty creates one obligation.

The second article is one of great importance—the declaration that this state shall be placed under the immediate and exclusive protection of the King of Great Britain. I am strongly inclined to think that the necessary and inevitable consequence of such a condition is, that the King of Great Britain has the right of making war and peace; indeed, such a power is inseparable from protection; for how could the duty of protection be fulfilled without such a right? and how could the Ionian islands be secured from aggression but by the exercise of that power? and how could their tranquillity be secured afterwards, save by the power to conclude peace, with all its concomitants.

But it is another and wholly different question whether, in consequence of this protectorate right, the Ionian states become, ipso facto, the enemies of all or any power or powers with which Great Britain may happen to be at war; and it is also another and different question whether, if Great Britain were, on account of Ionian

(*a*) Hertslet's Treaties, vol. i. p. 44.

grievances alone, to adopt measures for their protection against any other state, the kingdom of Great Britain would necessarily be at war with such state.

This is a question which I must consider when hereafter I have further discussed the provisions of this treaty.

The concluding part of this article is not unimportant. The other contracting powers renounce every right or pretension which they might have had with regard to the Ionian islands and guarantee—guarantee—all the dispositions of the treaty. It is obvious that this clause entirely removes from me the necessity of looking into any part of the antecedent history, because, whatever might have been the claims of any of the contracting powers, they have so completely ceded and merged them by this treaty, that it were perfectly vain to look back to them to obtain any information which can by possibility be of use on the present occasion. It is important, however, to bear in mind that all the contracting powers guarantee the position of these states.

This guarantee, it appears to me, opens another view of this case. Did Russia, Austria, or Prussia intend to guarantee so intimate a dependence on Great Britain, that if one of such guaranteeing powers became at war with Great Britain—I must use the same expression over again—of necessity the Ionian **[219]** states must take part in that war? It would, I think, be a singular guarantee, a state of warfare against themselves, and in which the Ionian islands might not have the remotest interest. Take the case of a war between Great Britain and Prussia—some dispute having arisen in the Baltic from the affairs of Denmark, or any other cause; and would it not be extraordinary if Austria or Prussia herself was to guarantee, as a matter of necessity, a war against herself, and in cases that might be supposed most injurious to the interests of the Ionian people?

I mention these instances, not as decisive of the question before me, but as elucidating some of the very gross anomalies which might very possibly arise from some constructions of the treaty. Whether they were in any degree foreseen or intended by the high contracting powers, is a question upon which I am not called on to speculate.

Some of the secondary propositions of this treaty I may omit to notice with much convenience.

By the third article the united Ionian states were, with the approbation of Great Britain, to regulate their internal organization.

By the fourth there is to be a legislative assembly and a new constitutional charter, also to be ratified by the King of Great Britain. Until such charter was ratified no alteration was to be made in the existing constitution save by the King in Council. Until that period, therefore, as to internal concerns, these islands remained nearly, though not altogether, in the position of conquered islands belonging to the crown of Great Britain.

The fifth article declares that the Britannic Majesty shall have a right to occupy the fortresses of the islands, to maintain garrisons, and have the control of the Ionian forces.

By the sixth, a particular convention is to regulate the maintenance of the forces, payment of the garrisons, and the number of men in time of peace.

This is a remarkable limitation, because it evidently leads to the conclusion that in time of war, non constat what war, Great Britain was not to be subject to any such restriction.

The seventh article is one deserving great attention. The trading flag of the Ionian islands was acknowledged by all the contracting parties as the flag of a free and independent state. The effect of this provision, I apprehend, is, if war existed between Russia and Austria, Great Britain having no part in it, the Ionian flag would be respected as the flag of a neutral power. In one respect, and one only, therefore, the neutral character would clearly belong to the subjects of these islands. The description of the flag to be carried I need not enlarge upon. **[220]** I must also observe that the whole diplomatic power is lodged in Great Britain by virtue of this treaty.

The constitutional charter does not, in my opinion, essentially influence any view I may take of the question on which I am unfortunately called to pronounce my opinion. The status of the subjects of the Ionian states must be governed by the treaty, not by the charter, so far as any question may arise affecting the right or interest of the powers, parties to that treaty.

I will now make a short summary of this treaty; it will show some of the anomalies. A single free and independent state, having the flag of a free and independent state,—the military, naval, and diplomatic power all vested in the protecting state,—the protected, not the subjects of the protector,—not British subjects, for that is perfectly clear. I apprehend that I must endeavour to give effect to all these main provisions of this treaty. I must maintain the quality of independence, save as modified by the treaty itself, and, by parity of reasoning, the independence of the flag, or rather the rights and attributes of the flag of an independent state.

Having carefully addressed myself to these considerations, I come to the question of whether I ought to condemn the ship and cargo proceeded against as the property of British subjects trading with the enemy, as the property of allies trading with the enemy, or as the property of subjects of the Ionian states being at war with Russia. There is no other state of things in which I conceive it to be possible to pronounce a decree of condemnation.

With respect to the first ground of condemnation, I am of opinion that this property cannot be condemned, for, according to all the authorities and all the principles on which the authorities are founded, no property can be condemned on that ground, unless it belong to British subjects, in the proper sense of the term—which the Ionians are not. As to the second ground, I am of opinion I cannot condemn, because the Ionians are not allies in the war. No act whatsoever of the Ionian Government or of the protecting power has brought them within the fair meaning of that term. On the third ground I am of opinion that it does not follow of necessity that the Ionian subjects are at once, by a declaration of war by the Crown of Great Britain,—confined to a declaration of war by Great Britain, only against another power—comprised within that declaration, and constituted enemies of that power. This being so, I know of no act of the protecting power to place the Ionians in that predicament. Great Britain may have authority to do so, as the protecting power is possessed of all the rights of treating with **[221]** foreign nations, and of the right to place them in the category of enemies; but she has not thought proper to do so.

This observation, I think, is entitled to more weight from a consideration of the manner in which Great Britain has exercised the great powers secured to her by the treaty. I refer to the convention dated January 1852 between the Queen and the King of the Netherlands.(*a*) The terms of that treaty are: "The inhabitants and vessels of the Ionian islands shall enjoy in the dominion of His Majesty the King of the Netherlands all the advantages which are guaranteed by the treaty of the 27th of October 1837 between Great Britain and the Netherlands, and by the convention additional to that treaty, signed in March 1851, so soon and for as long as the Government of the Ionian islands shall grant to the inhabitants and vessels of the Netherlands the same advantages which were granted in these islands to the inhabitants and vessels of Great Britain."

The commencement, too, of that treaty is not unworthy of observation. The Queen negociates on behalf of the Ionian states as perfectly separate and distinct from the dominions of the Crown of Great Britain. It commences,—"Her Majesty the Queen of the United Kingdom of Great Britain and Ireland on the one part, and His Majesty the King of the Netherlands on the other part, being desirous of promoting the relations of commerce and navigation existing between the United States of the Ionian islands, which are under the protection of Her Britannic Majesty and the kingdom of the Netherlands, have agreed to conclude a convention for that purpose, and have named as their respective plenipotentiaries," &c.—Nothing can be more manifest than this preamble to shew that the Queen of Great Britain has negociated for the Ionian islands as an entirely separate and distinct state.

Certain conclusions, therefore, appear to me to follow from a consideration of this treaty. First, it is evident that Her Majesty ascribes to herself the right of making treaties on behalf of the Ionian states. Secondly, that no treaty between Great Britain with another state does include the Ionian islands, except specially named. I think that is perfectly evident, because otherwise there is no necessity for this treaty if it was included in the former. Thirdly, that this power, vested in the

(*a*) Cited by Dr. Twiss from the Ionian Government Gazette of June 5, 1852.

Crown of Great Britain, is limited as to the Ionian states in the same way that the power is limited with respect to the British territories themselves, namely, the Crown may contract, but as to all internal legislation necessary to carry such contracts into execution, it rests with the Government of the Ionian states to [222] adopt the required measures as it would so in similar cases rest with the British Parliament.

Now there is another very recent treaty with the Grand Duke of Tuscany, bearing date the 30th of December 1854. By the second article of that treaty it is stipulated that the subjects of the Ionian islands and their vessels shall enjoy the same privileges as the British ships in the Tuscan dominions, subject to the condition that the Government of the Ionian islands shall grant reciprocal rights. There, again, it is perfectly manifest that there must be a distinct contract to include the Ionian islands, and that no obligation or contract with Great Britain or for a part of her own dominions would otherwise include the states.

If, then, it be necessary for purposes of a secondary character, or commercial purposes of comparatively small importance, for Great Britain, specially by name to include the Ionian states, and if in the exercise of the powers of peace and war conferred, if they are so, on Great Britain such powers are exercised in so special a form and manner, does not the same argument shew that when Great Britain, as the protector of the Ionian islands, intends a measure of infinitely greater consequence, as affecting their welfare, such an intention should be expressed in a formal and definite shape, that all the subjects of those states may be aware of their changed condition, of the new duties and obligations which await them in consequence of their being placed in a state of hostility with a great continental power?

To me, I confess, it appears clear that what was deemed proper and necessary for minor changes must, à fortiori, be expected where the inhabitants of a state called free and independent, and guaranteed to be so, not by Great Britain alone, but by other powers, are converted into enemies of one of the guaranteeing powers themselves.

But confining myself to the consideration of the question whether, by the terms of the treaty, the subjects of the Ionian states, as a necessary consequence of the provisions of that treaty, became the enemies of the enemies of the protecting power, at least I ought to consider from what cause such necessity springs. Again I must repeat the terms of the proposition, to prevent mistake. I am not putting, or attempting to put, bounds to the authority of Great Britain under this treaty. I am considering the import of the treaty only where Great Britain has not declared the exercise of her power. In this view of the case, is it at all immaterial, at all inconsistent with the powers of the treaty, at all injurious to the subjects of the protected states themselves, that whatever might be the [223] relations of Great Britain towards Russia or any other country, peace with the Ionian states should continue, at least until war was declared on their part by Great Britain? Are there not many instances in which Great Britain herself might wish not to involve the Ionian states in a warfare in which she herself is engaged, but in which they have no interest? But above all, I must repeat what I have so often said before in substance—could it have been the intention of the contracting powers, evinced by the terms of the treaty, that a state of warfare should necessarily follow upon hostilities breaking out between themselves and others without giving, in terms of the proposition, even an option to the protecting powers to leave the Ionian states at peace? To make the extension of all wars to the Ionian states inevitable would be to deprive the protecting power of her discretion to leave them at peace.

Now, I am told that anomalous consequences must follow, if the Ionian states are allowed to maintain a neutral character. I admit it must be so. But will such consequences be more repugnant to the treaty, than to hold that a guaranteed free and independent state is involved necessarily in war by the act of another state, contrary to their own interests, and without the least regard to them? and that not by the act, the deliberate act of the protecting power, but merely by an inevitable inference? But again, are anomalous consequences resulting from a treaty a reason for abrogating its main provisions? For construing such provisions, if possible, so as not to produce such consequences, no doubt there is a very strong reason; for abrogating them, none. Though all contracting powers may be bound by what they have done, yet surely it would be difficult to contend that such a construction as this must be taken as actually foreseen, and intentionally provided for too, by the stipulations of the treaty to the

effect of entailing on the Ionian states any war in which Great Britain may be involved. But to this I ought to add that if anomalous consequences, or such as can be deemed so, could dissolve treaties, I fear there would be little security for compacts amongst states. It often happens, unfortunately, from the want of care and caution, treaties are so framed, that when they come to be put in practice, consequences wholly unforeseen by the contracting parties may arise.

But in this case are the anomalies so fearful, and are the consequences so detrimental to the protecting power as have been supposed? Trade by the enemy to the Ionian islands there can be none, without the consent of the protecting power; for Great Britain is in possession of all the fortresses, and all the ports. What trade can be carried on by Ionian vessels? Every vessel **[224]** under the Ionian flag must be provided with a pass, signed by the Lord High Admiral, or she will not be considered as navigating according to law. The protecting power, if it chooses to exercise it, has ample means of preventing any injurious consequences arising to itself, and that without resorting to any violent construction of the treaty.

I have not hitherto adverted to the Order in Council of the 15th of April. I will now consider what bearing it has on the question before me.

By this Order in Council it is declared all the subjects of Her Majesty, all the subjects of any friendly or neutral state may, notwithstanding the present hostilities, freely trade with any ports or places not in a state of blockade—contraband and carrying despatches excepted. Nothing can be clearer or more comprehensive than this declaration. There is only one exception, viz., "Except that no British vessel shall, under any circumstances whatsoever, either under or by virtue of this order, or otherwise, be permitted to enter any port or place in the possession or occupation of Her Majesty's enemies."

The single question on this occasion is, whether a vessel under the Ionian flag is a British vessel within the meaning of this declaration. Whether this question was a casus omissus, or what were the intentions of Her Majesty's Government, save as expressed in this declaration, I am not called upon to inquire.

Then what is the definition or true meaning of the words "British vessels"? First, all vessels properly so called according to our municipal law. Secondly, all vessels under the British flag, though perhaps not strictly entitled thereto, because, by the Law of Nations, the carrying the British flag stamps on them, as to other nations, the British national character. And thirdly, such words may mean, though this is a much more doubtful point, vessels under neutral flags but owned by British subjects.

I can affix no other meaning to these particular words. Within which of these three meanings can I place an Ionian vessel? Not in the first or second, clearly, without utterly disregarding and discarding the plainest expression of the treaty. I never can call the Ionian flag the British flag. The words of the treaty are the acknowledgment of the flag of the Ionian islands as the flag of a free and independent state. If words have any meaning, these words do not mean British flag. Then, lastly, can I say that this vessel under the Ionian flag, and owned by the inhabitants of those states, was owned by British subjects? I am of opinion that by no rational **[225]** mode of construction can I come to such a conclusion. I think this Order in Council, judging from its terms, does not contemplate the case of the inhabitants of the Ionian islands at all. I think they are not strictly British subjects either in the strict sense of the terms, or any other within the purview of this order.

I have, therefore, come to the conclusion that an Ionian vessel is not, by virtue of this order, prohibited from entering a Russian port not blockaded.

There is, however, another question behind. Though the order does not prohibit, does it permit and sanction an Ionian vessel in going to a Russian port? The solution of this question will depend on other considerations. Is an Ionian vessel a vessel under a neutral or friendly flag? Is an Ionian a subject of a neutral or a friendly state? If these questions can be answered in the affirmative, then the Order in Council would operate in this case; if not, then I apprehend, according to the view I have already taken, the case must be governed by the law, independently of the Order in Council.

I have brought forward this proposition because I am not willing to pass by any matter of importance discussed at the bar; but if I should be of opinion that the claimants are entitled to restitution independently of this Order in Council, it would not be necessary to determine whether they were included in the provisions of it;

and it may be that the very grounds on which I hold the claimants entitled to restitution, would bring them within the operations of the Order in Council.

I shall, if there be no other merits affecting the question, and if the case is to depend solely on the point argued before me, restore this ship on the following grounds:—

First, because it is not the property of British subjects in any sense of the term, consequently it cannot be, as the property of a British subject, illegally engaged in trade with Russia on the ground of the war with Russia.

Now, it may be, as to this head, not unimportant to consider on what ground the property of a British merchant trading with the enemy of Great Britain during war is condemned. We have all the law in the case of *The "Hoop"* (1 C. Rob. 196), and in *The "Nelly,"* cited in *The "Hoop."* It is upon the ground that such property is taken adhering to the enemy; and, therefore, the property being bound not so to adhere, is considered, pro hac vice, committing an illegal act. Such property belonging to a neutral, is not adhering to the enemy in the sense which is meant in this judgment, for he has no enemies to adhere to. The prohibition is to British subjects only, or to allies in the war.

**[226]** Now, Lord Stowell, in the case of *The "Hoop,"* especially relied on the authority of Bynkershoek, and upon a greater authority he could not have placed his dependence; and every word in the passages quoted, and in the whole treatise, relates to subditi, to subjects, and to subjects only. That is the expression used in Bynkershoek—to subjects and subjects only. So in the numerous cases cited by Lord Stowell, the whole inquiry is whether the property claimed was the property of British subjects—the subjects of Great Britain in the sense in which the term is used in Courts of Prize, namely, persons carrying on trade in territories subject to the British Crown, and, consequently, owing, at least, a temporary allegiance to the Crown of Great Britain.

Do then, the subjects of the Ionian states stand in eâdem conditione? It is admitted on all hands they are not British subjects in the proper sense of the term; they have not their domicil in British territories; for to make such an averment would set the whole treaty at naught; it would be to make a mockery of the most stringent stipulations contained in that treaty. Diplomatic authorities may do so—a Court of Justice cannot.

Again, the Ionian subjects do not participate with British subjects in the advantages of commercial intercourse in virtue of the treaty. Are they to suffer the inconveniences and have noue of the benefit? Do they owe any allegiance to the Crown of Great Britain which they violate by such a trade? Perhaps this is the nicest and most difficult point, but I am of opinion that allegiance, in the proper sense of the term, undoubtedly they do not owe; because allegiance exists only between the Sovereign and his subjects, properly so called, which they are not. A limited obedience, according to the treaty, they do owe, and that by the terms of the treaty itself as a sort of equivalent for protection; and there may be cases in which it might be competent to Great Britain to declare that abstinence from trade with her enemy is due for such protection. But is it to be enforced without such a declaration? I think not.

But again, is this presumed illegality of trade a principle to be enforced beyond all precedent—for precedent I can find none—beyond what it has hitherto been carried by any Court in any country, at any time, in any decided case? On what ground is it to be based? Not of advantage to the Ionian islands, for they have no interest in the quarrel, while, without a possibility of benefit to themselves, they may be deprived of a lucrative trade, and that, too, without any formal act done by the protecting power.

**[227]** I have mentioned, at least, some of the reasons which have induced me to come to that conclusion.

I shall restore, because the property is not the property of allies in the war, for neither by the treaty nor by the Law of Nations can I impose on the subjects of the Ionian states that character.

Again, I shall restore, because if Great Britain had the right by treaty of declaring war between the Ionian islands and Russia, she had not done it.

Because, in the absence of all such declaration or solemn act, in whatever form, I am of opinion that the Ionian subjects are not placed in any state of war.

Because I hold it to be the duty of every Court professing to administer the Law

of Nations to carry into effect and operation the plainest terms of a treaty, though the consequences may not be perceived. Various anomalous results may follow, but they are infinitely less important in their consequences than if a Court of Justice should take upon itself to disregard a solemn compact carefully expressed. I hardly need go further.

If, therefore, the only question as to this ship and cargo should be the title of subjects of the Ionian states to claim ships and cargoes, their property engaged in trade with Russia, I must hold myself bound to restore. Now I wish to add that this judgment is founded on the conviction that I am bound to give effect to the treaty of Paris, and that notwithstanding the consequences I have stated, yet I am equally bound to carry out its leading provisions. This only goes to the general question. In a case of the great importance of this, I think it would be desirable, Queen's Advocate, to give an opportunity of considering it.

The Queen's Advocate. If the Court pleases.

Dr. Lushington. Because it may be thought right to take it to the Superior Court.

Dr. Addams. I submit to the Court that the claimant is entitled to costs and damages, on the authority of *The "Ostsee."*

The Court. I cannot give the costs at this stage of the proceedings. When I have heard the whole case out, if you claim costs, I shall hear your argument, and then, of course, I shall be governed by that decision, in the Privy Council, by the principles there laid down. That must be my guide in future; but I beg to be understood that I shall expect an argument on the point of the application of the principles of that case to the present.

**[228]** THE "LEUCADE."—(Arronis). Admiralty Prize Court. April 30, May 21, 1855.—The status of the Ionian states relatively to Great Britain being of so doubtful a character, and depending upon the nice construction of public documents, a commissioned captor, seizing an Ionian vessel, on the ground of illegal trade with Russia, though that trade is, in fact, legal, is not liable to condemnation in costs and damages, as having captured her without probable cause.

[S. C. Sp. Pr. Cas. 217; 2 Eng. Pr. Cas. 473; 1 Jur. (N. S.) 554.
Referred to, *The "Zamora,"* [1916] 2 A. C. 86.]

This vessel, under Ionian colours, sailed from Santa Maura with a cargo of olive oil, bound for Taganrog, in the Sea of Azoff; and having put in by reason of stress of weather, first to Syra, and then to Mytilene, reached Constantinople, where, in consequence of the war, she was refused her clearance for Taganrog. The master, therefore, changed her destination for Trebizond, for which place, nominally, she sailed on the 1st of May 1854, still having on board her bill of lading for the cargo, stated to be "shipped by Messrs. Pietro and Alexandro Stamatopulo, Brothers, Ionian subjects, for their own account; consigned to Taganrog, to order, on payment of freight as therein mentioned."

After her departure, her Majesty's acting Consul-General at Constantinople sent a letter to Viscount Stratford de Redcliffe, informing him of the circumstances, and intimating a suspicion of the master's intention still to sail for the Sea of Azoff. This letter His Excellency officially transmitted to Vice-Admiral Dundas, who immediately despatched from off Sebastopol Her Majesty's steam frigate "Firebrand," in the suspected track of the said vessel.

On the 14th of May the "Firebrand" fell in with her about forty-eight miles from the Straits of Kertch, steering to the ENE., with the wind from the SSE., in the proper course for the Sea of Azoff, and, as it was stated, not for Trebizond. On being boarded, it seems, her master persisted that he was bound to Trebizond, and that he was in the direct course for that port; but a person on board, who called himself the owner, contended that the Ionian flag, under which she was navigated, being a neutral one, she was at full liberty to enter a Russian port. She was captured and brought in for adjudication.

A claim was given in by Alexandro Stamatopulo for the ship and cargo, as the property of himself and Pietro Stamatopulo, both of Santa Maura, and Ionian subjects. The Court having decided that trade with Russia was not prohibited to Ionian subjects, the question was whether the claimants were entitled to restitution, with costs and damages.

The Queen's Advocate and the Admiralty Advocate appeared for the captor; Dr. Addams and Dr. Twiss for the claimant.

May 21.—*Dr. Lushington.* In this case, on behalf of the claimants, the Court has been prayed to decree restitution, with costs and [229] damages; on the part of the captors that prayer is opposed, and they have asked, if the Court is not satisfied, that it would allow them the benefit of giving explanatory evidence.

Questions of very great difficulty have been mooted in the case, of which some are likely to occur frequently; it is, therefore, for the interest of all concerned, or who may be so in future, that the Court should, to the best of its ability, fully consider the points which have been discussed, and declare what, according to its conception, the doctrine and practice of this Court has been, and the course which on similar questions, where there are no distinguishing circumstances, it will pursue in other cases as well as in this.

The questions which so present themselves are, first, the question of costs and damages, when they ought to be decreed to the claimants; secondly, the question of allowing captors to give explanatory evidence—whether it ought to be allowed at all, and under what circumstances. Before I enter on this discussion, I will state the principles and rules by which I have been, and am anxious to be, governed, in all my judgments, and which I deem to be binding on the Court, whatever its own individual opinion may be in any particular case.

This Court is, I conceive, bound to adhere without deviation to a course of precedents adopted by its predecessors, though not to a single decision; where that course has also been sanctioned by the Court of Appeal, this Court has no discretion at all; its sole duty is to obey. If I am able to discover what that course has been, to it I must adhere, until either it be shewn that I have mistaken it, or that the Judicial Committee have made any change therein. Until this has happened, I should not, from any notions of my own, or by reference to general principles or strong dicta, in particular cases, where there was no doubt as to the application of the general principles, or from the judgments of foreign authorities, consider myself at liberty to depart from the established practice of the Court. Indeed, it would appear to me that such practice would but shew to what extent, and within what limits, according to the judgments of my predecessors and the Court of Appeal, the general principles should be carried out, and would prove under what modifications they ought to be enforced.

Such is my notion of the duty of a Court, subject to a Court of Appeal. The Privy Council stands in a very different situation; they have infinitely larger powers, are at liberty to exercise a much wider discretion, the limits whereof it is not for me to attempt to define.

Whenever that Court may have given a clear explanation of [230] the principles which ought to be adopted, or of the manner in which they ought to be brought to bear in practice, or of the extent to which they ought to be carried, whether such explanation be consistent with former practice or not, it becomes the duty of this Court, without any regard to its own opinion, or any notion of its own, to regulate all its own proceedings by the judgment of that superior tribunal; and, to the best of its ability, without regard to any other consideration, to give the fullest force and effect to the expressed directions of the superior authority. If I fail in so doing in this or any other case, such failure will arise from inability on my part, and not from want of inclination, for no duty can be more imperative than strictly following out the decrees of the superior Court. If this were not done, all would be uncertainty and confusion.

In this great inquiry, therefore, as in all other matters, my first guide will be the principles adopted by Lord Stowell, as modified by him, in constant usage and every-day practice; and I shall not depart from them, save as I may be admonished to do by the Court of Appeal.

I now approach the question of costs and damages. That is an expression very familiar to our ears, but still it requires some explanation, and my apology for entering into some detail is, that as there have been no prize proceedings for nearly forty years, it is impossible for the present advocates and proctors to be intimately acquainted with the practice of the Prize Court. Valuable as our Reports are, admirably calculated to give a knowledge of general principles, they were not intended and are not calculated to give full information as to matters of everyday practice—matters seldom made the subject of any Reports.

Costs alone, independently of damages—I mean law costs, in the common acceptation of the term—were very seldom, if ever, given in the Prize Court of the Admiralty to either the captors or the claimants. I hardly remember a single instance. I did in this war, in one case (*The "Atlantic,"* 2 ante 93), under very peculiar circumstances, condemn a British merchant in costs where the claim was abandoned; but I doubt if I could have found a precedent of a similar decree where the claim was given by or on behalf of a neutral merchant. In this, as in many other respects, the practice of the Prize Court wholly differs from the practice in Courts of Equity and Common Law.

Costs, however, in the Court of Appeal were sometimes given, but not very frequently; and still more seldom was it that such decree extended to the costs in the Court below, and, **[231]** as I believe, such rare cases were confined to the decrees of Vice-Admiralty Courts.

Captors' expenses include law costs and all other expenses fairly incurred in bringing the case before the Court; but as this matter is not immediately connected with the question I am now to decide, and as this judgment will, I regret to say, be of some length, I need not now enter upon it, save to observe that if the absence of what is termed probable cause appearing on the ship's papers and depositions is alone a ground for condemnation in costs and damages, a question which I dare not attempt to solve must arise, and it is this: if upon the depositions and ship's papers, there is probable cause for detention and bringing to adjudication, is not such a case, a case for captors' expenses? How, under such circumstances, the intermediate line is to be drawn, I have not the slightest conception, if that should be the established principle.

Costs and damages may be best expressed by the term restitutio in integrum—complete indemnity for the capture.

It is, then, now my object to shew what was the course of proceeding in these matters during Lord Stowell's time; but it will tend to make this inquiry clearer if I first state generally the different circumstances under which costs and damages may be decreed.

We must bear in mind the wide difference between the detention of a vessel under the colours of the enemy, or under neutral flags.

The destruction of a vessel under hostile colours is a matter of duty; the Court may condemn on proof which would be inadmissible or wholly irregular in the instance of a neutral vessel. It may be justifiable or even praiseworthy in the captors to destroy an enemy's vessel. Indeed, the bringing to adjudication at all of an enemy's vessel is not called for by any respect to the right of the enemy proprietor, where there is no neutral property on board. But for totally different considerations, which I need not now enter upon, where a vessel under neutral colours is detained, it is the right of the neutral to be brought to adjudication, according to the regular course of proceeding in the Prize Court; and it is the very first duty of the captor to bring it in if it be practicable.

From the performance of this duty the captor can be exonerated only by shewing that he was a bonâ fide possessor, and that it was impossible for him to discharge it. No excuse for him as to inconvenience or difficulty can be admitted as between captors and claimants. If the ship be lost, that fact alone is no answer; the captor must shew a valid cause for detention as **[232]** well as the loss. If the ship be destroyed for reasons of policy alone, as to maintain a blockade or otherwise, the claimant is entitled to costs and damages. The general rule, therefore, is, that if a ship under neutral colours be not brought to a competent Court for adjudication, the claimants are, as against the captor, entitled to costs and damages. Indeed, if the captor doubt his power to bring a neutral vessel to adjudication, it is his duty, under ordinary circumstances, to release her.

These observations will be found hereafter to have a bearing on some of the decided cases which have been referred to in the case of *The "Ostsee"* (ante, p. 170). Again, costs and damages were given where neutral vessels were brought to adjudication duly, but the detention was deemed to be unwarrantable. This will be the chief matter for investigation at present.

The materials for inquiry into the practice of the Prize Court of Admiralty of England are not of very great extent. The Reports of Sir Christopher Robinson, of Dr. Edwards, of Sir John Dodson, and Mr. Acton, are our principal sources of information. The Appeal Cases will furnish some further means of knowledge, and

so will the records of the Court itself; but to examine them requires much time and the expenditure of great labour. After all, as I have already observed, the usage of the Court, the everyday practice, can only be known thoroughly by those who have had opportunity of observing it daily. I am sorry to say very few survive who can speak from their own personal experience.

Then what proof of the course of proceeding adopted is to be extracted from these materials, namely, the Reports I have referred to? The cases are very few in number.

First, the Cape Nicola Mole cases, and *The "Actæon,"* and others falling under the same category, must be considered. It may be well to state the mode of proceeding in these cases. The captors were called upon by monition to proceed to adjudication; they were unable to do so in most of the cases,—the ships and crews gone; and in the case of *The "Actæon"* (2 Dods. 51) the ship was destroyed and the papers were destroyed also. The captors appeared under protest, the object of the protest being to shew that the capture and destruction of the ship was warranted, and that the not proceeding to adjudication was justified by circumstances, as in the case of a captured vessel justly detained, but accidentally destroyed by a storm. The onus probandi lay entirely on the captor, and, of course, captor's evidence was admitted, for there could be no other.

The Court then pronounced for or against the protest. If **[233]** for the protest, there was an end of the case; if against it, the captors appeared absolutely, and, according to the circumstances of the case, were condemned in costs and damages for not proceeding to adjudication, or to restitution in value.

It is not always in the Reports that these proceedings are reported distinctly, but in one of the Cape Nicola Mole cases it will appear what was done; that is, in the case of *The "Huldah"* (3 C. Rob. 235). I need not enter into the particulars of that case, because my only object is to shew what was done, and the conclusion of it. The protest was overruled, an absolute appearance given for the captors, and the cause heard on the merits; when the Court decreed restitution of the principal part of the cargo belonging to the owner of the ship. I point this out because there was a distinction taken in the Cape Nicola Mole cases; in some there was restitution with costs and damages, in some restitution of the cargo only. This distinction does not seem to be adverted to.

Now these cases were distinguished from others in many important respects. The principal question was, though mixed up with others, whether the not proceeding to adjudication was justifiable, not whether the original detention was justifiable, though that was thrown in in the case of *The "Actæon."*

That case I perfectly well remember, having argued it, and I have had recourse to the original papers to see whether my memory failed me or not. That was a case under a licence, where Captain Capel acted under the express order of the Commander-in-Chief on the station, for I find on looking to the proceedings, that was the state of the case. There was no doubt as to his being indemnified by Government; but it should be known that the invariable rule of the Government was not to pay or undertake to pay on behalf of the captors one single sixpence till the case had been heard and decided by the Court of Admiralty; and for this purpose, and this purpose only, the action was brought before the Court, and all the circumstances stated, though I must say with very considerable irregularity, with a view to save the Government, not Captain Capel, who would have been broken if he had disobeyed the orders of his superior.

It is clear that the destruction of this vessel, and consequent thereon the not proceeding to adjudication, was the ground of that decree. Lord Stowell (2 Dods. 53) says: "Why, it is said in the first place that Captain Capel found that the transfer of these licences from one vessel to another rendered such cases suspicious, and made it necessary for him to use great vigilance in detecting **[234]** them, but that does not at all impose upon him a necessity of destroying the vessels which were furnished with them."

I do not dwell further on these cases because they are cases in which the captor was condemned in costs and damages, not on account of there being no probable cause of seizure, which is the case I have particularly under my consideration, but for not bringing the captured vessel to a proper Court for adjudication, and for destroying the vessel. This explanation is necessary in order to give due weight to such cases. I should also observe that in the Cape Nicola Mole cases the captors had taken the

ship to a Court having no jurisdiction, and consequently the claimants had no power to appeal from the condemnation which took place; whether such condemnation was well-founded or not had nothing to do with the present question; in fact, the condemnation was erroneous; the condemnation took place for a breach of blockade which did not exist. That was the real ground of condemnation in the Cape Nicola Mole cases, and that is perfectly evident from what was said. There was a right secured in many instances by treaty, and always given at the commencement of every war, namely, a right of appeal to the superior tribunal.

Under circumstances like these, when captors could not perform their first duty to bring the prize before a competent Court for adjudication, and that, for want of the ship herself, the papers and witnesses being gone, a condemnation for omitting so to do was called for by the evident demands of justice, as well as by the rules which govern prize proceedings.

The next class of precedents are those which may bear on the principal questions before me—seizure without probable cause.

It is manifest that this class must be subdivided. First, cases where it appears that the captors were guilty of misconduct or vexation. They are to be found upon the records and in our books: I believe there were some fourteen to eighteen cases. Secondly, cases of a totally different kind—cases where, upon the production of the depositions and ship's papers alone, no probable cause was disclosed. I believe that all the precedents which have been produced are cases which fall under the first of these divisions. I have dedicated a considerable portion of all the time I could spare to search on this question. All the cases which have been cited in *The "Ostsee"* were cases of this description—for I have examined them—all cases of improper conduct on behalf of the captors.

I say, then, that I verily believe that not one case will be found where Lord Stowell condemned the captors in costs and damages upon the production of the ship's papers and depositions **[235]** upon the ground that they did not disclose a probable cause of capture.

I will state the ground of this belief. There were hundreds of cases—not scores—but hundreds, in which costs and damages must have been decreed had such been the rule. There is not a single one in which they were decreed, though restitution had been constantly passing every day, and sometimes many in a day. There are cases where captors' expenses had been refused on the ground that the seizure was not justifiable, but costs and damages were not given, and they are some of them to be found in Sir C. Robinson's Reports.

My own notes, for I have gone through them all, furnish but very meagre information, and, for the best of all possible reasons—that such questions were not discussed—the practice was known to all who practised here. I will state, however, what I have found. I am now about to read, word for word, the whole of my notes in two cases: "On the 4th of December 1809, in the case of *The 'Hannah Holmes,'* an American ship, the question was whether she was going to France;—professed to be bound to Tonningen;—all the papers so purport;—positively sworn to;—aided in this case by general probability;—it is not likely that an American ship should be going to France;—the Court is not inclined to believe that the ship was going to Calais;—very improbable;—great numbers of British cruizers watching at Calais;—inconsistencies of the log are explained;—better a few ships should escape than the principles of justice be relaxed in so dangerous a way. N.B. Captors wanted to introduce affidavits. Ship and cargo restored. Addams asked for expenses for claimants, on the ground of the loss they had suffered by losing their voyage to Tonningen. The Court refused expenses."

*The "Frau Aletta,"* on the 27th of November: "Vessel lying in Pappenburg;—a licence for this vessel by name, from Ems to London, to take colonial produce. First difficulty to obtain leave from Dutch Government;—partly between two fires;—ship lay at Embden;—then comes an embargo;—he slips from Embden in the night and comes to Cape Bury, to take protection of British cruizers;—was stopped for want of his papers;—papers delivered up to commissioners;—papers support his account;—taken in the western passage;—licence permits him to do it;—this permission took off the blockade. The passage in the licence does not keep on the restriction on the western passage; perhaps inserted unintentionally, being a common clause. Not a capture that ought to have been made. Vessel restored without costs and damages."

Now, having adverted to the precedents, it may be well to [236] look at the principle and see some of the reasons which governed Lord Stowell's mind, though, of course, it is not in my power to state all. We shall thereby see with how many serious difficulties this subject is environed, and it may perhaps enable us the better to overcome them in future.

Lord Stowell administered the Prize Law on great and comprehensive principles; his object was that on the whole equal justice should be done to the rights of the belligerent, and the just claims of neutral nations, but he did not seek in each particular case to do the most perfect justice. Many passages in his judgments might be cited to shew this, whereby he declared that, though there might be hardships in particular cases, both to captors and especially neutrals, yet, on the whole, the balance was in favour of the neutral rather than against him. Lord Stowell used to say though blockade was a hardship on a neutral, and the right of search was a hardship on a neutral, yet it was to be recollected the whole trade was always open to them—the carrying trade in time of war. He used always to say, and rely greatly on that rule of law, that in the first instance, the case should be heard on the evidence of the claimants themselves, namely, the ship's papers and depositions. In the case of *The "Diligentia"* (1 Dods. 404), where the captors complained of what Lord Stowell was about to do, Lord Stowell made the same answer; he told them though they might complain in particular instances, yet he must adhere to the general principle, though the consequences might press hard upon them. Now, no person more readily acknowledged the truth of the principle that a claimant should be indemnified for a capture made without probable cause than Lord Stowell;—no one more powerfully manifested it;—but that will necessarily presuppose that the Court is in possession of the truth.

It is equally contrary to common justice that a captor should be mulcted in costs and damages where he has faithfully performed his duty, and had, in truth, adequate cause for the seizure. Yet this cause of seizure might not appear on the face of the depositions and ship's papers. So it might be in blockade cases, and in numerous others which might be stated.

Then the question arises how is the truth to be got at? By what evidence are the facts whether probable cause existed or did not exist to be ascertained? Justice will say by evidence from both of the litigant parties;—that no one ought to be condemned upon ex parte evidence. But for reasons which I need not enter into, the great rule,—the established rule of the Prize Court of Great Britain and of most others, save France for [237] some time, was to hear the case in the first instance, on the depositions of the master and crew of the captured ship, excluding all evidence from the captors. If such evidence was satisfactory, restitution always followed as a matter of course, whatever might be the truth of the transaction.

If, then, on such ex parte evidence, a prayer for condemnation with costs and damages was founded, what was to be done in that case?

In the case of *The "Elise"* (ante, p. 39), I stated that when such a state of things once occurred, and once only in my knowledge, Lord Stowell observed that though restitution followed, the case of no probable cause appearing on the face of the depositions, or in the ship's papers, whatever might be the true merits of the case, no further inquiry would be allowed; but that if costs and damages were demanded, they could not be decreed without receiving evidence from the captors.

I have not, I regret to say, been able to find the name of that case, but I have a perfect recollection of the fact within my own knowledge—I was present at the time. Nothing further was done in that case, and it is most remarkable, but I believe it to be true, that no case could be found, though I do not say so positively, in which such explanatory evidence was actually received, it must be remembered, with respect to costs and damages.

How is this to be accounted for? It is to be accounted for by various circumstances. I mean what the practice was then. I am not talking of what the practice is now; but I am endeavouring to show not only what the practice was then, but the reason on which it was founded. I say, how were such cases to be accounted for? In this way, first, that the claimants, knowing that the captors' evidence might possibly be received, in many cases would not press their demand. Secondly, that the production of captors' evidence was attended with many difficulties, and surrounded with embarrassment. Captures were made on the high seas in all parts of the world.

Captors, from the nature of their occupation, were constantly moving from place to place. Generally it would be a matter of great difficulty to procure the evidence of any one present at the capture; but if, after much delay, such evidence was procured —if it disclosed new facts, as it must almost necessarily have done—then the claimants must have had an opportunity to reply, and such evidence must also be procured from abroad, and frequently from distant countries.

Now, when we consider what were the limited means of [238] communication in those days, some notion may be formed of the delay and expense which would have been attendant on such proceedings in allowing captors to give explanatory evidence to excuse themselves from costs and damages. Suppose, however, the evidence was produced, there would not be an end of the difficulty. Though it may be true that no such case has occurred, yet in a case nearly analogous to it, Lord Stowell pointed out the embarrassments which would necessarily present themselves. I allude to the case of *The "Haabet"* (6 C. Rob. 54), in which captors' evidence was produced for a different purpose—with a view to the decree of condemnation.

In endeavouring to account for the prevalence of this usage, if so I may call it, reference may be had to the nature of prize itself, and the incidents which necessarily attach to it. Ships and cargoes are not only perishable commodities, but the care necessary to preserve them, even for a short time, is attended with much expense. Hence all claimants were desirous of obtaining restitution as speedily as possible; and, looking at the consequences of asking for more, simple restitution by consent took place in hundreds of cases frequently on the payment of captors' expenses. Lord Stowell commenced with an arrear of nearly 800 cases; fresh captures were coming in daily. To have investigated one-twentieth part of the cases of restitution with one-tenth part of the time and pains bestowed on *The "Ostsee,"* would, I think, have been deemed by all more than a Herculean task. The records of the Court of Appeal, so far as they extend, shew that that high tribunal did not repudiate the course followed by Lord Stowell; indeed, it is most remarkable that scarcely one of his judgments, or any question of great importance, was ever reversed—not one in a thousand. In one case only of moment, an appeal from a Vice-Admiralty Court, was there a serious difference between Lord Stowell and Sir William Grant; and in that case, I am rather ashamed to say, no final judgment was ever pronounced. After remaining five years for judgment, it finally was compromised. That was a class of cases involving property to an enormous amount. I may add that the sanction of Lord Stowell's proceedings was not confined to the very high authority of Sir William Grant. I agree with an expression in *The "Ostsee,"* that it is scarcely possible to call in a higher authority. Sir William Wynne was a constant attendant at the sittings of the Privy Council; he had been King's Advocate; he had had the experience of the two wars before the war of 1793. No man had a greater knowledge of his profession, no [239] one was more dedicated to the performance of its duties, and no man was more conscientious, or more independent in his opinions. To Sir William Wynne I must also add the name of Sir John Nicholl, also King's Advocate, whose knowledge, experience, and accuracy, are known to us all. A board more distinguished for talent, ability, and knowledge was never constituted. Constant opportunities occurred where, had they differed from Lord Stowell on the question I have been discussing, they must and would have so expressed that opinion.

Much more might be said, but I abstain from further observation, because my object is only to prove the course of practice prevailing in this Court on the subject of costs and damages, and in some degree to account for it. It is no part of my duty now to maintain and defend it.

In the case of *The "Ostsee,"* I had not the advantage of hearing the very elaborate argument which it appears, so far as it was reported, was addressed to the Lords of Appeal, on the part of the claimants. There was very little discussion before me, and I expressed my opinion upon the question briefly, and assigned no reasons in detail, and I did so because what had occurred in former days on this subject was fresh in my memory and present to my mind. But I avow that had I had an opportunity of hearing all that has since been urged on the subject, I should have given the same judgment; and for this simple reason, that I should have considered myself not at liberty to exercise any discretion upon the subject; that as a subordinate Judge, I should have deemed myself absolutely bound to follow the rule as to costs and damages as carried into execution according to the uniform practice of this Court, sanctioned

by those whose names I have mentioned. I should have asked, as I have in this case, for any one precedent to justify my acceding to the motion; failing the production of such precedent—and none I believe has or can be produced—I should have refused the prayer. I do not find that Sir John Dodson, who had much experience during the late war, and who formed one of the Judicial Committee, referred to any such precedent; yet if such a precedent was known to him, he must undoubtedly have given their Lordships the benefit of it. Failing the production of all precedent to the contrary, I should have thought it presumption on my part to have questioned the propriety or justice of a course so long pursued. My duty was to obey.

The Judicial Committee stands in a very different position from me. It is their privilege not merely to ascertain what has been done in past times, but if in their judgment such a course of practice is not consistent with justice, they have power to [240] alter and reform it. That Court is at liberty to take into consideration any alteration which may have occurred in the relative situation of the belligerent and neutral states, and to act upon much wider views than I should dare to speculate upon.

It remains then to examine the judgment of their Lordships to ascertain what are the principles and rules they intend to prescribe—what alteration there ought to be made in the course hitherto followed; and it is my duty to discover how far that judgment affects the case of *The* "*Leucade*," and other similar cases, for I hope and trust that this examination will not only assist me in pronouncing a just judgment in the case of *The* "*Leucade*," but afford light to guide us in future. It is a fearful state of the law when the administration of justice in each particular case depends, not on the application of some general principles, but upon the dissection of minute particulars.

The first rule which I extract from their Lordships' decision is founded upon the following passage: "The result of these authorities is, that in order to exempt a captor from costs and damages in case of restitution, there must have been some circumstances connected with the ship and cargo affording reasonable ground for belief that one, or both, or some part of the cargo, might prove, upon future inquiry, to be lawful prize" (2 Eccl. & Adm. 174).

This rule I apprehend to be that, in the case of all ships and cargoes brought in for adjudication, if it should appear from the depositions and ship's papers that the seizure was made without probable cause, a condemnation in costs and damages will follow; or in other words, such decree shall be passed when the depositions and ship's papers do not show probable cause. That must be the meaning of the expression, for I agree with the argument of counsel. I do not think it is the most fortunate expression that could be made use of; it is not the expression of their Lordships, but the authority they cited. It may be that probable cause existed, though no such probable cause existed on the face of the papers.

Now their lordships most truly stated that probable cause is incapable of definition; that probable cause must be probable in the opinion of the Judge, not probable cause in the opinion of the captor, who, unfortunately, in the discharge of his duty, has to determine whether to detain or not, with little time for deliberation, and very often amidst a bundle of papers in a foreign language, and a crew speaking the same. In such individual case, then, such task must now fall upon the Judge.

But perhaps some light may be thrown upon this important inquiry, though we cannot define what probable cause is, by [241] considering what is not probable cause within the meaning which the Court of Appeal has affixed to the term in the passage I have cited. I apprehend that slight irregularity in the ship's papers, or petty variations in the depositions would not be deemed probable cause; for were it otherwise, in what case could it be said with truth there was no probable cause? In almost every case there is some little irregularity or omission. So to construe their Lordships' declaration would be little less than a mockery and a snare. I apprehend that the ground on which a seizure could now be justified, speaking of the present time, must be real and substantial.

The judgment has, however, touched upon another question which I must not pass unnoticed; it is this,—whether the probable cause must have arisen from the fault or defect of the captured vessel, or whether a captor will be relieved from the liability to costs and damages for other reasons. I do not apprehend that their Lordships intended to express any decided opinion whatever upon these points at all. I will only observe that there is a very wide distinction between the cases which have occurred and may possibly occur again.

I must again refer to *The "Actæon."* The act of destruction of the ship by Captain Capel was in itself illegal, even if the vessel was liable to condemnation; it could only be justified on the grounds of public policy, and for illegal acts done for such a reason responsibility must attach.

The same in the Cape Nicola Mole cases. Very different is the case where the Government gives a lawful order, and the captor from circumstances has difficulty in applying it. In the case of an absolute order to seize a particular ship, Lord Stowell expressed his opinion that the captor would be indemnified; that is the case of *The "Diligentia"* (1 Dods. 404.) That is the expression used by Lord Stowell. Perhaps it may be somewhat ambiguous, but, looking at the context, I think that in that case it meant he would not be liable to condemnation in costs and damages in a Prize Court. Except so far as the necessity of the case now under consideration may compel me, I shall certainly abstain from considering this branch of the subject, finding the law in the state I have mentioned.

There is another matter intimately connected with the question, to which I must advert. I refer to the production of captors' evidence, on which I have already touched for another purpose. We must bear in mind certain distinctions if we desire to comprehend this head of evidence. First, the production of evidence as relates to the facts of actual capture as con-**[242]**-tradistinguished from other evidence, which the case may call for to clear up difficulties which may arise—and this for the purpose of procuring condemnation or of showing that costs and damages ought not to be decreed.

If I may use the expression, there are three classes: captors' evidence as to the facts to procure condemnation; captors' evidence as to the facts of seizure to escape condemnation in costs; and there is captors' evidence as to the facts not relating to the act of capture. That is the distinction I am desirous of expressing. Captors' evidence as to matters not immediately connected with the facts of capture.

Now, to the best of my knowledge and belief, the practice of this Court was as follows: I speak of general rules to which there may be few and very few exceptions, such as the case of *The "Haabet."* Captors' evidence as to the fact attending the actual capture, for the purpose of procuring condemnation, was almost universally excluded. I might say, with few exceptions, such as the case of *The "Haabet"* and the other case cited. Those are the only two cases on record, and Lord Stowell shows, in his judgment and a note to *The "Haabet,"* that he was determined not to admit that practice in future.

Now, evidence from the captors for incidental questions, if I may so call them, was constantly admitted, as to prove a blockade de facto, and numerous other circumstances not necessary to advert to. That was every day's practice.

As to that point which most materially concerns us now, the admission of captors' evidence to shew probable cause of capture where vexation and misconduct were not imputed, there was no course of practice at all; and for the best of all reasons, because there was no case in which it was necessary to determine the point, or to introduce such evidence; the Court refusing to condemn without asking for captors' evidence. I therefore know no precedent for its introduction, and I know of no authority for its introduction, except what I have already stated that I heard Lord Stowell declare, and which I have mentioned in the case of *The "Wilhelmina"* (*"Elize,"* otherwise *"Elise Wilhelmine,"* 2 Ecc. & Adm. 31).

Upon this very important question their Lordships have expressed no opinion, and I shall abstain from doing so until it becomes absolutely necessary; for this question is beset still with the most serious difficulties. Great mischief must arise from the admission of captors' evidence, and gross injustice from its universal exclusion.

Now, the admission would occasion delay, expense, and doubt—doubt as to what may be the decision which justice **[243]** requires. There is always difficulty in deciding between conflicting affidavits. How enormously would that difficulty be enhanced when the affidavits came from persons all interested in the result; and for the most part, as relates to the claimant, prepared abroad, and from translations also. Those who remember the last war know full well to what extent the manufacture of papers and evidence was carried.

Then take the other alternative, the refusal to admit captors' evidence. The captors then, whatever may be the truth of the case, will be left wholly at the mercy of the claimants. Our experience, even in this war, shows in some degree what would then

be the state of the case. Look at the case that came before me, *The "Odessa."* What an array of papers to prove a national character, which, by the claimants, was disclaimed! What a mass of evidence to support such papers!

Take the case of blockade. Those who command our cruizers are bound by their orders to detain vessels bound to blockaded ports attempting to break a blockade. The place of capture is, perhaps, the most essential question; the depositions may be contrary to the truth, and often have been; the place of capture may be much nearer to the blockaded port. The captors are shut out of all proof. Precisely the same, it may be, as to the course which the vessel pursued. So as to an attempt to escape. It appears to me, therefore, that to subject the captors to costs and damages without giving them the opportunity of explanation would at least savour of injustice. Remember, too, how severely Lord Stowell blames the cruizers in the case of the Havre Blockade for not enforcing it. How severe he is upon officers in command of Her Majesty's cruizers for not doing what it was their duty to do. In vain it is, he said, for the Government of this country to impose a blockade, if those to whom it is entrusted will not fulfil the duty they undertake to perform. That is the case of *The "Juffrow Maria Schrœder"* (3 C. Rob. 157).

In fact, the captors are placed between two fires; and at the same time their lips, even for self-defence, would be closed. It may be for reasons like those that Lord Stowell said he might, perhaps, at times have been too favourable to them.

Again, however, we are bound to look, in this Court at least, to the preservation of the just rights of the belligerent. None is more essential to the interests of Great Britain than the right of blockade. The right of seizing enemy's property on board neutral vessels has been parted with—so far there is a change of circumstances; but I am at a loss to conceive that such conces-**[244]**-sion on the part of Great Britain ought, in the slightest degree to relax the exercise of the right of blockade.

But if upon claimants' evidence alone, a cruizer would be condemned in costs and damages, will any man rationally expect a blockade would be adequately enforced? Even in this war occasions are not wanting in which our cruizers have been accused of not uniformly and efficiently performing their arduous duties.

So much, then, upon the question of refusing captors' evidence altogether. I have addressed myself, it will be recollected, to the difficulties and dangers of captors' and to the injustice of excluding them.

Suppose, however, a middle term was adopted, that captors' evidence in exoneration of themselves might, in certain cases, be received against the depositions and ship's papers, how would it be possible within the bounds of any human power to draw the line? Would it not be a question of dispute and discussion in every case? And then again come delay and expense.

It may be for these and many other reasons which presented themselves to the wisdom and sagacity of Lord Stowell, that, with scarcely an exception—and then only when particular circumstances warranted it—he adhered most pertinaciously to the great rule that the case should be heard on the claimants' evidence, and restitution should pass without admitting captors' evidence;—that with equal fixity of purpose he did not decree costs and damages, save in most special cases.

Having now fully explained my general views on this question of costs and damages, and having endeavoured to ascertain to what purport and effect the Lords of Appeal have expressed their opinion in the case of *The "Ostsee,"* I now proceed to the facts of the case before me in *The "Leucade"*; and here I greatly regret to say I must proceed on the assumption that I am right in the conclusion to which I come that the subjects of the Ionian states were at liberty to trade with Russian ports not under blockade. I must, I say, assume I am right in my solution of a question of great novelty, doubt, and difficulty.

There are three modes of disposing of this case;—first, simple restitution; secondly, costs and damages; thirdly, to allow the captors to give explanatory evidence. Assuming for the moment that this ship was seized only on the ground of her being an Ionian vessel trading with Russia—and which trading I have held to be lawful—ought costs and damages to be decreed under such circumstances? I put the proposition simply.

If that is the decree I must pronounce, assuredly I must **[245]** found my judgment on the case of *The "Ostsee"* exclusively, and not on any authority or practice with which I was before acquainted. Under these circumstances, it behoves me to bestow

the greatest pains, and to exercise the greatest caution, in my endeavour to ascertain the true intent and purport of that judgment, and to apply its principles to this case as their Lordships would wish them to be applied if they were adjudicating on this case in the first instance.

Now, if I fail in any particular, I may on the one hand impose a liability on the captors which that decision did not intend to impose; on the other, I may relieve the captors, and in so doing incur the blame of not giving full effect to the judgment of their Lordships—an error I am most anxious to avoid.

I proceed, then, on this principle: what the decision of *The "Ostsee"* has clearly decided, that I do; as to what may be left in doubt, I shall be guided, as I have said, in my judgment by all the principles and practice carried into operation by Lord Stowell. As in the one case I shall rigidly carry out all the directions I receive from the superior Court, so in the other, I shall not, till commanded, depart one iota from what I believe was the practice established under the authority of Lord Stowell.

I must now again advert to that most important passage in the case of *The "Ostsee,"* already cited: "The result of all these authorities" (ante, p. 174). I need not read it over again.

I presume that this passage is meant to be not only a statement of their Lordships' opinion as to what was the result of the authorities, but to be also a declaration of their adoption of it, as the rule which they intend to establish.

The first question then, is, as to the meaning of this passage. Then, confining my observations to the ship alone, there must be circumstances connected with it affording a reasonable ground for the belief that upon further inquiry she would prove to be lawful prize. If this paragraph admit of no qualification, I am of opinion that I am not called upon to condemn the captors in costs and damages; because it appears to me that the peculiar condition of the Ionian flag was such as to afford a reasonable ground for the belief that the ship would prove lawful prize. I allude to the connection of the Ionian islands with Great Britain, to the fact of the Ionian flag being joined to some extent with the British, and to all those notorious facts and circumstances which have lately been the subjects of much discussion.

**[246]** But if the paragraph I have read is intended to have another construction —to mean circumstances importing some fault or defect, or some apparent fault or defect, in or about the ship, and that such a state of things only can excuse a captor from costs and damages, then I think that the mere fact of bearing Ionian colours, and being an Ionian vessel, cannot possibly be deemed a fault or apparent fault; and in that view of the case, I should be bound to decree costs and damages.

Looking at the whole of this judgment, I entertain a most serious doubt as to what construction I ought to put on their Lordships' expressions.

There follows a passage from Mr. Justice Story, to the effect that the captors will be excused if there be a reasonable suspicion of illegal traffic, or a reasonable doubt as to national character, or as to the legality of the conduct of the parties. I am of opinion that there was a reasonable suspicion of illegal traffic in this case, but whether their Lordships adopted the passage I have quoted in this meaning, I really do not know.

I must, however, notice other parts of this judgment. Their Lordships cite the case of *The "Betsey"* (1 C. Rob. 93), and of *The "Luna"* (1 Edw. 190), and then observe: "If, however, these cases be held to establish the principle that there may be questions of so much nicety in the construction of public documents, or the determination of unsettled points of law, as to exonerate captors from what would ordinarily be the consequence of their mistake, they will not much assist the argument of the respondents here, where no questions of law of any kind appear to have existed" (2 Eccl. & Adm. 182).

I am of opinion that the present case did involve a question of much nicety in the construction of a public document, and the determination of unsettled points of law. But whether their Lordships intended to adopt this principle of justification or not, I am wholly at a loss to determine, because the passage is put hypothetically; and I really do not know, and cannot conceive, whether it was intended to affirm or to controvert the doctrine.

As the claimants have founded their claim for costs and damages on the case of *The "Ostsee,"* I have for that, as well as other reasons, examined it with as much care as I could bestow. The result is, that in my opinion, the question which I have now

to decide is not governed by the judgment in the case of *The "Ostsee,"* but that the utmost that can be urged in this respect on behalf of the claimants is, that the question is left altogether open.

**[247]** Then, if the question be left doubtful, and consequently I am entitled to pronounce my own opinion unrestrained by superior authority, I have not the slightest hesitation as to the decision to which I should come. I have no hesitation in adhering to the course pursued in former wars, and in pronouncing that judgment which I am certain Lord Stowell would have pronounced, and, therefore, in refusing to condemn the captors in costs and damages on the ground relied on by the claimants. It is my confident belief that if this question had been raised before Lord Stowell he would not have allowed it to occupy five minutes of his most valuable time.

I should have thought, under ordinary circumstances, that I should now have discharged my duty, and that it would not be necessary for me to travel further into the facts of this case; but, as probably this case may be appealed, and my judgment upon the point I have just discussed may be deemed unsound—and there are not wanting passages in the judgment in the case of *The "Ostsee"* which create in my mind great distrust as to the conclusion to which I have come,—I deem it but just to the captors to mention,—I deem it right to mention, other grounds on which they have founded their right to be exempted from costs and damages.

For this purpose I must consider the "Leucade" as a neutral vessel, and in that character entitled to sail either to Taganrog or Trebizond. Counsel argued, and I think with great truth, that the foundation of the seizure of this vessel was, that she was an Ionian vessel going to a Russian port; but it does not appear to me to follow, necessarily, that if that ground fails to justify the captors, there may not be other circumstances to excuse the captors from a condemnation in costs and damages.

The question, then, is one of fact. Are there other circumstances to justify the detention or to show probable cause for the seizure? This is not very easy of solution; for if this vessel ought to have been deemed, by the cruizers which captured her, entitled to a neutral character, then all that related to her destination, there not being any blockade in the neighbourhood, could be of no importance; and the case comes very much to this: if the captor institutes an investigation which, turn out which way it will, will not afford probable cause for seizure, can he avail himself of the fact that the neutral vessel endeavoured to evade his inquiry, and that by means which would not be justifiable if the object of inquiry was well founded? In former wars, no doubt, the captors would be held justified; but their suspicion, attaching to the conduct of the **[248]** ship, might attach to the cargo; and if not proved to be neutral property, such cargo would be liable to condemnation. No such reason exists in the present war, as "free ships make free goods." There cannot, in such a case, be inquiry as to the property in the cargo.

It is said that this vessel was sailing wide of her asserted destination; that she had no log; that there were other defects in her papers; that she had deceived the British authorities; that her ostensible destination was Trebizond, but her real destination was a Russian port.

Now, assuming all these facts to be true, neither any single one nor all put together would furnish a legal ground for the condemnation of a neutral vessel. I incline to think, upon the best consideration I can give to the judgment in *The "Ostsee,"* that, according to that decision, these circumstances would not be held to furnish probable cause for seizure; but as I have declared my opinion on the leading question that the captors are not liable to be condemned in costs and damages, I do not think that I am called on to say more. Should this case travel to the Privy Council, their Lordships will put their own construction on the judgment in *The "Ostsee,"* and its applicability to the circumstances I have been discussing. I leave this part of the case.

The conclusion to which I have come disposes of the question of evidence from the captors; and I will conclude this judgment by observing that it is most probable that this case and many others will be appealed, and I shall then have the benefit of the opinions of their Lordships upon some of the many difficulties which may beset my course; and I entertain a confident hope that, by the new light which the superior wisdom and knowledge of their Lordships will shed on these embarrassing questions, I may be able to effect that which is the great desideratum of a Court of Prize—preserve, undiminished, the rights of the subjects of neutral states without derogating

from rights equally sanctioned by the Law of Nations—the rights of belligerent powers; and so reconcile the abstract principles of justice with practicability.

Proctors: for the captors, the Queen's Proctor; for the claimants, Orme.

[249] THE "HOPEWELL." The High Court of Admiralty, March 10, 1855.—Salvage. The owners originally offered 534l., but subsequent to the completion of the salvage service, having suffered loss by a long detention of the ship, which they attributed to the salvors, they deducted 260l. for such loss, and tendered in Court 275l.—*Held:* 1st, that whether the detention was attributable to the salvors or not, the owners could not compensate themselves for the loss out of the sum tendered for the salvage service.—2nd, the detention arose from the owners' ignorance of the Salvage Act, and of the course of proceeding thereunder.

This was a suit for salvage, instituted by the owners and crews of the yawl "Mosquito," the life-boat "Prince Albert," and the steamer "Beacon," belonging to the Trinity Corporation, for services rendered to the "Hopewell," which was discovered by the steamer, deserted by the crew, on the south end of the Hasbro' Sand, on the morning of the 18th of April 1854.

She was got off and brought into Lowestoft harbour; her value, with her cargo of coals, was agreed at 1705l., less 105l., the charges and fees of the Receiver of Droits.

In consequence of negotiations and circumstances which are fully detailed in the judgment, the vessel was detained in custody until the 9th of August. On the 8th of June, the owners tendered 534l., being one-third of the agreed value, which was refused by the agent of the salvors; but the proctor for the owners tendered only 275l., and alleged that, by the vexatious conduct of the salvors, the owners have been unjustly, vexatiously, and unnecessarily deprived of the profit arising from the employment of the said barque, and thereby, and by the extra charges and expenses to which they have been put, sustained an actual loss of 260l., or thereabouts; and that he had tendered the sum of 275l., being the difference or thereabouts between the sum of 534l., previously tendered, and the loss they have sustained by the misconduct of the salvors, &c.

Dr. Haggard and Dr. Jenner appeared for the salvors.

The Queen's Advocate and Dr. Bayford, for the owners, were called upon to begin.

*Dr. Lushington.* In this case it would have been of advantage to the owners if they had caused the Act of Parliament (9 & 10 Vict. c. 99) to be read in the first instance, when the property was brought into Lowestoft. It appears to me clear that by the Act there are two modes whereby the owners might have taken the ship out of the custody of the Receiver of Droits. One was by satisfying him that the salvors had been reasonably compensated for their services, for which purpose it would have been necessary to have the assent of the salvors themselves, or some person competent to act for them; the other, by giving reasonable security, to the satisfaction of the Receiver. With this the [250] salvors had nothing to do. The owners have only a plain straightforward course to pursue—to offer reasonable security,—and the Receiver would be bound to accept it; if he had then refused to restore the vessel to the owners, he would have violated the Act of Parliament.

As to the circumstances of the case itself, there appears a novel point—in fact, it is the first time it has been brought forward in this Court. A tender of 275l. has been made by the owners, who have deducted from their original offer of 534l. the sum of 260l.; this they have done, asking the Court to pronounce for this sum less than the previous offer, on the principle that the Court may in this way compensate them for a loss they allege themselves to have incurred by the improper detention of this vessel by the salvors after the salvage service was performed. I will assume, for the purpose of the present discussion, that there has been an improper detention by the act and intention of the salvors. Now, to the best of my memory, there never was a precedent in which the Court has been asked to act on this principle. There have been many cases, indeed, in which the Court has made a deduction from the amount of salvage it would otherwise have given, on account of neglect or mismanagement, or other improper conduct in the salvors in the performance of the service, and up to the time when the salvors had ceased to have legal custody of the property salved—the improper detention of property prior to that. I think one case had that

ingredient; but there has been no case, to my knowledge, where a deduction has been made from salvage reward on account of imputed misconduct after the property was out of the custody of the salvors. I will not undertake to say that no such case has occurred, but I have no recollection of it, and I can find no note of such a case. On a further consideration, since this case was opened by Her Majesty's Advocate,—and on this account I desired him to begin,—I remain of my original opinion, that I cannot deduct from the salvage compensation anything on account of such imputed misconduct, assuming it to be true.

I doubt whether it is fairly within the province of the Court to take such matters into its consideration at all for such a purpose; it would, in many cases, be extremely difficult to estimate what ought to be the deduction on account of such misconduct after the service was performed. In some cases the damages or inconvenience to the owner might be great, yet the misconduct venial. I could not, in many cases, accept the amount of loss which might be incurred by particular circumstances as a criterion, nor could I find any other satisfactory criterion **[251]** whereby to mulct such improper conduct in a particular sum. I am aware that, on the present occasion, it is calculated on the actual loss that has occurred. Besides, there is another reason: parties would be necessarily led into expensive and protracted litigation, which, in salvage cases, it has ever been the policy of this Court to avoid. To these considerations I may add, that it is only on a very few rare occasions that there could be any pretext for asking the Court to act on such principles, for in all ordinary cases, the owners would be protected by the fear which the salvors would have of not receiving their costs. This is the proper and usual check which the Court imposes on all salvors who are unreasonable in their demands, or vexatious in their conduct, with regard to the recovery of salvage.

For these reasons I must, in the present case, pronounce against the tender, the sum tendered being, in the estimation of the owners, less than the real value of the services rendered.

I cannot but add, in making these observations, that though I have said on the present occasion I assume that the salvors were to blame for this detention, and that the loss may have been occasioned by their misconduct, yet, I only assume it for the purpose of argument; because, in point of fact, looking to the Act of Parliament, on which I have already commented, there is nothing required to be done by the salvors, the Act requiring neither assent nor consent for the restitution of the property, for the owners are entitled to it without any reference to the salvors whatever.

The next consideration is, what sum ought the Court to allot to the parties? The admitted value of the property salved is 1700l., less the Receiver's costs as agreed by all parties. Now, looking only at the affidavits of the salvors themselves, and viewing such affidavits as the experience of the Court accustoms it to do; seeing, also, that however valuable these services were to the owners, they occupied, as salvage services, a period of twelve hours only; and recollecting, also, that the vessel which was employed on this occasion was the property of the Trinity Board, and the Trinity Board claim no salvage on account of that vessel, I am very clearly of opinion that one-third of the value of this ship and cargo is an ample compensation.

I must go further. As the owners offered to pay the amount of 534l. in the first instance, and it was not accepted, I will first consider why, according to the ordinary mode of proceeding, I should give the salvors their costs. What was the reason why this tender was not accepted, supposing it to be, as I consider it, an ample remuneration? Mr. Clark would not **[252]** accept it, on the ground that he was not justified in doing so, as the agent of the salvors, on account of not having sufficient power. That was a matter entirely for Mr. Clark's own judgment. I cannot tell to what extent the salvors authorized Mr. Clark. They might have given him general power, or have restricted him to the performance of an individual act. I am not aware that any agent is bound to perform any act that he does not consider himself strictly bound to do by the instruction of his principal. But with respect to the salvors themselves, if after having commenced a discussion as to the salvage to be given, whether it should be two-fifths or one-third, they choose to go to sea without appointing a proper person with adequate authority to act on their part, and consequently it is out of the power of the owners of the ship and cargo to make a tender, I shall hold the blame to rest at the door of the salvors. It appears to me I must consider this tender was duly made, and it was refused, and that all the consequences

of refusal must necessarily fall back on the salvors. This is the course I have always endeavoured to follow, namely, never to give costs, where salvors might have had full and ample compensation without any litigation at all. Upon the present occasion, however, it has been said that the salvors were placed in a peculiar position, because the tender made now is not the tender of the sum originally offered, but a tender of a much less sum. No doubt this was an irregular, and, as I think, an erroneous proceeding; but it does not appear to me essentially to alter the view I have taken of the case, which is this,—a view which I should be very difficult to be displaced from,—that wherever salvors can have the compensation which the Court holds afterwards to be full and ample, and with which they ought to be satisfied, I will never give costs.

The effect of giving costs would be to induce persons to reject adequate tenders, and the consequence would be a great injury to the owners. Therefore, most undoubtedly, on the present occasion, I shall not give the salvors their costs.

Then there remains this question, whether there is any charge of misconduct which requires me to mulct the salvors in the costs of the proceeding. I apprehend there are many reasons why I should do no such thing.

In the first place, I think the owners have gone on blundering throughout the case in an extraordinary manner. Whether they have been aided in this blundering by any misconception on the part of the Receiver of Droits, it is not my duty to inquire. I do not think that he did himself misconceive the matter. He seems to me to have acted in accordance with the **[253]** statute. I think that the owners have not acted with great discretion. If the salvors have fallen into error in not giving their agent sufficient power, I think that is an error into which the owners have also fallen. They allowed their agent to act with insufficient power; and when he stipulated to give two-fifths, they refused to confirm this arrangement, and the consequence was the salvors went to sea, leaving the matter in uncertainty. Hence arose a great deal of the confusion, for I can call it by no other name, which subsequently occurred.

There is another matter to which I must refer which has been commented upon by the counsel on both sides. There is a proceeding on the part of the owners' agents of which the Court must express its disapprobation—I mean the release of the vessel on the 23rd of June. I am clearly of opinion that the release without bail was obtained from the Receiver of Droits by the most unjustifiable concealment on the part of the owners of a most important circumstance—the repudiation of Mr. Clark; in other words, the release was obtained by fraud, for suppressio veri is as bad as the suggestio falsi.

There are other circumstances upon which it is not necessary to comment. The judgment of the Court is to give 534l. to the salvors, and to give no costs on either side.

Proctors: Jenner; and Stokes.

THE "LADY WORSLEY." The High Court of Admiralty, April 18, 1855.—Important salvage of a vessel and cargo derelict on the coast of Africa.—Claim to salvage forfeited by the misconduct of the salvor in retaining possession of and improperly dealing with the property salved.

This was a suit for salvage, instituted by Mr. J. Thompson, for services rendered to this ship on the coast of Africa on the 14th of January 1853. The circumstances are fully set forth in the judgment.

The owners in their answer admitted that certain services in the nature of salvage were rendered to the ship by Mr. Thompson, but alleged that the exertions of the said Mr. Thompson were of a slight and nominal character; that such salvage services terminated when the "Lady Worsley" was brought to anchor on the 21st of January; that notwithstanding the same, the said Mr. Thompson, as salvor, retained possession of the said ship until the June following, when she was given up to an agent sent out by the owners; that the said Mr. Thompson and Mr. Wylie (acting therein, and describing themselves as joint salvors) unjustifiably, and without sufficient notice, sold the portions **[254]** of the cargo salved, instead of leaving the same to be bartered for palm oil, agreeably to the instructions of the owners thereof, and according to the universal custom of trade there prevailing; that the owners thereby sustained a heavy loss, inasmuch as the goods so sold realised only 3850l. 12s. 2d., whereas the invoice

prices thereof amounted to 4308l. 17s. 11d.; that the said Mr. Thompson and Mr. Wylie, with the view of retaining possession of the proceeds arising from such sale, directed that the bills drawn for the payment of the goods sold should be drawn in their favour as joint salvors.

Dr. Addams and Dr. Bayford for the salvor; the Queen's Advocate and Dr. Twiss for the owner.

*Dr. Lushington.* The present suit arises out of the following circumstances:—It appears that the ship proceeded against, the "Lady Worsley," on the 14th of January 1853, got fast among the breakers at the back of Breaker Island, at the confluence of the rivers Bonny and New Calabar. She had a cargo destined for the African trade, and was the property of Harrison and Company, merchants, of Liverpool. After the accident she became derelict—what species of derelict is a matter for consideration. The present suit for salvage is instituted by one individual only, Mr. Thompson, who was resident on the African coast as the agent of another Liverpool house, Messrs. Horsfall and Company.

It appears that he was on the look-out for the "Garrow," a ship belonging to his employers, when he discovered the "Lady Worsley," abandoned by her crew, and surrounded by natives, who were engaged in plundering her. The natives quitted, but afterwards returned; and Mr. Thompson, being unarmed, could not prevent their so doing, and he returned to Bonny. So that when he first discovered the vessel he was unable to take possession, or, in fact, to assert any right as an original salvor.

It appears that at Bonny there was resident also Capt. Wylie, who was the agent, and bound to perform the duty of agent, for this house of Harrison and Company, and to him, with great propriety, Mr. Thompson communicated the circumstances of the case and what he had seen. According to the representation of Mr. Thompson, it was then determined that a joint effort should be made to save the remains of the ship and cargo. Here I must observe, that immediately Capt. Wylie was informed of the position of the vessel, it became his bounden duty to take any means in his power for the preservation of the property of the owners, from whom he was receiving his wages.

On the morning of the 15th, Mr. Thompson and Mr. Wylie, **[255]** with six boats, manned with forty-seven hands, proceeded to the "Lady Worsley," and found several hundreds of the natives engaged in plundering her; but these retreated on perceiving the force brought against them. Various measures were pursued for the purpose of saving the cargo. The vessel was lightened, and was found to be lying on the edge of the rocks. Measures were taken to remove her into deep water, and with success. She was eventually, on the 21st, brought into New Calabar.

I think there can be no reasonable doubt that this was a salvage service: the vessel was not only subject to the elements, but also to the inevitable plunder of the natives. Had the case stopped here, there would not have been much difficulty, though to some extent I accede to the argument of the counsel for the owners, that Mr. Thompson was one of the salvors, and one only. He represented the severe labour and fatigue he underwent at the wreck, and no doubt there are circumstances which always induce the Court to give a larger reward in such a climate, than if the services were performed in circumstances that expose the parties to less risk.

Had the case rested here, the Court would only have had to decide upon the amount of reward; but the subsequent dealing with the property requires the most careful attention. Mr. Thompson retained possession of the vessel, and, under the circumstances, I am of opinion he had no right to do so. It is perfectly true it is laid down by some authorities that there is a right to possession in salvors, but that is a defence never received by this Court without great consideration. I cannot conceive that there could be any rule more mischievous to the commercial interests at large, and to the property salved, than that it should be held that, under whatever circumstances, it was the duty of the salvors to retain the property. Mr. Thompson thought fit to retain possession of the ship till the month of May, and then, according to his own statement, the surrender is made to a gentleman who had arrived from England, and was then the constituted agent of Horsfall and Company. I want to know why he did not, in the first instance, surrender her up to Capt. Wylie, their constituted agent at the time; and why Capt. Wylie did not perform his duty in obtaining possession without delay? It appears that Captain Wylie has taken upon himself two inconsistent characters—agent and salvor—just as it suits his purpose.

Again, with regard to the cargo, how does Mr. Thompson act? He was determined that he would not lose his hold of it, and would not allow it to be bartered in the usual course of [256] trade in those parts. It was sold, and the bills given in payment for it were made payable in England; the bills were made payable to him and Capt. Wylie, as salvors. Mr. Thompson was the seller, and he was at the same time the purchaser of a considerable portion of it; and there is nothing to satisfy the Court that it was sold for anything like its value. Mr. Thompson took the bills for the purpose of keeping his hand over the property; he is therefore the vendor and the vendee.

It is an established rule of this Court, and one I shall never depart from, that however valuable a service may be, salvors may forfeit their just reward if they are guilty of misconduct.

It is quite clear in this case that the interests of the owners of this property have been most unjustly sacrificed, and that Mr. Thompson has dealt with it exclusively for his own benefit, without any regard to their interest. I think the case assumes a still darker complexion from the participation of Capt. Wylie. It was his bounden duty to protect, not to make a profit of, this property, and the evidence leads me to the conclusion that there was collusion between Mr. Thompson and Capt. Wylie, the latter assuming to himself a character to which he was not entitled,—the character of co-salvor.

It is not necessary for the Court to enter into the particulars as to how much was lost or gained, but I must observe that salvors are not at liberty to deal with any part of the property salved for such reasons as those assigned by Mr. Thompson. I can hardly find any ground of justification alleged in these proceedings for what was done.

I am of opinion that Mr. Thompson has forfeited all claim to salvage, and I reject his demand. I should have given costs, but when I look to the manner in which the case has been conducted, the minuteness with which little matters have been entered into in the affidavits, the best and wisest course I can take is to confine myself to the rejection of the demand, and to give no costs.

Proctors: Jennings; and Rothery.

THE "WEAR PACKET." The High Court of Admiralty, April 21, 1855.—The Court will not entertain the claim of parties who have been previously convicted under 9 & 10 Vict. c. 99 by the magistrates for their conduct in the same transaction for which they claim salvage reward.

This was a suit for salvage promoted by the crew of the "Rose in June" for services alleged to have been rendered to [257] the vessel on the 7th of December 1854. With the exception of a portion of her stores, the ship and cargo was lost.

The asserted salvors alleged, that having discovered the perilous position of the "Wear Packet," and observed her crew in the rigging, they put off to her assistance; that before they arrived, a steamer and a yawl put off and rescued the crew; that they then boarded her, and brought on shore a considerable portion of her stores, &c.

To this the owners replied, that the Receiver of Droits had dispatched another party to take possession of the vessel; that the asserted salvors had improperly interfered, for which they had been convicted before the magistrates under the statute of 9 & 10 Vict. c. 99; that they appealed against such conviction to the Quarter Sessions, but that it was confirmed.

When Dr. Jenner was about to open the case on behalf of the salvors,

*Dr. Lushington* said: I am very clearly of opinion that it is quite impossible for the Court to decree salvage to the parties claiming it under the circumstances of this case.

The provisions of the Act of Parliament referred to have been carefully framed for the purpose of preventing any unjust interference with respect to a ship in distress. I say carefully framed, becaused it vests authority in the master, owner, or officer in charge of the ship, then in the Receiver of Droits, and, for want of their presence, in various officers (*a*), as the coast guard, excise, &c., stating them in every gradation,

(*a*) Sect. 15. "First the officers of customs or coast guard, then those of the excise, then of the sheriff or his deputy, then any justice of the peace, then any mayor or chief magistrate of any corporation, then any coroner, then any chief constable, then any petty constable or peace officer."

Under 17 & 18 Vict. c. 104, which came into operation on the 1st of May, similar

to prevent not merely improper interference with persons attempting to effect the salvage, but sometimes also the destruction of the property.

Whether these parties have been convicted of a violation of section 15, or section 45, does not appear to me to be of importance. After the men had been sent on board by the receiving officer, these parties still persisted in their endeavour to unload the cargo, and to put it on board their own boats. **[258]** This I apprehend to be a violation of the Act of Parliament, and, on that ground, I should feel myself compelled to reject this claim; and when I find that criminal proceedings under the statute were instituted against the parties, that they were convicted, and that the conviction was confirmed at the Quarter Sessions, I am of opinion that I have no power to consider whether such conviction was right or wrong. It stands before me as an act unimpeachable in this and other Courts. If I were to give these parties a salvage reward, the case would be reduced to the absurdity of the same men being punished in one Court and rewarded in another for the very same act.

I must pronounce against the salvage, and I must give the costs.

THE "ROYAL STUART." The High Court of Admiralty. May 4, 1855.—A lender on bottomry, the agent of the ship, cannot include in the bond the expenses of relanding a cargo of his own shipped in an unsafe condition, nor money advanced to the master, without proof of inquiry as to its necessity, and as to its proper application.

[S. C. 1 Jur. (N.S.) 1116. Commented on, *The "Pontida,"* 1884, 9 P. D. 181.]

A bottomry bond on this vessel had been pronounced for by this Court, and referred to the registrar and merchant to take the accounts. The claim amounted to 3317l. 17s. 5d., of which they disallowed 1508l. 5s. 1d. To this report the bondholder objected, and entered into an act on petition.

Dr. Addams and Dr. Twiss appeared in support of the objections.

Dr. Bayford and Dr. Deane of the report.

June 5.—*Dr. Lushington.* The bottomry bond given on this ship was pronounced for on the 16th of August last, and a reference then made in the usual manner to the registrar and merchants to take the accounts. On the 3rd of March 1855 the registrar gave in his report. The proctor for the owner of the ship prayed that it should be confirmed. The proctor for the bondholder objected. An act on petition was entered into, and I have now to decide whether the objections to the report can be sustained.

The claim brought in on behalf of the bondholder amounts to 3317l. 17s. 5d. The sum allowed is 1809l. 12s. 4d., so that the sum of 1508l. 5s. 1d. was taken off.

The objections taken to the report do not allege that 1508l. 5s. 1d. was improperly taken off, but they are confined to three items, 188l. 16s. 6d., 16l. 4s., and 490l., amounting in all to 695l. 0s. 6d. It is not denied, therefore, that the sum of 813l. 4s. 7d. was properly disallowed.

**[259]** The two first items, 188l. 16s. 6d. and 16l. 4s., are composed of certain expenses attendant upon relanding a quantity of flour which was shipped on board this vessel by Messrs. M. and Company, the agents of the ship at Sydney. The bondholder states that the flour was shipped under the circumstances stated in the affidavit of Mr. Tobias, to which I must refer.

Mr. Tobias swears that the flour was known to be damaged flour, not only generally, but especially by the master of this vessel, and that, by the master's desire, Messrs. M. and Company shipped the flour on board the "Royal Stuart" on freight; that the flour became heated, and that such heating was accidental; and as it was apprehended the ship could not carry it with safety, Messrs. M. and Company took it back.

From the bill of lading it appears that 3084 cases of merchandize were shipped on board this vessel, freight being payable at the rate of forty shillings per ton. There is no mention of what these cases consisted, but the contents were well known to the

---

authority is vested in "the following officers in succession, each in the absence of the other, in the order in which they are named; that is to say, the receiver of the district, any principal officer of customs or of the coast guard, or officer of inland revenue, any sheriff, justice of the peace, commissioned officer on full pay in the naval service of Her Majesty, or commissioned officer on full pay in the military service of Her Majesty."—Sect. 445.

master. The indorsement states that the cargo had been received back, being declared dangerous, and the ship is absolved from all responsibility for non-delivery.

These are the facts of the case; and the question is, whether Messrs. M. and Co. had a right to charge these expenses against the ship, and include them in the bottomry bond.

Messrs. M. and Co. were the agents of the ship, not of the master. They have certain duties to perform towards the owner, and for which they receive payment. Acquitting them of all intentional misconduct, was it competent to them to ship a cargo of damaged flour, their own property, on board a ship for which they were agents, and when that flour turned out to be dangerous, to turn round and say, "Pay me the expenses of relanding my flour, which you cannot, from its state, carry to its destination"? Had they any right, as agents, to ship their own property on board this ship,—a property which, from its nature, might become dangerous; and then because a risk—which they ought to have foreseen and protected their principal from —occurs, charge him with the cost of that very risk, and especially when there was no increased freight? What would be the result? If a dangerous transaction turned out well, all the profit would go to the agent; to the principal only an ordinary freight—a compensation for the conveyance of a safe article. If it turn out ill, then the principal is to bear all the expense of putting an end to the transaction. I cannot think that an agent is justified in putting his principal into so unfair a predicament.

**[260]** But there is still another consideration. Are such expenses, in any view of the case, a fit subject for bottomry—expenses incurred by the agent, and charged in the bottomry bond? Are these necessary expenses within the proper limits of a bottomry bond—expenses which an agent of a ship can include in a bond taken to himself? Many questions arise deserving consideration. It must be remembered always, that this is a bond taken by the agent of the ship, whose duty it is to protect the ship from all improper charges; and though it is true in law that an agent may take a bottomry bond, yet, when he does so, all the transactions thereto appertaining require the utmost vigilance of the Court, for the obvious reason that when the agent and lender are blended in one, the owner is deprived of the protection expected from a paid agent. I am satisfied that the registrar and merchants did right in excluding these items.

The last remaining item is the sum of 490l. advanced to the master. What is the law respecting such advances? First, I take the case of a lender on bottomry, not acting as agent to the ship, nor having any connection with it. Such a lender is not responsible for the application of moneys advanced to the master, provided such moneys have been properly advanced. But what is a legal advance to the master? An advance made after due inquiry that such moneys were wanting to defray the expenses of the ship, in repairs, the purchase of necessaries, and other things indispensable to the completion of the voyage. The lender is bound to exercise due care and caution in making such advances; to be reasonably satisfied by inquiries that the money is wanting for the purposes I have mentioned. Having made these inquiries, he is not responsible for the application of the money. Here, however, there is no evidence of any such inquiry, no proof that the lender inquired, or had any evidence that the money was bonâ fide wanted, nor even the subsidiary proof how a single sixpence was expended. If the case rested here, I should approve of the refusal to allow this item. But the lender is the agent; he is bound by a much stronger obligation than a merchant not so connected with the ship. It is his duty to superintend the expenditure; to protect the owner from the malfeasance or the errors of the master; to see that the money is wanting for necessary expenses and to see that it is so applied, so far as relates to all larger sums.

This duty the lender and agent has not performed. Nor is this all; there are charges in this account for every possible expense which could have been required for the outfit of the ship. The agent and lender, therefore, knows that the advance of this money was not necessary. Repairs there were none.

**[261]** I am clearly of opinion that the registrar and merchants exercised a just and legal discretion in disallowing this item.

I cannot take leave of this case without expressing my conviction, both from the facts herein disclosed, and from what I have seen in other cases, that the merchants of Australia have formed a very erroneous notion of the duties to be performed as

agents, and of the obligations imposed on those who advance money on bottomry. It is the duty of merchants undertaking the agency of a vessel to protect the owners against the extravagance, carelessness, or dishonesty of the master; and it is the duty of all persons advancing money on bottomry to ascertain by previous inquiry that the moneys asked for are required for the necessary purposes of the ship, and, in the case of an agent, to see to the due application of the money lent.

I confirm the report, and as so large a sum has been deducted, the bondholder must pay the costs of the reference and the expenses of these proceedings.

Proctors: Nicholl for the bondholder; Nicholson for the owners.

THE "CARL,"—(Bach). Admiralty Prize Court. May 4, 1855.—A ship of war is entitled to share in all captures made by a tender attached to her, however distant she may have been at the time of capture.

[S. C. Sp. Pr. Cas. 238. 2 Eng. Pr. Cas. 497.]

This Russian vessel had been captured by Her Majesty's steam-vessel "Avon," and condemned as prize in August last. A claim was now made of behalf of Her Majesty's ship of war "Impregnable" to share in the proceeds, on the ground that the "Avon" was attached to the "Impregnable" as a tender, and could therefore make no independent capture of which the benefit would not accrue to the "Impregnable" equally with the tender.

The Queen's Advocate and the Admiralty Advocate appeared for the "Avon"; Dr. Addams and Dr. Twiss for the "Impregnable."

June 5.—*Dr. Lushington.* This Russian vessel was captured off the Start Point by Her Majesty's steam-vessel the "Avon," and on the 6th of August last year condemned as good and lawful prize to her.

Since such decree was made an appearance has been given on behalf of H. M. ship, the "Impregnable," and a claim **[262]** asserted that distribution should be made, not to the "Avon" alone, but to the "Impregnable" and "Avon" together, on the ground that the "Avon" was attached to the "Impregnable" as a tender.

That the "Avon" was so attached is sufficiently proved by the letter from the Admiralty.

The question which I have to determine is, whether, on this state of facts, the claim of the "Impregnable" can be supported.

I propose to consider what was the rule during the last war, and then whether there is any cause to induce the Court to depart therefrom.

In the case of *The "Charlotte"* (5 C. Rob. 282), Lord Stowell said, "The claim for the King's ship is given in virtue of a seizure said to be made by this vessel as a tender; and in order to support that averment, it must be shewn either that there has been some express designation of her in that character by the orders of the Admiralty, or that there has been a constant employment and occupation in a manner peculiar to tenders equivalent to an express declaration, and sufficient to impress that character upon her. The former species of proof would undoubtedly be most desirable."

It must be necessarily inferred from those observations, that if the conditions mentioned by Lord Stowell were complied with, the result would be that the ship to which the tender was so attached would be entitled to be considered as captor, and the capture effected by a duly commissioned vessel.

It is quite clear that the "Avon" had all the requisites mentioned in this judgment. There is an express designation of her as tender, and there is constant employment of her in that capacity. Under such circumstances I apprehend that the tender becomes, in law, a part of the ship to which she has been attached, and that any capture made by her enures to the benefit of the ship to which the tender is an adjunct. This was the old rule and practice, and must prevail, unless any distinction can now be shown.

First, as to the place of capture. It was off the Start, about fifty miles from Plymouth, where the "Impregnable" lay, but I do not think that on the ground of distance only any exception has hitherto been engrafted, nor is there any clear reason for so doing. Tenders are, I apprehend, used for the very purpose of performing service which it may be inconvenient for the large ship to attempt, and must necessarily proceed to a considerable distance.

**[263]** I think that no line has or could well be drawn, though I do not say that there might not be a combination of circumstances which would form an exception.

Then is there anything to be found in the existing proclamation on naval prizes which ought to militate against the long-established usage of the navy?

It has been said, and truly, that in a former proclamation mention is made of tenders, and that in the present proclamation nothing respecting them can be found.

Since the hearing of this case I have had an opportunity of seeing some of the proclamations which have been issued under the authority of the Crown for the distribution of prizes or other seizures.

The proclamation of 1780 relates to prize, and in that proclamation there is no mention of tenders; proclamation of 1793 same; so also in those of 1803 and 1805.

The proclamation of 1816 was issued during the time of peace, and no mention is made of prize at all. The subject-matter is seizure under the Revenue and Navigation Laws; and in this document is to be found an express provision that the ships to which tenders are attached shall share, and also persons absent from the ship or tender on ship's duty or revenue business.

There was a proclamation of King William IV., dated the 3rd of February 1836, which I have not had the opportunity of seeing, but which is partly recited in a proclamation of the 19th of May 1846.

It appears that that proclamation of William IV. did relate to prize, revenues, seizures, and so forth. How it came to include prize I do not know—probably by reference to some of the statutes which formed the subject of discussion on a former occasion, respecting which there is some confusion.

This proclamation is silent as to tenders. The existing proclamation of March 5 relates only to prizes captured in the present war.

The result is, that up to the present moment, so far as I know, ships to which tenders were duly attached were considered as the captors of all captures actually made by tenders, and that too under a series of proclamations in which no express mention was made of tenders; that in a proclamation, that of 1816, reference is made to tenders, the subject being seizures and not prize; that subsequently there was a reference to prize as well as seizure, and no mention made of tenders.

Upon this I will observe, that if in a proclamation for such purpose there be found anything of a novel character creating **[264]** a right which did not exist before, and in a subsequent proclamation, all mention of such right is omitted, it would be a fair inference that it was so done intentionally, and with the view of not renewing a grant previously made; but if the right or usage had existed long prior to the first proclamation, and before mention was made of it in any proclamation, then I think the mention of it must be considered only as declaratory of the usage, not as creating the right, and that the omission in a subsequent proclamation remits the case to its former state, namely, a right founded on usage. But I am putting the case stronger than it really ought to be put, for the express mention of tenders is to be found in the proclamation of 1816 only, and that does not include prize.

It would not, I think, with respect to proclamations, be necessary to put on them the same degree of legal strictness which might be applied to Acts of Parliament. With respect to the Russian Naval Prize Act, and especially the 7th section, I do not perceive that the present question is affected thereby.

This tender is not commissioned: if the capture were considered as made by her only, that ship must be condemned as a droit.

It appears to me, however, that according to established usage, the capture must be considered as made by the "Impregnable," through her tender, and distribution made accordingly.

The orders that were given by the admiral on the station were given through the "Impregnable," and the tender had on board of her a part of the crew of the ship.

The tender herself was not commissioned, and, were I to come to any other conclusion, I think it would be that the "Carl" was taken by a vessel not commissioned, and consequently a droit.

Proctors: The Queen's Proctor; and Nelson.

*Only those cases reported in Spinks Prize Cases are reprinted which are not to be found in Spinks (Ecc. & Ad.).*

*Such documents as are common to the appendices are also omitted.*

# REPORTS OF CASES DECIDED during the Present War in the ADMIRALTY PRIZE COURT and the COURT of APPEAL. Published for the Registry of the High Court of Admiralty, and Edited by THOMAS SPINKS, D.C.L., of Doctors Commons, Advocate. London, 1855.

[1] CASES DECIDED IN THE ADMIRALTY PRIZE COURT AND THE COURT OF APPEAL.

[80] THE "RAPID"—(Hansen). October 18, 1854.—A purchase purporting to be made just antecedent to the war by the master, who had before sailed in the ship as a Russian subject, can only be upheld by indisputable proof that the transfer was bonâ fide, that the money was paid, and that the purchaser was a neutral subject.

[S. C. 2 Eng. Pr. Cas. 317.]

This vessel, under Danish colours, arrived from Archangel at Hull with a cargo on the 19th of August, and on the 21st was seized as Russian property. The cargo, belonging to British subjects, was restored.

A claim for the ship was given on behalf of Mr. Hansen, her master, as her sole owner and a Danish subject. The vessel was built at Libau in 1853, and purchased by Messrs. Brandt and Sons, of Riga, who appointed Mr. Hansen master.

He alleged himself to have become the purchaser of the vessel on the 13th of April last, subsequently to which he made a voyage from Riga to London with a cargo, whence he proceeded in ballast to Archangel, where he took on board the cargo with which he arrived at Hull.

The Queen's Advocate and the Admiralty Advocate appeared for the seizor, Dr. Deane for the claimant.

*Dr. Lushington.* It has been contended, on behalf of the captors in this case, that the ship is liable to condemnation on two grounds: either on the ground that the transfer was colourable and fictitious; or that, if bonâ fide, the master who purchased the vessel was a Russian subject, and consequently that the ship is Russian property.

I will consider in the first instance whether there was a bonâ fide transfer of the ship. It is necessary to state that this was a purchase purporting to be made just antecedent to the war by the master who had commanded her before, and who had sailed in her as a Russian subject. This, according to all the rules and principles laid down and established in the Prize Court, has been always considered as a transaction that cannot be upheld, unless it be indisputably clear that the transfer was bonâ fide, that the money agreed to be paid was paid, and that the person to whom the vessel was transferred was a neutral subject.

The case has been very fully discussed, and all the documents have been brought under the notice of the Court; and though I must, in justification of the opinion which I am about to give [81] refer to some of them, yet I shall refer more briefly to them than I should otherwise have done in consequence of my adopting the arguments which I have heard on one side and on the other.

I will first read the answer of the master to the 8th interrogatory for the purpose

of seeing how far that evidence is borne out and supported by the documents which have been produced in this case. He swears that "on the 18th of March he was told by the Russian Consul at Lubeck that the vessel was sold." Therefore the information which he received from the Russian Consul was, that on the 18th of March that sale had actually taken place. "That he then went over to Hamburg," I suppose I must understand from that, without any delay in consequence of hearing that report; "where he learnt,"—that is, for the first time information was given him,—"that Messrs. Wagner and Enet had bought the vessel, and he thereupon called upon them and offered to buy it." He concludes by saying, that he has had no correspondence with any one upon the ship since the purchase.

The ship had been originally built by Buckhoff in 1853, and was sold by him to Brandt and Co., merchants, carrying on a trade at Riga. It is stated in the papers that they were merchants at Archangel. It is a matter of no consequence, because it is clear, from previous cases, that the house of Brandt and Co. at Archangel and Riga are connected, to a certain extent, with the house in London.

I may here observe, because it may be of use in other cases, that it is the custom of the Court where information has been acquired in one case to use it in others. Lord Stowell over and over again states, "I do not forget the information which I have derived from other cases."

Soon after the month of April it appears, according to a previous part of the master's evidence, that the vessel went from Lubeck to Riga in ballast, from Riga to London with a cargo of hemp, from London to Archangel in ballast, and from Archangel to Hull with a cargo of linseed, and there she was seized. This is the history of the vessel, according to the statement of the master.

Let us now see whether the documents are conformable to the evidence; whether it is consistent with probability that he received the information which he alleged he received from the Russian Consul at Lubeck as to the vessel being sold, and whether in consequence of that information he did go to Hamburg and purchase her on his own account. Now the alleged account is, that Brandt and Co., of Riga, being determined to **[82]** get rid of the vessel, in consequence of the impending war, authorized Wagner and Co. to dispose of her. A strange circumstance then took place. Those who had the power of attorney to sell the vessel, sold it to one of themselves; and it was almost immediately afterwards transferred to the master,—a still more striking circumstance.

[The learned judge then referred to several of the documents, with a view of testing the truth of these statements, and said:] It appears to me that the master has deposed falsely and untruly; therefore I have not the least hesitation in saying that the transfer of the property was merely colourable, and I condemn the vessel. With regard to the very important argument respecting the national character of the master, it is of no use for me to enter into it, because I entertain no doubt that the other ground is a very sufficient one for condemning the vessel.

**[85]** THE "FIDENTIA"—(Serlachius). Nov. 14, 1854.—Further time to bring in proof the ownership of the cargo, when the asserted owner has made no affidavit and produced no correspondence, refused, and the cargo condemned.

[S. C. 2 Eng. Pr. Cas. 323.]

On the 21st of July the Court allowed further proof in this case as to the cargo (Spinks, Pr. Cas. 39; 1 Spinks (Ecc. & Adm.), 344). The proof not being brought in within the time allowed, an application was now made for further time.

Dr. Addams appeared in support of the application; the Queen's Advocate, contra.

*Dr. Lushington.* The present question is, whether the Court ought to allow more time for the purpose of giving in the further proof which was ordered when the case came before it on the 21st of July last. Before I proceed to the circumstances of this case, it is very expedient that I should remark, that such an application for the extension of time, made in so informal a manner, will not again be entertained by the Court, because it is necessary in all such cases that the application should be founded on an affidavit which should be delivered to the Court, together with the papers in the cause, in due time before the motion comes on to be heard. As observed by Dr. Addams, the main question before the Court is, whether it should allow further time or not; yet it is not irrelevant in many cases to refer not only to the papers and to the facts adduced, in order to induce it to give further time, but also to the

evidence in the original cause. I do not think it necessary upon the present occasion that I [86] should comment upon the evidence in the original cause. It appeared to me perfectly clear at the hearing, that the Court would not restore the property, under the circumstances of the case, unless perfect and adequate proof were given. The facts of the case are, that this was a Finnish vessel, and that she was proceeding with a cargo to a Finnish port. She sailed, so far as I recollect, towards the latter end of March, and was captured on the 9th of April. A claim was given on the 27th of May, according to a statement in an affidavit made by a gentleman who appears to be a merchant resident in this town, and connected he must be, by inference, with a house in Finland. He says, "I received a letter from Elias Unonius, of Lovisa, in Finland, dated the 12th of May, enclosing a power of attorney from himself and A. Sundman, authorizing me to claim the above-named barque 'Fidentia,' as their property,"—it was claimed as Russian property; that claim was rejected and the ship condemned,—"and the cargo as the property of Johan Duncan Shaw, of Cadiz." I must say this case does not set out under very favourable auspices, because the claim is made on behalf of Mr. Shaw, who, though a British subject, yet in fact is entitled on the present occasion to no other character than that of a neutral merchant resident in Cadiz; and the claim comes, not from any authority from him, but from the authority of consignees, who are the enemy merchants in an enemy's country.

It does not appear that even up to the 21st of July, according to the statement of this letter, this gentleman had interfered in this case. The affidavit then goes on, "On ascertaining from my proctor that the judge had directed the claim on behalf of the said Johan Duncan Shaw to stand over for further proof as to its being his property, I, on the 27th of July last, transmitted, per post, to the said Johan Duncan Shaw, at Cadiz, a sketch of an affidavit to be sworn to by him in further proof of the said cargo being his bonâ fide property, with directions to him to annex to such affidavit as exhibits copies of the letters which had been addressed and sent by him to the said Elias Unonius and A. Sundman, transmitting to them the bills of lading of the respective portions of the cargo consigned to them by the said Johan Duncan Shaw, and containing his directions as to the disposal thereof." Now this letter was sent, and the form of an affidavit. So far as the Court can collect from the brief statement contained in this affidavit, if correct and true, the affidavit forwarded to Mr. Shaw must have been to the effect that the property belonged to him, and the letter required him to transmit the correspondence. "On the 19th of August [87] following, I received a letter dated the 8th of that month"—I do not see that there was any delay in this—"from Mr. Shaw, returning the said affidavit for amendment, by reason that he was unable to furnish copies of the letters so sent to the said Elias Unonius and A. Sundman, inasmuch as by some accident they had not been entered in his letter-book." Now it will be observed, that in this letter, whatever else might have been its contents, there is not only no proof that no letters were written on such occasion, but there is proof by necessary inference that there were letters accompanying the bill of lading, and their not being annexed is attributed to the accident that they had not been entered in the letter-book.

It is rather, I confess, to me a startling circumstance, that a merchant making a consignment at that period, especially under the circumstances of this case, who wrote letters representing what was to be done with the cargo when it arrived in Finland, should by some unaccountable accident not have entered them in the letter-book.

Mr. Unonius says, on the 29th of August, having conferred with his proctor, he sent a letter to Mr. Shaw, stating that he feared it would be useless again to apply to the Court for the restitution of the goods, unless the original letters were produced. On the 29th of September, he received a further letter from Mr. Shaw, dated the 20th of that month, informing him that he was unable to furnish him with copies, as he had also stated in his former letter, but suggesting that he (Mr. Unonius) should claim the originals which had been sent to Finland. I must say, I am a little surprised that at the time the correspondence took place Mr. Shaw did not make an affidavit stating that the property claimed did belong to him, and giving the reasons why he was unable to produce copies of the papers. There would then have been a very strong ground laid for the extension of the time. Mr. Shaw, however, does not appear to have taken any step of that kind. Mr. Unonius in this country writes to Mr. Unonius in Finland, requesting him to send the letters addressed to him. He

wrote to Mr. Shaw, acquainting him that he had done so, and transmitted a copy of the letter so written. On the 28th October, he received a letter from Mr. Shaw, dated the 16th of that month, in reply to his letter addressed to him on the 30th September, and on the 20th of October he says, "I received a reply from Mr. Unonius to my said letter to him of the 29th September last, acquainting me that neither he nor Mr. Sundman had any further documents in their hands from Mr. Shaw concerning the 'Fidentia's' cargo."

**[88]** Then as to what had become of those letters, or where they were at any time, there is no statement; but a still more extraordinary accident is, the original letters which had been addressed to Mr. Unonius in Finland have disappeared altogether. If I am to believe Mr. Shaw's letter, they were written, though not copied into his letter-book, and it is not stated they were ever received. All that is said is, that the house of Unonius at Carleby in Finland had not got them in their possession.

If I were to order further proof, under the circumstances, what do they offer as satisfactory evidence that this cargo belongs to Mr. Shaw? They offer me Mr. Unonius's affidavit, of Finland—the affidavit of an enemy merchant. Does any man believe that I do not require the original documents; that I do not require proof that, not now, but in March last, bonâ fide documents were written and sent to Finland, giving directions as to the disposition of this property, or that any amount of affidavit will now induce the Court to restore it? I have not altogether forgotten the practice of former days. I am not going to suppose that the world has undergone so great a change that those practices which then prevailed have vanished. It is my duty to take care, and I will take care, that when these claims are made under suspicious circumstances, they shall be supported by proofs that ought to be in the power of a bonâ fide claimant.

I will attribute no blame to Mr. Shaw; but if any merchant ships goods in a vessel without ordinary and due prudence, he must expect to take the consequences. It appears to me on all these and other grounds that there is no satisfactory reason assigned for giving further time; that all the facts as they appear in the original evidence, and as they appear in the affidavits that ask for further time, can lead the Court to no other conclusion than to the rejection of this motion and the condemnation of the cargo.

**[172]** "RAPIDA" alias "RAPIDE"—(Bockelman). Jan. 31, 1855.—A vessel under Monte Videan colours was seized at Liverpool as Russian. The Court allowed the Monte Videan Consul to bring in an affidavit as to certain points before it proceeded to condemn the ship. The affidavit not being sufficient, the Court refused to grant further time to bring in the claim, and condemned the vessel.

This vessel sailed from Monte Video, in August 1854, under Monte Videan colours, bound to Liverpool, where she arrived on the 31st of October. On the 3rd of November she was seized by the officers of the Customs, on the suspicion of being Russian property.

On a former court-day it was stated that a claim with affidavit annexed had been sent out to Don Francisco Gomez, of Monte Video, the owner, and application was made to the Court to allow time for the return of the same. The Court then intimated that it would give further time, if, by the next court-day, Mr. Hall, the Monte Videan Consul at Liverpool, would make an affidavit as to his belief that the ship was the property of Don Francisco Antonio Gomez, of Monte Video, and that a claim would be given in on his behalf if the Court granted time for the purpose. An affidavit was brought in from Mr. Hall, and,

The Queen's Advocate and Dr. Bayford now contended, that the affidavit was not in compliance with the requisitions of the Court, and asked the Court at once to condemn the vessel.

Dr. Twiss, contra, urged the Court to grant further time.

*Dr. Lushington.* The Court is directed by the provisions of the Act of Parliament, as soon as the necessary public proceedings have been had, to proceed with all convenient speed either to release or condemn any ship, goods, or merchandise which may be brought before it. It may allow further time for a claim to be entered or security to be given. In the ordinary course it would be the duty of the Court to proceed to adjudication; but if special circumstances had inter-**[173]**-vened, then

the Court would have been at liberty to allow further time for a claim to be given in, and its validity tried. How stands this case? It appears that the master of the vessel has absconded, and, as stated by Mr. Hall, under the fear that he might be detained as a prisoner, being a Russian subject. No other reason is attempted to be given for his non-appearance. He is the representative of the owner for the purpose of making a claim; and no reason has been assigned why he should not have done so if the owner had been a Monte Videan, because for that purpose he would have been divested of his Russian character. However, the master is gone, and the ship, so far as appears, is abandoned.

The history of the ship is, that in February last she was a Russian vessel, then she became British, and somehow or other at Monte Video she became a Monte Videan vessel. There was no bill of sale on board, and there is nothing at all to shew who was the vendor at Monte Video. I presume Mr. Gomez was the vendee. In this state of things, the consul of Monte Video intervenes. Mr. Hall was called upon to make an affidavit, because it appeared to the Court that it would be absurd to delay the condemnation of the ship unless a bonâ fide claim was to be made. I therefore requested an affidavit from Mr. Hall that this was the property, not of an enemy, but of the person on whose behalf he believed the claim would be entered.

Mr. Hall, having had the means of ascertaining the true facts, has declined to state his belief as to the truth of the matter. Mr. Hall has said, "Here is a vessel nominally belonging to Mr. Gomez, a Monte Videan subject; so far as I know the papers themselves are correct, and true Monte Videan papers;" but he does not pledge himself to their truth. He is very wisely cautious, and I avail myself of this opportunity of giving him credit for it. I think he has done his duty, and conscientiously abstained from going beyond his duty.

The question then is, whether a sufficient excuse has been made for the absence of the claim. With all the suspicion that attends the case, the Court cannot grant the application made. It is a totally different case from where the master has died or become insane. In such cases the Court is always desirous of giving the owners a further opportunity of making a claim. I have no hesitation in saying that I must proceed to condemn the property. With respect to proceedings in a Court of Appeal, that is no concern of mine; I must leave the party to make the application there if he thinks he can do so with success. Condemn the ship.

**[208]** THE "ODESSA"—(Wicklund). May 12, 1855.—A ship under neutral colours sailed from a foreign port bound with a cargo to Hull within the time granted to Russian vessels to sail, was seized on her arrival at Hull on suspicion of being Russian, was immediately released as protected by the Order in Council, remained at Hull six months after the discharge of her cargo, and was then again seized. Held—1st, the first seizure not having been judicially recorded was no bar to the second. 2nd, an enemy entering a British port, and claiming the protection of the Order in Council, must enter under enemy, not neutral, colours. 3rd, the protection of the Order in Council does not extend to enemy vessels beyond a reasonable time for the discharge of their cargoes and for their departure.

[S. C. 2 Eng. Pr. Cas. 462.]

This vessel, laden with linseed, sailed from Odessa under the Tuscan flag, on the 28th February 1854, bound to Hull, where she arrived on the 18th of June, and was immediately seized by the officers of the Customs, on suspicion of being Russian property. Proceedings were commenced before the standing Commission at that place, but on its having been ascertained that the vessel had sailed from Odessa before the 29th March, bound for Hull, and upon the case being referred to the Proctor for the Admiralty, he gave directions for her release, on the ground that she was, if Russian property, pro-**[209]**-tected by the Order in Council (Appendix, p. iii) of the 29th March, and he reported accordingly to the Admiralty.

No return had been made to the Court of the proceedings commenced at Hull, and no monition had issued.

The cargo was discharged on the 6th of July, but the ship, instead of "departing forthwith," as permitted by the Order in Council, still remained at Hull. This circumstance having been reported to the Admiralty by the officers of the Customs, the Admiralty Proctor was instructed in the month of December to take proceedings

against her. The vessel was then again seized, and the examination in preparatory taken.

On the 29th of January, a claim was given in by S. W. Bowden, of Hull, merchant, on behalf of Andrea Wicklund and others, of Gamla Carleby, in Finland, subjects of the Emperor of Russia, as the owners. In the affidavit accompanying the claim, Mr. Bowden deposed, that the vessel sailed from Odessa on the 28th of February 1854, laden with a cargo of linseed, the property of British owners, bound to the port of Hull, and arrived there on the 18th of June; that by virtue of a certain Order in Council of Her Majesty, made on the 29th of March 1854, Russian vessels which shall have sailed prior to the date of the said order from any foreign port, bound for any port or place in Her Majesty's dominions, are exempt from capture or detention on entering such port or place; that prior to sailing from the port of Odessa, and with a view to protect the said vessel and cargo from capture by the forces of the Ottoman Porte, then at war with the Emperor of Russia, a bill of sale of the said ship "Odessa" to Pietro Augusto Adami, of Leghorn, merchant, a subject of the Grand Duke of Tuscany, was executed by Henric Wicklund, the then master of the said vessel; that the said vessel passed through the Turkish waters and the Dardanelles on her said voyage to Hull under the Tuscan flag; that on her entering the said port under the Tuscan flag, the said vessel was seized by the Collector of Her Britannic Majesty's Customs, but, on a representation of the circumstances being made to Her Majesty's authorities after inspecting the said ship's papers, was released as being Russian property, and protected by the said Order in Council.

The case now came on for hearing on the admission of the claim.

The Queen's Advocate and the Admiralty Advocate appeared for the Crown; Dr. Bayford for the claimant.

**[210]** *Dr. Lushington.* The Court has been called upon to condemn this vessel upon two grounds: first, that the claim is contrary to the depositions and to the ship's papers, and therefore cannot be entertained; secondly, that, supposing the Court to enter into the facts of the case, it cannot be proved to its satisfaction that this vessel was protected by the Order in Council of the 29th of March; that in fact she does not fall within the terms of that order, that she has violated that order, and on that ground also ought to be condemned.

On the other hand, on behalf of the claimants, it is urged, first, that this is a second seizure; and though it is not pressed as an absolute bar to the proceedings of the Court, yet it is alleged that in equity the Court ought to look with great suspicion upon the case, if not to reject it altogether; secondly, that, if the Court goes into the merits of the case, it will appear that this vessel, although entering a British port under Tuscan colours, is entitled to be restored as a Russian vessel under the Order in Council.

I will first dispose of that part of this defence which relates to the second seizure. So far as I am acquainted with the facts of the first seizure, I think they are these—that some suspicion arose whether the vessel was not entitled to protection under the Order in Council. She was seized by one of the Custom-house officers at Hull, the depositions were taken in part; then, by an order of the Lords of the Admiralty, the vessel was released; she remained at Hull till the month of January, and then she was again seized by the officers of the Customs.

Now in order to make a bar to the proceedings under the second seizure two things are requisite: first, it is necessary that there should have been a restitution by consent or otherwise in this Court, judicially recorded; and, secondly, it must be shewn that there were no circumstances—no noviter perventa of importance—which would call on the Court to adjudicate on the merits of the case. There is no such restitution here, there has been no decree of restitution of the Court, and therefore, I apprehend it was competent to the seizors to make a second seizure; but, wherever a second seizure is made, it is always at the peril of costs and damages.

Again, it was pressed upon the Court, that though there was no regular restitution, yet it was done by order of the Lords of the Admiralty; that it emanated from high authority, and ought to operate in favour of the claimants. But if I am not wholly mistaken, the present proceeding has been conducted with the approbation of the Lords of the Admiralty, other-**[211]**-wise the proceeding could not take place at all; therefore, the Lords of the Admiralty, on a reconsideration of the circumstances of the case, having determined to sanction the investigation, it is clearly not for the

Court to refuse to entertain the case. I am also of opinion, that the circumstances which occurred after the first restitution are such as fully justify the proceedings being commenced. I refer to the fact of the vessel remaining in port, and to the fact of the attempted sale of the vessel.

I will now preceed with the history of this case, and consider the facts.

This ship is claimed, on behalf of an asserted Russian owner, as a Russian vessel protected by the Order in Council of the 29th of March 1854. By the admission of the claimant, therefore, she is subject to condemnation, unless protected by that Order in Council.

The facts of the case are these:—she was and is a Russian vessel; she left Gloucester in 1853, bound to Odessa to bring from thence a cargo to England; she quitted Odessa at the end of February 1854; reached this country about the 18th of June, was seized on the 20th, but released again on the 27th of that month; the cargo was discharged in the course of the month of July, but she remained in the port of Hull until the month of January in the present year, when she was again seized.

It further appears, that a fictitious sale took place at Odessa from the Russian owner to an Italian merchant at Leghorn. I call it a fictitious sale, because the present claim is founded on the fact of its being a fictitious sale, and because, from an examination of all the papers, there is no reason to suppose that any interest vests in any one but the Russian owner. Whether or not the whole of the proceedings have been conducted with fairness and integrity, whether there has not been an attempt to deceive through the medium of the papers, is quite a different consideration, to which I shall presently direct my attention. The fact is, she assumed Tuscan colours at Odessa, and obtained more formal papers at Leghorn, where she touched on her voyage to England; and that under the same Tuscan colours she sailed from Leghorn and entered the British port as a Tuscan vessel.

I must observe, that when the vessel quitted Odessa, on the 28th of February, she could by no possible means have had in contemplation the Order in Council dated the 29th of March; indeed, I am not satisfied that this vessel ever had the benefit of the Order in Council in view at all. She left Leghorn some **[212]** day in April, but I have no reliable evidence to shew either the precise date of her departure, or whether she was then apprised of the Order in Council. If she was apprised of the Order in Council, it is somewhat surprising that at Leghorn, where there was an opportunity of abandoning the Tuscan and resuming the Russian character, she did not avail herself of it.

Let us now see what is the reason assigned for this fictitious sale. The reason, and the only reason, according to the affidavit of claim and the evidence of the master, is stated to have been to enable this ship to prosecute her voyage with safety, notwithstanding the war between Russia and Turkey.

I will here advert to the distinction which prevails between this case and *The "Soglasie"* (Spinks, Pr. Cas. 104; 2 Spinks (Ecc. & Adm.), 101). In that case, the master claimed the ship as a Danish vessel on behalf of himself, the owner, as a Danish subject; when it appeared that this claim could not be sustained, an attempt was made to ask for restitution on behalf of the real owner, a Russian subject, which the Court rejected. In the present case, the Italian title is ab initio abandoned, and the claim is preferred on the part of the Russian owner as protected by the order. There is no attempt therefore by the claimant to deceive the Court, and he is free from all culpability on that ground.

I now consider the alleged cause for assuming Tuscan colours, bearing in mind that it is sworn that there was no other object in view.

It is true that Great Britain did not become an ally in the war between Turkey and Russia till the end of March 1854; and though the excuse of escaping from the power of the Turks at that time cannot be viewed in a very favourable light, yet I will not venture to say, whatever I may think, as to the fact of assuming Tuscan colours, that the alleged reason for so doing imported any legal culpability. I do not think it did. I think that, in the absence of war between Great Britain and Russia, the fictitious assumption of neutral colours, for the purpose of avoiding capture by the Turks and passing the Bosphorus, is not an offence of which the Law of Nations can take cognizance.

It appears, however, in this case, that the disguise continued long after the reason for its assumption was at an end; because as soon as this vessel had escaped the

Dardanelles, there was then no reason to be afraid of Turkish intervention and Turkish capture. It so happens that this simulation—

Dr. Bayford. I may mention she had no Russian papers at that time.

**[213]** The Court. I am perfectly aware she had no Russian papers, but she had a Russian flag on board; the Russian papers were left at Odessa, that is one of the facts of the case. But I must consider a little the necessity, not only of continuing the flag at Leghorn, but the necessity of sailing and entering here under that flag.

I say the necessity for the assumption or continuance of the Tuscan flag, so far as relates to the reason assigned, entirely ceased when this vessel came out of those waters. But she enters here, as I have stated, under the Tuscan flag, without giving, so far as I know, or as appears from the papers or from the depositions, the least intimation that she was not bonâ fide entitled to that flag.

Now with regard to vessels entering a British port, there is a very wide difference between one which bonâ fide belongs to a neutral and enters under a neutral flag, and one which, being an enemy's vessel, has no title to enter that port except under peculiar protection; and how far it is justifiable in an enemy intending to claim protection from the Order in Council to assume a neutral status entirely at variance with her evidence and her real character, must be the subject of the present investigation.

I will look at once to the Order in Council, upon the construction of which the Court's final determination must depend.

The words are, "Any Russian merchant vessel which prior to the date of this order shall have sailed." Now is this vessel entitled to be considered in any sense of the word a Russian merchant vessel? What was the intention—the fair intention—of those who framed the Order in Council at the time, is to be collected from the terms of the order itself; because out of the order itself, of course, I cannot presume to go.

It has been said, and said with great truth, repeating indeed only the sentiment to which the Court gave utterance on a former occasion, that wherever there is any relaxation of the rights of war extended to any belligerent, that the document which confers such privileges ought to receive a liberal construction; but though that be true, a rational and natural construction must be put on the instrument. Now can this order mean anything else than a Russian vessel under Russian colours, coming in avowedly for the purpose of claiming the protection of the Order in Council? Let us see what the consequence would be if I were to yield to the construction which has been put upon the order by the counsel for the claimants. It would be this:—any number of vessels coming under any flags what-**[214]**-ever, being Russian owned, would be entitled to the protection of this order; and not only entitled to the protection of this order, but, having once come to a British port, and having been received as neutrals, would remain and trade—for who could prevent it?—in whatever way seemed most conducive to the interests of those concerned. She might take a cargo, and she would be protected under the assumed character; and not only take a cargo, but she might become the subject of sale and transfer, and to all intents and purposes would be treated as a neutral vessel. It is clearly my opinion that the only construction to be put on the Order in Council is, that it extends protection, as in the case of *The "Success"* (1 Dods. 131), only to those who come within the fair meaning of the terms; that is, vessels under the Russian flag, exclusively owned by Russian merchants.

The case of *The "Success,"* which was cited by the Advocate for the Admiralty, I well remember, for I argued it myself. That case laid down two propositions; the one was a repetition of what the Court had said in another case, namely, that the flag and pass bind the parties. It went further; it stated at length the opinion of the Court, that if any inconvenience arose from the assumption of such flag and pass, it must fall on those who thought fit to assume that character. That was one of the points decided in that case. The other was that, though the vessel was Swedish to all appearance, though she carried the Swedish flag and would have been protected if Swedish property; yet, part, and part only, not being Swedish property, the Court held she was not protected by the words of that proclamation—a proclamation which was intended to protect vessels which were bonâ fide Swedish vessels. I think this is a very strong authority, and has been properly cited by Dr. Phillimore to satisfy the Court what ought to be the fair construction put on this Order in Council.

But I must take care not to be misunderstood; I do not say there might not occur a case of that peculiar description, where, for instance, a belligerent avails himself of a British licence authorizing a ship under any flag, and for the purpose of carrying out that licence, and acting bonâ fide in the matter, assumes a flag in order to escape the enemy; and I do not say that such an assumption would be a simulation that would be visited with punishment; on the contrary, there were such cases in the last war, arising from various causes, especially from the manner in which licences were granted, when it was deemed desirable on the part of this country to extend the system of [215] licences; and, instead of licensing a neutral by name, to give authority to bring a cargo in a vessel under any colour, by whomsoever owned. There the terms of the commission granted permitted the assumption of the colours of the enemy, without regard to the real national character of the vessel.

Now let me follow this up a little. This vessel comes here, and what does the vessel do then? Does she comply with the terms of the Order in Council, either as to the time or as to anything else? The words are, "shall forthwith depart without molestation; and that any such vessel, if met at sea by any of Her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded."

I am of opinion that the words "any port not blockaded" include every port whatsoever, and that the words "not blockaded" are especially added for the purpose of giving a liberty to go as well to a neutral port as to the enemy's port; and I think the word forthwith ought not to be pressed with too much severity against a vessel so circumstanced. I think so for this reason: circumstances might intervene which would render it difficult, perhaps impossible, to discharge the cargo with great expedition, or to leave the port. She might have had to make repairs, or something of the kind. But the argument is, that the vessel might remain here for any length of time whatever, because the argument on the other side is founded on the assumption that all Russian ports are blockaded, or will be blockaded as soon as the ice allows the navigation to be opened. If that were so, not only might she be allowed to remain during the late blockade, but even during the present blockade; and there would be no end. It is difficult to satisfy my mind that that is the proper construction of this order. It is true that ports in the Baltic are blockaded; it is not true that all Russian ports are blockaded. I apprehend, when the instrument was framed, those who framed it must have considered the probability of a blockade in the Baltic, but still there would be Russian ports open for a considerable time to which a vessel might resort. It is obvious that the vessel might have gone to Memel, in the immediate neighbourhood of Russian ports, had she been minded so to do.

I am of opinion, therefore, she was not protected by the Order in Council from that period when she might fairly have quitted this country.

But there is another matter which strikes me with still greater force—this vessel is advertised for sale. Has it been contended to-day, or could it be contended for a single instant, that it was intended by this Order in Council to allow a [216] Russian vessel to come to a British port and discharge her cargo forthwith, and then to remain to be the subject of barter and sale? I was astonished to hear that that could be within the view of British policy at all. What are the views of British policy? To place the whole of the enemy's navy in that position in which they can be of no value whatever to the owners. But if you allow them to remain under the Order in Council, and permanently to remain, you are defeating your own intentions, and conferring upon them that which is the greatest benefit to a commercial nation—namely, the opportunity of competing with yourselves in the best market to which their wares can possibly be brought.

Upon that ground alone, I should hold this vessel liable to condemnation, as not being protected by the Order in Council in so lying here. I am not speaking of the gentleman who makes the claim, Mr. Bowden. I am not saying whether he was right or wrong in signing this document which advertises the ship for sale. I do not attribute any blame to him as a merchant carrying on his business. The vessel was under Tuscan colours, he may have consulted the Custom-house authorities; but if the Custom-house officers, with the knowledge they possessed in Hull, knowing she was a Russian vessel, sanctioned the sale as a Tuscan vessel, they were guilty of a double fault; first, for countenancing a fraud, and secondly, for countenancing a sale contrary to the laws of the country. But their ignorance or disregard of the law cannot protect from condemnation the property of those who are enemies to Great Britain, and have no protection from the authorities of this country.

It appears to me, therefore, that I really am under the necessity of condemning this ship for many reasons. There is still another reason besides those I have mentioned; I think there has been an attempt, and a very clear attempt, to deceive the authorities of this country.

I refer to the evidence given on the 10th Interrogatory by all the three witnesses. Henric Wicklund, the master, swears boldly and straightforward, that Mr. Adami is the owner of this vessel. It is not till he is pressed on the 31st Interrogatory, that his conscience a little pricks him, and he endeavours to shew that he was the owner in law, but that, in reality, the gentleman who resides in the Russian dominions is the true owner. This is the real fact.

Let us see what the papers say. They go to a late period, subsequent even to the first arrest. There was a letter from Mr. P. Augustius Adami to the master, enclosing important documents, **[217]** proving Mr. Adami's ownership of the "Odessa," previous to the declaration of war, namely: "a declaration from the Tuscan mariners, which will be very useful." I should like to know for what.—"Copy of a deed of his ownership of the ship 'Odessa'"; and finally, "a copy of a passport from the Tuscan Consulate at Odessa." These papers are to be used when and where necessary. There is a latitude given for the use of these papers, within the British dominions, a fraudulent use, of course, if they knew the sale to be fictitious. The letter further states that another vessel of his, the "Orio," has been seized by a French steamer and not yet released; and that both ships, the "Odessa" and "Orio," were purchased by him prior to the declaration of war. Nevertheless he says, "You will be cautious to consider well before leaving the port where you now are. Tell me whether the documents I transmit you are sufficient." Dated, "Leghorn, 22nd July 1854." So that there is a perseverance in that which is now admitted to be a false and fictitious character from the beginning to the end, and false and fictitious with the very view of deceiving those in this country who might make an investigation.

But it is not these documents alone; there are others, and several of them too, in which the same thing appears. Nos. 211 and 212, for instance; they are documents in the form of an agreement, the first between Captain Wicklund and the supercargo, and the second an agreement of Captain Wicklund with Captain Patron, all for the purpose of withholding all the testimony that could be withheld—if it was known that there was the Order in Council—in defiance of that order, because it cannot be said that they could rationally intend to send the vessel under Tuscan colours to avail themselves of that Order in Council. It appears to me, on all these grounds, that I am bound to condemn this vessel, though I do not attribute the slightest blame to the gentleman who appears on behalf of the Russian merchant, for he acted, as he was bound to do, for the interests of those whom he represented. He has stated the truth, yet I think it falls short. I am bound to condemn this vessel.

**[252]** THE "CAROLINE"—(Kraft). June 12, 1855.—A Prussian vessel, during the war between Denmark and Prussia, was fictitiously sold to a Russian and assumed Russian colours, which she continued until the war between Great Britain and Russia was imminent. Her seizure, on suspicion of her being Russian, was not without probable cause, and cannot subject the seizor to costs and damages.

[S. C. 2 Eng. Pr. Cas. 501. Referred to, *The "Tommi,"* [1914] P. 253.]

This vessel was seized in London, on the 29th of March last, under the Prussian flag. She was claimed by the Prussian owner, and the Court was prayed to condemn the seizor in costs and damages.

It appeared from the ship-papers and depositions that she was Prussian built, and sailed under Prussian colours until the war between Denmark and Prussia, when it was thought advisable to assume Russian colours, which she did while in St. Petersburg in the year 1849 or 1850. At this time there was a fictitious sale of the vessel to a Russian. It seems she continued to carry the Russian flag long after the war between Denmark and Prussia was terminated and until February 1854, when she resumed her Prussian flag.

**[253]** The Queen's Advocate and Admiralty Advocate for the seizor, contended that it was a case of such suspicion that the Court could not restore without requiring further proof.

Dr. Addams and Dr. Twiss, for the claimant, contended that there was no ground whatever for the seizure, and that they were entitled to a decree not only of restitution but of costs and damages.

*Dr. Lushington.* During the last war it was a matter of every-day's experience, that when vessels were brought in and the case came on to be heard before the Court, the counsel for the captors, according to the peculiar circumstances of each case, either prayed for condemnation or asked for further proof. If they prayed for condemnation, of course it was open to the counsel for the claimants either to pray immediate restitution or that they might be permitted to give further proof; and the Court decided according to its own opinion of what was justice on a consideration of the whole facts of the case.

But there was frequently a whole class of cases in which it was perfectly known by the practitioners that they were cases for further proof without further discussion. They were a class of cases in which the master not being able to speak to the property, or the bills of lading not having been produced in terms sufficiently clear, these circumstances were matters for further proof, which was granted in the ordinary course. Such was the practice.

With respect to persons making seizures of vessels, not upon the high seas, and not entitled by their commission so to do, I adhere entirely to the observations I made in the case of *The "Elise Wilhelmine"* (Spinks, Pr. Cas. 92; 2 Spinks (Ecc. & Adm.), 35), at the same time what I then observed must not be carried to an extent which I think the words did not convey, and which the Court did not certainly intend. It is one thing for an officer of the customs, or a revenue officer to make a seizure of a vessel in a port and come and claim condemnation on the ground of a violation of the Law of Nations, either by a breach of blockade or in any other way, as in the case of *The "Elise Wilhelmine"*; it is another thing where a Custom-house officer seizes a vessel believed to be an enemy's, carrying on any trade in the port of Great Britain. I apprehend it to be a part of the duty of a Custom-house officer to take due care and exercise due diligence that vessels are not admitted as neutral vessels to carry on a trade, if in reality they are the property of an enemy disguised under a **[254]** neutral flag. Then it is for the officer to make the seizure, and afterwards, if the Lords of the Admiralty give their sanction, to follow that up by a suit; I apprehend without that sanction this Court would not entertain the suit.

Now what are the facts of this case? It appears that this was a vessel under Prussian colours, and, as I collect from the whole of the proceedings, she had been accustomed, if not always, yet frequently to trade from ports in the Baltic to British ports, and, being under Prussian colours, she reached this country at the close of last year, or the beginning of the present. The cargo then brought was unladen and a fresh cargo laden; and on the 29th of March, in the present year, she was seized by the Custom-house officers and these proceedings were instituted. She has been claimed on behalf of the present owners, and it appears that the master is greatly interested, so much so, that he has about twenty-seven parts out of sixty.

It is alleged, by the counsel for the captors, that there is such a deficiency of proof that the Court ought not to be satisfied without directing further proof of the facts alleged in the claim.

Many observations have been made by Her Majesty's Advocate as to the defect of the papers, but with regard to some of these observations I must confess I cannot at all concur; for instance, much has been said about the log; I now hold it in my hand; it is said to be a mutilated instrument, but I am at a loss to know where. In the year 1855, when a vessel has been performing voyages almost without number, is it to be expected that you would find a perfect log of the years 1849 and 1850? I am at a loss to conceive how the tearing out of this leaf or that leaf, or as many as you please in that log, can have framed a just cause of suspicion. I am still more at a loss to conceive why, looking at the transaction, the transfer to the Russian flag should ever appear in the log, provided the vessel was intending to carry on a trade under a colourable character. I dismiss that from my consideration, and I dismiss also the muster-roll, for I do not apprehend that, under circumstances like these, the Court is in the habit of requiring that nice investigation of instruments of that character if there be others more important to be considered.

Now the statement of the master is, that the ship was built in 1846 in a Prussian port. At one time, and indeed for a great many years, she carried on her trade under the Prussian flag; but when the war broke out between Denmark and Prussia, it being no longer safe to sail under that flag, because **[255]** she might be intercepted in her passage through the Sound, she assumed Russian colours. It is stated, and

stated fairly, that the colours were assumed at St. Petersburg or Cronstadt—it matters nothing at which port they were assumed—and she continued under these assumed colours to carry on her trade till the month of February 1854. It is perfectly apparent that the avowed object for which the Russian colours were assumed, namely, in consequence of the war between Prussia and Denmark, had for nearly three years entirely ceased, and therefore that the continuance to have Russian colours is not accounted for by the statement which the master has made, inasmuch as the reason has entirely failed. I must say, that when I see the change from Russian colours to Prussian just when the war was imminent, it is a circumstance of very considerable suspicion, and not of less suspicion because it is a matter of perfect notoriety that every possible attempt has been made in the present war to cover Russian property by transfer to neutral merchants.

I must, therefore, look to the other documents, and see whether, notwithstanding this, the Court is satisfied as to the property in this vessel. I may observe by the way that it is quite true that this Court does not take cognizance of frauds practised upon other nations; for instance, this Court never takes cognizance of any attempt which may have been made by the disguise of colours, or in other ways, to avoid navigation or other laws of foreign countries. It is no offence in the eye of the Prize Court when such an attempt is made, it is only an offence where it is made in violation of British law.

Let us look how the facts stand here. The first instrument of great importance referred to in the argument, is what is called the grand bill of sale. It appears that the vessel had, when originally built, an instrument on board—call it by what name you will—a bielbrief, or a grand bill of sale. Now the úsual appellation which is bestowed upon the document which a ship possesses when she is built, is a bielbrief, but I am by no means disposed to say that a similar meaning may not attach when the instrument which emanates from the ship builder, or from those who employ him, is called a grand bill of sale, and I apprehend that either the one or the other—whether bielbrief or grand bill of sale—is meant to be the foundation of the title of those to whom it is granted. This document, on careful examination, appears to me to be a substitution for a former document of the same description which was lost, and which appears, from the correspondence, to have been what I should have been more inclined to denominate a bielbrief. It has been lost, and this was a substitution thereof, **[256]** but I cannot in justice to the claimants say that this is a document to which, because it bears a different name from that which would be given to the original instrument, the Court ought not to pay attention. I think I am bound to consider this instrument as a proof of the title of the claimants to the same extent as I should the original bielbrief if it had been produced; there is therefore one document of very great importance produced on the present occasion. There are other documents certainly wanting, one of which I certainly confess I did look for and do not find, namely, a sea pass.

Now, according to the doctrine which I believe has been maintained by my predecessors in this chair, it has always been considered, I will not say a matter of absolute and indispensable necessity, but of the greatest moment, that a neutral vessel sailing the seas in time of war should be provided with an instrument called a sea-pass, or something tantamount thereto. There is no such document to be found here. The master accounts for its absence by saying he believes it was left behind at Elsinore. It must be remembered, this is a document of first-rate importance, for this is the document which entitles him to sail under the flag and pass of the nation to which he belongs, and I hope and trust, whatever may be the result of this case, that in future it will be understood that this is one of the documents which the Court will require to be produced; it will require it to be produced, or a satisfactory reason assigned for its nonproduction.

Now, how stands the result of the evidence in this case? The master is unsupported by the testimony of the mate, and though I do not expect from the mate many particulars relating to the transactions of the ship, because it is not usual and customary for persons of that description to give the Court such detail, yet it is certainly somewhat surprising that he has not stated in his evidence a fact which must have been well known to him, namely, that his vessel carried Russian colours till February 1854, he having come on board in the month of October 1853.

With respect to the correspondence, it appears to me to be greatly corroborative

of the evidence of the master. The whole of the correspondence tends to shew that a gentleman of the name of Gradener, with whom he was in the habit of corresponding, had property in the ship. I see nothing in the documents or any part of the evidence that points to Russian interest.

The first question, therefore, is whether I am to order further proof or direct immediate restitution? I am, I must say, [257] satisfied that the ship is Prussian property; and I am of opinion that I ought on this evidence to direct her to be restored, not that there is no irregularity in the proceeding, but because, upon the whole, I am clearly convinced in my own mind that the property is proved to be Prussian.

The only question that remains is that of costs and damages; and to them I am equally clear that the claimants are not entitled. It is utterly impossible to hold that this was a seizure without probable cause, or, to use an expression employed by Mr. Justice Story, where there is no reasonable doubt. I think that where a vessel was carrying Russian colours up to the commencement of the war, and where she was divested of them only at the breaking out of the war, that one ground is a justification for seizing the vessel. When I look further at the circumstances of the case, that the master is not corroborated, that the grand bill of sale was procured under circumstances which, though they now are explained, were primâ facie not clear, and when I see no sea-pass on board, I am satisfied that the justice of the case does not require me to condemn the seizor in costs. I shall therefore simply restore.

The Admiralty Advocate. Upon the payment of the captors' costs and expenses, or without.

The Court. No, simple restitution.

Dr. Addams applied on behalf of the owners of the cargo in this case for restitution with costs and damages, and submitted that, whatever cause there might have been for detaining the ship, there could be no pretence whatever for seizing the cargo.

The Court said: That when a ship was seized, it was quite impossible to do otherwise than arrest the cargo. That was an universal rule. He would simply restore the cargo and make no order as to costs.

THE "OTTO AND OLAF." July 12, 1855.—Primâ facie, every ship leaving a blockaded port with a cargo is liable to detention without the risk of costs and damages. Where the claim and preparatory evidence is at variance with the documentary, the Court is bound to require further proof.

[S. C. 2 Eng. Pr. Cas. 507.]

This ship under Danish colours sailed from Copenhagen with a cargo of coals, for Riga, after the blockade of the year 1854 had been raised. Having arrived there and discharged her cargo, she took on board a cargo of wheat, &c., and attempted to prosecute her return voyage, but in consequence of the ice, she was compelled to put into Bolderaa, and remain [258] there for some time. On leaving that port in the month of April, she was found to be too deeply laden to cross the bar, and was compelled to unload a part of her cargo into lighters, from which she again reshipped it after having passed the bar.

In the meantime (on the 19th of April) the blockade had been again imposed upon the Gulf of Riga. On the 8th of May, she was captured by Her Majesty's ships "Archer" and "Geyser," was released on the 15th, and upon the same day was again seized by them, and sent here for adjudication on the ground of breach of the blockade. The cargo having been restored, a claim was made for costs and damages. A claim was also given in on behalf of four Danish subjects, as the owners, for restitution of the ship with costs and damages.

The Queen's Advocate and Dr. Deane appeared for the captors; Dr. Addams and Dr. Twiss, for the claimants.

*Dr. Lushington.* There are two questions to be disposed of in this case: the one relating to the claim for the cargo, the other to the claim for the ship. With respect to the circumstances of the case, some of them are common to both questions which the Court will have to decide; and some will be more applicable to the cargo, and some to the ship.

The general nature of the adventure was this: assuming for a moment that the ship was duly transferred to Danish subjects, that they were the owners at the time of the capture, she being a Danish vessel lying at Copenhagen, and it being perfectly

notorious when the Baltic was covered with ice that the British fleet would withdraw, and the ports which were blockaded would of necessity be left open; it was determined by the owners of the vessel to embark in an adventure for the purpose of carrying a cargo of coals from Copenhagen to Riga, and of bringing back another cargo to some other port, which was to be named when the vessel arrived at Kiel. No doubt it was in the contemplation of the parties, that if they were unable to get the cargo on board at the time, and before the ice set in so as to render it impossible to get out, they would be detained until the approaching spring; that, if they stayed, the British Government would reimpose the blockade, and that they would be shut up there; and then they well knew and relied upon the rule of law, that a vessel taking on board a cargo antecedent to the blockade was entitled to come out.

I am of opinion that this was a perfectly lawful undertaking; that the owners had a right to enter as they did into the charter-party with Messrs. Suse and Co., namely, to take a cargo out in the first instance, and then to bring back another, if they [259] chose to run the risk of being detained by the ice, knowing that a blockade would be imposed, and then to assert their rights to carry out the cargo by reason of its having been laden antecedent to the blockade. I know of no illegality in this, and no blame is to be attributed to them, provided they carry out their intentions bonâ fide.

It appears then that the vessel reaches Riga, discharges her cargo of coals, and takes on board a cargo of wheat and other articles of that description. It appears that such cargo was taken on board before the end of the month of January, but that the vessel was unable to quit the port in consequence of the ice—one of those contingencies which was anticipated. She remained there; the cargo was too heavy, and the ship was too deep to get over the bar. In the month of April part of the cargo was transferred to a lighter to enable the vessel to get over the bar, and was subsequently put on board again. The blockade was imposed on the 19th of April, and I think the 8th of May was the day of capture; and I am of opinion that the unshipping of the cargo into the lighter was not an illegal act, provided that the Court was satisfied that the identical cargo, which had been originally shipped in the January preceding and no other, was again put on board. These are the general facts of the case, and common both to the ship and cargo.

I apprehend that when this vessel came out of the Gulf of Riga, or before she came out of the Gulf of Riga, she was liable to detention by any of Her Majesty's cruizers who were maintaining the blockade established on the 19th of April; and it becomes, under circumstances like these, the duty of the claimant to establish his title to restitution. Primâ facie, every vessel whatsoever laden with a cargo, quitting a blockaded port, is liable to condemnation on that account, and must satisfactorily establish her exception to the general rule.

I apprehend further, that when a laden vessel coming out of a blockaded port has been taken by a ship of war, it never could be contended or maintained that such vessel was detained without probable cause. The very fact of coming out of a blockaded port with a cargo is probable cause for detention.(*a*)

[260] It is clear that the cargo could not have been restored without the ship. If it had been contended on the part of the cargo that the cargo was not to blame, that it ought to have been restored immediately, then the answer is this: the cargo must participate in the lot and fate of the ship. If there was good ground to bring the ship to this country, then also there was good ground to bring the cargo. That follows as a matter of necessity; consequently it is utterly vain to contend for costs and damages in cases of that description. The cargo has been already restored, and I am very clearly of opinion, that the claim for costs and damages has no shadow of foundation whatever. This will appear more clearly when I discuss the case of the ship, but, as far as I have gone, I am clearly of opinion that there is

(*a*) On the 3rd of August, the "Mecklenburg" and four other ships, seized under similar circumstances to the present, were restored upon payment of captors' expenses; the Court observing that the principle applied by Lord Stowell to such cases was, that it was the duty of captors to bring such vessels to the Court for adjudication, unless they were satisfied that they formed exceptions to the rule, that a vessel leaving a blockaded port with a cargo was liable to condemnation. At first appeals were entered on behalf of the claimants against these judgments, but they were afterwards abandoned.

no pretence for such a claim; and the question now is, whether I ought to decree payment of the captors' expenses. I am of opinion that I ought to do so. First, I ought to do it on the general ground that this was a vessel coming out of a blockaded port; and that, availing herself of an exception to general principles, she was bound to prove that she came within it. It will never do to argue that you have no right to seize a vessel, and no right to detain her. It is impossible for the capturing vessel to ascertain what the case really is; she has no opportunity of examining the documents, and no opportunity to enable her to pronounce a decided opinion on the subject. But I think the captors are entitled to their expenses on another ground, viz., that the cargo was partly unladen, and was after the establishment of the blockade again taken on board. This is another feature in the case; and I am perfectly satisfied that these captors were justified in bringing the cargo in for adjudication, though the officers of the Crown did right in releasing it, and they are therefore entitled to their costs and expenses.

With regard to the ship, independent of the cargo, very many objections have been raised to the restitution of the vessel, some of which I do not think it will be necessary to dwell upon at any length. She is sailing under Danish colours, and it is my duty to see that she is the property, strictly the property, of those who claim her; for I know nothing more important in the discharge of the duties of a Prize Court than to take care it does not restore the property brought in by cruizers except to those who are the rightful and legal owners.

But other arguments have been addressed to the Court with regard to the Danish character in another sense of the term. A vessel may have, and in one sense be entitled to, a Danish character, because she is the property of Danish subjects, and **[261]** because she sails under the Danish flag; and yet she may violate all the municipal laws of Denmark. Now, in a simple case depending upon the Law of Nations, and not depending upon the peculiar construction of any treaty between Denmark and England, I am of opinion that it is no part of my duty to examine minutely into the municipal law of Denmark. I have no right to look and see whether Denmark has been fraudulently treated by the parties who procured these instruments. The only purpose for which I can look into that question is to see whether the property bonâ fide belongs to Danish subjects. I have no right to penetrate into the mysteries of their institutions, or to see whether their directions have been substantially or at all complied with. I wish this distinctly to be understood, because a contrary doctrine would be most serious. In the case of the capture of any neutral vessel, which was bearing the neutral flag throughout the civilized world, I should have to examine into the pass, perhaps, of the kingdom of Hanover, of Mecklenburg, of the United States of America, or of the South American States, in order to ascertain whether the vessel that carried the flag of that particular state had complied with its particular municipal institutions. I never will enter on such a discussion, except for the purpose of considering whether the property is bonâ fide the property of the claimant.

But the most serious objection on the present occasion is that which I am about to state. The claim is made on behalf of four persons, viz., of Jensen, Salomonsen, Hansen, and Dirck Carlsen Jans, who are all respectively subjects of Denmark; and certainly the evidence of the master does support the claim, for he says the owners are Carl Jensen, H. S. Hansen, Mr. Salomen, and Captain Jans; therefore his evidence is in conformity with the claim. But I am bound to look at the documentary evidence, and see whether that supports the statements made in the claim, and supports the evidence of the master; for I take it to be quite clear that if the claim and the evidence in preparatory differ from the evidence to be found in the documents, that is just the case in which the Court is bound, as common and ordinary practice, to require further proof.

Of course the first document to which I look is the bill of sale, and that differs from the evidence given by the master, and also differs from the claim; for the bill of sale, which bears date the 30th day of May 1854, states the vessel to have been sold to Mr. P. Brown, in connexion with these other gentlemen. There is, therefore, a difference from the claim; and if I were to restore on this evidence I should restore on the affidavit of **[262]** the claimant, and upon the evidence of the master, and not admit the title conferred on another individual by the bill of sale. But not merely the bill of sale, but all the other documents in this case are equally in discordance

with the claim and the master's evidence; for instance, the admeasurement bill states her to belong to Messrs. Brown and Co., the owners, resident in Copenhagen; in fact, setting them forth as having the greatest interest, if not the exclusive interest, certainly as the continuing owners, and as entitled to be considered in that light. That is one document; there is another document of exactly the same kind and character, I allude to what is called the certificate of the Captain Surveyor. He certifies the ship to belong to Carl Jensen, of Copenhagen, as if it had been the exclusive property of that individual. There is also a fourth document, in which the same person's name is given as being the owner.

Upon this state of facts then, I should have no hesitation in ordering further proof; but there is additional reason for so doing, namely, that this sale, alleged to have taken place in June 1854, was a sale from Russian owners to Danish owners very shortly after the commencement of the war, and the Court, according to its ordinary rules, looks with great jealousy upon the sale of a vessel to a neutral subject at the commencement of war; that would be an additional ground for further proof.

But I am told on the present occasion that all this might be reconciled by bringing in the transfer, alleged to have taken place, from Brown to Salomonsen; that the bill of sale has been shewn to the Queen's Proctor, and, therefore, that the Court must take it into consideration. Now I neither can nor will do any such thing. It is utterly irregular to attempt to introduce into the case evidence not properly before the Court; the evidence before the Court is that by which I must be guided. If there be such a bill of sale as that mentioned, it will be necessary to produce it if further proof is required. I agree that the very circumstance of handing over the bill of sale to the Queen's Proctor might induce him to restore, on the payment of captors' expenses, with which the Court has nothing to do; but if it is brought under the cognizance of the Court, it is the strongest reason for doing that which I should have done without, namely, for directing further proof in this case.

I do not think it necessary to travel into the circumstances as to the pass; whether the pass be, as has been argued on behalf of the claimant, a pass delivered in blank, and afterwards **[263]** on a certificate being obtained, filled up with an earlier date, and, consequently, with a date anterior to that of the transfer itself, is a matter with which I do not think it necessary to trouble myself in this case, nor in any other, except for the purpose of ascertaining whether it is a bonâ fide document, where there is a doubt of the validity of the transfer. I restore the cargo on payment of captors' expenses, and I decree further proof as to the ship.

It is quite in the power of the Court to direct further proof generally, or in any shape it thinks fit. On the present occasion it will direct further proof generally; and will require to be satisfied with respect to both the original and the second transfer.

There is one observation I omitted to make, and it may be convenient to make it at once. On several occasions my judgment in *The "Soglasie"* (Spinks, Pr. Cas. 106; 2 Spinks (Ecc. & Adm.), 101), has been quoted with respect to what I consider to be requisite and necessary after a purchase by a neutral of an enemy's ship, namely, the correspondence which preceded, the correspondence which attended, and the correspondence which succeeded the transfer. Now I in no degree whatsoever depart from what I said on that occasion, but it must be taken with an understanding of what were the facts of that case. In the case of *The "Soglasie,"* where I made those observations, the vessel was on a voyage immediately after the transfer; but where it turns out that many voyages have taken place, and much time has elapsed, the Court will not expect in such case that there will be that correspondence attending the original transfer which might fairly be looked for when the vessel has only been lately purchased.

The Queen's Advocate. That would be the correspondence on board; that would not depend on further proof.

The Court. That would depend on circumstances. Where a vessel has been purchased by a neutral, and continued in a lawful trade for a considerable length of time, the presumption arises in favour of the neutral, which would not exist provided it had been the first voyage.(*b*)

---

(*b*) Further proof having been brought in, the Court on the 27th of November restored the ship upon payment of captors' expenses.

**[264]** THE "BALTICA" (*a*)—(Pygelstrom). Feb. 8, 9, 21, and Aug. 6, 1855.—Several vessels sold by a father, an enemy, to his son, a neutral, immediately before the war, and only paid for in part, the remainder to be paid out of the future earnings thereof, condemned on the ground of a continuance of the enemy's interest. Transactions in contemplation of war must be considered in the same light and governed by the same rules as transactions flagrante bello. A neutral residing in an enemy's country as the neutral consul, but also trading as a merchant, must be regarded as an enemy.

[Reversed, 1857, 11 Moore, P. C. 141; 14 E. R. 648. Applied, *The "Tommi," The "Rothersand,"* [1914] P. 259; *The "Southfield,"* [1917] A. C. 391; *The "Noordam,"* [1919] P. 258.]

This ship, under Danish colours, sailed from Copenhagen with a cargo of linseed, on the 21st of May 1854, arrived at Leith on the 29th, and was seized on the 31st of that month by the officers of the Customs on suspicion of being a Russian vessel.

At the commencement of the year 1854 the ship belonged to Mr. Sorensen, senior, a Dane by birth, but long resident at Libau as a merchant and Danish Consul. At the beginning of March, and antecedent to the declaration of war, it was said to have been transferred to Mr. Herman Alexander Sorensen, his son, a Danish subject, said to be resident at Altona, on whose behalf as sole owner a claim was given in.

The admission of the claim was argued on the 15th of August 1854, when the Court directed further proof with reference especially; 1st, to the date of the vessel's sailing from Libau to Copenhagen; 2nd, to the bill of sale, and the circumstance of the purchase; and 3rd, to the residence and national character of the claimant.

On further proof being brought in, it appeared that there was no evidence as to the date when the ship sailed from Libau to Copenhagen, that the log commenced on the 19th of May, only two days before she sailed from Copenhagen; that the claimant in the month of February 1854 had been resident and carrying on business in London for two years previously, that on the 22d of that month he received in London a telegraphic message from his father immediately to proceed to Hamburgh to meet him; that he immediately proceeded thither and entered into negotiations with his father for the purchase of this and other vessels; that he agreed to pay part of the purchase money with a sum of about 2420l. which he then had in his father's hands, and to pay the remainder partly from the proceeds of the winding up of his London business, and partly from the earnings of the ships; that some time in March he took a counting-house in Altona, and a place of residence in Hamburgh, and otherwise formally clothed himself with the Danish character; that the bill of sale, which purported to **[265]** transfer the vessel then lying at Libau to him, bore date the 5th of March; and that Mr. Sorensen, senior, died on the 17th of May.

The case was argued on the 8th, 9th, and 21st of February.

The Queen's Advocate, the Admiralty Advocate, and Dr. Bayford appeared for the Crown; Dr. Addams and Dr. Twiss for the claimant.

*Dr. Lushington.* Before considering the facts of this and the other cases, nearly similarly circumstanced, and the various points of law which may arise thereon, it may be well to state certain dates which have an important bearing on all these questions.

The Russian ambassador left this country on the 8th of February, and war was declared on the 29th of March 1854.

Looking at all the circumstances attending the political state of Europe, I think that it may in truth be said that, from the commencement of the year 1854, war was imminent in the sense in which Lord Stowell uses that and similar expressions, or in other words war was highly probable.

The bill of sale in the case of *The "Baltica"* bears date the 5th of March in that year 1854. The bill of sale, therefore, which is the conveyance of the vessel, took place after the war had become imminent, and before the actual declaration.

---

(*a*) This was the first of several vessels seized in different British ports, and claimed by Mr. H. A. Sorensen, as a Dane and the sole owner. The Court decided to hear the arguments in all the cases before delivering judgment in any. *The "Œolus"* was argued Feb. 21 and 22, *The "Amelie"* Feb. 22, *The "John"* Feb. 26, *The "Ariel"* June 13, *The "Ceres"* and *The "Industrie"* June 16. Though the circumstances of some of these cases varied, yet the principles involved were the same, and their condemnation followed that of *The "Baltica."*

The vendor was Mr. Sorensen, the elder, who died on the 17th of May following. His national character for the purpose of this transaction is beyond all doubt Russian: more doubt arises as to the national character of Mr. Sorensen, the son, who was the purchaser of this vessel. At the period when these transactions originated in the month of February, Mr. Sorensen, junior, was carrying on a mercantile business in London, and, whatever was his origin, he must be as to trade considered a British merchant at that particular period.

It appeared to Mr. Sorensen, the elder, and to other merchants at Libau, owners of vessels under the Russian flag, that, as war between Great Britain and Russia was probable, the preponderance of the naval forces of Great Britain was such as would seriously embarrass, if not wholly prevent, the profitable employment of vessels sailing under the Russian flag, and that, therefore, it was expedient to sell their vessels, though at a considerable sacrifice. Actuated by these considerations, Mr. Sorensen, senior, framed a plan for the transfer of his property. He appointed his son, then resident in England, to meet him at Hamburgh, and it appears that either on the 23rd or 24th of February they met, and then came to an agreement, **[266]** that he, Mr. Sorensen, junior, should become a merchant at Altona, and be the purchaser of the ships, or some of the ships, in question. With respect to the payment for these vessels, it will be a question requiring, presently, the attention of the Court. Mr. Sorensen, junior, assented to this arrangement, and then, or shortly after—the precise time matters not—Mr. Sorensen undertook to be the purchaser of all the vessels, the fate of which is now under the consideration of the Court, and in pursuance of that plan, he, in the beginning of March, took a counting-house at Altona, on the 8th of March was admited a burgher of that place, and subsequently resided at Hamburgh, in the manner deposed to in the evidence in this case.

I shall now address myself to the question, which has been much discussed at the bar, namely, what was the national character of Mr. Sorensen, junior, at the time when these contracts were entered into and completed? Much has been said as to the domicile of origin of Mr. Sorensen, junior. I will briefly advert to it, though I do not think it has any strong bearing on the case, for the question before me is that of mercantile national character, which is governed by rules and by authorities particularly applicable to it alone. I think I should only confuse the case by following it up in reference to other cases of domicile, therefore I shall abstain from so doing. Mr. Sorensen, senior, was a Dane by birth, and Danish Consul at Libau, but long settled at that place as a merchant. His son was born at Libau, and until his son acquired another mercantile national character, he must, being resident at Libau, have inherited that of his father, at least so long as he continued to reside there. I am of opinion, therefore, that Mr. Sorensen, junior, remained a Russian until he came to England, but that he did acquire a British mercantile national character, and at the commencement of this transaction he was to be considered a British merchant.

When then, and how, did he become divested of that national character, and become entitled to call himself a Dane? This question appears to me to turn upon divers considerations. It was no doubt fully competent to Mr. Sorensen, junior, bonâ fide to abandon his British character and assume the Danish. Did he do so animo et facto is the question.

As to his intention, it appears to me that the probability was in favour of his becoming a Dane, and for obvious reasons. The very object of the purchase of these vessels was to carry on trade as a neutral merchant, and this object, of course, could not be effected if his national character was either Russian or British, and if he desired to be invested with a neutral character it is most **[267]** probable that he would select a Danish domicile,—most probable because it was the domicile of origin of his father, and was best calculated to further his mercantile pursuits. I see no reason to doubt the bonâ fide intention of Mr. Sorensen, junior, to assume that character. Then, as to the fact, it appears to me that Mr. Sorensen did, as speedily as was convenient, carry that intention into effect, he did proceed to wind up his affairs in England, he did take a counting-house at Altona in March, and he did take lodgings at Hamburgh, and upon the authority of the case of *The "Conferensrath"* (6 C. Rob. 362), I am of opinion that the residence at Hamburgh must be taken as equivalent to a residence at Altona.

I have come to the conclusion, therefore, that Mr. Sorensen, junior, at the time when he made this claim was not in error in ascribing to himself a Danish national

character, but at what particular time he became entitled thereto might, if it was necessary narrowly to investigate it, be a matter, not only of some but of very great difficulty. I have considered all the authorities on this subject, and I think the fair result is, with respect to a mercantile national character, that the party becomes clothed with a new character from the period when he first takes steps animo removendi to abandon his former domicile, and animo manendi to acquire a new one; and I think the claimant is fairly entitled to a liberal consideration in this respect. At the same time, I place very little reliance upon the mere formality of becoming an Altona burgher. Such common form proceedings are little more than nominal, and obtainable at the expense of a few dollars.

I have now arrived at the following state of facts, that at the interview between the father and the son when the contract was first entered into, Mr. Sorensen, junior, was to be considered a British merchant; that is, on the 23rd or 24th of February. From that time he purposed to become a merchant of Altona, and from the period of his taking his counting-house and beginning to reside at Hamburgh he became an Altona merchant. It is necessary to bear these dates strictly in recollection in order to pronounce anything like a clear opinion upon these transactions. The interview with the father was at the end of February, when Mr. Sorensen, junior, was undoubtedly a British merchant, according to his national character; at the time of the completion of this transaction he had become a Dane.

Now on this state of facts, the first question which arises is, whether the contract of sale as to some of these vessels [268] between a Russian merchant and a British merchant is a legal transaction for the transfer of these ships. In other words, the proposition is this, whether a British merchant can, when war is imminent, enter legally into a contract with a subject of a state likely to become hostile for the purpose of purchasing his property in ships.

This question, if it were necessary to prosecute it, would give rise to very curious inquiries, but from what has subsequently occurred I do not think that it is incumbent on me to pronounce any definite opinion on this point. I will only observe, I am not aware that any authority whatsoever can be found on it. When the question arises in a proper shape, it will be a very nice question for consideration, namely, whether it is competent for a British merchant, immediately antecedent to hostilities, to purchase shipping belonging to the subjects of that state likely to become hostile, and legally to hold it. This case becomes complicated by the change of national character, if I may use the expression, in the midst of the transactions themselves, and this change, as I think, did take place, or rather was in progress—it is impossible to say more as regards Mr. Sorensen, junior—after the contract and before the actual purchase was complete.

But before I address myself to that question, I must briefly advert to the consequences of a purchase by a British merchant as distinguished from the purchase by a neutral. As regards a British merchant, if the matter exists in contract only, the declaration of war puts an end to the contract; if the contract be completed, the bill of sale executed, and the ship delivered, the transaction is valid and complete. If the purchase money has not been paid, even if there were a mortgage on the ship, there would be no remedy for the enforcement of payment, and so far as a British Prize Court is concerned, of course the mortgage or other security on the ships would be held to be of no avail, for the Russian vendor can have no claim or locus standi in a Prize Court.

Where a neutral merchant makes a purchase of a ship, the property of the subject of a state that immediately afterwards becomes hostile to Great Britain, and does not make full payment of the purchase money, but leaves the same either as an encumbrance or a debt, I apprehend that such vendor would clearly be entitled to have a locus standi in any Court whatever having a competent jurisdiction, excepting of course the Court of an enemy.

Looking, then, through the whole of these transactions, I think Mr. Sorensen changed his national character between the making the contract and the actual transfer; that, imputing [269] no illegality to the contract in initio, I must consider the sale itself, being the completion of the contract—giving Mr. Sorensen, junior, the benefit of any doubt which may arise on this point—as a sale made to a Danish subject. I will add that of course all the papers are to that effect, and in delivering the judgment I am about to pronounce, I apply my mind solely to the consideration,

arising from the sale by a Russian shipowner to a neutral merchant when war was imminent.

Having, then, determined to consider this question in that light, I will briefly consider the facts relating to the purchase, and the circumstances necessary to raise the question of law applicable to such questions; I must find, as it were, a special verdict, and then apply the law.

I take these facts entirely from the affidavit of Mr. Sorensen, junior, himself. I advert especially to his affidavit of the 28th of October 1854; and I would here observe that I have no reason to complain of the conduct of the claimants in this case; I do not think there has been any attempt to deceive the Court by false statements, and if deficiencies there be, or matters left unexplained, I am inclined to attribute them to the death of Mr. Sorensen, the elder, and other circumstances rendering accuracy very difficult, and not to any mala fides on the part of Mr. Sorensen, junior. I say this after having most deliberately considered the whole of the evidence and documents in this case.

Speaking then of the "Baltica" only, there is a contract of sale in February 1854, between father and son, and a completion of that contract by a bill of sale, dated the 5th of March 1854. The vessel at that time was not at Libau, but at Copenhagen, and she soon afterwards came into possession, or rather under the control, of Mr. Sorensen, junior. I consider this, for the purpose I am now discussing, exactly as if the sale had been made at Libau, and Mr. Sorensen, junior, had been there to receive the vessel, though I may hereafter have occasion to speak of the doctrine of sale in transitu. As to the payment of the purchase money, a part is said to have been paid—what part I am unable to say with any degree of certainty from these papers—the remainder of the purchase money was to be paid out of the earnings of this vessel.

What then is the law and practice of this Court with regard to such a transaction as this? First, as to the sale by an enemy to a neutral during war,—that is not the present case; but I must first consider the law in the case of any sale to a neutral. Such a sale of a single ship I apprehend to be lawful, where payment is made of the purchase money, the title of the vendor divested, and no interest remains in him of any kind; **[270]** and it matters not, generally speaking, where the ship was lying at the period of such a sale, provided she was not in transitu, nor lying in a blockaded port.

The principle upon which such a law is founded, I conceive to be this, that such a course of trade is the ordinary course of commerce during peace, and that, therefore, the neutral merchant is entitled to carry it out during war, when no special belligerent right intervenes to prevent him. This is the law as laid down by Lord Stowell in *The "Sechs Geschwistern"* (4 C. Rob. 100), and so far as this law is in favour of a neutral, it must be at least equally operative where the purchase of a vessel takes place before the commencement of hostilities, but where they are imminent.

This being so, there appear to me to be only two circumstances requiring consideration with reference to this and the other cases. These two circumstances are, first, the completion of the purchase by payment; and, secondly, the number of vessels bought by the same purchaser under similar circumstances. That complete payment has not been made is an admitted fact in all these cases; that there is a stipulation to complete the payment out of the earnings of the vessel is also an admitted fact. Does the right to demand the appropriation of the freight for this purpose constitute an interest in the ship within the meaning of the expression used by Lord Stowell?

The great principle by which I am to be guided in this inquiry is whether this is a transaction such as would accord with the ordinary course of neutral trade, by which I mean, not the purchase of this particular ship per se, for no one can doubt that this ship would not have been sold, and certainly not for the price, save from apprehension of the war; but whether, independently of that motive, the transaction itself, the mode of sale and of payment, was accordant with the ordinary custom of merchants during peace. I say so for this reason, that the general rule, subject to exceptional belligerent rights, is, that the neutral subject shall be allowed during war to carry out the same commercial transactions which he was entitled to carry out during peace, but that he is not permitted in war, to the disadvantage of one belligerent, to engage in commercial concerns which were not open to him in peace. When I use the expression not open to him during peace, I must not be understood to mean prohibited by any lawful

authority, but concerns into which, from the state of trade, there was no opportunity, or temptation, or occasion to enter. I do not [271] mean transactions at all times lawful in themselves, but for which during peace there was no temptation or occasion.

Now, first, I will consider the question of such a purchase during war, and here I have the inestimable advantage of Lord Stowell's judgment in *The "Sechs Geschwistern"* (4 C. Rob. 100), the question as to the purchase of a ship, lying in the enemy's country, of an enemy—for that is the case rather—by a neutral merchant, was greatly discussed. In that case Lord Stowell said, that property so transferred must be bonâ fide, and absolutely transferred, and that there must be a sale divesting the enemy of all further interest in it;—I use his own expressions—that anything tending to continue his interest vitiates a contract of this description altogether. Again, the enemy's title must be absolutely and completely divested. He said further in that case, there is an agreement by which the purchaser mortgages the brig, deducting the sum paid on account. Under such circumstances, he said, the ship would stand bound for the whole amount, and it could not be said that the interest of the former owner was divested.

From these rules arise two propositions, first, whether these rules which were laid down for a transfer during war are applicable to the transfer of a ship, war being imminent, but not declared; secondly, the true meaning and effect of the rules themselves and their applicability to the transfer in question.

I will take his propositions in their order. I have stated that, as to the fact, there is no doubt that these transfers were made when war was imminent, and that the object, for it is admitted on all hands, was to rescue the property of those who became enemies from the effects of that war; in truth, all the bargains were solicited and made, not at the instance of the purchaser, but by the authority and influence and urgency of the seller.

The principal authority cited to maintain the position that the transfer of this ship was illegal on account of the war being imminent was *The "Jan Frederick."*(*b*) In that case a contract made in contemplation of war for the transfer of property in transitu was held illegal, and it was held illegal upon the ground that such a transfer in transitu during war was clearly illegal by the Law of Nations; being illegal during war, it was held to be illegal during the approach of war. Lord Stowell was of opinion, that in the case of a war being imminent, the [272] same fraud was committed against the belligerent as in the case of an actual war.

Is this authority then properly applicable to the present case, or are there not facts on which that judgment was grounded which do not apply to the case under consideration? There are some differences. In the case of *The "Jan Frederick,"* first, the property was in transitu, and, secondly, it was perfectly clear in that case that a transfer similar in terms during war would have been illegal. In the case I am considering, a transfer during war from an enemy to a neutral, would, on the authority of *The "Samuel"* (4 C. Rob. 284 note), cited by Dr. Twiss, if everything else were correct, be legal, even although the ship might be lying in another port. But I must observe, that *The "Samuel"* was a case of the transfer of an enemy's ship not in transitu, but lying in an enemy's port. I am of opinion, therefore, that in some respects the two cases differ, and that the case of *The "Jan Frederick,"* so far as it relates to a transfer in transitu, does not support the proposition intended to be maintained by it.

Now as the case of *The "Danckebaar Africaan"* (1 C. Rob. 112) is merely the foundation of *The "Jan Frederick,"* and does not go further, I need not advert to it. But though I discard *The "Jan Frederick"* as any authority for the purpose of placing this ship in precisely the same position as the property condemned was in the case of *The "Jan Frederick,"* yet I conceive it to be an authority and of the very highest weight for another and infinitely more important purpose. I consider it to be an authority to this effect, that when war is imminent, the transfer by an enemy to a neutral of a ship belonging to the enemy should be governed by the same rules which apply to a similar transfer during actual war; that as far as a transfer during actual war would be legal, so would it be when war was imminent, but not otherwise, or further; and that if this transaction was illegal during war, it would be illegal in contemplation of war. I conceive that Lord Stowell intended to lay down as a

(*b*) 5 C. Rob. 128. Strongly pressed in argument by the Admiralty Advocate.

principle to be acted upon, that in all transactions coming within the cognizance of a Prize Court, the attempt to elude a belligerent right either present or expected would not be permitted. The question for the consideration of the Court being whether the facts are sufficient to establish the attempt to elude a belligerent right, I think that in these respects *The "Jan Frederick"* and the present case agree. The transfer in *The "Jan Frederick"* was formed for the purpose of preventing capture if war should break **[273]** out during the intended voyage. The sale of these vessels was intended to attain a similar result, namely, to place the property by such sale out of the reach of capture by the belligerent.

The same principle must be applied to both cases, but in a different degree. In the case of *The "Jan Frederick,"* the transaction during the war would have been wholly illegal, therefore, taking place just before the commencement of a war it was held to be equally illegal. In this case the sale during war would not have been absolutely unlawful but must have been fenced by certain regulations, and therefore I hold that taking place when war was imminent it must be fenced by similar rules.

In order to ascertain what these rules really are, we must again refer to the judgment of Lord Stowell in *The "Sechs Geschwistern"* (4 C. Rob. 100). Unfortunately that case is mixed up with facts having no reference to the present, which renders it somewhat more difficult to ascertain the precise effect of Lord Stowell's observations.

I am inclined to hold that the present sale was bonâ fide, but whether it was a sale divesting the enemy of all further interest in the ship is another and a different question. Lord Stowell has added, that anything tending to continue the enemy's interest would vitiate a contract of this description altogether. Then if payment has been made for this ship in part only, and there is a stipulation that the remaining part shall be paid for out of the freight, and that the freight shall be appropriated to such purpose, can it be truly said that the enemy vendor has ceased to have any interest in this ship? Clearly he has an interest in the earnings of the ship. What is the meaning of "interest in the ship" according to the sense in which Lord Stowell intended to express himself? All who are conversant with Lord Stowell's judgments, must be aware that he was not in the habit of using technical expressions in the same manner in which they are most properly employed in Courts of Common Law. His language was generally so framed as to convey an intelligible idea, even to the most unlearned, and when he used the word interest, I have no doubt that he did not mean what would be called in municipal law any legal title to the whole or part of the property, but rather—howsoever effected—what would give the enemy vendor a pecuniary claim to or against the ship itself, or anything connected with the ship, either directly or indirectly. Directly there is no claim against the ship, save what arises from the nonpayment of the whole of the purchase money.

**[274]** How, then, does this affect the validity of the transaction? Let us trace the claim as far as it is possible to do so to the end. It may be that it does not give the vendor any direct claim against the ship itself, though of course the vendor will have a right to sue the purchaser for the price unpaid. It may be, indeed, that in some countries and before some tribunals, the authority of the law would, in such a state of things, attach the ship itself. If the ship had been mortgaged for the sum due, no doubt the ship might have been seized. Is this the sort of interest contemplated by Lord Stowell?

Having, I say, weighed these matters with repeated and painful consideration, I have asked myself the question again and again, whether I put the matter fairly in asking whether this is the sort of interest understood by Lord Stowell. But I put it in another shape, and perhaps in a more proper shape, for I think the more proper mode of putting the question is, suppose this question had arisen bello flagrante, would the transfer, where the payment was made as in this case, have sufficed to protect the property from condemnation; supposing the purchase to have been made bonâ fide, would it have been sufficient?

Now I am of opinion that I should, without doubt or hesitation, have condemned property so circumstanced, and on several grounds. First, because the enemy's interest was not wholly divested; secondly, because if part payment were allowed to suffice it would be difficult, nay, it would be wholly impossible, to fix the proportion, and admitting part payment to be sufficient, would of necessity increase the facility of protecting the shipping of the enemy from the effects of the war, for no man could say that if two thirds would be sufficient as a payment for the vessel, why one third

should not, or even a less proportion; thirdly, I am of opinion that in such a class of cases as this, the very number would take them out of the ordinary course of trade.

Then, if these vessels would have been liable to condemnation if transferred during war, are not the same principles to be applied to a similar transaction on the very eve of a war? I am of opinion that *The "Sechs Geschwistern"* is a direct authority for the affirmative of this proposition.

But what after all is really the true character of all these transactions? Not the fair and ordinary employment of neutral capital in commercial transactions, but, war being on the very point of breaking out between Great Britain and Russia, certain Russian shipowners, anxious to withdraw their property in ships from the naval power of Great Britain, should war, as **[275]** was expected, take place, or in other words—to use the very expression of Lord Stowell in *The "Jan Frederick"*(*a*)—to protect the property "from the danger of capture when it should occur," devise a scheme whereby all these ships should be transferred—to whom? To the son of a gentleman, the owner of four other ships at least, who, to all intents and purposes, was a Russian merchant—to a gentleman who at that time had a British national character, and who had little or no capital, certainly not sufficient capital to pay for them; for it is an admitted fact, that the purchase was to be carried out in some cases by a stipulation as to the freight, and in some cases by the personal credit of Mr. Sorensen, senior; and further, for the very purpose of completing this transaction, Mr. Sorensen, junior, is to abandon his British character and to **[276]** become instanter a Dane, and Danish colours are to be hoisted on board all the ships.

Now I think it must be admitted that this has been a most ingenious scheme to rescue the property belonging to those who became hostile from the risk of capture

(*a*) 5 C. Rob. 132. Lord Stowell says, "That a transfer may take place in transitu has been decided in two or three cases where there had been no actual war, nor any prospect of war mixing itself with the transaction of the parties. But in time of war this is prohibited as a vicious contract; being a fraud on belligerent rights not only in the particular transaction, but in the great facility which it would necessarily introduce, of evading those rights beyond the possibility of detection. It is a road that in the time of war must be shut up; for although honest men might be induced to travel it with very innocent intentions, the far greater proportion of those who passed would use it only for sinister purposes, and with views of fraud on the rights of the belligerent. This however is not a contract made in time of war; and therefore an important question is raised whether the contemplation of war would have the same effect in vitiating these contracts as actual war? It cannot be said that all engagements in the proximity of war, into which the speculation of war might enter, as, for instance, with regard to the price, would therefore be invalid. The contemplation of war is undoubtedly to be taken in a more restricted sense. But if the contemplation of war leads immediately to the transfer and becomes the foundation of a contract that would not otherwise be entered into on the part of the seller, and this is known to be so done in the understanding of the purchaser, though on his part there may be other concurrent motives, as in the case of *The 'Rendsborg,'* such a contract cannot be held good on the same principle that applies to invalidate a transfer in transitu in time of actual war. The motive may indeed be difficult to be proved, but that will be the difficulty of particular cases. Supposing the fact to be established that it is false under an admitted necessity arising from a certain expectation of war, that it is a sale of goods not in the possession of the seller, and in a state where they could not during war be legally transferred on account of the fraud on belligerent rights, I cannot but think that the same fraud is committed against the belligerent, not indeed as an actual belligerent, but as one who was in the clear expectation of both the contracting parties likely to become a belligerent before the arrival of the property which is made the subject of their agreement. The nature of both contracts is identically the same—being equally to protect the property from capture of war—not indeed in either case from capture at the present moment when the contract is made, but from the danger of capture when it was likely to occur. The object is the same in both instances, to afford a guarantee against the same crisis. In other words, both are done for the purpose of eluding a belligerent right either present or expected. Both contracts are framed with the same animo fraudandi, and are in my opinion justly subject to the same rule."

by British ships. We all know that one of the most efficacious means in the possession of Great Britain to carry on this war, and that which is universally allowed by the Law of Nations, was the capture of the mercantile navy of the enemy. The present scheme was a crafty device intended to defeat that right when it should arise. I am, therefore, of opinion, that on the authority of *The "Jan Frederick,"* and also in full accordance with the principle of the Law of Nations, this property is liable to condemnation. I feel fully assured that no neutral state is entitled to complain of what the Court has done, for I am clear that it is not the honest employment of neutral capital in any ordinary sense of the word; nor is it an ordinary and accustomed course of trade, nor is it to be expected that any neutral state will be prepared to maintain that their national character and their national flag should be assumed for the avowed purpose of withdrawing the shipping of the enemies of Great Britain from her just right of capture.

I am of opinion that according to the principle by which I must be guided, all these vessels claimed by Mr. Sorensen stand in eâdem conditione, and must be condemned. They all fall within the application of the same principles, and cannot be favourably distinguished. Some of the cases indeed, as *The "Ceres,"* are open to further objections, but I do not think it necessary to notice them. I decide the case on broad grounds. I decide it on the ground that the whole was a scheme to defeat the right of British capture, a scheme not permitted by the Law of Nations, and one which I, on the authority of the cases cited, am bound to visit with condemnation.

THE "NINA"—(Stipanovich). August 11, 1855.—The Court cannot restore to a person who claims as sole owner, when others appear to have an interest in the property; and it cannot allow further proof when it is satisfied that no trustworthy proof could alter the complexion of the case. The suppression of papers and the prevarication of the master also afford grounds for refusing further proof.

[S. C. 2 Eng. Pr. Cas. 514. Affirmed, post, p. 345.]

This vessel arrived at Ipswich on the 14th of May 1855, under Austrian colours, and upon the 4th of June, after her cargo had been discharged, was seized by the officers of the Customs on suspicion of being Russian property.

A claim was made on behalf of "Martino Gherdacovich, of Costrena, near Fiumé, in Austria, shipowner, a subject of the Emperor of Austria, as the sole owner thereof."

**[277]** The master, mate, and two seamen having been examined on the standing interrogatories, the case now came on for hearing on the admission of the claim.

The Queen's Advocate and the Admiralty Advocate for the seizor contended to the effect of the judgment of the Court; Dr. Addams and Dr. Bayford for the claimant submitted that it was a case for further proof, that the documents before the Court might be explained, and the seeming discrepancies in the evidence reconciled by further proof, and that no injury could result to the seizor by the delay.

*Dr Lushington.* It is admitted on behalf of the claimant that he cannot ask for anything more than further proof, in order to clear away the difficulties which, it is asserted and indeed not denied on the part of any one, exist in this case.

Having read all the papers before I came into Court, and having attended to all the observations of counsel on both sides, I think it wholly unnecessary to delay my decision, being perfectly satisfied that I should never alter my view of this case, though, perhaps, if I occupied further time before I delivered my judgment, I might make it a little clearer, or carry it to greater length.

The claim is made on behalf of a person of the name of Gherdacovich, of Costrena in Austria, and it was stated that originally it was the intention of Baron Rothschild to have made the claim as Consul-General for Austria, and so it appears upon the face of this claim. Now really that has nothing to do with the question which I am about to decide, for whether the claim is preferred by one individual or by another, the Court abides by its general rules and principles, without any regard to persons or individuals. No doubt it was exceedingly proper in this vessel's master to take the advice of the Consul-General of the state to which he claimed to be a subject, and for aught I know, he might have applied also to the Ambassador; but even if that were the fact, it would not make on the mind of the Court even the very slightest impression, for I am neither to be influenced nor in the slightest degree governed by the opinion of any person, nor by anything except what I deem to be the Law of Nations as administered in this Court.

If the master did make application to the Consul-General in due time, it was unfortunate that from some cause or other he did not receive that advice which would have enabled him, I trust, to have conducted himself with greater propriety than he has done towards the officers of the Customs. Instead of affording every facility for bringing in the papers, and for the [278] examination of himself and his crew, he folded his arms, and if not actively engaged in preventing the inspection of those papers, rendered no aid, and certainly prevented the examination of himself and of those on board; but I do not attribute that to the advice of his Consul; I should be exceedingly sorry so to do, because, undoubtedly, if that was so, whether it emanated from consular or any other authority, it would tend to indispose the Court from giving due consideration to persons filling those high offices.

Now what are the facts of this case? The ship was originally a British, then a Russian vessel, but as represented became Austrian in the year 1853, at what particular time is uncertain from these papers, in which, although the vessel was represented to be an Austrian vessel in the month of July 1853, yet she did not become so till the month of November in the same year.

Now at that period I have no hesitation in saying, that if a Russian owner was desirous of changing her character by sale, it was competent for him so to do, and equally competent to the Austrian subject to buy it, provided only the transaction was fair, and the Russian interest was divested, and the Austrian flag properly assumed under the authority of that country, that country not being deceived by any false representation, and the owner being entitled to a national Austrian character.

Such being the facts in the case, the vessel has been claimed by Mr. Gherdacovich as the sole owner of the property, and the Court can decree restitution to this claimant on no other ground than that he himself is the person solely entitled to it. Even if the case should be made out by further proof, which appeared to me to be a little inadvertently suggested to the Court, namely, that he had the legal title in this property, but in reality other persons in conjunction with him were interested in the ship, be they who they may, unquestionably I could never restore on this claim. The Court will never restore on any claim, unless it is satisfied that the property is bonâ fide the property of the individual who claims it, and if it finds any other interest lurking out in any shape it is quite sufficient for me to pronounce against that claim.

There are two points then which arise for the consideration of the Court in this case independently of the many questions and the many doctrines which have been ably discussed at the bar.

The first question is one that might be a matter for further proof, viz.:—Whether Mr. Gherdacovich was of Costrena, or [279] not? What do I find in the evidence? I find the master swearing in no very credible or satisfactory manner, first, that he had been resident at Costrena 16 or 17 years, and then that he was resident at Odessa, but when and where he knew not, though it appears beyond all doubt and question, that this Mr. Gherdacovich put him in possession of the ship in 1851, at Odessa. He might have had, I think, the means of giving us a little more satisfactory information of the residence of Mr. Gherdacovich at Odessa. But what do I find besides? Without entering minutely into the particulars of this case, I find Mr. Gherdacovich in 1854 resident at Odessa, both in the month of April, and also of November. Now these circumstances excite very great suspicion as to whether Mr. Gherdacovich is really entitled to be considered an Austrian subject, according to the sense in which the words must be understood in this Court. It does not follow, as seems to be imagined, that, because this gentleman might have been born of Austrian parents, might have been resident at Costrena, and might have gone there occasionally or frequently (if he was carrying on trade and business at Odessa), therefore he would be entitled to come before the Court and claim restitution in an Austrian character. He must be bound by the character of that place where he was resident, and carrying on his trade, and to which the transaction properly belongs. I mention this, because at the commencement of the transaction, when Austrian colours were assumed, matters appear throughout the papers, which are explained in a very unsatisfactory manner to the Court. It seems to have been thought by the parties, that they were at liberty to change the national character of the vessel without the slightest regard to the reality of the transaction, on the mere representation that they wished to obtain, first, Austrian colours, and then any other that might suit the purposes of trade. If that be so—I do not say it is in the case of Austria, as I regret to say it has been in

other cases,—the grant of the national flag has been made without a just regard to the rights of the belligerent.

Supposing I got over that, what is the next point? I have already said I can restore to nobody but Mr. Gherdacovich, as sole owner. What then is the state of the papers? I am told,—very cautiously, certainly, for counsel abstained from stating the mode and manner in which they would effect their object,—that, if I will but shut my eyes and open my ears they will find the means of proving Mr. Gherdacovich to be the sole owner. Notwithstanding the documents under my eyes, they will find the means whereby, in reading them, I **[280]** shall be enabled to put on them a construction totally and wholly incompatible with that sense which they bear upon the face of them.

How, I ask, is this to be done? I again refer to those words, which I read before in the course of the argument, "I know you would be pleased to proceed on your voyage to the Adriatic, I would consent to it, but you know well that I am not the sole owner, and must execute the orders of my partners."(*a*)[1]

Now, if it were to be proved by any evidence produced in the case that this gentleman was sole owner, it would, as the learned Queen's Advocate has said, be in direct contradiction to the construction which any man of common sense must put on the words to which I have referred. But does the case rest here? Not only would it be in direct defiance of that meaning, but in direct contradiction of the whole of the correspondence, because there are letters upon letters in which Signor Cossio is represented as having an interest in this vessel, in which Anatra, living at Odessa, is represented as having an interest in the vessel; and when I see that the construction I put on these words,—and no man living can put another,—is in direct accordance with all the other documentary evidence, can I, under these circumstances, allow further proof, the very object of which would be to falsify the whole of the papers? I am of opinion that upon this ground alone, I must not allow further proof; but there are in this case a variety of other reasons which fortify my opinion, and which seem to demand from the Court that determination which I have now expressed.

I will make every possible excuse for this man being a foreigner, every possible excuse for his not understanding what is meant by a suppression of papers, but it is clear that he, through an agent, was concealing papers from the seizors, and preventing them obtaining possession of the papers which by the Law of Nations this Court is entitled to require. Nor is this all, more unsatisfactory evidence the Court never had occasion to read. Can I believe that this person, who was appointed by the owners in 1851, and had been master ever since that time, was so ignorant of the ownership of this vessel that if the claim were such as it is represented to be, viz. a sale or transfer in November 1853 to the present claimant, he could not have given the Court some rational exposition of the **[281]** subject? The paper marked No. 101 (*a*)[2] shews that in 1851 Cossio and Co. were the owners, and the master must have known, what was obvious to every man of common sense, that there was a transfer,—I do not say a culpable transfer,—for the purpose of getting rid of the Russian national character and taking the Austrian national character. He must have known who the Russian owners were who executed the conveyance, and he must have known something of the consideration which passed if it was an honest and just transaction.

I condemn this vessel, and I regret that in the first case of a vessel coming before this Court under the Austrian flag, it is my duty to pronounce that sentence. I shall always be ready to give that flag as indulgent a consideration as the Law of Nations will permit; but, at the same time, I trust that the Austrian Government will take care not to allow its flag to be prostituted for the purpose of protecting the property of an enemy from the just rights of a belligerent.(*b*)

---

(*a*)[1] Cited from a letter of the claimant to the master, dated "Trieste, 6th June 1855."

(*a*)[2] The description in the abstract is as follows: "An inventory of the barque 'Nina,' under the Russian flag, the property of Messrs. Bartolomeo Cossio and Co., commanded by Captain Martino Stipanovich. Dated Gavano di Odessa, 7/19 September 1851. Signed, Martino Gherdacovich."

(*b*) This judgment was appealed against, but was affirmed with costs, Feb. 11, 1856. Vide post, p. 345.

THE "NEPTUNE"—(Keetley). Nov. 20, 1855.—A Russian ship, coming into a British port under the protection of the Orders in Council and discharging her cargo, instead of departing forthwith was sold to a British subject and remained in a British port. She was seized, and proceedings taken against her, but before hearing on the admission of claim, the Admiralty Proctor, by direction of the Lords of the Admiralty, declared "that he proceeded no further, but reserved the question of costs and damages." Held, 1st, the declaration does not necessarily entitle the claimant to costs, it being always in the power of the Crown to stay the proceedings for condemnation. 2d. The purchase of the ship by a British subject was a trading with the enemy not specially permitted by the Orders in Council, and, therefore, illegal. 3d. For these reasons, and also for illegal opposition to those who seized the ship, under the authority of the Court, the claimant must be condemned in the costs.

[S. C. 2 Eng. Pr. Cas. 520; 1 Jur. (N. S.) 1144; 4 W. R. 1; 26 L. T. (O. S.) 110. Referred to, *The "Zamora,"* [1916] 2 A. C. 87.]

This ship arrived at Hull under the Russian flag on the 29th May 1854, with a cargo from Kertch, in the Crimea. Having left that place on the 26th March, she was protected by the Order in Council of the 29th March (2 Sp. Ecc. & Adm. (App.) 3), but after she had discharged her cargo on the 29th of June, instead of departing forthwith, she was removed the next day to Great Grimsby, where she has ever since remained.

It appeared, from documents and affidavits produced, that in the early part of June 1854, negotiations were entered into between Mr. Robert Keetley, of Great Grimsby, and Jacob Ljoberg the Russian master, who had a power of attorney authorizing him to sell her, for her purchase. An application was then made by the Russian master to the Customs authorities for information whether he might sell her instead of departing, and whether a British register would be granted to her. A letter was sent by one of the solicitors to Her Majesty's Board of Customs in London to the Customs authorities at [282] Grimsby, who thereupon informed the Russian master that if his vessel was sold bonâ fide a British register would be granted. It appeared that application had also been made on behalf of the alleged purchaser to the Commissioners of Customs in London, and that one of their solicitors had expressed his opinion to the effect that the sale would be legal, and that, if proved to be bonâ fide, the ship might have a British register granted.

Accordingly, Mr. Robert Keetley, in the month of June 1854, purchased the ship for 2800l. He afterwards had her dismantled and thoroughly repaired. She was still lying at Grimsby in a dismantled state in the summer of 1855.

When the decision of the Court in the case of *The "Odessa"* (ante, p. 208) came to the knowledge of the officers of Customs at Hull, they reported the "Neptune" to the Marshal of the Admiralty. This led to proceedings being taken against her by the directions of the Lords of the Admiralty.

The vessel was seized on the 8th of August, and on the 11th a proctor appeared for Mr. Keetley, whom he alleged to be the sole owner, and obtained a monition against the seizors and the Admiralty Proctor to proceed to adjudication. On the 15th of August, the proctor gave in the claim of Mr. Keetley, with an affidavit annexed. When Thomas Keetley, who was named in the monition as the master of the vessel, was summoned in form before the Commissioners at Hull to attend before them on the prize interrogatories, he did not appear or take any notice of the summons. It also appeared that when the vessel was seized great opposition was offered to the seizors, who were compelled to take the keys of the cabin by force from the claimant.

After the case was ready for hearing on the admission of claim, the Admiralty Proctor received a communication from the Secretary to the Admiralty respecting the case, and upon the 14th of November declared "that by the directions of the Lords Commissioners of the Admiralty he proceeded no further in the cause, reserving the question of costs and damages on either side"; but the claimant's proctor "prayed the Judge to order a decree of restitution to issue, and to condemn the seizors in costs and damages." The Court having directed the question to stand over, it now came on for argument, and the Queen's Advocate on the part of the Crown now offered to forego any application for costs, provided that the claimant would do the same, but Dr. Addams on behalf of the claimant declined the offer. The argument was therefore proceeded with.

[283] The Queen's Advocate and Admiralty Advocate for the seizor; Dr. Addams and Dr. Twiss for the claimant.

*Dr. Lushington.* The first question for the determination of the Court is, whether there is anything introduced in the course of these proceedings which ought to stop it from considering the case of costs and damages in its ordinary and usual mode. For this purpose it will not be necessary that I should state the proceedings at any length.

It appears that the vessel was originally seized by two Custom-house officers at Hull, and Mr. Clarkson appeared for Mr. Keetley, and prayed the Judge to assign Mr. Townsend, Her Majesty's Procurator-General in her office of Admiralty, to set forth the names of the seizors, and to decree a monition against the Admiralty Proctor to proceed to adjudication. After an affidavit with papers annexed had been brought in by the Admiralty Proctor, the usual monition had been decreed at his petition and returned, and after affidavits had been brought in by Mr. Clarkson on the 31st of October, and admitted on the 6th November, Mr. Townsend on the 14th of November declared that, by the direction of the Lords Commissioners of the Admiralty, he should not further proceed in this case, reserving the question of costs and damages on either side.

The question is, then, whether that declaration made by Mr. Townsend has the effect of preventing the Court from entering into the merits of the case, or whether the Court must proceed as if there had been a declaration of consent to restitution, reserving the question of costs and damages, because I do not mean to take up time in commenting upon what is the every day practice of the Court, and always has been, that the captor may consent to the restitution of the property seized, and reserve the question of costs and damages.

Certainly, it is not very usual that a minute should be entered to the effect that one of the parties does not intend to proceed further in the case, but reserves the question of costs and damages; it nevertheless appears to me that it is quite impossible to say that the other party should have a right to avail himself of this declaration, that the party proceeding will proceed no further, and at the same time to reject the reservation with respect to costs and damages. He might, if he had thought fit, have objected to this minute altogether; he might, if he had been so advised, have said it was an extraordinary and irregular minute, and the Court would have pronounced its opinion upon it, though I must say I see nothing in it with which the Court can reasonably find fault. There are many [284] cases in which the Crown may not consent to restitution, and at the same time may not think fit to press the case to an ultimate decision, and, under such circumstances, this form appears the best adapted to answer the ends of justice.

Here I must observe, with respect to seizures made by captors commissioned or non-commissioned, that the real party proceeding is always the Crown; in both cases, and clearly in the case of commissioned captors, it is under the control of the Crown properly speaking, and the Crown may at any time it thinks fit, order the Queen's Proctor to take any measures it may according to its wisdom deem right, namely, to proceed no further, and to restore the property or whatever else it may deem proper. So, where the seizure is made by non-commissioned persons, and the proceedings are conducted under the authority of the Lords of the Admiralty, through the medium of the Admiralty Proctor, the Lords of the Admiralty are invested with precisely the same powers if they think fit to exercise them. There ought to be no mistake on these matters, but it is equally true, if it comes to be a question for the judgment of the Court, it may condemn in costs and damages the actual seizor, whether he be a commissioned captor or a non-commissioned captor.

Now, as to the facts of this case, this vessel beyond all doubt was originally a Russian vessel, which reached this country in May, and discharged her cargo. She was under the protection of the Order in Council, bearing date the 29th of March 1854 (2 Sp. Ecc. & Adm. (App.) 3). That Order in Council was purposely framed in order to protect vessels coming to this country, unlading their cargoes, and departing forthwith, but it has not been contended, as I conceive it was impossible to contend, that that order sanctions the party in further proceedings by way of sale of the vessel.

On the breaking out of war, the general rule of the law is,—and it is really the A B C of prize proceedings,—I do not mean to comment upon it or illustrate it for a single moment,—that all trading whatsoever between the subjects of the country declaring war and the country against which it is declared is wholly prohibited, and

is totally and entirely illegal. The Crown alone can alter or relax that law, and it is not competent to any authority, save that which is by implication derived from the Crown, to relax the general Prize Law of the land.

If, then, that be the general Prize Law, it follows, in my opinion beyond all shadow of doubt, that this sale was illegal, [285] because it was a sale by a Russian subject during war to a British subject of property which was protected by the Order in Council to the extent only of being permitted to come to this country, to discharge her cargo, and forthwith to depart without molestation for any port not blockaded. If that be so, the only question is, whether the authority of the Crown has by virtue of any other Order in Council, or in any other equivalent manner, signified its consent that this ship so circumstanced shall be exempted from the general law, and that a Russian owner shall have power to dispose of, and a British subject shall have authority to buy her.

A reference has been made to another Order in Council which bears date the 15th of April 1854 (2 Sp. Ecc. & Adm. (App.) 9). It is to this effect,—I do not mean to go through it, but the whole Order in Council must be considered together in order to arrive at a safe conclusion as to any part of it,—but this part has been referred to:—

"That save and except only as aforesaid all the subjects of Her Majesty's and the subjects or citizens of any neutral or friendly state, shall and may during and notwithstanding the present hostilities with Russia, freely trade with all ports and places wheresoever situate which shall not be in a state of blockade, save and except that no British vessel shall under any circumstances whatsoever either under or by virtue of this order or otherwise, be permitted or empowered to enter or communicate with any port or place which shall belong to or be in the possession or occupation of Her Majesty's enemies."

It is impossible to contend for a single moment that the port of Grimsby comes within the terms or spirit of this order? The effect of this order is to allow subjects of Her Majesty's and neutral subjects to trade to ports and places not in a state of blockade. I need not say that this very expression,—not in a state of blockade,—could by no possibility apply to any British ports whatever, and this Order in Council never could be extended to justify the subjects of Russia in trading with any port in Her Majesty's dominions, which construction, in fact, it is now attempted to put upon it.

For many reasons, I will not state what I believe to be the true construction of this Order in Council under the limitations, because I agree with Her Majesty's Advocate, that it is better that such important questions should be discussed when they are raised directly, than where they are raised incidentally on such a point as this. But I am compelled to notice them to come to this conclusion, was this sale legal or illegal? I have no doubt whatever that the sale was illegal, nor have I any doubt that if this case had been pressed by the Crown or the [286] Lords of the Admiralty, so as to compel the Court to come to a conclusion, that I should beyond all doubt have condemned the ship on the ground of the illegality of the sale. It is not a British ship under the Prize Law, but an enemy's vessel. So much for the first question.

The next question that arises is, can the law, as stated, be qualified by anything done by the Commissioners of the Customs. I will assume that the whole facts and circumstances were brought under the cognizance of the Commissioners of the Customs, that their opinion was taken whether the sale was legal or illegal, that they gave their judgment that it would be legal and proper, and that they confirmed it by granting a British register. That would not weigh one single iota in the matter. It would be impossible that a subordinate authority, or any other authority short of the Crown, could change the Prize Law here or elsewhere. If it was intended to do that, there were means by which it might have been effected by the interposition of the Crown itself.

If I were to travel no further, this would be a perfect justification, an entire justification of the seizure; it would entirely stop the claim for costs and damages, and give the seizors a perfect title to costs and expenses.

There have been other circumstances which I have been pressed to consider, but having delivered my judgment, I do not see that I should expend my time in going into circumstances which I consider to be of less importance. I shall not advert to the issuing of the monition, because, from the explanation given by Dr. Twiss, that

might be erroneous; and it may be that before the monition was under seal, the claim was given in. But I must say that the proceedings at Grimsby have been such, that I do not hesitate to say, that if they had been brought before the Court, I should not have hesitated one single instant in attaching the party, and I think he would have found the attachment would not have been a matter of form; it would not have been easy to get a release from that attachment, because it is the duty of the Court to enforce at all times a due obedience to the laws of this country, which I am bound to administer. With respect to the conduct of the master, it appears to me to be equally reprehensible, and that is also an additional ground for giving the seizors their expenses.

I have now mentioned all the grounds on which I proceed to decree the seizors' expenses, but the first one is so incontrovertible, and it gives them such a right and title to their expenses that it operates on my mind above all other. I reject **[287]** the claim for costs and damages on the part of the claimant, and I decree the expenses of the seizors. I think it is to be lamented that the liberal offer of the Crown by its officers to grant restitution of the vessel, and without raising the question of costs and damages on either side, was not accepted, and that the claimant was not wise enough to take the vessel without the risk of having to do, what now he must do, pay the costs and expenses.

THE "FRANCISKA"—(Mechelsen), AND THE "JOHANNA MARIA."

[S. C. 10 Moore P. C. 37; 14 E. R. 403; 2 Eng. P. C. 346. Referred to, *The "Zamora,"* [1916] 2 A. C. 95. As to rights of claimant on restitution, see S. C. 10 Moore P. C. 73; 14 E. R. 417; 2 Eng. Pr. Cas. 416.]

**[307]** THE "JOHANNA MARIA."

[Vide S. C. 10 Moore P. C. 69; 14 E. R. 403.]

THE "FORTUNA"—(Anderson). Aug. 11, Nov. 6, and Dec. 4, 1855.—A captor having seized a vessel and sent her home for adjudication on mere suspicion of her intention to break the blockade of Riga, when the ship's papers clearly indicated Stockholm as her destination, condemned in costs and damages.—When the ship-papers and depositions clearly point to a legal distinction, the court will not, from the locality of capture, infer an illegal one, without the assistance of Trinity Masters.

[S. C. 2 Jur. (N. S.) 71; 4 W. R. 166.]

This vessel, under Norwegian colours, sailed from Newcastle on the 7th of May 1855, with a cargo of coals, bound for Stockholm. On the 29th she was captured by Her Majesty's ship "Conflict" for an alleged attempt to break the blockade of Riga, and was sent to England for adjudication.

**[308]** On the 11th of August the case was argued on the admission of the claim, and the Court expressed a strong opinion that the ship-papers and the evidence shewed that she was proceeding to Stockholm. As, however, the counsel for the Crown contended that the place of capture indicated an intention to enter Riga, the Court, considering that to be a nautical question, offered to defer its decision for the attendance of Trinity Masters if the counsel for the Crown requested it; but at the same time intimated its intention to inform the Trinity Masters that both the depositions and ship-papers clearly pointed to Stockholm as the destination of the vessel, and stated that it would put the claimants in the same position as if it immediately restored the vessel, unless the Trinity Masters expressed a decided opinion that, from the locality of the capture, she could not have been proceeding to that place.

Subsequently the Crown consented to restitution; the question of captor's expenses and claimant's costs and damages being reserved. That question was argued upon the 6th of November.

The Queen's Advocate and the Admiralty Advocate appeared for the Crown; Dr. Addams and Dr. Twiss for the claimants.

Dec. 4, 1855.—*Dr. Lushington.* In this case restitution of the ship and cargo has already been decreed, with the consent of the captors. Subsequently thereto, the Court heard counsel on the question reserved, namely, whether the claimants were entitled to costs and damages, or whether, if that prayer was refused, the captors are entitled to have their expenses paid. Of course the Court might, if it thought

fit, refuse both prayers, and then, as it is technically called, it would be a case of simple restitution.

The whole law upon these questions is now to be taken from the decision of the Judicial Committee in the case of *The "Ostsee"* (Spinks Pr. Cas. 174; 2 Spinks (Ecc. & Adm.) 170). Having ascertained, to the best of my ability, the true meaning and intention of that judgment, the only question is, whether the circumstances of the present case bring it within the pale of that decision; whether according to that decision I am to decree to the claimants costs and damages, or, refusing that prayer, direct that the captor's costs and expenses be paid or decree restitution simply. In the case of *The "Leucade"* (Spinks Pr. Cas. 217; 2 Spinks (Ecc. & Adm.) 228), I did most carefully, to the utmost of my power at least, examine the judgment in the case of *The "Ostsee."* I then **[309]** stated what I believe to be its true import, and I have no occasion to attempt that task again.

I apprehend the general result of that decision in *The "Ostsee"* has in the course of the argument been truly stated by the counsel for the claimants, viz.:—if no probable cause for capture appears on the depositions and ship-papers, the claimants are entitled to restitution with costs and damages. Therefore the present case is simply an inquiry whether probable cause for the seizure is shown on the face of the depositions and ship-papers.

The captors allege that the capture was justifiable because there was good ground to believe that the ship was attempting to break the blockade of Riga. The existence of that blockade was not disputed in this case, nor have I anything to do with a knowledge of the blockade, for no such question arises.

This was a Norwegian vessel according to the papers bound from Newcastle, with coals, to Stockholm. There is a bill of lading in English to that effect and also a Sound pass, and a charter-party in English marked No. 8, whereby this vessel was chartered by Messrs. Dickson and Co., London, to go to Stockholm and bring back a cargo of wood to England. No. 9 is a letter from Sewell and Neck, dated Elsinore, 14th May 1855, directing the master, after discharging the outward cargo at Stockholm, to proceed to Holmsund in order to load for London.

I need not enumerate the other ship-papers; suffice it to say, that all the ship-papers strongly evidence a voyage to Stockholm, and no one paper gives rise to the slightest suspicion of any other destination; and moreover nearly all the papers are in English, and consequently their contents might be easily known by the captors when they examined the vessel.

All the witnesses examined depose, in conformity with the papers, that the destination was Stockholm. Against this weight of evidence it has been argued, on the part of the captors in the first instance, that the vessel ought to be condemned for breach of blockade, by reason that she was detained in a locality which proved that she was about to break that blockade, and was not going to Stockholm; and latterly restitution having passed by consent, it was argued on the same ground that the capture and detention were justified.

With respect to the place of capture, until I am directed to the contrary, I must take it also from the depositions, log, and ship-papers. As to the deduction to be drawn from the place of capture when once fixed by the evidence to which I have referred, except in a very glaring case indeed, the Court would never take upon itself to pronounce an opinion without the **[310]** assistance of Trinity Masters. It is obvious that it could not safely do so, because so many nautical matters, such as courses, winds, and currents, must be taken into consideration, that none but persons of nautical science could safely draw any conclusion.

For these reasons, when this question was raised, I offered to the captors, if they desired it, to request the attendance of Trinity Masters, but I added, as I think I was in justice bound to do, that I should tell the Trinity Masters that all the evidence, except that which may be strictly called nautical, was in favour of a destination to Stockholm,—that as to nautical evidence they must form their own opinion; and I further observed, what I apprehend is indisputably true, that unless they were clearly of opinion from the nautical evidence that the ship was not going to Stockholm, but to break the blockade, I must restore it.

According to the shorthand writer's notes of what I said on that occasion, which I doubt not are perfectly accurate, I added that if the Trinity Masters did not give a clear judgment that the vessel was on her way to a blockaded port, I should put the

claimants in the same situation as if the restitution had taken place at the first hearing, and that to all expenses of the future hearing, and to all expenses from that day thenceforward the captors would be liable.

These observations applied to the question then raised, namely, the question of restitution or condemnation, the main issue in the cause, and I apprehend that if the captors asked for Trinity Masters to obtain condemnation and failed, these observations were not unfounded in justice. I certainly should not have thought myself at liberty to ask the Trinity Masters whether there was probable ground of seizure or detention, because that is not a simple nautical question, but one mixed up with legal considerations; but I should have availed myself of their presence to obtain all nautical information which could bear on the question of costs and damages; but such a question as that I have mentioned, I should never have put to them.

However, the captors declined to solicit the ordeal of Trinity Masters, and consented to the restitution of ship and cargo. Under these circumstances, my duty is to declare what deduction my unassisted judgment will enable me to draw, from the depositions and logs, as to the place of capture. The master, on the third interrogatory, deposes, that the vessel was seized in the open sea off Gothland. "From recollection, I cannot state the latitude and longitude, but I had it on board recorded on a slate at the time by the mate, and with a view to the entry in **[311]** the log in the evening." It appears to me, this evidence does not, in the slightest degree, assist the captors, but is, to a certain extent, detrimental to their case. It is impossible to contend that, because a vessel is in the open sea off Gothland, that she was therefore going to commit a breach of blockade, because a vessel going to Stockholm might, with perfect innocence, take that course. Again as to the slate and the completion of the log there is not the least reason to suppose that the slate was improperly concealed, or kept back, and I cannot proceed upon surmises unsupported by evidence. I attribute no blame to either party for not bringing in the slate, but I can draw no inference from its absence.

Then as to the mate's evidence; "the ship was taken off Gothland," he says; "the longitude was about 20° 52′, I cannot recollect the latitude." If the mere fact of being in that longitude was proof of intention to break the blockade, it was an inference which could be drawn by persons conversant with these matters only; certainly I could draw no such inference without the assistance of gentlemen experienced in these matters. From the mere statement of the longitude in which the vessel was, I never would undertake to draw any inference whatever.

The third witness gives no information. I may here introduce a remark which I trust will be duly attended to by the Examiners. They do not and cannot know upon what answer to a particular interrogatory a case may turn; but this and other cases shew the absolute necessity of obtaining from the witnesses the most precise answers to the questions put to them. I do not undertake to say on the present occasion, that any care on the part of the Examiner could have extracted more accurate testimony from the witnesses; clear it is, the evidence which has been obtained is of a loose and unsatisfactory character.

I now come to the log. Again I say, unless the case was very clear I should wholly distrust my own judgment in forming an opinion on a document of that description, and I will not venture any very minute remarks. It appears to me, looking at the log, that on the 27th of May the vessel was close to the Island of Gothland, and that upon the 29th she had the wind adverse for a course to Stockholm. I cannot say how far it was necessary, under circumstances like these, that she should bear to the eastward and southward; it is impossible for me to form an opinion on that point.

Then the result of the examination of the log is, that I can draw no satisfactory conclusion at all, and certainly cannot **[312]** conclude that it proves what the captors insist on, that the vessel when taken was, from her position, about to proceed to Riga, Libau, or Windau; and to this I must add, that vessels have a right to take their course to Stockholm southward of the Island of Gothland, and that they frequently do so. That is the information which I have derived, I believe, from a trustworthy source, in the course of the investigations which previously to this have come under my consideration; and with regard to a vessel taking such course, I am of opinion, that no one but a person conversant with the peculiar navigation of the Baltic, and also equally acquainted with the course that a vessel ought to steer, could in any ordinary case say from the depositions and the log whether such a vessel was,

considering the winds and currents, so far to the southward and eastward of the Island of Gothland, as with justice to fix on her the offence of intending to break the blockade.

The case therefore is thus circumstanced; all the evidence, except that which is called purely nautical, most strongly tends to prove a destination to Stockholm,—the nautical evidence does not contradict it in my judgment.

If this be so, what is the probable ground of seizure as required by the authority of the judgment in *The "Ostsee"* (Spinks Pr. Cas. 174; 2 Spinks (Ecc. & Adm.) 180)? I am told that the officer commanding the ships constituting the blockading force will be left at the mercy of the claimants, who will make what statements they think best for their own safety, as the captors will not be permitted to contradict it; and that captors will be compelled to pay costs and damages, though, in truth and reality, they have only fulfilled their duty, and captured vessels justly liable to the suspicion of breaking the blockade. And further, I am told that such an administration of the law will tend to weaken and impair the exercise of one most important belligerent right,—the right of blockade. To this my answer is, that, looking at all the consequences of admitting captor's evidence on such questions—to all that was said by Lord Stowell on that subject, I never will admit it till authorized by superior authority. I know, indeed, that the whole question of costs and damages was then in practice differently treated; but this circumstance will not justify me in altering the practice of excluding captor's evidence.

As to any further consequences which may result, it is no part of my duty to consider them. No doubt they have been weighed in the balance by higher authority; by that authority I am bound, and I wish to be distinctly understood in these [313] cases of costs and damages, that I will not again be tempted to consider what were the principles applied, or what practice prevailed in former wars. I may, indeed, on this question have much to learn, and perhaps more to unlearn; but my own task now is to understand and apply the judgment of the Privy Council in *The "Ostsee"* to the best of my skill and ability, as I did in the case of *The "Leucade"* (Spinks Pr. Cas. 217; 2 Spinks (Ecc. & Adm.) 228).

Upon the best consideration, therefore, of all the circumstances of this case, lying as it does within a very narrow compass, the result is what I have already stated, that the original evidence of destination to Stockholm is not questionable. I further must observe, that with regard to that original evidence the captors had the most ample opportunity of making themselves acquainted with and considering it, for it was not, as frequently happens in the case of foreign vessels, that the papers were all in a language unintelligible to those who examined the vessel, but the most important papers with regard to destination,—all those papers which strongly pointed out a probable destination to Stockholm,—were in a language accessible to the captors, and capable of being understood by them. The papers which exist in this case are very strong evidence of original intention. I may add to this, that Lord Stowell expressed it as his opinion in more cases than one that with regard to the destination of a vessel the evidence of the master, unless it was fairly discredited, was the most important evidence to decide the question, and is conclusive on that point.

Now against this current of evidence, therefore, there is nothing but an alleged suspicion of the captors arising from the place where she was seized. This suspicion is in my opinion unsupported by anything in the cause. There is no evidence, according to my judgment, which invests it with any degree of probability. I am therefore compelled to say, that this is a seizure without probable cause on the face of the depositions and ship-papers.

This being so, I have no alternative but to obey the rule laid down for my governance in *The "Ostsee"* (Spinks Pr. Cas. 174; 2 Spinks (Ecc. & Adm.) 170), and according to my construction of it, I am bound to decree costs and damages.

[314] THE "BENEDICT." Dec. 4, 1855.—The voluntary transfer of a ship by a father, an enemy, to his son, a neutral, as an advance of a portion of his inheritance, is valid if made bonâ fide. Education in a foreign country, followed by a continued residence after the completion of the education, tends strongly to establish the foreign domicile.

[S. C. 2 Eng. Pr. Cas. 527; 4 W. R. 165.]

This ship was originally captured and sent home for adjudication as for breach of the blockade of Riga, but at the hearing on the admission of claim, on the 13th of

August, that ground was abandoned, and the argument turned on the national character of the vessel. She had been transferred to Hans Friedrich Philipsen (on whose behalf as a Dane and sole owner the claim was made) by his father, a Russian subject; the Court allowed further proof, which was now brought in. The facts are fully stated in the judgment.

The Queen's Advocate and Admiralty Advocate appeared for the captors; Dr. Addams and Dr. Twiss for the claimant.

*Dr. Lushington.* This vessel, under Danish colours, was captured near Riga, on the 8th of May, in the year 1855. Claims were given for the ship, the freight, and the cargo,—parts of the cargo were upon several occasions restored by consent. On the 13th of August the admission of the claim for ship and freight was debated. The claim was admitted, but further proof ordered as to the property in the said ship and freight. Such are the terms of the minute of August 13. The further proof having been brought in, this case has been lately argued at length, it being contended on the part of the Crown that the vessel is liable to condemnation, not on account of the breach of blockade, which was the original ground of seizure, but on various other grounds which I must presently speak of more in detail.

I think the most convenient course I can pursue will be first to state, as fairly as I can, the case of the claimant, and then, without reference in the first instance to its credibility, inquire whether, assuming it to be true, the claimant would under such given circumstances be entitled to restitution. If I should ultimately be of opinion that the facts, if proved, would justify me in restoring the property to him, then I must also consider whether the proof of the facts is satisfactory.

The claim is given on behalf of Hans Friedrich Philipsen, of Altona, and the statement contained in the further proof is to the following effect,—not in detail but in effect: that he was the youngest son of Niss Hansen Philipsen, a merchant carrying on business at Riga; that his father was by birth a Dane, settled for very many years within the Russian dominions; that his two brothers were in partnership with his father, that in 1852 he himself was sent to Denmark for the purpose of learning the art of shipbuilding, and of acquiring other knowledge to fit him to carry on the business of a shipbuilder **[315]** and shipowner in Denmark; that he continued to prosecute his studies till the month of August 1853, when, hearing that his father was about to visit Hamburg, he went thither to meet him; that upon that occasion his father promised to advance him a part of that share in the property which would devolve to him as his portion,—the sum so agreed to be advanced being fixed at the amount of 24,000 roubles; that it was at the same time arranged between the father and son that the ship, the "Benedict," should be valued at 4000 roubles, and be transferred from the father to the son in part payment of the 24,000 roubles; that the claimant became of age on the 25th of December in that year, and took up his residence at Altona,—towards the end, as it would appear, of the month of February 1854; that on the 6th of March, I believe the 18th, according to our time, in the same year, the ship, which was then lying at Lubeck, was transferred to him by bill of sale,—the whole arrangement as to the advance of the 24,000 roubles, and the transference of this ship, having been approved of by his mother and brothers and sisters, as appears by an instrument produced in this cause; that the claimant, having taken possession of this vessel in the year 1854, employed her in various voyages; that she brought a cargo of wheat to Scotland, went to Memel, to Malaga, and finally to Riga at the end of 1854, when the blockade was withdrawn.

Upon this statement of facts, assuming them true, several objections have been raised on the part of the captors. First, it has been contended that this Court cannot recognise a title by donation and voluntary conveyance without a valuable consideration, or rather, as we should call it, pecuniary consideration; and that there is no precedent for the Court sanctioning such a claim, for that so doing might lead to great abuse.

I certainly am not aware of any precedent, and it is equally true, that without great care and caution a voluntary transfer might be resorted to for fraudulent purposes; but if the title be such as this Court ought to recognise, I should not be dismayed from so doing simply by the absence of an example, neither should I be deterred by the probability of abuse, for I think that the Court, provided it exercised due diligence, might protect itself from any reasonable chance of fraud.

I approach at once, then, the question, whether a title by donation, if sufficiently

proved, ought to be received by this Court or universally rejected. I am well aware how many distinctions are made in the administration of municipal law [316] between voluntary conveyances and titles for a valuable, or rather a pecuniary, consideration. But these are distinctions which I should be very reluctant to introduce into the administration of Prize Law, for I think that, sitting as a Court of the Law of Nations, I ought as far as practicable to look at what has really and truly been done,—to reject on the one hand any transaction however perfect in form if not sound in its foundations, and on the other hand to admit, notwithstanding technical considerations, whatever has been truly and bonâ fide done.

I know not indeed by what authority I should be justified in saying to the subjects of neutral states, that I would stop them during the time of war from acquiring property by a title which would be unassailable in time of peace; in saying, "You make take a vessel by way of legacy, but you shall never acquire a ship from a father or other relation by way of donation"; in saying, moreover, that I will interrupt, or rather make void, all the consequences of the natural relation of father and son or other relations. Were I so to do, I think I should sin against a great principle of Prize Law, by prohibiting to neutrals a transference of property perfectly lawful in time of peace. I am not disposed to establish so harsh a rule; but, before I gave any claimant the benefits of a more lenient principle, I should undoubtedly require very satisfactory proof of all the circumstances which had led to the transaction under consideration, and more especially in a case where it might happen that the person so conveying the property was clothed with a hostile character.

If, therefore, the history of this case be correct, I should not refuse restitution to the claimant on the ground that his title was acquired by donation; at the same time I must observe, that I very greatly doubt whether the advance of a portion by persons who live in countries where the property must in great part be divided amongst the children at the time of the death of their parents, can with strict propriety be termed a donation. Many cases might be put where, in the exercise of a power, persons advance during their own lifetime money which is not strictly due till after their deaths, and I doubt whether such advances can be truly characterized as pure donations.

I must now address myself to other objections. It has been contended that the claimant, at the period of the arrangement with his father in August 1853, and of the transfer of this vessel in March 1854, was to be considered as a subject of Russia. To a certain extent I am disposed to assent to some of the reasons on which this argument is founded. It is quite true [317] that a son under age sent for his education to another country would not thereby acquire the national character of that country; but it is not equally correct to say that the circumstance of such education, accompanied with other facts, would not be of importance in ascertaining the national character, for if the original project of sending for education was coupled with an intention when that education was completed to settle in the same country, it would render great facility to the immediate acquirement of such national character when the residence was continued after majority, and the education was complete. I do not, however, deem it necessary to enter further into this consideration for the obvious reason, that the question is, whether, when this ship was captured in 1855, and the claim given in in the month of June in that year, the claimant was then a Dane; for if he was, he would be entitled to the benefit of that character. I am of opinion that the continued residence at Altona has, were it necessary to press the matter so far, a retroactive effect upon all that was done at the time of this transfer; and perhaps I might even go further and say, that if in March 1854 the claimant was not justly entitled to be considered a Dane, yet he has certainly acquired that title since; and moreover, I am not aware that a person whose character was hostile may not change his domicile between the period of the transfer and the time of the claim. Suppose that Mr. Philipsen senior, undoubtedly a Russian in March 1854, had removed himself and his vessel to Denmark at that period; can any one contend that if such vessel were captured in May 1855, and he had been settled in Denmark during the intermediate period, he would not be entitled to restitution?

Another objection has been raised which regards the national character of the master. He was by birth a subject of Mecklenburg; he navigated this ship for several years under Russian colours, Russian owned; therefore no doubt at the time of the transfer he was to be considered a Russian subject. He afterwards assumed

the Danish character in the month of April 1854, according to means which that country affords, with extraordinary facility and expedition. Now what effect is to be attributed to this state of things? I am yet to be informed that the single circumstance of having a master of a hostile character to command a vessel will destroy a claimant's right to restitution, if he be otherwise so entitled; and looking at the rapidity with which national character is allowed to be changed as regards neutrals, I shall be very reluctant to come to such a conclusion. I grant, however, when a case is viewed in a different aspect, the fact that the master's character is that of **[318]** an enemy may afford a strong ground of suspicion. As to any supposed fraud upon the Danish government, I lay that wholly out of consideration, for I see nothing on the face of the facts to lead me to suppose that there was any; familiar as the Court is with their mode of transmuting a Russian master into a Danish master, the whole transaction passes in ordinary form, and gives rise to no suspicion whatever. Even if it were otherwise, I disclaim entering into an examination of what the law of Denmark does require to enable any one to command a vessel under Danish colours.

On this occasion it has been said, that this vessel is not provided with those Danish papers which are required by law. If by law is meant the treaty with Denmark, I know of no provision in that treaty which authorizes Great Britain to condemn a Danish vessel, because the municipal law of Denmark may not have been strictly complied with. If reference be made to the Law of Nations simply, I am not aware that when a vessel has de facto by the authority of a neutral government been incorporated into the marine of that state, this Court has inquired narrowly, if at all, into the law of that state, or how far its municipal regulations have been strictly complied with; and I am of opinion that such an inquiry would be attended with great inconvenience, and could not be prosecuted with reasonable facility or with the probability of doing justice. Every state differs with respect to the regulations of their mercantile marine; the Court is not disposed to enter upon an investigation of systems of jurisprudence in foreign states, which it is not competent thoroughly to understand.

Upon the present occasion, an objection is raised as to the pass,—that it is dated at one period and issued at another. I know no reason why the Danish government may not adopt any regulation it pleases upon that subject. It is said that the vessel was not lying in the port where it was represented to be when some of the papers were granted, that a fraud has been practised on the Danish government. This is an investigation which I will not enter upon. The Danish government is quite powerful enough to protect itself against fraudulent attempts to obtain for vessels the national character of Denmark; I do not know about its having the will, but I have no doubt about its power. It may be, for aught I know, quite consistent with their practice, or it may be visited with some penalties unknown to me, quite beside the confiscation of the vessel; but I repeat, I will not, for such a purpose as the present, make any attempt to dive into the maritime law of Denmark and their usages, any further than I would present to Denmark **[319]** a copy of our Merchant Shipping Act for the edification of its judicial tribunals. I doubt indeed, if I were inclined to make such offer, whether I should not be under the necessity of sending also some learned expounder of all that is contained in that lengthy document. I, perhaps, might have no difficulty in selecting from the Court one quite capable of so doing, and who would be very acceptable to the Danish government.

It is sufficient for me to find that by the sanction of Danish authority this vessel has been received into the Danish mercantile marine; and if I am so satisfied, and that she is also the property of a Danish subject, it is my duty to restore her, provided that there has been no fraud on any belligerent rights.

I believe that I have now disposed of all the objections that have been raised in this case on the assumption that the statement of the claimant is founded in truth. Inquiry into this latter question will not occupy the Court long, for I do not think it necessary to enter into great detail. I am of opinion that the statement so made by the claimant is not repugnant to probability, and, though the consideration of impending hostilities might be an ingredient prompting the completion of this transaction, yet that it would not on that account be invalid, because, if I am right in the conclusion I have drawn as to the national character of the claimant, his father would have a right, when war was either imminent or declared, to transfer his vessel to him, and there is nothing in this proposition at all opposed to the decision in *The*

"*Baltica*" (ante, p. 264). *The* "*Baltica*" went mainly on the ground of a continuing enemy's interest though I also adverted to the attempt to sell by wholesale ships the property of the enemy to one individual.

The present transaction commenced in August 1853, and at that period, beyond all doubt, the parties were fully competent, without being liable to suspicion, to enter into the engagements which are said to have been made. I think also that the arrangement of August 1853 was carried into execution with as much expedition as could reasonably be expected, considering that the claimant did not come of age till the 25th of December 1853; and I think also it is proved, that as soon as that agreement was completed by the execution of the bill of sale, and from that time till the period of capture, the present claimant exercised all the rights of owner. There is an abundance of correspondence demonstrating it.

It is true that remittances to complete the sum of 24,000 roubles were continued in 1854; but what possible effect can [320] that have upon the transaction which I have to discuss. It appears quite consistent with probability and quite consistent also with law, that the father should make such remittances, and, if it should have happened that in addition to them there was a transfer of other property or remittances to the son to be held on his own account or on the account of the father, provided there was no fraud as to this particular ship, it was no more than the ordinary course of trade, and no infringement of any belligerent right. In 1854 Mr. Philipsen, as a merchant, had a right, subject to any chances, to remit any property he thought fit, to be held either on the son's account or on his own; it is nothing more than the ordinary course of trade. I will notice one or two other objections. I think it was stated, that it is very improbable that the master should have lost the letter of March 1854, addressed to him by Niss Hansen Philipsen and directing him to give up the vessel to the present claimant, and one of the counsel for the captors expressed a wish to see that document, on the supposition, I conceive, that it might impeach the genuineness of this transaction. It does not appear to me at all improbable that in May 1855, when the son had been in the possession and in the government of this vessel for fourteen months, that such a document should not be forthcoming, especially out of the custody of a ship-master; indeed, I think it would have been much more unusual if it had been forthcoming, when the father had, for fourteen months, with the full knowledge of the master, himself treated the vessel as the property of the son, to whom he was directed to give up possession.

But as for the contents of this letter, I apprehend that counsel would find no great difficulty in satisfying their curiosity, for there is a copy annexed to the affidavit of Mr. Philipsen, senior. It is the letter dated March 17, and gives in correct detail instructions for the delivery of this ship to the present claimant, and in fact it is a copy of that very letter which the master himself has lost. The observations in that letter with respect to the employment of the master are, in my opinion, strong evidence of the genuineness of the letter and the truth of the transaction. The father desires the master if he can to effect arrangements with the son for the purpose of continuing master; supposing that could not be done, then he says, if you come here, I will do the best for you considering you have been in my service.

With regard to the claimant's letter of March 23, I do not think that the true construction of it is inconsistent with the other statement. The surprise in that letter is expressed not [321] at the act being done at all, but that the whole promise of his father should be carried into effect so speedily. The surprise is at that expedition, not at the thing done. The whole correspondence with the master is annexed, and I think it would be difficult to find in it anything inconsistent or incongruous.

I think it was said also, that though the agreement, if so it can be called, took place between the father and the son in August 1853, yet that there was no writing of any kind written in that year to verify that transaction. Now this objection would be entitled to great weight if this transaction had been a contract between two parties intended to be legally binding; but what passed on that occasion between the father and son was of a totally different nature. It was a promise on the part of the father to confer certain benefits on the son, benefits which could not be conferred till after he was of age. I confess I should have been surprised had there been a written agreement to any such effect. There was no obligation on the father to make this promise, or to carry it into effect when made, save his own parental kindness and his own sense of honour. Such obligations are not put in writing. On the whole I am

satisfied that I ought to give credit to the proofs adduced on the behalf of the claimant.

Of course this is a case, looking to the further proof, where the captor is entitled to his expenses.

THE "MARIA"—(F. M. Petit). December 12, 1855.—The absence of the bill of sale and the ignorance of the master as to the ownership, both necessitate further proof.—If the claimant elects to proceed by plea and proof, the case is open to further proof on the part of the captors.

[For subsequent proceedings, see 11 Moore, P. C. 271; 14 E. R. 698; 2 Eng. Pr. Cas. 616.]

This vessel, under Belgian colours, bound from Rio Janeiro to a port of Great Britain, with directions to call at Cork for orders, was captured on the 27th of October 1855 off Cork, by the revenue cutter "Eliza," on suspicion of being Russian property.

The claim was given in on behalf of "G. F. E. Huger and J. I. H. Huger, of the city of Antwerp, merchants and shipowners, trading under the firm of Messrs. Huger and Co., subjects of the King of the Belgians, as sole owners." The examinations on the interrogatories having been taken, the case now came on for hearing on admission of the claim.

The Queen's Advocate and Admiralty Advocate for the seizor, Dr. Addams and Dr. Twiss for the claimants, contended that there could be no possible doubt as to the neutrality of the vessel, and that she ought to be restored without further proof. The rule that the absence of the bill of sale was a ground for **[322]** further proof was not of universal application, but must be qualified by the circumstances of the case.

*Dr. Lushington.* The bill of sale not having been produced, this would clearly be a case for further proof on that ground alone. There is, however, another, equally strong; the claim is given in on behalf of two persons, the Messrs. Huger; but the master in his evidence describes the ship as belonging to other parties. The explanation which has been given of that circumstance may or may not be true, but that explanation can only be received by the Court on further proof. It is an imperative rule of the Prize Court that the master must be acquainted with the ship-papers, and be able to state without doubt or hesitation who are the owners. Further proof must be given.

The Queen's Advocate. I must ask the Court in this case to allow the captors to give further proof, as I am instructed that we have proof of the most important character as to the true ownership of this vessel.

The Proctor for the claimant thereupon prayed the Court to allow him to bring in a special allegation.

The Court. In that case all difficulty is removed; I should have hesitated to open the case to further proof on the part of the captors, but if the claimant elects to proceed by plea and proof, that of course will open the case to both parties.

THE "ALINE AND FANNY"—(Hildebrandt). Jan. 18 and 30, 1856.—The practice is for captor or claimant, in asking for further proof, to state what he proposes to prove. The judicial opinion of Lord Stowell was expressed strongly against the admission of captors' evidence. When no suspicion of intention to break a blockade arises on the ship-papers, or the primary depositions, the Court, according to the established practice, cannot receive captors' evidence to contradict those depositions with respect to the place of capture. Though hardship may arise from the practice, any deviation therefrom must emanate from the Superior Court.

[S. C. 2 Jur. (N. S.) 143; 26 L. T. (O. S.) 262; 4 W. R. 321. Affirmed, 10 Moore, P. C. 491; 14 E. R. 577; 2 Eng. Pr. Cas. 537.]

This vessel, under Lubeck colours, sailed from Lubeck with a general cargo of sugar, coffee, tobacco, &c., bound, according to the ship-papers, for Haparanda, in Sweden. On the 14th of November last she was captured by Her Majesty's ships "Tartar" and "Dragon" for an alleged attempt to break the blockade of Jacobstadt.

A claim for the ship and cargo was given in by the master on behalf of the respective owners, citizens of Lubeck.

The master in his deposition swore that he was captured between the 63 and 64 degrees north latitude, about 20 miles from the land, and only just within sight of the coast of Finland.

On behalf of the captors a certificate or statement was brought in to the following effect:—

"William Fitzherbert Ruxton, lieutenant, and William Belford Stubbs, lieutenant, have deposed before me that they were on the deck of Her [323] Majesty's steam ship-of-war, the 'Dragon,' when at anchor inside the Island of Maskar, off the town of Jacobstadt, on the coast of Finland; that on the morning of the 14th day of November 1855, and at about half-past 8 o'clock, A.M., they saw a schooner apparently running for the anchorage off Jacobstadt, about three or four miles off, and that they reported this circumstance to me; also, that on opening the point of the Island of Maskar, which would give a full view of Her Majesty's ships-of-war 'Tartar' and 'Dragon' at the anchorage, this schooner set her boom mainsail, and hauled out on the port tack, which proceeding they also reported to me; and that this schooner was consequently kept in view until she was detained by Her Majesty's ship-of-war 'Tartar,' about seven miles N.N.W. of Jacobstadt.

"I certify that the foregoing reports were made to me, and also that I myself saw the schooner running for the anchorage off Jacobstadt, and afterwards haul out on the port tack.

"Dated on board Her Majesty's steam ship-of-war the 'Dragon,' and signed by us in the harbour of Hernösand, in Sweden, this 18th day of November 1855.

"WILLIAM FITZHERBERT RUXTON, Lieutenant,
"WILLIAM BELFORD STUBBS, Lieutenant,
} On board Her Majesty's steam ship-of-war, the 'Dragon.'

"WILLIAM W. STEWART,
"Signed in my presence,
"Captain of Her Majesty's steam ship-of-war, the 'Dragon.'"

When the case came on for hearing the counsel for the claimant protested against this irregular attempt to introduce captors' evidence, and the Court remarked that the statement certainly could not at that stage of the proceedings be received as evidence, but that, to the best of its recollection, the practice in former times was, when either captor or claimant prayed to be allowed to bring in further proof, for him to state what he proposed to prove. The Court also said that the counsel must argue the case, before it could come to any decision upon it.

The Queen's Advocate, for the captors. The present is a case in which the Court will scarcely refuse to allow the captors to bring in further proof as to the place of capture. Even from the depositions there is so much doubt about the "Aline and Fanny," that, under the 22nd section of the "Prize Act, Russia, 1854," the Court would be justified in admitting further proof. The destination is said to have been Haparanda, lying at the head of the Gulf of Bothnia, so that the vessel was off the enemy's coast the whole of the way, and was under considerable temptation to enter the port of the enemy. Wherever she entered she would have had no difficulty with regard to her bills of lading. It appears from the depositions that in the course of her voyage she had, without any assignable reason, put into two Swedish ports situated in the [324] narrowest parts of the Gulf of Bothnia, though at the time the wind was favourable for her alleged destination. The inference from such conduct was, that she had put in there to obtain information respecting the blockading squadron, in order to slip into an enemy's port if she had the opportunity of so doing. Though the master swore that he was captured 20 miles from the enemy's coast, yet the captors stated that he was captured about seven miles from Jacobstadt, and they prayed the Court to allow them to bring in further proof to that effect. Authorities are not wanting for such a course—*The "Romeo"* (6 C. Rob. 351), *The "Charlotte Christine"* (6 C. Rob. 101). The reasons for adopting such a course are far stronger now than formerly, inasmuch as captors are now liable to condemnation in costs and damages, unless there appear to be probable cause of seizure. The officers of the navy are in this predicament;—if they do not seize vessels apparently attempting to break the blockade, they are liable to be tried by a court-martial; if they do seize them, they are liable to be condemned in costs and damages if the ship-papers disclose no ground of suspicion, and the master boldly swears he was captured many miles away from the enemy's coast. Nothing can be easier than to have the ship-papers correct for a legal destination, and to have a story all ready prepared in case a British man-of-war

should happen to fall in with them. The Court can hardly leave Her Majesty's officers in such a predicament, and refuse to allow them to give proof of the actual place of capture.

Dr. Deane, on the same side, referred to the Court's remarks on *The "Haabet"* (6 C. Rob. 54), in the case of *The "Leucade"* (Spinks Pr. Cas. 231; 2 Spinks (Ecc. & Adm.) 241), and contended that there must be some mistake, as the decision in *The "Charlotte Christine"* (6 C. Rob. 101), in which Lord Stowell admitted captors' evidence, was subsequent to that of *The "Haabet,"* in which he expressed his opinion strongly against such evidence. He also cited, from the MS. notes of the late Dr. Burnaby, the judgment of Lord Stowell in the case of *The "Friede"* (post, p. 330, n.).

Dr. Addams, for the claimant, contended to the effect of the judgment as to the admission of captors' evidence, and cited *The "Haabet"* (6 C. Rob. 54), *"Charlotte Christine"* (6 C. Rob. 101), and *The "Fortuna"* (ante, p. 307). He also contended that as there was nothing whatever in the ship-papers to raise any suspicion that the vessel was not going to any other port than her alleged destination, she ought to be restored with costs and damages.

**[325]** The Queen's Advocate having replied,

The Court reserved its decision, and directed both parties to furnish him with their respective prayers.

*Dr. Lushington.* This is a Lubeck vessel, laden with a general cargo. She sailed from Lubeck, and according to the evidence of the master, was bound to Haparanda, in Sweden, a destination admitted to be lawful. She was captured on the 14th of November, in the past year, 1855, and the alleged ground of her seizure and detention is, that she was attempting to break the blockade of the coast of Finland. The existence of the blockade and its legality is not disputed, the point at issue, or sought to be put in issue, is, the breach of the blockade.

The Court, according to its ordinary practice—a practice affirmed and sanctioned by all the highest authorities of the Law of Nations—looks primarily to the ship-papers and the depositions. With regard to the ship-papers, one single observation will suffice. As far as the bills of lading and documents of that description can tend to prove the destination, they all point, as strongly as such documents can do, to a destination to Haparanda.

I then come to the depositions. The master, on the 3rd interrogatory, says, "The ship was seized between 63 and 64 degrees of north latitude, about 20 English miles from land; we could just see the coast of Finland, and I suppose we were seized for being too near the Finland coast, so the captain of the 'Tartar' told me." On the 8th interrogatory, he says, "that the schooner put into Oregrund, in Sweden, and afterwards into Umea, also in Sweden, and the next day she was taken." On the 30th interrogatory, he deposes, "when I left Umea, the day before the schooner was seized, I had to steer south-east, and when we made the lighthouse, on the little island of Gadden, we steered east-north-east to get off the Swedish coast, on which we should have been driven, had the wind blown hard. My proper course was never altered save to keep free from the Swedish coast. When the wind is from the north-east it is very dangerous, and we are obliged to keep well off the land." Again, he says, "we were then 20 miles about from the coast of Finland." On the 35th interrogatory, he denies all attempts to break the blockade.

The evidence of the other two witnesses is not material. It does not contradict, but, so far as it goes, supports the testimony of the master.

It has been argued that there is an inconsistency in the evidence, as to the cause of putting into Oregrund and Umea. **[326]** Now, even if this were so, and I confess I can see very little difference between distress of weather and contrary winds, I do not perceive how such difference could affect the decision of this case. It was perfectly competent for this vessel to go into any Swedish port she pleased, and for any reason she thought fit, and I am really at a loss to understand how entering a Swedish port would affect the question of blockade, how so doing could render a breach of blockade more probable, or tend to prove a breach of blockade.

Reference has been made to the log, and various deductions attempted to be drawn from the entries therein. It has been said that the ship went to Abordso, and not to Umea, Umea being situated much higher up, but it appears to me that this objection is open to a similar answer, what possible criminal motive can with any logical deduction be ascribed to such a misdescription, even if it be one? And

is it not most probable, that the misunderstanding arose from the want of knowledge of the locality, and that Abordso may be the entrance to Umea, and is confounded with the town itself? I apprehend that, nautically speaking, it is not unusual to describe the entrance to a place as the place itself, for instance, in calling at Cork for orders, it must frequently happen that the vessel never attempts to enter the harbour at all,—merely calls at the mouth of the river. I have no right, nor is it consistent with justice, to assume guilt from a statement that is not clearly intelligible to me, and which does not furnish some rational and probable ground for imputing an unlawful intention.

Then how does this case stand? The captors have not asked for Trinity Masters; they have not contended that on the evidence, as it now appears before the Court, condemnation could be decreed,—that is to say, upon the ship-papers, the depositions, and log,—the primary evidence in the case. I apprehend therefore, upon the present evidence, it is impossible for me to say that a breach of blockade has been committed—the only ground upon which condemnation is prayed,—that I cannot require the claimants to produce further proof when already the papers point to a lawful destination, and when all the evidence in preparatory is to the same effect, and the onus is on the captors; and that consequently I must either restore or receive captors' evidence. I consider this to be a case in which the depositions, ship-papers, and log, do not afford any ground for suspecting,—any reasonable ground for supposing,—that this ship was committing a breach of blockade.

[327] At the risk of occupying more time than I would wish, I state these facts in detail, because I think it will presently appear that inconvenience has arisen from some reports furnished at previous times, from an attempt to render those reports too short and too succinct, and they have left the Court, and every person whose duty it is to study such reports, in a considerable state of doubt and difficulty in such cases.

Now, in the present case, certain certificates were brought in on behalf of the captors. They could only be offered as statements of what the captors alleged they were desirous of proving, if they were permitted so to do by the Court. The Court could not regularly receive them as evidence in the first instance, even if they had been presented in the most formal shape, for the Court is bound, as I think, when a case comes before it, to hear it upon the original and proper evidence in the case,—the depositions and ship-papers. But though the Court could not in that stage receive the certificates as evidence, yet according to my recollection, the practice of the Court has always been to permit both the captors and claimants to state at the hearing any facts they may deem conducive to their interest, and to pray leave to prove them, and for the Court after hearing the case on the primary evidence to deal with such application as it may think fit.

I cannot deny that on some occasions the strict rules of practice have in such cases been departed from, and that the Court in former times has been induced, when statements have been made founded upon affidavits or other documents, to look at them even when first offered in an irregular shape, but still only with a view of more formal proof, if such statements should be admitted to proof at all. Such distinctions may not always have been adverted to in the reports. My meaning is, that a statement has been offered, in the shape either of a certificate or affidavit from the captors, and the Court has taken into consideration the facts stated in that certificate, or that affidavit, without admitting the further proof at all, but merely, if I may use the expression, de bene esse, has discussed the question at the time without determining whether the evidence was admissible or inadmissible, and has decided against the captors, saying, "I will give you the benefit of presuming that such evidence has been given in a formal shape." I am afraid that that has occurred more than once in former days, and I will presently set forth the reasons why I think so.

Under these circumstances, the prayer of the captors is, that I should receive further proof to the effect that this ship was running for Jacobstadt, a blockaded port, that on seeing two of [328] Her Majesty's ships-of-war, she altered her course, was chased, and was captured 7 miles to the north-north-west of Jacobstadt. The claimants pray that I should reject that proof and decree restitution with costs and damages.

Before I approach the main question, I will observe that the evidence offered on behalf of the captors is not as to any collateral point, but for the purpose of contradicting and disproving the original evidence in the cause, and that even if it were

admitted, and no further proof were offered by the claimants, the Court would be placed in the predicament so forcibly described by Lord Stowell,—the predicament of having to determine the case without any satisfactory means of deciding upon the credit due to the respective parties.

But, passing this by, I come to the main question. The case, as it stands, being according to my opinion a case for immediate restitution, ought the Court to receive evidence to contradict the depositions and the ship-papers, and to prove a breach of blockade?

I have already, in other cases, expressed my opinion, that the Court ought not to receive such evidence, and I have stated my reasons, and I have no intention to repeat them. I refer especially to *The "Leucade"* (Spinks Pr. Cas. 231; 2 Spinks (Ecc. & Adm.) 241).

But as some cases have been cited by the counsel for the captors, which have not, on former occasions, been brought under the consideration of the Court, I deem it to be my duty, in a matter of so much importance, to consider these cases, and to inquire whether they ought to induce the Court to depart from its former opinion. These questions were at all times replete with difficulty; and that difficulty is now greatly augmented when the consequences may be, not simple restitution to the claimant, but condemnation of the captors in costs and damages, a consequence which formerly would not have followed. It is therefore both my duty and inclination to see if any fresh light can be thrown on this subject.

The question then which I propose to myself is this, whether Lord Stowell has or has not expressed his judicial opinion against the admission of captors' evidence in cases similar to the present? That is the question I have to determine, and I pray that these words may be remembered, for there are many distinctions which may arise in cases similar to the present.

It appears to me that the case of *The "Haabet"* (6 C. Rob. 55), decided on the 20th of June 1805, and the case of *The "Glierktigheit"* (6 C. Rob. 58 n.), decided on the 25th of July 1805, furnish **[329]** conclusive evidence of the judicial opinion of Lord Stowell on this question, and that he had supported such opinion by very powerful reasoning.

Of course I do not mean to go over the case of *The "Haabet"* again, but I may refer to one single observation there. After having stated certain facts, he says, "The general rule of law notwithstanding, is, that on all points the evidence of the claimants alone shall be received in the first instance; and if no doubt arise upon that view of the case, the Court is bound, by the general law, as well as by the act of the British Legislature, to take those points as fully demonstrated." It is upon that exposition of the law that the Court has hitherto acted, and founded all its previous judgments.

Now, it will be desirable to see whether Lord Stowell, subsequently to the case of *The "Haabet,"* in any degree departed from the opinion so strongly and so forcibly expressed by him; and, I may add, not only forcibly expressed in the very passage I have read, but in the whole reasoning he has set forth in giving judgment in that case.

In the course of the argument reference was made to what fell from the Court in the case of *The "Leucade"* (Spinks Pr. Cas. 231; 2 Spinks (Ecc. & Adm.) 241). I repeat what I said in that case, and I am not inclined, till further advised, to depart from one single syllable that I uttered there as being my conviction of what is the law and practice of this Court. I believe I never did say, and I certainly did not mean to say, that, antecedent to this case, captors' evidence had never been admitted in cases similar to *The "Haabet"* and *The "Glierktigheit."* I could not well have thought so, and if I said so it must have been a mere slip of the tongue, and for obvious and plain reasons because these two cases themselves furnish proof that the evidence of captors in like cases had been admitted, and the effect of these cases is, that Lord Stowell held the former instance of the admission of such evidence to be mala praxis, and expressed his opinion that it would not be expedient to follow it in future. They furnish, in fact, evidence that such practice would not be unusual in these Courts. What I said was this, "Now, to the best of my knowledge and belief the practice of this Court was as follows; I speak of general rules, to which there may be few, and very few exceptions, as in the case of *The 'Haabet.'* Captors' evidence as to the fact attending the actual capture, for the purpose of procuring condemnation, was almost

universally excluded,"—almost—"I might say, with few exceptions, such as the case of *The 'Haabet,'* and the other **[330]** case cited. Those are the only two cases on record,"—I mean in the reports, of course,—"and Lord Stowell shews in his judgment, and it also appears in a note to *The 'Haabet,'* that he was determined not to admit that practice in future." I really am not sensible that there is any error in the statement of the law on the part of the reporter, but if there be an error, the error is with me and not with the reporter.

Now, examples of what has been done prior to the case of *The "Haabet"* and *The "Glierktigheit,"* would be, I think, of little or rather no weight, because they are acknowledged by Lord Stowell and are repudiated by him. The true question would be, did Lord Stowell depart from the principles he laid down in *The "Haabet"* and in *The "Glierktigheit"*? Now, though this question could not be affected by former practice, still I deem it right to notice the case cited by Dr. Deane from Dr. Burnaby's notes to the case of *The "Der Friede."* (*a*) I have gone through that case. That case commenced on the 14th of February 1803. I have that case here, but I really do not know that I should be justified in reading through the whole of it. On the 3rd interrogatory, in that case, the master swears that "the ship was seized in the river Weser, lying close to the Mellen buoy, lying just above the Red Sand, in the month of August 1803, by reason of his bringing his ship to anchor in the river after having been desired by the captors to proceed to sea." I had better perhaps state what the general fact was. The master entered the river Weser, ignorant of the blockade which had taken place, and he was warned by one of His Majesty's ships of war, and was desired to go elsewhere. Instead of going elsewhere he anchored his vessel in the immediate neighbourhood of His Majesty's ship of war, and the officer commanding that ship being of opinion that he intended to break the blockade, ordered him away. He refused to proceed unless he could get a pilot, and a pilot he said he could get cheaper in the river than by going to Ider, whither the commanding officer desired him to go. In consequence of this the vessel was seized and detained, and brought here for adjudication.

**[331]** I must observe, that in this case there was the most extraordinary irregularity I ever saw in any case. Two of the captors' witnesses were persons from on board his own ship, not from the ship captured. There was an affidavit bringing in the ship-papers sworn by a person who never saw the ship-papers in his life; in short, there was a mass of irregularity such as I never remember to have occurred in any case during my practice. This was long before I was conversant with these Courts.

Now I have looked at the minutes of this case which I now hold in my hand, and I will state what they were:—On the 6th of October the claimants' proctor brought in a protest of the master, mate, and mariner, and a further attestation of the master, and prayed the ship to be restored. In the minutes there is nothing said as to any prayer on the part of the captors,—nothing at all,—to be allowed to give evidence in the case. The Queen's Proctor merely prayed condemnation on the evidence brought in on the part of the captors. Whether it was received or not I cannot say, because the case was appealed, and there the captors' affidavit was exhibited, but whether or not that affidavit was ever received by Lord Stowell the minutes make no mention of.

What, then, was the result of the case? Lord Stowell delivered his judgment, which was read by Dr. Deane from a short note by Dr. Burnaby. Lord Stowell, taking the evidence of the captors into consideration, was of opinion that the seizure was premature, and he restored the vessel. That was the state of the case; but he does not say he admitted the evidence as captors' evidence; but I presume he had admitted all the facts, and even upon the captors' own evidence he restored the

(*a*) In the possession of Dr. Pratt, who has kindly favoured the editor with a copy. "Captors' affidavits admissible in cases of blockade. Friede, Mehrtens, October 6, 1803. Question whether party has been guilty of breach of blockade. I do not feel that indisposition to affidavits of captors;—generally true that evidence that Court proceeds on, is that afforded by claimants. But circumstances occurring at moment of capture are open to both—standing on equal footing as to knowledge and nearly so as to interest, objection therefore to evidence from captors not so strong. In other cases there are documents as well as parole evidence, but evidence at moment of seizure in blockade must be parole. Lay down no general rule as to affidavits from captors."

vessel. Upon this state of things the case went up on appeal, and the consequence was, that the judgment was affirmed with costs. Their Lordships were not much in the habit of giving costs, but they did it on that occasion. So much for this state of the case. I cannot undertake to say exactly what was done because the minutes do not afford me that satisfactory information which I should have expected; but this is quite clear, among the papers printed there is the affidavit of Captain Rosenhagen and others, namely, the affidavits of the captors, dated September 23, 1803, and there is also the affidavit of a seaman as to the capture, dated September 12, 1803.

Now, if I am to form a conjecture, and it is really no more than a conjecture, from such imperfect materials, I should say that the Court heard the statement of the captors, and came to **[332]** the conclusion that even if it had been admitted it could not have worked the effect of condemnation. However, I do not lose sight of the observations which Dr. Burnaby reports as coming from the mouth of Lord Stowell. I mean the observations respecting the reception of evidence as to the place of capture, which, if correctly reported,—which there is no reason to doubt,—are very strongly in favour of receiving captors' evidence under the circumstances. I do not lose sight of those observations, but I think the answer to them is the judgment in *The "Haabet,"* which goes exactly to the point as to the place of capture itself. If Lord Stowell, in 1803, did express himself in the terms which the note of Dr. Burnaby's states he did, then the answer is, that two years afterwards, in 1805, he changed his opinion on that point—the point of receiving evidence from the captors as to the place of capture.

There were two other cases cited by Her Majesty's Advocate; to both of them I have referred, and it will be well to make an observation upon them. One was the case of *The "Romeo"* (6 C. Rob. 351). I think that the question then under the consideration of the Court,—viz. the admission of a document from another ship,—depends upon reasons so wholly different from the present, that it cannot be made applicable with any stringency to the case now under consideration. With regard, however, to the general reasoning attributed to Lord Stowell in that case I am compelled to say, with all my respect for that great Judge, I cannot concur in it. Lord Stowell is said to have expressed himself thus (C. Rob. 355)—"The Act of Parliament ordains, that if any doubts arise the Court may direct further proof; but it has not limited the cause of doubt to evidence actually on board, nor could it with propriety have imposed any such restrictions." Now this is the passage from which I am compelled to dissent—"The Court itself might possess information that would completely falsify the claim. Could it be said in such a case that, because the depositions and the formal papers were consistent, there should be no means of extracting the real truth of the facts? Could it be expected that the Court should proceed to judgment on the mere formal evidence, in opposition to its own private conviction that the whole of what was there stated was false? It would be impossible to maintain that proposition to the utmost extent."

I must say I conceive that the Court, as to facts,—as to all that relates to the ship, and its destination and employment,—ought to know nothing but the evidence before it. As to the **[333]** law and the fact of blockade of course the case is wholly and entirely different, and here the Court would avail itself of any information which came within its reach or power. I am, therefore, bound to declare, that I wholly discard the notion that the Court may act on any information not judicially brought before it. I do not think it necessary to go further into that case, because the question of admitting evidence from on board another ship really is governed on principles entirely different from this.

I now come to the case of *The "Charlotte Christine"* (6 C. Rob. 101), which was also cited. That case was decided on the 1st of August 1805, and after the case of *The "Haabet"*; but it is to be remarked that the captors' evidence was received prior to the decision in *The "Haabet,"* as appears by the minutes of the proceedings in that case.

This fact alone would prevent the case of *The "Charlotte Christine"* from being an authority overruling *The "Haabet,"* even if there were no distinguishing circumstances; but it is most remarkable that the judgment throughout is founded upon the claimants' evidence, and not upon the captors'; and if any conclusion is to be drawn from it at all, it would rather appear that Lord Stowell, having admitted the captors' evidence prior to the case of *The "Haabet,"* was reluctant, after having given his judgment

in that case, to make any use of the captors' evidence in the case of *The "Charlotte Christine."*

I will not read the whole of that judgment in order to make good my words, because I think that would be wholly unnecessary, but I will read merely the conclusion of it. After having referred to the evidence of the claimants throughout, Lord Stowell says—"On a full consideration of all the circumstances of the case, and on the representation of the party himself, I am bound to pronounce that this ship and cargo were sailing in breach of the blockade."

Now I commend to persons the whole of that judgment, and if anyone wishes to understand this subject accurately and minutely, he will there see a specimen of Lord Stowell's skill—he will see how he was enabled to pronounce that judgment, as he did pronounce it, without reference to the captors' evidence (though he had admitted it), and as it appears to me clearly avoiding that evidence, in accordance with the opinion which he had expressed in the case of *The "Haabet."*

But this gives rise to another observation when one looks into it minutely. In the report of this case it appears that on **[334]** the original depositions the master had made certain statements. Now what follows in the report? It does not appear that it is the evidence, but it is, in fact, a statement of the learned reporter, and a mixture of what did appear in the original depositions and in the captors' evidence. Now that should be borne in mind if this case is to be understood; and then there is another fact that must be noted here, viz.—that this was a case where there was suspicion on the original evidence—a clear cause of suspicion, the vessel being within a mile and a half of the French coast, of which the greater part was blockaded, in the immediate neighbourhood of Havre. Therefore in all these points of view *The "Charlotte Christine"* would not operate as a precedent.

There is another case not reported, for the discovery of which I am indebted to the Registrar—that is *The "Rapid"* (Fleming). I mention this because my object is to lay before counsel and the public the whole that can be said on the question, whether it makes in favour of my opinion or not. That case no one can well understand until he has taken the trouble of going into the original papers, and seeing what actually did occur. *The "Rapid"* (Fleming), as reported in Dr. Edwards' Admiralty Reports (Edw. 228), is merely a case which was decided on the question of carrying despatches. Dr. Edwards states, that the question of destination having been abandoned by the captors, the case was argued only on the point of carrying despatches. The case was carried up to the Court of Appeal; and I find,—here are the papers now before me,—that one of the principal reasons stated on behalf of the captors' counsel for carrying up that appeal is, that the vessel was going to a blockaded port.

Now there the captors' evidence was admitted by Lord Stowell, and admitted after the case of *The "Haabet."*(*b*) I think it right to state that. But I am bound to say, after having looked at this case with some care, I cannot venture to pronounce an opinion how, why, or wherefore captors' evidence was admitted on that occasion. There is no report of it that I am aware of anywhere beyond what I have stated above. The case occurred within my own time, but I have no **[335]** recollection of it, nor any note of it that I can find. I think, however, there is a circumstance in that case which accounts for the admission of captors' evidence without infringing on the general principle. That circumstance is this—there was an admitted confusion in the log. It was admitted that one of the days on which the log ought to have been entered up had been omitted, and that the entry of the subsequent day applied to the preceding. There was a cause of suspicion on the primary evidence which might, or might not, for I do not know, be the reason why captors' evidence was admitted.

I have only to observe, that I have mentioned this case because I am anxious to disclose all that I know upon the question; and if the present case should be carried to the Court of Appeal, I hope this case and others will be made available, and that

(*b*) Minutes in the case of *The "Rapid."* "1810. Feb. 6. The cause came on for hearing, when the Judge directed the same to stand over, and reserved the consideration of the effect of carrying the despatches. Feb. 16. The cause again came on for hearing, when the Judge took time to deliberate whether he should permit the captors to exhibit affidavits. March 6. The Judge, having maturely deliberated, gave permission to the captors to bring in attestations."

their Lordships will be in possession of all the information which I, at least, can throw on the subject.

These are all the cases, so far as I can find,—though I will not say what the investigation of the printed volumes might produce,—having any application to *The "Haabet,"* or to the question now before me. It appears to me that they do not in any degree whatsoever impugn the authority of that deliberate judgment, nor leave to me any lawful and just cause for departing from it. Sure I am that the reasoning in *The "Haabet"* and *The "Glierktigheit"* cannot in any degree be refuted, and the consequences likely to arise from a contrary doctrine cannot be denied.

It is true, however, as has been forcibly argued by Her Majesty's Advocate, that circumstances have been somewhat changed, and that the captors run greater danger of being condemned in costs and damages than they did formerly. But however this may be, and for aught I say to the contrary, it may be a reason for the Judicial Committee to depart from the authority of *The "Haabet,"* yet I do not think it is competent to me to adopt such a course. Were the admission of captors' evidence an indisputable corollary to the case of *The "Ostsee"* (Spinks Pr. Cas. 174; 2 Spinks (Ecc. & Adm.) 170), it would be both my duty and my inclination to acknowledge it; but I do not think that such a consequence can be fairly predicted to follow from that judgment, and I think so both from the terms of the judgment itself, and from the fearful consequences which, in the opinion of Lord Stowell and of myself, would necessarily follow from the alteration of the practice. If, therefore, the practice is to be altered in this particular, and if captors' evidence is to be received, it must be **[336]** the act of a higher authority than mine—it must emanate from the Judicial Committee.

For these reasons my decree will be as follows:—In the present case I must reject the prayer of the captors for the admission of the evidence stated. I must restore the ship and cargo, but without costs and damages, because I think that the place of capture, as originally described by the master himself, proves that the seizure and detention were not without justifiable cause.

To prevent mistakes hereafter I must add one other observation. I do not mean to say, nor, as I apprehend, did Lord Stowell, that there were not cases, even as to the place of capture, where captors' evidence might be received. I can conceive cases in which it might appear from the original evidence and the depositions that there were doubts respecting which it might be just and consistent with principle to admit captors' evidence, but these would be exceptional cases, and not, in my judgment, resembling the present, and would have to be determined upon their special circumstances whenever they might arise.

My decree is founded upon the conviction that no serious doubt arises on the primary evidence in this case,—the depositions and ship-papers,—that this ship was, according to the evidence, taken 20 miles from the coast of Finland. If that can be constituted into a cause for detention, and to justify the production of captors' evidence, it does appear to me that any vessel navigating the gulf, which is about 60 miles wide, might be detained on a similar presumption. The decree is, therefore, simple restitution.

THE "PANAJA DRAPANIOTISA"(*a*)—(Harzaliako). Jan. 30 and Feb. 6, 1856.—The affidavit accompanying the claim must state the residence of the claimant.—A prayer for further proof must be founded upon a statement of what is intended to be proved.—The omission of such statement renders a claimant liable to costs.

[S. C. 2 Eng. Pr. Cas. 560. Followed, *The "Marie Glaeser,"* [1914] P. 221. Referred to, as to form of affidavit, *The "Palm Branch,"* [1916] P. 238.]

This vessel sailed out of Odessa in ballast, under Greek colours, on the 30th of May 1855. On sailing out of the harbour her master sent to Her Majesty's ship "Niger," which was then blockading Odessa, to inquire whether he might pass out for the Danube, and was informed that, if unladen, he might do so, but must first come alongside the "Niger" to have his papers examined.

**[337]** The examination of the ship-papers and other suspicious circumstances led to her being seized as prize and sent to Malta, where the examinations in preparatory were taken.

---

(*a*) The case of *The "Hariklia,"* heard on the same day, was precisely similar, and the judgment of the Court applied to both.

An affidavit and claim were given in by Michael Zarifi, of Leadenhall Street, on behalf of "Paul Iraclidi, merchant and shipowner, a subject of His Majesty, Otho, King of Greece, the true, lawful, and sole owner and proprietor of the said ship."

When the case came on for hearing, the Queen's Advocate (with whom was Dr. Deane) for the captors, took a preliminary objection to the claim and affidavit accompanying it, that the place of residence of the person in whose behalf the claim was made, and also the usual denial that any interest in the property remained in anyone "inhabiting within the country, territories, or dominions" of the enemy, were omitted, and that consequently it did not appear that the claimant had any locus standi in the Court.

The Court said it would give no decision upon the point until it had heard the counsel for the claimant.

Dr. Addams, for the claimant, stated that this and other vessels had entered Odessa under Servian colours, and had been detained by the Russian government, but subsequently released; that certain expenses had been incurred, which the owners were unable to defray, and that this vessel had been sold to Mr. Iraclidi, a Greek merchant, then residing at Odessa, but a subject of the King of Greece, and that he intended to dispatch her, and, in fact, did dispatch her, to Odessa. He said, that if Mr. Iraclidi had continued to trade with the ship from Odessa, she would, though under Greek colours, certainly be liable to condemnation, but that it might appear that Mr. Iraclidi had a house in Greece as well as in Russia, and that the vessel was intended to trade exclusively for that Greek house as a Greek vessel; and that it might also appear that Mr. Iraclidi was at Odessa for a temporary purpose, and that he was about to quit it.

He therefore prayed the Court, under the circumstances, to admit further proof in explanation of the real facts of the case, and cited *The "Jonge Klassina"* (5 C. Rob. 297), and *The "Herman"* (4 C. Rob. 228).

The Queen's Advocate opposed the prayer, and contended for immediate condemnation, on the ground that there was no claim before the Court, as it clearly appeared that Mr. Iraclidi was a merchant resident at Odessa, and therefore totally exlex, [338] and had no persona standi in judicio. *The "Hoop."* (*a*) He said that the claimant's counsel did not appear instructed to state what could be proved, if further proof were allowed, that the Court refused, in *The "Nina"* (ante, p. 279), to open a case to further proof, without information as to what could be proved, and when further proof could only lead to false evidence, and that no proof could possibly get rid of the master's evidence, that Mr. Iraclidi was a merchant resident at Odessa.(*c*)

Dr. Deane followed on the same side.

*Dr. Lushington.* I reserved my judgment in these two cases,—not because I entertained the slightest doubt what must be my decision, but for the purpose of considering; first, what was the practice with respect to claims and the affidavits in

---

(*a*) 1 C. Rob. 200, where Lord Stowell says—"In the law of almost every country, the character of alien enemy carries with it a disability to sue or to sustain, in the language of the civilians, a persona standi in judicio. The peculiar law of our own country applies this principle with great rigour. The same principle is received in our Courts of the Law of Nations; they are so far British Courts, that no man can sue therein who is a subject of the enemy, unless under particular circumstances, that pro hâc vice discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority, that puts him in the King's peace pro hâc vice."

(*c*) In answer to the 4th interrogatory, the master deposed: "I was appointed to the command of the vessel by Mr. Paolos Iraclidi, the owner, of Odessa, whereat he personally delivered up to me the possession, on or about the 22nd day of the month of May last. I left him at Odessa, where I believe him still to be, for he is established as a merchant thereat, and I believe it is his fixed place of abode, though I am not quite certain on this point. I know not how long he has resided at Odessa, nor where he was born, but I know him to be a subject, like myself, of the King of Greece." And in answer to the 8th interrogatory: "Whilst at Odessa, she was under the direction and management, in respect to her employment or trade, of the owner on the spot, Mr. Paolos Iraclidi, the party I have already named, with whom I should have had to correspond, when away from Odessa"

support thereof, and the prayers both of the captors and claimants; and secondly, what must be the description of the statement, upon which the Court would decree further proof.

Now, speaking to the best of my recollection, and so far as I have been able to refresh my conviction by search as to matters with which I have not been directly conversant for so many years, and which involve only questions of practice and not principle, and consequently take less hold of the memory. With respect to the claim offered in this case, and the affidavit in support thereof, I have caused a search to be made as to the practice both in the former and present war, and I am glad to find that the principle and the practice, with a few unimportant exceptions, entirely concur.

[339] The principle is this, that to support a claim in the Prize Court the individual asserting his claim must first show that he is entitled to a locus standi. No person to whom the character of enemy attaches can have such claim, save by the express authority of the Crown; therefore to prevent deception, which might arise from the use of ambiguous terms, and to stop claims which might be preferred in one sense by the subjects of friendly or neutral states resident in the enemy's country and carrying on a trade there, it has always been deemed necessary that the claimant should describe, both affirmatively and negatively, the character in which he claims.

He must describe the place to which he belongs, and he must negative all enemy's interest in a form specially framed for that purpose, and intended to apply, to all intents, to any person resident within the territories of the enemy, to whatever country he may happen to owe allegiance.(*a*)

---

(*a*) The following is the usual form of claim and affidavit:—

Admiralty Prize Court.
The Ship }
Master. }
185

Appeared personally of in the Kingdom of Sweden, master mariner, and made oath that he is a subject of His Majesty the King of Sweden and Norway, and is duly authorized to make the claim hereunto annexed as agent, and on behalf of and all of in the kingdom of Sweden, merchants, and shipowners, and subjects of His Majesty the King of Sweden and Norway, the true, lawful, and only owners and proprietors of the above-named ship or vessel , and of the freight due for the transportation of the cargo now or lately laden therein, and which ship or vessel was seized, to wit, by the officers of Her Majesty's Customs for the port of , on the day of . And the Appearer further made oath, that he verily believes that neither the Emperor of all the Russias, nor any of his subjects or others inhabiting within any of his countries, territories, or dominions, their factors or agents, nor any others enemies of the Crown of Great Britain and Ireland, had at the time of the seizure thereof, as aforesaid, or now have, directly or indirectly, any right, title, or interest in or to the said ship or freight, but that the same were at the time of the seizure thereof, and still are, and when restored will still be, the property of the said only, neutral subjects; and lastly that the claim hereto annexed, is (as he verily believes), a true and just claim, and that he shall be able to make due proof and specification thereof.

On the day of the said }
was duly sworn to the truth of this affidavit. }
Before me

Admiralty Prize Court.
The Ship }
Master. }

The claim of of in the Kingdom of Sweden, master mariner, a subject of His Majesty the King of Sweden and Norway, on behalf of and all of in the Kingdom of Sweden, merchants and shipowners, and subjects of His Majesty the King of Sweden and Norway, the true, lawful, and only owners and proprietors of the above-named ship or vessel and of the freight due for the transportation of the cargo now or lately laden therein, and which ship or vessel was seized, to wit, by the officers of

The excepted cases are where an enemy merchant claims under an Order in Council, or licence, and then, of necessity, the form is altered and the ground of the special claim inserted. The form of the affidavit has been altered from time to time, according to the States with which Great Britain was at war. Originally it excluded only persons resident in France; as the war became extended, it was altered to affect the subjects of other countries declared to be at war with Great Britain.

Now, it appears from the search that has been made, that in the war previous to this—that of 1798—the address of the persons for whom the claim is given has always been inserted. In the long list which I now hold in my hand, there is not a **[340]** single exception—the address of the persons always being inserted—by the address I mean the particular place to which he is described as belonging. Then, with regard to the clause in the affidavit beginning thus, "inhabiting within any of the countries, territories, or dominions of so and so," there are certain exceptions. Out of 30 or 40 there are three or four cases in which this clause is omitted, but these are special instances, and are entirely accounted for by the circumstances of each individual case. Such, for instance, is the case of *The "Le Sparck"*—it was necessary that the claim or affidavit should be special, because there were very special circumstances attending that case. The claim, for instance, was of this kind. The island from which the property had been shipped had at one time been in possession of the Crown of Great Britain, afterwards had been restored to France, and again re-conquered by Great Britain; the property had been shipped during the time when it was under French dominion, but, before the capture, the country had again become subject to Great Britain; the affidavit of claim was therefore subject to the alteration which was necessarily called for by such peculiar circumstances. Such was the case of *The "Le Sparck."*

It is not necessary to mention the other cases; but wherever the exception has been inserted, it is fully warranted, and indeed required, by the facts of the case. It may, therefore, now be taken with regard to the practice in the prior war, that it was what I have stated. With respect to this war it appears, with regard to the address, that in every case except one or two—I am not prepared to say whether this did not happen from inadvertence—the address has uniformly been inserted, till the case under consideration.

**[341]** There have been some cases in which the clause "inhabiting within any of his territories," has been omitted, because the claims have been made by Russians alleging themselves to be protected by an express Order in Council. There are two or three other cases in which, in consequence, I presume, of no notice having been taken, and the objections not having been brought before the Court, the clause has been omitted.

I conceive this examination shews what the practice is, and as it is conformable to principle we must adhere to it in future. Having said so much with respect to the claim and affidavit which would clearly prove the claim and affidavit in these cases to be entirely defective, it is not necessary for me to enter into that question, because my judgment will be founded on other circumstances.

I now proceed to consider the case in the other alternative, that is, the effect of further proof.

It was customary when the ships were brought in, for the proctor for the captors to file what some may have called a prize libel. This libel or allegation contained no special facts—it was a matter of mere form, and, in my opinion, of unnecessary form. It concluded with a prayer for condemnation—that was the only prayer given in. With respect to the claimants, a claim, in the form now in use, was brought in, and they claimed originally for restitution with costs and damages, and I am not aware that before the hearing any other prayer was ever made—either brought into the Registry or offered to the Court.

When the cause came on for hearing, the counsel for the captors opened his case and prayed for condemnation, or argued that it was a case for further proof, according

---

Her Majesty's customs for the port of , on the day of for the said ship or vessel and freight, as the true, lawful, and sole property of the said and neutral subjects, and for all such losses, costs, charges, damages, demurrages, and expenses as have arisen, or which shall or may arise, from or by reason of the said seizure.

to his own judgment, but he had not, as a matter of right, any power to call on the claimant's counsel to state what would be his particular prayer.

The claimant's counsel then argued for simple restitution, restitution with costs and damages, or further proof, as he deemed most advisable. Of course if the captor's counsel asked only for further proof, and the claimant's counsel knew that further proof was the utmost he could obtain, he at once acquiesced, and then there was no argument. In practice, cases for further proof were for the most part very quickly disposed of; the great majority of such cases arose from the proof of the property, belonging as claimed, not being sufficient, as, for instance, where the master could not speak to it in his deposition, or where the ship-papers did not describe to whom the property belonged.

The rules of the Court applying to such questions were so well known that little or no dispute arose. Both parties knew **[342]** what must be a case for further proof, and it was ordered by the Court without any discussion.

Such was the general practice in cases of that description, but of course there were many cases where the sole question was condemnation or restitution, and some where the captors contended that no further proof ought to be allowed, and others where the claimants contended that no further proof was necessary.

The result of the whole was that each party was entitled to take his own course, and neither would be compelled at the opening to make any specific prayer. The counsel for the captors could not ask the claimants whether they asked for restitution or further proof, neither could the counsel for the claimants ask the captors whether they prayed condemnation or would consent to further proof,—I mean as a matter of right,—de facto it was done almost every day, or I may say almost every hour. The court was not fettered by any restriction, but at any time it might ask either party what was his prayer. This power, however, could avail but little, for the captors might answer, as in fact they often did, in the alternative—condemnation, or, if that be refused, further proof, and so the claimants might answer restitution or further proof.

Now I deemed it might be convenient to those who practise in Prize proceedings that I should state what, to the best of my recollection, was the practice of the Court. I will only add the reason why in the case of *The "Chrissys"* I asked Dr. Addams what was his prayer. I did so,—not with the slightest intention of fettering his discretion in offering any prayer in the alternative or otherwise as he might think fit,—but because it had been mentioned by him in argument that on account of the small value it might not be expedient to ask for further proof, or to take it if the Court were disposed to grant it. Had I not put the question I might—I do not say I should—have been under the necessity of ordering further proof when such order would have been nugatory, when the owners would not accept it, and when the only consequence would have been delay and the deterioration of the property to no possible advantage whatever to any party.

With respect to the present cases I mean to make a few observations. It is admitted that these are not cases in which restitution could be claimed upon the evidence before the Court, indeed I think the true description is that primâ facie these are cases for immediate condemnation.

The masters state that these vessels are the property of a Greek subject carrying on trade at Odessa. If that be the true **[343]** description, then, beyond all doubt, the ships are subject to condemnation as enemy's property.

Dr. Addams very properly declined to argue for restitution, but begged that the Court might admit further proof, but he had no instructions which enabled him to state the facts that further proof would establish, nor upon what ground further proof could found a claim to restitution.

Now the Court has never bound itself to require that further proof should be asked for in any particular form; frequently it might happen that want of time and opportunity to advise with the owners might prevent such prayer from being accompanied by any affidavits or documents.

But what the Court always requires is, that whether the request of further proof be founded on the statements of counsel or affidavits or other documents, such a case should be presented as might, if it were proved, entitle the claimant to restitution. Then, according to the circumstances, the Court would allow further time to substantiate the statements made by counsel, or it would decree further proof at once.

In the present instance the counsel are not instructed even to say what the

description of case might be, which they propose to establish by further proof. They, and of course their proctors, are in total ignorance.

I must say that the prayer for further proof, under such circumstances, is not only unprecedented, but I think without any justification, and I trust that such a prayer as this will not be repeated, lest I should be under the necessity, if such a prayer were repeated, of condemning the claimant in costs.

I condemn these two ships.

THE "CHRISSYS"—(G. N. Moraiti). Jan. 18 and 30, 1856.—A vessel captured 60 or 70 miles out of its course, and in the neighbourhood of a blockaded port, cannot be restored without further proof of its destination.—If the claimant declines further proof the Court is bound to condemn the property.

[S. C. 2 Eng. Pr. Cas. 568.]

This vessel, under Greek colours, took on board at Foki, in the Gulf of Smyrna, a cargo of salt, and sailed therewith, bound, according to the master's statement, for Tultsha, on the Danube. On the 22nd of May 1855 she was captured by Her Majesty's ship "Niger," about 25 miles to the southward of Cape Fontana, whereon the Odessa light stands, and was sent in for adjudication on the ground of an intention to break the blockade of Odessa.

A claim was given in on behalf of Mr. Constantine John Bolanachi, of the Island of Syra, a subject of the King of Greece.

The master stated in his evidence that he was proceeding to Tultsha, and that on reaching Constantinople he deemed it **[344]** necessary, in consequence of information he received as to the depth of water at the Sulina mouth of the Danube, to lighten the vessel, by disposing of a portion of the cargo, and that on the 19th of May he sailed with the remainder for Tultsha, where he expected to meet his owner. He also stated that he was the shipper of the cargo, and would have been the consignee if she had arrived at her destination. He accounted for the fact of his being far out of his course by saying, that he did not know where he was.

The Queen's Advocate and Admiralty Advocate for the captors. As there is nothing on the ship-papers to corroborate the master as to the destination of the vessel, the document on board resembling a cargo-paper for the salt, and no log, and as the vessel was captured 70 miles out of her course, for which the only excuse given is, that the master did not know where he was, the inference is that she intended to break the blockade. The absence of the log leads to the inference that it has been destroyed.

If the Court thinks it cannot condemn, it is clearly a case in which it can allow the captors to give evidence as to the place of capture.

Dr. Addams for the claimant.

The value of the ship and cargo is considerably below 500l., and the master is the shipper, and would have been the consignee of the cargo if the vessel had reached her destination. This accounts for there being no cargo-paper. As to the log, these small foreign vessels frequently have none, and no inference of criminal intention can fairly be drawn from its absence. What are the probabilities of the case? If the master intended to go to Odessa, what necessity existed for his unloading any portion of the cargo at Constantinople? He would only have done that for the reason which he assigns, viz., that he could not otherwise have entered the Danube. Besides, the master must have known that Odessa was blockaded, and that it was 100 chances to 1 against his getting in there, and 1000 to 1 against his getting out again. Whatever may have been the reason of this vessel being out of her course, there is nothing to discredit the master's assertion that he was going to Tultsha.

The learned counsel expressed a hope that the Court would restore the vessel, but that if it would not do that, it would condemn it, inasmuch as the value of the property was so small, that if further proof were ordered the whole proceeds would be absorbed in costs.

The counsel for the captors having replied, the Court reserved its decision, and directed the parties to furnish it with their respective prayers.

**[345]** *Dr. Lushington.* I shall dispose of this case in a very few words. This is a case in which, if further proof had been asked on behalf of the claimants, I should not have hesitated in allowing them to bring it in. But, as the case stands, I have only to decide between restitution and condemnation.

It appears, according to the evidence of the master himself, and the circumstances set forth, that he was 60 or 70 miles out of his course, away from his proper destination. The port, into the neighbourhood of which she had got, was an enemy's port. I apprehend it to be quite clear, under such circumstances, that, according to law, there must be further proof to entitle the claimant to restitution. I desired that a prayer might be made with reference to the decision of the Court, that the case might be disposed of according to what the claimants thought most for their advantage. The prayer is for restitution, not further proof. I am under the necessity, as no further proof is asked for, of condemning the ship.

Dr. Addams. The Court is aware of the reason.

The Court. The smallness of the property. I have given the best consideration to the case. If I could, I would have restored, on payment of captors' expenses. It is a case for proof, I am bound by the law to say so, and if the parties will not accept further proof, I must condemn the property.

THE "NINA"—(Stipanovich). Judicial Committee of the Privy Council, Feb. 7 and 11, 1856.—The judgment of the Court below simply affirmed with costs.

[S. C. 2 Eng. Pr. Cas. 570.]

This was an appeal from a judgment of the Admiralty Prize Court condemning this ship, and refusing to allow the claimant to bring in further proof.

The facts of the case have been already reported at p. 276.

Dr. Addams and Dr. Twiss appeared for the appellant; the Queen's Advocate and the Admiralty Advocate for the respondent.(*a*)

**[346]** The Court consisted of the Right Honourables

SIR EDWARD RYAN. SIR JOHN DODSON.
THOMAS PEMBERTON LEIGH. SIR WILLIAM HENRY MAULE.
SIR JOHN PATTESON.

The Right Hon. Thomas Pemberton Leigh delivered the judgment of their Lordships.

The learned Judge in the Court below appears to their Lordships to have fallen into a little inaccuracy with respect to the period at which the claimant quitted Odessa. He appears to have considered that he remained till November 1854; the result of the evidence, in the opinion of their Lordships, is that he quitted Odessa soon after midsummer in that year, but it makes no difference in the conclusion at which the learned Judge has arrived. With that single exception, their Lordships entirely concur in opinion with the learned Judge, both as to the facts and the law of the case; they think that he has exercised a perfectly sound discretion in refusing further proof, and they must recommend to Her Majesty to affirm the sentence, with costs.

---

(*a*) One document, No. 13, was strongly relied upon, as shewing that Mr. Gherdacovich, the claimant, was not the sole owner. It was the copy of a letter from the master to his principal at Odessa, in which he expressed a hope that after having served him for the long period of four years, he would be allowed the 5 per cent. upon the remittances; and stated that the "Nina" had not been so profitable, but reminded the principal that he did not remit for the expenses as in past times, as the former captains had not only received this 5 per cent., but also presents in addition. He hoped his demand would be complied with. This letter was dated "Glubok, 15th December 1854," and in a postscript the master begged an answer to his demand to be addressed to Constantinople, for which place he was bound. It concluded with these words—"Communicate this to Mr. Martino Gherdacovich," thereby showing that the principal to whom the letter was addressed was not the claimant.

# APPENDIX.

**[ix]** J.—Convention between Her Majesty and the Emperor of the French, relative to Joint Captures, signed at London, May 10, 1854.

[Ratifications exchanged at London, May 20, 1854.]

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the Emperor of the French, being desirous to determine the jurisdiction to which the adjudication of joint captures which may be made during the course of the present war by the naval forces of the two nations, shall belong, or of captures which may be made of merchant vessels belonging to subjects of either of the two countries by the cruizers of the other, and being desirous to regulate at the same time the mode of distribution of the proceeds of joint captures, have named as their plenipotentiaries for that purpose, that is to say:

**[x]** Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, the Right Honourable George William Frederick, Earl of Clarendon, Baron Hyde of Hindon, a Peer of the United Kingdom, a Member of Her Britannic Majesty's most Honourable Privy Council, Knight of the Most Noble Order of the Garter, Knight Grand Cross of the Most Honourable Order of the Bath, Her Britannic Majesty's Principal Secretary of State for Foreign Affairs;

And His Majesty the Emperor of the French, the Sieur Alexander Colonna, Count Walewski, Grand Officer of the Imperial Order of the Legion of Honour, Grand Cross of the Order of St. Januarius of the Two Sicilies, Grand Cross of the Order of Danebrog of Denmark, Grand Cross of the Order of Merit of St. Joseph of Tuscany, &c., &c., his Ambassador to Her Britannic Majesty;

Who, after having exchanged their full powers, found in due form, have agreed upon the following articles:

Article I.—When a joint capture shall be made by the naval forces of the two countries, the adjudication thereof shall belong to the jurisdiction of the country whose flag shall have been borne by the officer having the superior command in the action.

Article II.—When a capture shall be made by a cruizer of either of the two allied nations in the presence and in the sight of a cruizer of the other, such cruizer having thus contributed to the intimidation of the enemy and encouragement of the captor, the adjudication thereof shall belong to the jurisdiction of the actual captor.

Article III.—In case of the capture of a merchant vessel of one of the two countries, the adjudication of such capture shall always belong to the jurisdiction of the country of the captured vessel; the cargo shall be dealt with, as to the jurisdiction, in the same manner as the vessel.

Article IV.—In case of condemnation under the circumstances described in the preceding articles:

1. If the capture shall have been made by vessels of the two nations whilst acting in conjunction, the net proceeds of the prize, after deducting the necessary expenses, shall be divided into as many shares as there were men on board the capturing vessels, without reference to rank, and the shares belonging to the men on board the vessels of the ally shall be paid and delivered to such person as may be duly authorized on behalf of the allied Government to receive the same; and the distribution of the amount belonging to each vessel shall be made by each Government according to the laws and regulations of the country.

2. If the capture shall have been made by cruizers of either of the two allied nations in the presence and in sight of a cruizer of the other, the division, the payment, and the distribution of the net proceeds of the prize, after deducting the necessary expenses, shall likewise be made in the manner above mentioned.

3. If a capture, made by a cruizer of one of the two countries, shall have been adjudicated by the Courts of the other, the net proceeds of the prize, after deducting the necessary expenses, shall be made over in the same manner to the Government of the captor, to be distributed according to its laws and regulations.

**[xi]** Article V.—The commanders of the vessels of war of their Majesties shall, with regard to the sending in and delivering up of prizes, conform to the instructions

annexed to the present Convention, and which the two Governments reserve to themselves to modify by common consent, if it should become necessary.

Article VI.—When, in the execution of the present Convention, the valuation of a captured vessel of war shall be in question, the calculation shall be according to the real value of the same; and the allied Government shall be entitled to delegate one or more competent officers to concur in the valuation. In case of disagreement, it shall be decided by lot which officer shall have the casting voice.

Article VII.—The crews of the captured vessels shall be dealt with according to the laws and regulations of the country to which the present Convention attributes the adjudication of the prize.

Article VIII.—The present Convention shall be ratified, and the ratifications shall be exchanged at London within ten days from this date, or sooner if possible.

In witness whereof, the respective plenipotentiaries have signed the present Convention, and have affixed thereto the seals of their arms.

Done at London, the tenth day of the month of May, in the year of our Lord one thousand eight hundred and fifty-four. (L.S.) CLARENDON.
(L.S.) A. WALEWSKI.

Annex to the Convention between Great Britain and France, signed at London, May 10, 1854.

Instructions to the Commanders of Ships of War belonging to Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and to his Majesty the Emperor of the French.

You will find inclosed a copy of a Convention which was signed on the 10th instant between Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the Emperor of the French, regulating the jurisdiction to which shall belong the adjudication of the joint captures made by the allied naval forces, or of the captures of merchant vessels belonging to the subjects of either of the two countries which shall be made by the cruizers of the other, as likewise the mode of distribution of the proceeds of such joint captures.

In order to ensure the execution of this Convention, you will conform yourself to the following instructions;

Article I.—Whenever, in consequence of a joint action, you are required to draw up the report or procès-verbal of a capture, you will take care to specify exactly the names of the ships of war present during the action, as well as the names of their commanding officers, and, as far as possible, the number of men embarked on board those ships at the commencement of the action, without distinction of rank.

[xii] You will deliver a copy of that report or procès-verbal to the officer of the allied power who shall have had the superior command during the action, and you will conform yourself to the instructions of that officer as far as relates to the measures to be taken for the conduct and the adjudication of the joint captures so made under his command.

If the action has been commanded by an officer of your nation you will conform yourself to the regulations of your own country, and you will confine yourself to handing over to the highest officer in rank of the allied power who was present during the action, a certified copy of the report or of the procès-verbal which you shall have drawn up.

Article II.—When you shall have effected a capture in presence of, and in sight of, an allied ship of war, you will mention exactly, in the report which you will draw up when the capture is a ship of war, and in the report or procès-verbal of the capture when the prize is a merchant vessel, the number of men on board your ship at the commencement of the action, without distinction of rank, as well as the name of the allied ship of war which happened to be in sight, and, if possible, the number of men embarked on board that ship, likewise without distinction of rank. You will deliver a certified copy of your report or procès-verbal to the commander of that ship.

Article III.—Whenever, in the case of a violation of a blockade, of the transport of contraband articles, of land or sea troops of the enemy, or of official dispatches from or for the enemy, you find yourself under the necessity of stopping and seizing a merchant vessel of the allied nation, you will take care to:

1. Draw up a report (or procès-verbal), stating the place, the date, and the motive of the arrest, the name of the vessel, that of the captain, the number of the crew;

and containing besides an exact description of the state of the vessel, and of her cargo.

2. Collect and place in a sealed packet, after having made an inventory of them, all the ship's papers, such as registers, passports, charter-parties, bills of lading, invoices, and other documents calculated to prove the nature and the ownership of the vessel and of her cargo.

3. Place seals upon the hatches.

4. Place on board an officer, with such a number of men as you may deem advisable, to take charge of the vessel, and to ensure its safe conduct.

5. Send the vessel to the nearest port belonging to the power whose flag it carried.

6. Deliver up the vessel to the authorities of the port to which you shall have taken her, together with a duplicate of the report (or procès-verbal), and of the inventory above-mentioned, and with the sealed packet containing the ship's papers.

Article IV.—The officer who conducts the captured vessel will procure a receipt proving his having delivered up the vessel, as well as his having delivered the sealed packet, and the duplicate of the report (or procès-verbal) and of the inventory above-mentioned.

Article V.—In case of distress, if the captured vessel is not in a fit state to continue its voyage, the officer charged to conduct to a port of the **[xiii]** allied power a prize made on the merchant service of that power, may enter a port of his own country or a neutral port; and he will deliver his prize to the local authority if he enters a port of his own country, and to the consul of the allied nation, if he enters a neutral port, without prejudice to the ulterior measures to be taken for the adjudication of the prize. He will take care, in that case, that the report or procès-verbal, and the inventory which he shall have drawn up, as well as the sealed packet containing the ship's papers, be sent exactly to the proper Court of adjudication.

Article VI.—You are not to consider as prisoners of war, and you will give free permission to land, to all women, children, and persons not belonging to the military or maritime profession who shall be found on board the captured vessels.

With this exception, and those which your own security may suggest, you will not permit any person to be removed from on board the vessel; and in all cases you will retain the master, super-cargo, and others whose evidence may be essential to the adjudication of the prize.

You will treat as prisoners of war all persons whatever who may be found on board the enemy's vessels, with the exceptions above mentioned in § 1.

You will place no other restriction on the liberty of allied or neutral subjects found on board allied or neutral vessels, than such as may be necessary for the security of the vessel.

With respect to your own countrymen, you will treat them according to the general instructions you have received, and you will, in no case, deliver them up to a foreign jurisdiction.

The persons who may have been exceptionally removed from the captured vessels shall afterwards be sent back to their own country, if they belong to the allied nation; if they are neutrals or enemies, they shall be treated as if they had been found on board vessels captured by you separately. (L.S.) CLARENDON.
(L.S.) A. WALEWSKI.

**[xix]** L.—Numb. 21562. 1855. The "London Gazette."—Published by Authority. Friday, June 16, 1854.

Foreign Office, June 16, 1854.

It is hereby notified, that a communication has been received by the Lords Commissioners of the Admiralty, from Vice-Admiral Sir Charles Napier, commanding Her Majesty's naval forces in the Baltic, dated Hangö Bay, 28th May, 1854, informing their Lordships that the ports of Libau and Windau, on the coast of Courland, and other ports, roads, havens, or creeks, from lat. 55° 53′ north, to as far north as Cape Dager Ort, including the ports of Riga, Pernau, and all other ports, roads, havens, or creeks in the Gulf of Riga were then in a state of blockade by a competent force.

That all ports, roads, havens, or creeks eastward from Cape Dager Ort, including Hapsal, Wormsö Island, Port Baltic, Revel, and other **[xx]** intermediate ports on the coast of Esthonia, as far as Ekholm Light [situated in lat. 59° 43′ north, longitude

25° 48′ east]; and from thence in a north-west direction as far as Helsingfors and Sveaborg, on the coast of Finland; continuing westward, Barö Sound, Hangö Head, Orö, and Abo, including the Aland Archipelago and intermediate ports; from thence north, including Nystad, Biorneborg, Christinestadt, Vasa, Walgrund Islands, Little Carleby, Iacobstad, Great Carleby, Lotea, Kalawki, Brahestad, Uleaborg, Karle Island, Tio, Gestila, Tornea, Ned. Tornea, [situated in lat. (about) 65° 50′ north, longitude 24° 15′ east,] and all intermediate Russian ports, roads, havens, and creeks in the Gulf of Bothnia, and all the before-mentioned ports and places, are and were then in a state of strict blockade by a competent force.

And it is hereby further notified that all the measures authorized by the Laws of Nations and the respective treaties between Her Majesty and the different neutral powers, will be adopted and executed with respect to all vessels which may attempt to violate the said blockade.

Numb. 21571. 2189. Supplement to the "London Gazette" of Tuesday, the 11th of July.—Published by Authority. Wednesday, July 12, 1854.

Foreign Office, July 12, 1854.

It is hereby notified, that the Lords Commissioners of the Admiralty have been informed by Vice-Admiral Sir Charles Napier, K.C.B., commanding Her Majesty's naval forces in the Baltic, that, on and from the 26th of June last, a strict and effective blockade was actually established by the combined fleets of Her Majesty and of His Imperial Majesty the Emperor of the French, of the various ports in the Gulf of Finland as hereafter specified; that is to say: The whole of the ports in the Gulf of Finland to the eastward of Helsingfors and Sveaborg, on the Finland shore, including Borgo, Lovisa, Pythis, Frederikshamn, Werolax Bay, Viborg, Biörkö Sound, and all intermediate ports, roads, havens, and creeks, to Cape Lubovki, in lat. 60° 5′ north, and long. 29° 56′ east.

From Cape Lubovki the line of blockade crosses to Tolboukin Light, immediately off Cronstadt, then across southward to off the town of Borki, in the province of Saint Petersburgh, in lat. 59° 57′ north, long. 29° 28′ east.

That a complete blockade of Cronstadt and Saint Petersburgh has been effected by the combined fleets, which anchored off Cronstadt on the 26th instant.

Proceeding westward, the line of blockade extends from Borki to Karavalda Island, thence to Dolgoi Ness, and from Dolgoi Ness to Kolgenpia Point, which includes the Bight of Koporia, from thence to Kourgoulo Point, which includes Louga Bay, then the river Narva, and the whole coast of Esthonia and adjacent islands to Ekholm Light, situated in lat. 59° 43′ north, long. 25° 48′ east.

And it is hereby further notified, that all the measures authorized by the Laws of Nations, and the respective treaties between Her Majesty and the different neutral powers, will be adopted and executed with respect to all vessels which may attempt to violate the said blockade.

**[xxi]** Numb. 21582. 2507. Supplement to the "London Gazette" of Friday, the 11th of August.—Published by Authority. Monday, August 14, 1854.(*a*)

Foreign Office, August 11, 1854.

With reference to the notifications of blockades of certain Russian ports in the Baltic Sea, published in the Gazettes of the 16th of June last and of the 12th of July last, it is hereby notified that the Lords Commissioners of the Admiralty have received further information from Vice-Admiral Sir Charles Napier, K.C.B., commanding Her Majesty's naval forces in the Baltic; from Captain Key, R.N., of Her Majesty's ship "Amphion," senior officer off the coast of Courland; and from William James Hertslet, Esq., British Vice-Consul at Memel, relating to such blockades, which information is as follows: viz., Sir Charles Napier states, that

On and from the 17th of April last, all Russian ports, roads, harbours, and creeks, from lat. 55° 53′ 0″ N., long. 21° 3′ 0″ E., to Cape Dager Ort, in lat. 58° 55′ 0″ N., long. 22° 5′ 0″ E., including especially the ports of Libau, Windau, Riga, and Pernau, were placed in a state of strict blockade by a competent force of Her Majesty's ships.

On and from the 26th of April last the Russian ports of Helsingfors and Sveaborg,

(*a*) These cases were heard on the admission of claim on the 15th of August. The publication of this supplement on the 14th was strongly commented upon by counsel.

and all Russian ports, roads, havens, and creeks to the westward of Helsingfors, as far as Hangö Head, in lat. 59° 48′ 0″ N., long. 22° 53′ 0″ E., were in like manner blockaded.

On and from the 20th of May last the Russian ports of Hafsal, Warmsö Islands, Port Baltic, Revel, and all Russian ports, roads, havens, and creeks on the coast of Esthonia, from Cape Dager Ort to Ekholm Light (situate in lat. 59° 43′ 0″ N., and long. 25° 48′ 0″ E.), were placed in a state of strict blockade by a competent force of Her Majesty's ships.

On and from the 26th of June last, the Russian ports of Agö, the islands of Orö Onto, and the Aland Archipelago, Nystad, Bjorneborg, Christinestad, Wasa, the Walgrund Islands, New Carleby, Iacobstad, Old Carleby, Lotea, Kalojoki, Brahestad, Uleaborg, Carlon Island, Ijo, Gestila, Kemie, and all Russian ports, roads, havens, and creeks, from Hangö Head, in lat. 59° 48′ 0″ N., long. 22° 53′ 0″ E., to Ned. Tornea (included), situate at the head of the Gulf of Bothnia, in lat. (about) 65° 50′ 0″ N., long. 24° 15′ 0″ E., were placed in a state of strict blockade by a competent force of the allied fleets.

On being joined by the French squadron, in the Gulf of Finland, on the 13th June, the duties of blockading in the Gulf, and elsewhere, were henceforward conjointly carried into effect.

(1). Copy of an Official Communication from Captain Key, R.N., of Her Majesty's Ship "Amphion," to W. J. Hertslet, Esq., British Vice-Consul at Memel.

Her Majesty's ship "Amphion,"
Memel Roads, May 12, 1854.

Sir,—I have the honour to request you will inform Her Britannic Majesty's consuls at Riga, Libau, and Windau, that those ports are **[xxii]** now strictly blockaded, and that any vessel leaving them, after the 15th of May, with a cargo, or part of a cargo, on board, will be detained and sent to England or France for condemnation.

This information is to be publicly made known at those ports.

(Signed) A. Cooper Key,
Captain and Senior Officer.

W. J. Hertslet, Esq.,
British Vice-Consul, Memel.

(2). Copy of an Official Communication from W. J. Hertslet, Esq., British Vice-Consul at Memel, to Captain Key, R.N., Her Majesty's Ship "Amphion."

British Vice-Consul, Memel,
June 8, 1854.

Sir,—I have the honour to inform you, that immediately on receipt of your letter of 12th May, which I received on the same day, I communicated the contents of that letter to

Mr. Grisler, Hanoverian Consul at Memel.
Mr. Schiller, Swedish and Norwegian Consul at Memel.
Mr. Schröder Sund, Danish Consul at Memel.

Mr. Hoeftmann, for Holland, Consul at Memel; and likewise to a number of merchants on the Exchange of this town, and to several Riga and Libau merchants who were there.

I likewise informed his Excellency, Lord Bloomfield, that I had communicated the subject of your letter to the Consuls of neutral powers at Memel.

(Signed) W. J. Hertslet.

Captain Cooper Key,
Memel Roadstead.

(3). Copy of an Official Report from Captain Key, R.N., Her Majesty's ship "Amphion," to Vice-Admiral Sir Charles Napier.

"Amphion," off Windau,
June 14, 1854.

Sir,—Her Majesty's ship under my orders having detained several vessels belonging to neutral nations for attempting to violate the blockade established on this coast, and sent them to England for legal adjudication, in accordance with Articles 9 and 10 of the Admiralty instructions on the subject, I have the honour to report, for your

information, the circumstances under which the said vessels have been captured, the manner in which the blockade has been carried out, and other points which may be of importance to the Court of Admiralty commissioned to take cognizance of this question.

Three points must be proved to condemn these vessels as lawful prizes:

1st. That an effective blockade has been established.

2d. That the vessels detained attempted to violate this blockade.

3d. That they were aware of its existence.

Regarding the first point, I have the honour to inform you that since May 9, when I was first entrusted with the blockade of this coast (at which time I found Her Majesty's ships "Conflict" and "Cruizer" on the station, which vessels had been blockading since April 20) two ships have been ordered to cruize off the entrance of the Gulf of Riga, a passage limited by the shoals to a breadth of [xxiii] three miles, this entrance has never been left without one vessel. Two other ships have been continually passing between Windau and Memel within sight of the coast.

No doubt, in a few instances, vessels have succeeded in evading the cruizers under cover of the night and the fogs, which have been so prevalent, but the number of vessels boarded is of itself a proof that vigilance has been exercised.

The second point is readily ascertained, by a reference to the definition which has been sent in each vessel by the captain of the ships detaining her, in which the locality, the course the vessel was steering, and the direction of the wind are stated.

With respect to the third point, the knowledge of the blockade, great care has been necessary to prevent injury to innocent vessels. The captured vessels come under two heads,—those attempting to enter the blockaded ports, and those leaving them. As regards the former, the captains of Her Majesty's ships received orders, that if the slightest reasonable doubt existed as to the captain or the owner of the vessel being informed of the blockade, she was to be sent away with a notification to that effect on his papers.

Under these orders, 154 vessels have been warned off since April 20, although nearly all of them passed through the Sound, communicating at Elsinore, which scarcely allows a doubt to exist of their knowledge of the blockade. Nevertheless, I deemed it my duty to shew as much leniency to neutrals as was compatible with the interests of the Allied Powers. Four vessels only have been detained for attempting to enter the ports. Two of these contained coal, and were without proper papers; the others were from Copenhagen, and confessed their knowledge of the blockade.

To insure that the residents in the blockaded ports should not plead ignorance of their condition, I wrote the accompanying letter (Enclosure No. 1) to the British Vice-Consul at Memel, the contents of which were published in the Berlin Gazette, and were publicly made known at Riga, Libau, and Windau. Mr. Hertslet's answer (No. 2) I enclose.

Notwithstanding this, several vessels have taken in cargoes, and left Riga; they have therefore been detained, and sent to England for adjudication.

(Signed) A. Cooper Key,
Captain and Senior Officer on
the coast of Courland.

Vice-Admiral Sir Charles Napier, K.C.B.,
Commander-in-Chief, &c. &c. &c.

M.—Treaty between Great Britain and Austria (and Russia and Prussia) signed at Paris 5th November 1815.(a)

In the name of the Most Holy and Undivided Trinity.

His Majesty the King of the United Kingdom of Great Britain and Ireland, His Majesty the Emperor of Austria, King of Hungary and Bohemia, His Majesty the Emperor of all the Russias, and His Majesty the King of Prussia, animated by the desire of prosecuting the negotiations adjourned at the Congress of Vienna, in order to fix the destiny of the seven Ionian Islands, and to ensure the independence, [xxiv] liberty, and happiness of the inhabitants of those islands, by placing them and their constitution under the immediate protection of one of the great Powers of Europe, have agreed to settle definitively by a special Act whatever relates to this object,

(a) Since acceded to by all the other Powers of Europe.

which, grounded upon the rights resulting from the Treaty of Paris of the 30th of May, 1814, and likewise upon the British declarations at the period when the British arms liberated Cerigo, Zante, Cephalonia, Santa Maura, Ithaca, and Paxo, shall be considered as forming part of the general Treaty concluded at Vienna on the 9th of June of the present year, 1815, on the termination of the Congress. And in order to settle and sign the said Act the High Contracting Powers have nominated Plenipotentiaries: that is to say, His Majesty the King of the United Kingdom of Great Britain and Ireland, the Right Honourable Robert Stewart, Viscount Castlereagh, K.G., &c. &c. &c.; and the Most Illustrious and Most Noble Lord Arthur, Duke, Marquess, and Earl of Wellington, Marquess of Douro, Viscount Wellington of Talavera and of Wellington, and Baron Douro of Wellesley, K.G., &c. &c. &c., and His Majesty the Emperor of Austria, King of Hungary and Bohemia, the Sieur Clement Wenaslas Lothaire, Prince of Metternich, Winnebourg, Ochsenhausen, &c. &c. &c., and the Sieur John Philip Baron Wessenberg, &c. &c. &c.; who, after having exchanged their full powers found to be in good and due form, having agreed upon the following articles:—

1. The islands of Corfu, Cephalonia, Zante, Santa Maura, Ithaca, Cerigo, and Paxo, with their dependencies, such as they are described in the Treaty between His Majesty the Emperor of all the Russias and the Ottoman Porte of the 21st of March 1800,(*a*) shall form a single free and independent State under the denomination of the United States of the Ionian Islands.

2. This State shall be placed under the immediate and exclusive protection of His Majesty the King of the United Kingdom of Great Britain and Ireland, his heirs and successors. The other Contracting Powers do consequently renounce every right or particular pretension which they might have formed in respect to them, and formally guarantee all the depositions of the present Treaty.

3. The United States of the Ionian Islands shall, with the approbation of the Protecting Power, regulate their internal organization; and in order to give to all parts of this organization the necessary consistency and action, His Britannic Majesty will employ a particular solicitude with regard to the legislation and the general administration of those States. His Majesty will, therefore, appoint a Lord High Commissioner to reside there, invested with all the necessary power and authorities for this purpose.

4. In order to carry into execution without delay the stipulations mentioned in the articles preceding, and to ground the political reorganization of the United Ionian States upon that organization which is actually in force, the Lord High Commissioner of the Protecting Power shall regulate the forms of convocation of a Legislative Assembly, of which he shall direct the proceedings, in order to draw up a new Constitutional Charter for the States, which His Majesty the King of the United Kingdom of Great Britain and Ireland shall be requested to ratify.

---

(*a*) "The islands of Corfu, Zante, Cephalonia, Maura, Ithaca, Paxo, Cerigo, and all the large and small islands, inhabited and uninhabited, which are situated opposite to the coasts of the Morea and Albania, which were detached from Venice, and have been recently conquered."—(Art. 2).

# REPORTS of CASES DECIDED in the ECCLESIASTICAL COURTS at DOCTORS' COMMONS, 1855 to 1857. By JAMES PARKER DEANE, D.C.L., and M. C. MERTTINS SWABEY, D.C.L., in Continuation of Dr. ROBERTSON'S REPORTS. London, 1858.

[1] Reports of Cases Argued and Determined in the Ecclesiastical Courts at Doctors' Commons.

In the Goods of Jane Webb. Prerogative Court, Nov. 7th, 1855.—Where the attesting witnesses subscribe the will in the presence of the testator, but not in the presence of each other, the execution is good under 1 Vic. c. 26, s. 9.

[S. C. 1 Jur. (N. S.) 1096; 4 W. R. 92.]

On Motion.

Jane Webb, on the 18th of March, wrote and signed her will, and on the 13th of May following she executed it, by acknowledging this signature in the presence of A. and B., both present at the same time; immediately after which B. left the room, and during her absence, but in the presence of the testatrix, A. subscribed the will as a witness. In a short time B. returned to the room, in which A. and the deceased still were, and B. then subscribed the will as a witness in the presence of the deceased and of A.

Deane moved for probate of the will.

The 1 Vic. c. 26, s. 9, does not, in terms, require that the witnesses shall subscribe in the presence of [2] each other. It would appear from a passage in the report of *Casement* v. *Fulton*, 5 Mo. P. C. C. 140, that the Privy Council considered a joint presence requisite at the time of subscription; but there is probably an error in that part of the report, for in a case which followed immediately afterwards (*Faulds* v. *Jackson*, 6 N. C. Suppl. 1), their Lordships held the will to be well executed though the witnesses did not subscribe in the presence of each other. And in *Chodwick* v. *Palmer*, 12th of July, 1851, a case which has not been reported, Sir H. Jenner Fust, referring to this passage in *Casement* v. *Fulton*, said, "That dictum has not been acted upon and received as the true interpretation of the statute in this Court. Cases have occurred in which the witnesses have not signed in the presence of each other, yet the Court has decided that the statute was complied with." And he held the will in that case well executed, though the witnesses had not subscribed in the presence of each other.

*Sir John Dodson.* I was at first inclined to take a different view of this case, but upon the authority of *Chodwick* v. *Palmer*, I will grant this motion.

Probate decreed.

[3] In the Goods of William Jones. Prerogative Court, Nov. 7th, 1855.—Execution by the testator's acknowledgment of his signature.

[S. C. 1 Jur. (N. S.) 1096; 4 W. R. 162. Referred to, *In re Sanderson*; *Wright* v. *Sanderson*, 1884, 9 P. D. 160.]

On Motion.

William Jones left a will which was drawn up from his instructions, and read over to him in the presence of J. and E. The deceased expressed his approval of it and

signed his name at once, and before W., one of the subscribing witnesses, had come into the room; but when that witness came in, he still held the pen, and E., who had assisted the testator by holding a book on which the will was placed for him to sign, he being in bed, still held the book and the will in his hand. Immediately on W.'s entering the room E., in the presence and hearing of the deceased, said that the paper he held in his hand was the deceased's will, and asked W. to sign it, which he did in the presence of the deceased, who watched him in doing so. E. then wrote his name under that of W., upon which E. said to the deceased, "Will that do?" to which the deceased replied, "Yes." The deceased died the same day. The property left was under £100 in this country, and about £200 in Australia.

Addams moved for probate of the will as having been executed by a virtual acknowledgment of the signature by the deceased, in the presence of two witnesses.

[4] *Sir John Dodson.* I think that, from the facts of the case, what was said and done by the testator amounted to such an acknowledgment as will satisfy the provisions of the Act of Parliament; but had the property not been so small, I should have directed the will to be propounded. Under the circumstances, however, I decree probate to the executor.

IN THE GOODS OF THOMAS OSBORNE. Prerogative Court, Nov. 16th, 1855.—Probate of several papers (one written after the death of the testator) granted as together containing his will, on proof of the law of the domicil.

On Motion.

This deceased was a natural-born British subject, but he had resided in Spain for many years, had married a Spanish woman, and continued to reside and carry on business there till his death. He was never naturalized as a Spaniard.

After his marriage, and when he had two children, he executed an instrument conferring on his wife the power of making and extending his will, instituted his then two children his heirs, and appointed his wife executrix. Subsequently, when he had five children, he executed, before the British Vice-Consul at Port St. Mary, a paper described on the face of it as a codicil to his will, appointing his wife executrix, and instructing her to dispose of his property among his five children.

[5] After the death of the deceased, in February, 1854, the widow appeared before the Captain-General of the Province in which the deceased had resided, and produced a copy of the codicil, and prayed that the then five children might be declared heirs. The Captain-General having so decreed, she, in June, 1855, appeared before a notary at Port St. Mary, and, in accordance with the power, and the codicil, and the decree of the Captain-General, made and extended the will of the deceased, and thereby instituted the five children of the deceased as his heirs, and assumed the office of executrix of the will.

An affidavit of an advocate of the national tribunal of Spain was read, from which it appeared that by the law of Spain one person may, by an instrument in writing, direct another to make a will for him after his death, in conformity with the contents of such written instrument, and that the Captain-General of the Province had jurisdiction over the civil affairs of all foreigners resident therein; and the Court was moved to decree letters of administration, with the three papers (that is, the power, the codicil, and the extended will) annexed, to the attornies of the widow.

*Sir John Dodson.* The domicil should have been established by affidavit; but the long continued residence in Spain is, in the circumstances of the case, sufficient to let in the law as stated by the affidavit which has been read. The administration may therefore go as now prayed.

[6] IN THE GOODS OF SIR JOSIAS HENRY STRACEY, BART., AND DIANA STRACEY, his Wife. Prerogative Court, Dec. 3rd, 1855.—Joint will. Practice.

[S. C. 1 Jur. (N. S.) 1177; 4 W. R. 164. Distinguished, *In the Goods of Raine*, 1858, 1 Sw. & Tr. 144. Applied, *In the Goods of Miskelly*, 1869, Ir. R. 4 Eq. 62.]

On Motion.

Sir J. H. Stracey, and Diana Stracey, his wife, made a joint will, dated the 25th of April, 1850. Lady Stracey died in June, 1854; Sir J. H. Stracey died on the 6th of November, 1855, without having altered or revoked the will. The will was enclosed in a sealed envelope, endorsed in the handwriting of Lady Stracey, "The will of J. H. Stracey, Esq., 1850."

After her death, one of the daughters asked Sir J. H. S. whether the will was to be opened; he said, "No, not in his lifetime, as it might give rise to unpleasant feelings." Lady Stracey had a power of appointment by will over certain property; and Sir J. H. Stracey had, as survivor, a power of appointment over other property, independent of his general property.

The will commenced, "We, Josias Henry Stracey and Diana Stracey, do hereby declare this to be our last will; and after the payment of all our just debts and funeral expenses, we direct that all our monies," &c. Certain bequests were then given to their children; and there was an appointment of executors of "this our joint will." The attestation clause described the will to have been "signed by the said J. H. S. and D. S. in our presence, who, in their presence, &c., have hereunto affixed our signatures as witnesses to this their will."

**[7]** Deane moved the Court to decree probate of the paper, as the last will and testament of Diana Stracey, to be granted to the executors, limited to all such personal estate and effects as she, the said D. S., had a right to appoint or dispose of; also, to decree a special general probate of the said paper, as the last will and testament of Sir J. H. S., to the executors. *Hobson* v. *Blackburn*, 1 Add. 274, is adverse to mutual wills, but, if it has any bearing upon the present case, shews the validity of a joint will like the one now before the Court.

*Sir John Dodson.* I think you are entitled to the prayer of your motion. *Hobson* v. *Blackburn*, when examined, is certainly not an authority against you. The paper should have been proved as the will of Lady Stracey upon her decease, but that cannot affect the right of the executors now.

EWEN *against* FRANKLIN AND OTHERS.[1] Prerogative Court, Dec. 3rd, 1855.—A will regularly drawn up by a solicitor was signed by the testator and also by two witnesses in the margin of the first four sheets; but in the fifth and last sheet the signature of the deceased alone appeared.—Held that the witnesses had not subscribed the will.

[S. C. 1 Jur. (N. S.) 1220; 4 W. R. 164. Referred to, *Sweetland* v. *Sweetland*, 1865, 4 Sw. & Tr. 6. Applied, *Phipps* v. *Hale*, 1874, L.R. 3 P. & D. 168; *Leonard* v. *Leonard*, [1902] P. 249.]

On admission of an Allegation.

This case came before the Court upon the admission of an allegation propounding a paper as the last will and testament of James Stares, propounded by Mr. W. Ewen, and opposed by an executor under a prior will.

**[8]** In April, 1846, the testator gave instructions to his solicitor, who accordingly prepared a will, which was read over to the testator, at the solicitor's office; but the testator declined to execute it there. The solicitor gave him full verbal instructions how to proceed, and made pencil marks indicating where the signatures of the testator and the witnesses should be placed. The will was written on five sheets of paper; at the bottom of each of the first four sheets appeared the testator's signature in ink, above his name, pencilled beforehand by the solicitor; on the margin of each of the first four sheets appeared the subscriptions of the witnesses. On the fifth and last sheet was a testimonium clause, expressing the testator's intention of executing the paper by placing his name on each sheet, and his name and seal at the end. The testator's signature followed opposite a regular attestation clause; but the witnesses had not written their names on any part of the fifth sheet. Both witnesses were dead; and no other person, apparently, was present at the execution.

Declarations of the testator as to the execution, and that the death of the witnesses would make no difference, were pleaded in the allegation, the admission of which was opposed.

Addams and Spinks, for different parties, opposed the admission of the allegation.

Jenner and Twiss contrà.

**[9]** *Sir John Dodson.* I think the signatures on the first sheets were intended merely to guard against other sheets being interpolated; that the testator's signature at the end of the paper is that which the Court must consider as intended to give validity to the whole instrument, and consequently that is the signature which ought to have been attested. *In the Goods of Chamney*, 1 Rob. 757, it clearly appeared that the signatures on the back of the paper were intended to attest the sole signature of the testator; whereas, in the present case, there is nothing even to shew that the

signatures in the margins were intended to attest that signature of the testator which alone would give effect to the paper as a will. I therefore reject the allegation propounding this paper.

IN THE GOODS OF P. A. COOPER. Prerogative Court, Dec. 11th, 1855.—General Probate. Practice.—General probate decreed of a will intended "to take effect only in the event," &c.

[S. C. 4 W. R. 182. Referred to, *In the Goods of Baugham*, 1876, 1 P. D. 429.]

On Motion.

The deceased directed that her will was "to take effect only in the event of my son Charles dying under the age of 21 years, and my daughter Sarah dying under that age and unmarried." She then went on to leave various legacies, disposed of the residue of her estate, and appointed C. G. her executor. The personal estate was under £200; [10] but in the event of the son dying under the age of 21 years, and the daughter dying under that age and unmarried, the deceased had a power, under her marriage settlement, to dispose of a certain amount of stock. Both children were living.

Probate of the will, with such limitations as the Court should think fit, was moved for on behalf of the executor.

*Sir John Dodson* decreed a general probate to the executor.

HERBERT *against* HERBERT. Prerogative Court, Dec. 14th, 1855.—1 Vic. c. 26, s. 11. Actual military service.

[S. C. 2 Jur. (N. S.) 24; 4 W. R. 182.]

On admission of an Allegation.

The deceased in this case died suddenly on the 16th of November, 1848. He had written on the same day a letter to his brother in the following terms:—

"Jellundur, 16th November, 1848.

"My dear George,—I have not heard from you for a long time, and being about to go to the Hills, sick, I write to give you a list of money, or rather a statement of my affairs, should anything happen to me during these [11] disturbed times. I intend that everything I have shall be yours, with the exception of £1000, which I purpose that John shall possess. My will I intend making over to George Hill, with whom I am staying. I have in this country, in Messrs. C. & Co.'s hands, 16,500 rupees in company's paper. I don't know the exact amount of last balance; I believe it was 250 or 260 rupees. I have paid 3350 rupees to the East India railway. I have not yet received last month's pay, 500 rupees, from Hodgson. I owe nothing in bills; and there are about 110 rupees in my boxes. I know not where to go or what to do in consequence of my regiment having gone on service, and also because I have been suddenly and unexpectedly relieved from the acting department I held at Hoosheropoore. John and my aunts can tell the amount of my property at home—indeed you know it pretty well. My wound pension is due from the 1st of August 1847 until this time. I go before the medical committee to-day, so that the next time you hear from me will be from Simlah, in all probability.—Your affectionate brother,

"R. A. HERBERT."

The allegation propounding this paper as the will of the deceased, pleaded that in January, 1848, he was ordered from his own regiment, the 46th, then stationed at Lahore, to join a Sikh regiment at Hoosheropoore, which he immediately did, with which regiment he remained till November, 1848; that during such time he was engaged in various skirmishes with the rebel troops of Rajah Shere [12] Sing, and that in the course of such services he was seriously injured in an arm which had been previously wounded; that during such time the deceased's own regiment was brigaded with the army on the Sutlej, and continued in active service until after his death; that the deceased left the Sikh regiment by order to rejoin his own regiment on the Sutlej on the 13th of November; that upon the urgent recommendation of the medical officer of the Sikh regiment, he, on his route to his own regiment, went to Jellundur, but little out of the direct road, to submit himself to the examination of a medical committee then sitting, in respect to the propriety or fitness of his immediately joining his own regiment, then in active service; that on the 15th of November he arrived at Jellundur, and stopped at a friend's house, to whom he expressed his

intention of leaving his property, except £1000, to his brother George, and that he died on the 16th; and that the paper propounded was entitled to probate as the will of a soldier in actual military service, under 1 Vic. c. 26, s. 11.

Sir J. D. Harding, Q.A., and Twiss, opposed the admission of this allegation—first, on the ground that the deceased was not shewn to have been in actual military service; secondly, that the paper was not intended by the deceased as his will.

Addams and Spinks contrà.

*Sir John Dodson.* The admission of this allegation has been opposed on two grounds: first, as to the paper itself, it has **[13]** been argued that the language is not dispositive, but gives a mere list of property—is, in fact, a letter without the form or semblance of a will; and so far from proving final intention, points in fact to the making of another instrument as a will. But a deed poll, a deed of gift, a bond, a marriage settlement, letters, and so forth, have been held sufficient in form to be entitled to probate as testamentary papers, provided the deceased intended that any of them should operate after his death: Wms. Exrs. 73, 3rd ed. It is true these were cases before the present Act, but the 11th section of that Act puts the wills of soldiers on the same footing as they previously stood; assuming, therefore, for the moment that the deceased was in actual military service, these cases are to the point. Looking next to the paper itself, I am clear that the deceased intended it to have effect after his death. This letter is very different from the paper in *The King's Proctor* v. *Daines*, 3 Hagg. 218, or that in *Torre* v. *Castle*, 1 Curt. 303. The second ground of opposition was, that actual military service was not shewn by the facts pleaded. But I do not think so: the facts are much stronger than those either in *Drummond* v. *Parish*, 3 Curt. 522, where the testator was at Woolwich, or *In the Goods of Hill*, 4 N. C. 174, where he was on a tour of inspection at a time of perfect peace. And again: in *Bowles* v. *Jackson*, 1 Eccl. & Adm. Rep. 294, the deceased had been ordered to join the expedition, but he had not left home. In all those cases probate was refused. In the present case the deceased was on his way from one regiment to another, both of which were in actual military service. The allegation must consequently be admitted, when it has been **[14]** reformed, so that actual military service be distinctly pleaded.

(*Theakston* v. *Marson*, 4 Hagg. 297, was cited in argument, as well as the cases referred to in the judgment.)

IN THE GOODS OF EMMA HAKEWELL. Prerogative Court, Jan. 13th, 1856.—Unexecuted paper. Incorporation.

On Motion.

E. H. duly executed a will in February, 1847, in which was the following clause:—"As to all the rest and residue of my estate, property, and effects, not hereby or by any codicil in writing hereinafter by me especially bequeathed, it being my intention by a separate paper to allot my plate, I give and bequeath the same, subject to the payment," &c. She executed a codicil in January, 1851. After her death in November 1855 there was found, with the will and codicil, a paper in the handwriting of the deceased, which began—"This is a codicil to my will dated 5th February, 1847, but which I do not wish to be proved at Doctors' Commons"; and ended, "And I confirm my will in all respects not altered thereby." By this unexecuted paper she gave and bequeathed, &c., and allotted her plate and pictures, among several legatees; it was dated **[15]** 26th of April, 1847, and signed by the testatrix. The attesting witnesses to both will and codicil deposed that they saw nothing of this paper of the 26th of April at the execution of either will or codicil, nor was any paper attached to either of them. The codicil of 1851 confirmed the will only.

Probate of the will and codicil only, excluding the paper of February, 1847, was prayed on behalf of the executors named in the will. *Ferraris* v. *Hertford*, 3 Curt. 468; *Haynes* v. *Hill*, 13 Jur. 1058, were cited.

*Sir John Dodson* granted the motion as prayed.

BAYNES *against* HARRISON. Prerogative Court, Jan. 23rd, 1856.—Creditor. Administration. After the death of an intestate, A. procured from B. an assignment of a debt due to B. by the intestate. Motion for administration to such assignee rejected.

[S. C. 2 Jur. (N. S.) 72. Referred to, *Depit* v. *Delevieleuse*, 1861, 2 Sw. & Tr. 131. Applied, *In the Goods of Coles*, 1863, 3 Sw. & Tr. 181; *In the Goods of Galbraith*, 1879, 3 L. R. Ir. 169.]

On Motion.

J. H., late of Glasgow, died in the month of August, 1853, a widower, and intestate, leaving R. H., an only son. At the time of the death of the deceased he was indebted to B. in the sum of £23, 4s. After the death of the deceased that debt was assigned to A. A decree issued at A.'s instance, citing the son of the deceased, to accept or refuse letters of administration of the effects of the deceased, or shew cause why the same should not be granted to A. on his giving the usual security. This decree was personally served on **[16]** R. H., who was a minor, on board the ship in which he was serving an an apprentice, in the presence of the mate of the said vessel. It appeared that all the parties were Scotch, and that a grant had been obtained in Scotland. The property in England consisted of the proceeds of a policy of insurance, amounting to the sum of £105. In the decree served on R. H., A. was described as a creditor, whilst he was in fact but an assignee of the debt.

Administration to be granted to A., as a creditor of the deceased, upon his giving the usual security, was moved for.

*Sir John Dodson* rejected the motion, observing that the decree being invalid, there must be a fresh citation, and that it would be a dangerous practice to decree administration of an intestate's estate to a person who had bought up a debt after the death of that intestate, especially where, as in the case before him, the assets considerably exceeded the amount of the debt.

On a subsequent date the motion was granted on affidavit, stating that A. was also a creditor of the intestate, and had been chosen by the several creditors of the intestate as the person to obtain the administration for their benefit.

**[17]** IN THE GOODS OF D. MACKENZIE. Prerogative Court, Feb. 8th, 1856.—Administration with the will annexed. Form of grant in Scotland varied as to the effects of the deceased in England.

[S. C. 2 Jur. (N. S.) 168.]

On Motion.

The deceased, a domiciled Scotchwoman, died in Scotland in the month of August, 1852. She left a will, in her own handwriting, signed by herself, but unattested, and without the appointment of an executor. By this will, after giving several general and specific legacies, the testatrix gave to her sister, for life, her money in the funds or in the bank, after payment of a legacy in the will mentioned; and, "After my sister's death, all to go to my nephew, George Jones." On the 3rd of November, 1852, this will of the deceased was duly confirmed by the Commissary Depute of the Commissariat of Wigtown, in North Britain, at the instance of George Jones, to whom, as executor dative, qua legatee, and residuary legatee, full power was granted by the Court of the said Commissary Depute to administer the personal estate of the deceased in Scotland,—and Mr. George Jones was accordingly constituted the sole personal representative of the deceased in Scotland; but it was afterwards suggested that, according to the true construction of the will, Mr. Jones was not entitled, according to the law of England, to the general residue of the personal property of the deceased, and therefore not entitled, according to the ordinary practice of this Court, to the letters of administration with the will annexed. It had now become **[18]** necessary, for the purpose of substantiating proceedings in Chancery, that there should be a representative of the deceased in this country.

Middleton moved for administration with the will annexed to George Jones, as legatee substituted in the will, limited to the goods of the deceased within the Province of Canterbury, varying the character of the representative so as to make the proceedings conform to the law of this country. He cited *In the Goods of Read*, 1 Hagg. 474, where a similar course had been adopted, the deceased having died at Madras, and probate having been granted there to the widow, as sole legatee and constructive executrix; this Court would only decree administration with the will annexed to the widow, as the relict and the principal legatee, upon the usual security.

*Sir John Dodson.* Under the authority of the case cited, I feel no difficulty in granting this motion as prayed.

**[19]** FOOT *against* STANTON. Prerogative Court, Feb. 8th, 1856.—Probate of will granted in the absence of proof of instructions or knowledge of contents, and the attesting witnesses not recollecting any of the circumstances of the execution of the will.

[S. C. 2 Jur. (N. S.) 380.]

This was a cause of proving, in solemn form of law, the last will of Mary Ann Stanton, bearing date the 15th day of October, 1850, promoted by Honor Fry Foot, wife of John Foot, the sister and one of the next of kin of the deceased, against Henry Stanton, the sole executor named in the will.

Robinson for the executor.

Middleton for the next of kin.

*Judgment—Sir John Dodson.* This paper is in due form. There is an attestation clause, and two witnesses have subscribed their names. The property is so small that I was in hopes the parties might have been induced to settle the whole matter out of Court; but as they will not do that, I must now give my opinion: The effect of the will is to give £19, 19s. to Mrs. Wheeler, a sister of the deceased; to Mrs. Foot, the party in the cause, £10; to Ellen and Martha Stanton, all the deceased's trinkets and jewellery; to Henry Stanton, party in this cause, £10, to be placed in his name in a savings' bank, in trust, for the children of another brother of the deceased, to accumulate till they are of age; to Henry Stanton, all furniture, linen, &c.; the residue to Henry **[20]** Stanton and Westcott Stanton, another brother of deceased; to appoint Henry Stanton sole executor, and to direct him to repay to deceased's brother-in-law, Henry Wheeler, all monies he may have expended for her use. It revokes all former wills. The whole property appears to be of the value of about £200. The will was propounded in a common condidit, on which three witnesses have been examined; Mr. Burke, a medical man; and Potto, in whose house the deceased was residing at the date of the will, and till her death—these were the two subscribing witnesses. Mr. Burke has no recollection whatever of the circumstances attending the execution of the will: in 1850 he was practising at Boxmoor and Hemel Hempstead, and was occasionally in attendance at Mr. Potto's house. When shewn his subscription to the will, he has no doubt inferentially that it was so signed and subscribed as appears; he is acquainted with the formalities necessary for the execution of a will; his attendance on the deceased was not for the epileptic fits to which she was subject. The other witness, Potto, at whose house and in whose care deceased had been placed by her brother, on account of the epileptic fits from which she suffered, knows as little about the transaction. When Mr. Foot, on deceased's death, wrote to Potto to ask about any will, he received for answer: "I never signed any will for Miss Mary Ann Stanton, nor was she in a fit state of mind during the four years she resided with me to make a will." However, Mr. Potto recognises his own subscription and that of Mr. Burke, and therefore has no doubt that whatever appears on the face of the **[21]** paper really took place. It is true that he can recollect no reading of the paper to the deceased, and will not speak positively to her testamentary capacity; yet, there is nothing in his evidence to negative it, except at those times when she was actually under the influence of a fit. The third witness, Drew, was copying clerk in a solicitor's office, and wrote out from a draft the paper now in question. He speaks to the interlineation of £19, 19s. as made before it left his hands. There is no evidence of any instructions given by the deceased. However, on the unopposed evidence of the subscribing witnesses, I am of opinion that I must pronounce for this will. I think Mrs. Foot was justified in putting the executor on proof, and is entitled to her costs.

**[22]** DYCE SOMBRE *against* TROUP, SOLAROLI (intervening), and PRINSEP, and the HON. EAST INDIA COMPANY (also intervening). Prerogative Court, Jan. 26th, 1856.—Where insanity, though confined to certain one or more delusions, has once existed, and the evidence shews the deceased to have been instructed to conceal the continued existence of such delusion or delusions, and the evidence to prove perfect recovery of capacity is at least doubtful, the will made by a person so affected, though rational and rationally instructed and executed, is not entitled to probate. Costs.

This deceased died on the 1st day of July, 1851. He left a will dated the 25th of June, and a codicil dated the 13th of August, 1849.

On the 2nd of July, 1851, a caveat was entered; and on the 5th of the same month an appearance was given for the widow of the deceased, alleging him to have died intestate, and praying administration. At the same time an appearance was also given for A. M. Troup, wife of J. R. Troup, alleging the deceased to have died without child or parent; that the said A. M. Troup was his natural and lawful sister, and one of his next of kin; and praying to be joined in the administration. And also, at the same time, an appearance was given for H. T. Prinsep; and he was alleged to be one of the executors named in a will of the deceased. On the 2nd of September, 1851, the same proctor who had appeared for A. M. Troup intervened for G. Solaroli, wife of P. R. N. Solaroli (Baron Solaroli), and alleged her to be the natural and lawful sister of the deceased, and one of his next of kin. On the 7th of October, G. Solaroli was admitted by the proctor for the executor to be a contradictor to the will and codicil; and on the 7th of November, the interest of A. M. Troup was admitted.

**[23]** On the 13th of December an appearance was given on behalf of the Honourable East India Company, as the residuary legatees in trust named in the will.

On the 16th of January the allegation on behalf of the executor propounding the will and codicil was brought in.

On the 4th of June, 1853, an allegation was brought in on behalf of the next of kin; and on the 7th of June, an allegation on behalf of the widow was also brought in. On the 30th of June additional articles to the allegation of the next of kin were brought in.

On the 21st of April, 1854, a further allegation was brought in on behalf of the executor; and on the 13th of October, a further allegation was brought in on behalf of the next of kin; but on the 17th this allegation was on consent subducted, and a new allegation brought in.

Upon these several pleadings 135 witnesses were examined in this country, in France, Belgium, and India. The proceedings and evidence, including a great number of exhibits, were contained in 1554 printed folio pages. There was also an octavo volume of 580 pages, published by the deceased in 1849, as a "refutation of the charges of lunacy brought against him in the Court of Chancery."

The case was argued for 19 days by

Bayford and Phillimore for the executor.

Haggard and Robertson for the East India Company.

Sir J. D. Harding, Q.A., and Jenner, for the widow.

Twiss and Spinks for the next of kin.

**[24]** *Judgment—Sir John Dodson.* The question in this case is as to the validity of the will and codicil of Mr. David Ochterlony Dyce Sombre, deceased—the will bearing date the 25th of June, 1849, and the codicil bearing date the 13th of August, in the same year. The deceased died on the 1st of July, 1851, at that time lodging in Davies Street, Berkeley Square, possessed of very large property.

The will and codicil are propounded by Henry Thoby Prinsep, one of the executors therein named—the two other executors, viz., the Honourable Mountstuart Elphinstone, and Sir Henry Miers Elliott, not being parties in the suit.

The will and codicil were opposed by the Honourable Mrs. Dyce Sombre, widow of the deceased; by Mrs. Troup, his lawful sister; and by the Baroness Solaroli, asserting herself also to be his lawful sister. The interest of the last-mentioned lady has not been confessed by Mr. Prinsep, on the alleged ground of her illegitimacy; but she has been admitted a contradictor to the will, and has appeared by her proctor and counsel. The East India Company have likewise intervened, with the intent of supporting the will and codicil, but have not thought it necessary to offer any allegation in the cause. The will and codicil are in due form, having been respectively prepared by a solicitor, and executed by the deceased in the presence of no less than three witnesses, all of them of the medical profession.

As to the contents of the will, it commences with a recital of the deceased having been appointed by **[25]** her late Highness the Begum Somroo trustee under certain deeds and instruments for charitable purposes, and appoints under such trust the bishop or senior Roman Catholic priest at Sirdhana to be his successor. It then gives special instructions for his funeral—directs that his body shall be conveyed to Sirdhana, and there buried in the corner of the Christian burying-ground facing the

south-east, and that there shall be placed over it a bronze cross, to be procured, if possible, at a certain place which he mentions, viz., at a certain manufactory at Berlin; and his heart is to be enclosed in a silver case, with an inscription thereon, and to be buried separately from his body, in the room adjoining and leading into the sepulchre of the late Begum; and tablets, with proper inscriptions, are to be placed both over his body and over his heart. It then directs the executors to attend to the erection of a monument to the late Begum, which was then preparing by the artist Tadolini, of Rome.

He then orders his executors to set apart out of his personal estate a sufficient sum to enable them to pay certain annuities, or rather, I should say, certain monthly payments; for although they are described as annuities in the will, yet it is proved, and is also admitted on the other side, that they were not intended to be annual payments, but that they were intended to be monthly payments. There was a misunderstanding in that respect between him and the solicitor by whom the will was drawn.

He then proceeds to enumerate the persons who were to receive those benefits. They are very numerous, and they seem to comprise a great number of persons who had received pensions from the **[26]** Begum, and to whom he had himself made allowances; and that circumstance shews that he had a very retentive memory at the time, that he was in full possession of that faculty, and in that respect it is clear that his capacity was good.

The will then goes on to give the interest of 20,000 rupees for life to Mrs. Troup, his sister, and if she have any children, the principal is to go to them; otherwise it is to fall into the residue, and is afterwards disposed of. He then makes certain other bequests to Mrs. Reghelini, to Major Reghelini, and others. He gives legacies to various persons, and, amongst others, the sum of £1000 to the Honourable Meliors Cotton, the daughter of Lord Combermere, who has had a good deal to do with this case, and is one of the witnesses examined in the cause. He then gives £500 each to the two eldest daughters of Sir Richard and Lady Jenkins, to Sir Charles Metcalfe Ochterlony £2000, and to the eldest son of Colonel Steuart the sum of £2000. The will then goes on to give to each of the 24 directors of the Honourable East India Company, at the time of his death, and also to the six directors who shall be out of office by rotation, the sum of £1000 each, in addition to the sums afterwards bequeathed to the chairman and deputy chairman. It gives £5000 each to his three executors. It directs likewise that the jewels, valued at £7000, shall be divided equally amongst them at the decease of his wife. He gives the palace at Delhi to Mrs. Troup for life; and then to her eldest and other sons, successively, in strict entail. And after other devises and bequests, he gives the East India Company the old palace at Sirdhana; and the residue of his real and **[27]** personal estate to the said Mountstuart Elphinstone, Henry Thoby Prinsep, and Sir Henry M. Elliott, in trust, to pay debts and legacies, and to invest 125,000 rupees, and apply the dividends for the support of the blind, lame, or indigent, of Sirdhana, and to pay over the clear residue to the East India Company, who are to set apart sufficient to produce the annual sum of £2500—£1000, part thereof, to be paid to the president of the Board of Control, £1000 to the chairman of the Company, and £500 to the deputy chairman. The residue of his estate to be applied for the endowment of an institution to be called the Sombre College, for the education of the higher classes of the natives of India, without any distinction of religion. Such is the purport of the will.

The codicil seems merely to have been made for the purpose of confirming the will, or to make it a little more clear; but it makes no disposition whatever of any property. Such are the contents of the instruments now in question before the Court.

The opposition to these instruments, the will and the codicil, is founded upon the averment that the deceased was of unsound mind at the time when they were prepared and executed; that he was labouring, not under any general kind of insanity, but under that form of insanity which is usually termed "monomania." On the other hand, it is contended that the deceased was at all times of perfectly sound mind, and that the supposed delusions under which he is said to have laboured were not of an insane character, but that they were attributable solely to Asiatic habits and manners, to the feelings prevailing in India, and to his ignorance of **[28]** the customs and manners of this country; and that even upon the supposition that he had been of

unsound mind at any particular time, he had entirely recovered from it previously to the execution of the will and the codicil, and that he was perfectly sane at those respective periods.

Before I enter upon the consideration of the particular delusions to which the deceased is alleged to have been subject, it may be convenient to see what are the principles which have been considered in these Courts applicable to cases of this description; and for this purpose, I think it will be necessary only to refer to the case of *Waring* v. *Waring*, which was decided by the Judicial Committee of the Privy Council, and which is reported in the sixth volume of Moore's Privy Council Cases. In that judgment reference is made to almost all the preceding cases; and being a decision of the Superior Court, I must take it as a binding authority, even if I entertained a different opinion upon the subject, which I, however, certainly do not. Lord Brougham, who delivered the very able judgment in that case, and which judgment was understood to have had the full concurrence and sanction of all the lords who sat upon that occasion, expressed himself in these words, which are to be found at page 348: "The principles which must govern a case of this description are sufficiently clear, and they may be regarded as well settled by the current of former decisions: indeed, they flow easily from considering the nature of the inquiry in which such cases engage us. The question being, whether the will was duly made by a person of sound mind or not, our inquiry of **[29]** course is, whether or not the party possessed his faculties, and possessed them in a healthy state? His mental powers may be still subsisting; no disease may have taken them away; and yet they may have been affected with disease, and thus may not have entitled their possessor to the appellation of a person whose mind was sound. Again, the disease affecting them may have been more or less general, it may have extended over a greater or a less portion of the understanding; or rather we ought to say, that it may have affected more or it may have affected fewer of the mental faculties: for we must keep always in view that which the inaccuracy of ordinary language inclines us to forget, that the mind is one and indivisible; that when we speak of its different powers or faculties, as memory, imagination, consciousness, we speak metaphorically, likening the mind to the body, as if it had members or compartments; whereas, in all accuracy of speech, we mean to speak of the mind acting variously, that is, remembering, fancying, reflecting—the same mind in all these operations being the agent. We therefore cannot, in any correctness of language, speak of general or partial insanity; but we may most accurately speak of the mind exerting itself in consciousness without cloud or imperfection, but being morbid when it fancies; and so its owner may have a diseased imagination; or the imagination may not be diseased, and yet the memory may be impaired, and its owner be said to have lost his memory. In these cases we do not mean that the mind has one faculty, as consciousness, sound,—while another, as memory or imagination, is diseased; but that the mind is sound when **[30]** reflecting on its own operations, and diseased when exercising the combination termed imagining, or casting the retrospect called recollecting. This view of the subject, though apparently simple and almost too unquestionable to require or even to justify a formal statement, is of considerable importance when we come to examine cases of what are called incorrectly 'partial insanity,' which would be better described by the phrase 'insanity,' or 'unsoundness,' always existing, though only occasionally manifest." That, Lord Brougham thinks, is the correct way of expressing the state where insanity always exists, but only occasionally and on certain subjects shews itself. "Nothing," he continues, "is more certain than the existence of mental disease of this description. Nay, by far the greater number of morbid cases belong to this class. They have acquired a name—the disease called familiarly, as well as by physicians, 'monomania,' on the supposition of its being confined, which it rarely is, to a single faculty or exercise of the mind: a person shall be of sound mind to all appearance upon all subjects save one or two, and on these he shall be subject to delusions, mistaking for realities the suggestions of his imagination. The disease here is said to be in the imagination; that is, the patient's mind is morbid or unsound when it imagines, healthy and sound when it remembers. Nay, he may be of unsound mind when his imagination is employed on some subjects, in making some combinations, and sound when making others, or making one single kind of combination. Thus, he may not believe all his fancies to be realities, but only some or one; of such a person we **[31]** usually predicate that he is of unsound mind only upon certain points. I have qualified the

proposition thus on purpose; because if the being or essence which we term the mind is unsound on one subject, provided that unsoundness is at all times existing upon that subject, it is quite erroneous to suppose such a mind really sound on other subjects. It is only sound in appearance; for if the subject of the delusion be presented to it, the unsoundness which is manifested by believing in the suggestions of fancy, as if they were realities, would break out; consequently, it is as absurd to speak of this as a really sound mind (a mind sound when the subject of the delusion is not presented), as it would be to say that a person had not the gout because his attention being diverted from the pain by some more powerful sensation by which the person was affected, he for the moment was unconscious of his visitation. It follows from hence, that no confidence can be placed in the acts, or in any act, of a diseased mind, however apparently rational that act may appear to be, or may in reality be." He goes on further, using language of the same description, and very much to the same purport, and then considers what a delusion is, and what is a delusion which is an insane delusion, and which has been described as a belief of things as realities which exist only in the imagination of the patient. He then gives Dr. Willis's account with very much accuracy, which confirms the view which he had taken himself, and which, as I said before, had been taken by all the members of the Judicial Committee, for the judgment had their express sanction when Lord Brougham delivered it.

**[32]** We have to consider now a little of the history of the deceased, because, as I have before stated, it is asserted that he was not insane, that his imagination was not unsound, and that his conduct and behaviour were not the result and consequence of insanity, but proceeded merely from his Asiatic feelings, the manner in which he had been brought up, and the mode of thinking which prevailed in India; and that he was unused and unaccustomed to society in England, and to the ways and manners of Europeans.

The history of the deceased is this: He appears to have been born at Sirdhana, in the upper provinces of Bengal, in or about the year 1808, and to have been descended from ancestors some of whom were of European, and others of Asiatic origin. As to his exact pedigree, the parties are not agreed. Mr. Prinsep, the executor, alleges that Mr. George Alexander Dyce, the father of the deceased, was of Asiatic extraction; that he was for some time a colonel in the service, and an officer in the household of Her Highness the Begum Sombre, or Somroo, who exercised a right of sovereignty over a certain portion of territory in the Upper Provinces of Hindostan; that his mother was the grandaughter of a General Sombre, who had been the husband of the Begum, or who cohabited with her as such, but who died in her lifetime; that General Sombre, by a previous marriage or cohabitation with a native Hindoo woman, had a son named Louis Balthazar Sombre, who was the father of Juliana Dyce, the mother of the deceased.

By Mrs. Dyce Sombre, the widow, it is denied that the father of the deceased was of Asiatic origin. **[33]** On the other hand, she asserts that he, that is, the father of the deceased, was the son of a British officer, a native of Scotland; and as regards the maternal side, that the mother of the deceased was Juliana Reinaud, the daughter of Louis Reinaud, by a Miss Lefevre; and that the said Louis Reinaud was the son, by a Rajpoot lady, of Walter Reinaud, who was a German by birth, surnamed Sombre, and who was the husband of the Begum.

Now, what may have been the very precise origin or pedigree of Mr. Dyce Sombre, it is perhaps not very easy to collect from these statements, or from the evidence given in the cause; but it cannot, I think, be of any great importance to determine whether European or Asiatic blood prevailed in his veins. It is more to the purpose to inquire how he was brought up, and by whom he was educated, and with whom he afterwards associated. Of this, I think, a very fair and satisfactory account is given by Dr. Drever, who was an intimate friend of the deceased, who knew him well in India, and who also knew him after his return to Europe. Dr. Drever says: "I became acquainted with David Ochterlony Dyce Sombre, the deceased in this cause, in the year 1829. I was then assistant surgeon to the 32nd regiment of Bengal Native Infantry, at Meerut. The deceased was living with the Begum Somroo. I knew the father of the deceased, George Alexander Dyce, who had been in the employ of the Begum, but had left her service in disgrace. The mother of the deceased I never knew. The deceased was then about 21 years of age. His father **[34]** was a Protestant. I do not know it myself, but I have no doubt of the fact, that

the deceased had been under the care of Mr. Fisher, a clergyman of the Church of England, who was still chaplain at Meerut. I was not on terms of intimacy with the family, but I knew his sons, who were in the same service with me. Meerut is twelve miles from Sirdhana. The deceased, while I knew him, always belonged to the Roman Catholic Church. He mixed in the society of the civil and military servants of the East India Company. They were frequently dining at the Begum's table, and the deceased was present. It is a large military station; there were many English families; and when at her own place at Sirdhana, there was very good English society, male and female. The deceased had acquired their habits, and conducted himself at all times in a very becoming manner. Three years after I became acquainted with him, viz., in 1832—I was attached to the Begum's household, as her physician; for four years I lived in her family, with the deceased, and we were then in daily intercourse. No person knew him so thoroughly as I did, and there was no one in whom he placed such entire confidence as in me. When going into society, the deceased dressed as an European—sometimes in plain clothes, at others in uniform, as a colonel in the Begum's service. For the opportunities he had, the manners of the deceased were very good. He lived altogether as an European. In regard to the treatment of women, it is to be remembered, that though the natives do not allow the females of their families to appear in society, **[35]** yet, meeting European ladies in society, they treat them with great respect. In so far, there is no difference between the conduct of Europeans and natives; but the deceased showed a marked difference in another respect, viz., he had a native woman with whom he cohabited, and although very much attached to her, yet he never showed the slightest jealousy of her, but allowed many of his friends to visit her in the female apartments of the Zenana. I frequently saw her, and unveiled. It was in the palace of the Begum; she lived in one of the apartments. His own disposition seemed to be very gentle, mild, and forgiving; I never saw him lose his temper; I have seen him under provocation, not disposed to take offence; and he was unassuming, though frequently appearing and acting as the head of the establishment." Then he goes on with an account of the continuance of his acquaintance with the deceased till the period when he departed for Calcutta, and afterwards he corresponded with him, and subsequently knew him in England. The witness says that prior to the deceased's embarkation for England, he sent the witness his will. Such is the account given by this gentleman, and from which it is to be taken that the deceased certainly was cognisant to a considerable degree of European manners; that he associated with Europeans; that he had been educated by a clergyman of the Church of England, who was a married man, and who had a family, one of his sons about the age of the deceased himself; that he afterwards became acquainted with the officers and with their ladies, and others, who visited the Begum; that he was in the habit of **[36]** going over to the military station where the officers were, and associating with them; and, therefore, that he was not altogether ignorant of European manners, though he was born in India; and I think that is the account which is pretty generally given by other witnesses who have been examined upon the point. There is a difference in some respects, in regard to his jealousy of women; because by some of them it is said that he never suffered anybody to see the women who were kept in the Zenana; but, according to Dr. Drever, he admitted his friends into the Zenana, who there saw the women, and unveiled. Now it is true that he can only mention, I think, one friend by whom they were visited besides himself, and that is a Captain Rogers; but to that extent they were admitted into the Zenana, and they did see the women. However, I think his manners were to be considered as partly Asiatic and partly European; that he was conversant both with the manners of Asia and those of Europe to a certain extent, and not so entirely ignorant of European manners as he has been described to be.

In 1836 Her Highness the Begum died, and upon that occasion her will was proved in the Court at Calcutta. In October, 1836, the deceased quitted Sirdhana, to which he never returned. The Begum left him, as I before stated, and he became possessed, at her death, of a very large property. On quitting Sirdhana, he appears to have gone to Calcutta,—at least he was there about the month of January, 1837,—and to have remained there until August in that year, when he sailed for Singapore and Canton, in China, and returned to **[37]** Calcutta in February, 1838. He then embarked for England, and arrived at Bristol in August of that year. In September,

1840, he was married to the Honourable Mary Anne Jervis, the daughter of Lord St. Vincent. It appears that he had travelled upon the Continent for some time; that he had made proposals to her; that the marriage was broken off; that in consequence of a letter he received from her, he returned to this country, and the marriage took place between them, and they cohabited together after this marriage till about the month of March, 1843. At that time a separation took place between them, in consequence of the deceased having been put under restraint as a lunatic, at the Clarendon Hotel, and thence he was removed under the care of a keeper to Hanover Lodge, in the Regent's Park, at which place he continued for some time. In September, 1843, he was allowed to travel, for the benefit of his health, with Dr. Grant, who was to take care of him, and upon the 21st or 22nd of September he escaped from Liverpool, and he arrived in Paris upon the 22nd or the 23rd of September.

With respect to this confinement and the insanity, the charge is that he became insane in 1842 or 1843, and that it was necessary to put him under restraint. On the other hand, it is said that he was not insane at that time; that he was not insane at any time; and Mr. Prinsep asserts, in his answers in the present suit, that he does not believe that the deceased was at any time insane. So the first question is, whether he was insane in 1842 and 1843, and especially **[38]** in 1843, when he was put under restraint; and if it shall be established that he was insane at that time, the question will arise whether he had recovered from that insanity previous to the time of the execution of the will and the codicil. And the onus probandi must, in the first case, lie upon the party setting up the insanity, since every person must be presumed to be of sound mind till the contrary is shewn. The question is, whether Mrs. Dyce Sombre has duly discharged herself of that duty; whether she has proved to the satisfaction of the Court that at this particular time, in 1842 and 1843, the deceased was of unsound mind?

The witnesses who have been produced to prove the insanity upon this occasion are several. Sarah Lake, who was the servant in attendance upon Mrs. Dyce Sombre, says: "I think it was in the year 1838 that I entered the service of Mrs. Dyce Sombre, then the Honourable Miss Jervis. I have lived with her ever since. The first occasion on which I noticed anything amiss in Mr. Dyce Sombre, the deceased, was on the way from Donnington Park to Lord St. Vincent's; that was in the year 1841." So that she carries it rather farther back; but that was the first time that she noticed anything extraordinary, and that was upon her return from Donnington Park, where they had been on a visit to the Marchioness of Hastings—that was in the month of May. "At Donnington, Mrs. Dyce Sombre came crying to me, in great distress, at what Mr. Dyce Sombre had been saying of her." "The next that I remarked extraordinary in him was in June **[39]** of that year, at the Burlington Hotel. There I knew him to keep Mrs. Dyce Sombre in her room for as much, perhaps, as two hours, while he called her all sorts of names—a damned bitch, a person of improper character, worse than any woman that walked the streets," and so forth. We next come to a later period, which is rather more important. She says: "In 1842, at the Clarendon, I heard him charge her to her face with being guilty with Mr. M., with Mr. C. F., with Mr. F., with General V., with her own father." These are certainly most extraordinary charges to have been made against a lady: it is not a mere Asiatic suspicion of infidelity, but it is general infidelity, with a great number of people, and with her own father. However, it is said that this may still be consistent with Asiatic feelings—that incest between father and daughter is by no means an uncommon thing in India; and one of the learned physicians, to whose evidence I shall presently advert, says that even in England he has known very many cases of the kind. However, this is only the commencement of the charges which he makes: for they are not confined merely to those parties who are enumerated, but are made with respect to all manner of persons—the waiters, the tradesmen, anybody. The witness says: "I never heard him say that she had confessed it, but that her father had confessed it; that Lord St. Vincent had confessed it to him, Mr. Dyce Sombre." Now, surely that is not very consistent even with Asiatic manners in a person of sound mind. "He charged her many times, and in different words, **[40]** but what he said was always to the same effect, and that was, her being guilty of adultery with them. He charged her with having been guilty with Mr. M., in my room"; and so forth.

In this, to a certain extent, she is confirmed by a witness of the name of Roulin, who was the valet of Mr. Dyce Sombre at the time, and who speaks to the violent conduct of this gentleman towards his wife.

But, however, it does not rest merely upon these servants, because we have the evidence of the physicians by whom he was attended upon this occasion, and under whose authority he was put under restraint. Sir James Clark first knew him in the month of February, 1843. He says: "I was called in by another physician, since deceased." They were then at the Clarendon Hotel. "I continued to attend him at various places, from the end of February till the end of August," that is, in 1843, "when I left him, being obliged to be in attendance upon the Queen. I saw him at various times and places, as I shall have occasion to relate, till November, 1848, when I saw him for the last time." Then he goes on to say that he saw the deceased in Clarges Street, in June, 1844, and so forth; but that is not the point upon which we are now, which is confined to 1842 and 1843. "The deceased at all times manifested delusions respecting the infidelity of his wife. I knew it to be an insane delusion, from the nature of the accusations against her, and the reasons he assigned." Therefore, it is not merely that he was jealous of his wife; for jealousy, though unfounded, might not **[41]** be any proof of insanity at all; but the witness says he judges from the nature of the accusations against her and the reasons which the deceased assigned for them, "or rather from his inability to give any sound reason for it, or any rational account of his suspicion. One very manifest proof of its being an insane delusion, was his assertion that she had had connexion with her own father in Hyde Park in open day." So that it was not that which might exist in the mind of an Asiatic, that she had been guilty not only of adultery, but of incest; but his notion was that she had been guilty of adultery in Hyde Park in the open day, and with her own father. Certainly that is a strong instance of insanity, and I think that Sir James Clark is perfectly correct in describing that as an insane delusion. His evidence on this part concludes thus: "There were a variety of persons with whom he charged her, and not one sound reason could he at any time assign for his suspicions. On one occasion, indeed, he admitted that he might be wrong in his belief of her infidelity, but only as if he had been taught to say so—not at all as if the suspicion was abandoned, or the delusion at an end." That relates to an examination which took place at Mivart's Hotel in 1848, and the manner in which the deceased made the denial on that occasion must be afterwards looked at; the evidence given upon that occasion was taken by a shorthand writer and is now before the Court. There was another examination in 1844, and Sir J. Clark states not only the existence of the delusion as to adultery, but goes on to describe other matters which clearly shew insanity. Referring to other **[42]** delusions, he says: "On one occasion, on the 10th of April, 1843, the deceased said that he had that night seen the heavens open, and one of the spirits rise from his grave, and desire him to do one of three things: the first, he said, was too bad to mention, and he would not mention it; the second was to kill a cat in a particular manner; and the third was to eat his own dirt. He spoke of two spirits, one evil, the other good. One had counselled him to throw Mrs. Dyce Sombre's ring (her marriage ring no doubt) into the fire. I cannot speak to his talking to himself, or laughing aloud, &c.; it would not happen in my experience, because when I had done talking with him I left. He was very restless, and his whole demeanour was such as to make it marvellous that anyone could doubt his insanity." I think from this statement it would be marvellous that anyone could doubt it; because as to the truth of the statement there can be no doubt, since it is quite impossible to suppose that Sir James Clark would depose to facts untruly. His opinion, like the opinion of any other man, might be wrong, but he could not depose to these facts untruly; he could have no interest in stating anything that was not perfectly correct. He goes on to say that "on the 30th of March, in the same year, 1843, he had a consultation with Dr. Sutherland, Dr. Monro, and Dr. Conolly. There were present also Lord St. Vincent, T. H. Parker, Esq., Mr. Edward Ricketts, and Mr. B. J. L. Frere. That was held in his absence for the special purpose of deciding whether it was necessary to put Mr Dyce Sombre under restraint, and it was decided that it ought to be effected immediately, provided that the consent **[43]** of Mrs. Dyce Sombre could be obtained." It has rather been represented that she was a person eager to get this poor man placed under confinement; but the difficulty here was to get her to consent to it. The medical men and her father all thought that he was insane, and

that it was necessary, even for her protection, that he should be placed under restraint, for that her life was in danger. Sir J. Clark, referring to the conduct of Mrs. Dyce Sombre, says: "She had hitherto expressed great reluctance to it. I saw her on the subject, and did strongly represent to her how indispensably necessary it was: she then gave her consent. Thereupon a certificate was signed by Dr. Conolly, Dr. Sutherland, and myself." Then he is placed under restraint, and Dr. Domier, a young physician, is selected to take care of him. The witness then deposes as to other instances of insanity about spirits; he says: "On the 10th of May, 1843, the deceased told me that his wife had acknowledged that her father had had connexion with her in Hyde Park in open day." Before, we had the confession of the father; now, we have her own confession: "On the 17th of May he told me that he was visited by a spirit every night; that the day before he had dined on what he called a 'state ball,' which consisted of some bread and apple (over which he had burnt some brandy) and a glass of porter. Being asked an explanation of this, he replied that he took that kind of dinner in order to stop the Queen's levee; and he expressed surprise that the levee had notwithstanding taken place, adding that he should protest against it."

There is ample evidence of insanity here; but **[44]** it is necessary also to advert to what he says upon the twentieth article, and it becomes necessary to advert to the particulars of the evidence which is given of the description of insanity; because I shall have to consider presently the examination which took place before certain physicians in Paris, who came to a very different conclusion from what Sir James Clark and the other medical men who attended the deceased in England, and who were consulted upon this case, did; a very different conclusion. Upon the twentieth article he says: "Whilst at Hanover Lodge, in the summer of 1843, he talked to me of the terms on which he was willing that his wife should return to him. These conditions were of such an extraordinary kind, that I requested him to put them in writing. Soon after, perhaps the next day—it may have been the next, he produced to me a paper in red ink, to be delivered to Mrs. Dyce Sombre, intimating that it contained the conditions for her return to him." A very different account is given by the deceased when he comes to mention the circumstance at Paris before the physicians there. Sir J. Clark identifies the contents of the paper, and says: "How and when I copied it, I cannot say. I have no recollection of that, or of having seen it after I sent it to Mr. Frere; but a copy of it I must have made, as I believe. I now speak to its contents from a copy in a paper before me, which is my own affidavit embodying it, and in which I am certain that it was correctly recited. The original was in the deceased's handwriting." He then says: "I know that by the 'A. B. of C.,' were meant and intended the Archbishop of Can-**[45]**terbury; by the letters 'E. J.' were meant and intended the brother of Mrs. Dyce Sombre; by 'H. P.' were meant Hyde Park; and by the abbreviations 'Vis. Ct. St. V.' were meant the father of Mrs. Dyce Sombre. That I know, because the contents of the paper had been repeated to me by the deceased by word of mouth. He talked them over seriously, the names and place being mentioned by him at length. The paper was handed to me by the deceased deliberately, as I have said, as containing the conditions on which he would receive back his wife. The paper was subscribed with his own initials." The words of the paper were these: "First—Let the A. B. of C. procure and furnish every requisite for passing a pleasant evening with a virgin of the same rank as the one now lost. Second—Let Mr. E. J. produce another lady to receive the extinguisher (of rank). Third—Let there be a duel of three fires at the place in H. P. Fourth—Let Vis. Ct. St. V. procure a roan horse, well broke, for the occasion. Fifth—When the ground has been consecrated with the duel, I shall reconsecrate it with madame, and bring her back home on the horse." This is indeed a most extraordinary paper.

The other evidence, I think, of Sir James Clark goes to the years 1844 and 1848; and I have already cited quite sufficient with reference to the year 1843; and Sir James Clark is confirmed in all these circumstances by Dr. Monro, who attended the deceased, in February, 1843, at the Clarendon, and, in July, 1843, at Hanover Lodge. He says: "The main feature of his case was delusion in respect to the infidelity of his wife. **[46]** In July, 1843, it was very strongly marked, and wore a settled and determined character. It was pregnant with the seeds of much risk and danger to Mrs. Dyce Sombre, from the peculiar nature of the delusions under which he

distinctly laboured with respect to her, and her supposed want of conjugal fidelity. The insane character of his suspicion was evidenced in his general accusation of incontinency with anybody and everybody; and the assertion that she had herself owned to having received men, from her own father down to shopmen. The delusion was fixed, as I have said, and was manifested by him on each of the occasions when I saw him in the years 1843 and 1844. I remember thinking that there was serious risk of his doing her some mischief when he was at the Clarendon Hotel in 1843." This witness attended the execution of the commission which was held to inquire into the state of the deceased's mind, and was examined, and so were Dr. Chambers, Dr. Elliotson, and others. And he speaks not only as to this insanity with respect to the infidelity of his wife, and the nature of that infidelity, but he also speaks to the belief which the deceased entertained, that he was likely to be poisoned, which is undoubtedly a very frequent attendant in diseases of this kind. He says, to the sixty-third article: "I find from my affidavit, but I do not depose from recollection, though I have no doubt of the fact, that in June, 1844, the deceased stated, as he had done before to my recollection, that pernicious things had been put into his food at the Clarendon and at Hanover Lodge. His meaning, in 1843, was, as I understood **[47]** him, that such things were administered to him for the purpose of producing impotency." It does appear from the testimony of several other witnesses in the case, and from some of the entries in his own handwriting, that he sometimes considered that his food was poisoned, and sometimes that pernicious drugs were put in to deprive him of the power of sexual intercourse.

Mr. M. has been examined, with whom the deceased supposed that his wife had committed adultery, but he seems to have had no intercourse with her to give any colour whatever to the suspicion; he merely, I think, on one occasion went to the same theatre, and went from one box to the other for a short period of time, and then they separated.

Of the other physicians, Mr. Martin says: "I was made aware of his delusions respecting his wife by his own communications, made to me personally when at Hanover Lodge. He then stated to me that his wife had been unfaithful to him, in that she had lived (for three days I think) with Sir F. B.; further, that he had seen her having sexual intercourse with soldiers of the Guards in the Regent's Park; and further, that she had had criminal intercourse with her father. At this time I became acquainted with Mrs. Dyce Sombre, I think by her signifying her wish to see me, with a view to her having a meeting with her husband. She accompanied me to Hanover Lodge, where I had previously prepared the deceased to expect her. They were together for perhaps half an hour alone, the door being left ajar in case of needful interference on my part, I remaining **[48]** in the passage. I saw their meeting. He shrank from her as from an object that was repulsive. His manner towards her appeared to me to be repulsive, certainly not cordial. At the conclusion of the interview, I was requested to enter the room, when the deceased declared to me in her presence, that his consenting to her wish to see her again should depend upon my calling out Sir F. B., and that the sooner the meeting was arranged the better." That was the way in which he was to be reconciled to his wife, though she had committed adultery with Sir F. B.; that Mr. Martin was to call out Sir F. B. and to fight him, and then the husband and wife were to be reconciled. Now, this witness gives most important evidence, but it relates to other periods of time, viz., those of the examinations at Mivart's Hotel in 1848.

Dr. Conolly gives evidence to the same effect; and he speaks to the spirits, and the dining on apple and porter to prevent the levee. He says on the nineteenth article: "I have no more to say about the spirits. I remember his saying, on the occasion just deposed of, that he had dined upon an apple and some porter, I think for the purpose of preventing a levee; but my recollection of that is less distinct than of what passed on the same subject in June, 1844, when he was asked about it, and acknowledged that he had felt displeased that the levee had not been postponed. He complained also that the influence of the Duchess of Kent had been used against him." Dr. Elliotson, in his evidence, states that the deceased called upon him, and challenged him, and so forth, though he was quite a **[49]** stranger to him, and wanted him to give him something to make him have more intercourse with his wife.

I think it is quite clear from this testimony of these physicians, that in the year 1843 the deceased was insane, and that he was incapable of making a will, or doing

any act whatever requiring thought, and judgment, and reflection; for though he might converse rationally upon ordinary subjects, yet the fact of his having these insane delusions with respect to the infidelity of his wife, her committing adultery in the open day with her own father, with all manner of persons, with shopboys, with the waiters of hotels, with the soldiers of the Guards—his delivering the paper relating to the Archbishop of Canterbury, and the mode that was to be pursued to reconcile him to his wife—the existence of these delusions and strange fancies can leave no doubt whatever that the deceased at this time, in the year 1843, was of unsound mind, and incapable of making his will. To all this I may add, that there was the verdict of a jury in 1843, finding that the deceased was of unsound mind, and that he had been so from the preceding month of October, 1842. The Court can, therefore, have no hesitation whatever in considering that the deceased was of unsound mind in the year 1843.

Then the question is, whether he had recovered from that state of insanity.

The onus probandi that the deceased was of unsound mind, I have stated, lay, in the first instance, upon the party alleging the insanity; but when once the existence of that insanity has been esta-[50]-blished, as I think it undoubtedly has in the present case, then the onus probandi is shifted; then it is necessary that the party setting up the recovery from that insanity should satisfy the Court by distinct proof that their averments are well founded.

The deceased having been for some time at Hanover Lodge, was permitted to travel; and about the 9th September, 1843, he left Hanover Lodge, under the care of Dr. Grant. He travelled about with that gentleman; but on the 21st of that month, while at Liverpool, he escaped from Dr. Grant, and proceeded to Paris, and arrived there upon the 22nd or 23rd of September. He was shortly followed thither by Mr. Frere, who had been his solicitor, and who was the solicitor of the committees of the person. Mr. Frere took with him a keeper, and upon his arrival in Paris, he made an application to the English Ambassador, for the purpose of having, through him, an application made to the French authorities, that Mr. Dyce Sombre might be delivered up and sent back to England. However, it happened that the French authorities thought that such was not a proper course to pursue, and that it was not in conformity with the French law, considering that they were bound to inquire into the state of the deceased before they took that step; and it was determined that an Investigation should take place, and that an Inquisition should be held. Accordingly an Inquisition was held there, under the direction of Monsieur Delessert, the Prefet of Police; and it was attended by two or three physicians, who were nominated by the French authorities for that purpose. And it now becomes necessary to see [51] what the evidence before that Inquisition was, and what determination they came to with respect to the sanity of the deceased.

I should, however, first refer to an authority upon the subject of the mode of examination in France and in England; and I will now refer to a passage in Dr. Ray's Medical Jurisprudence, on the subject of the mode of examination which prevails in France.

He says, at page 246, and at section 268: "In England, and in this country, the choice of the means for establishing the existence of insanity when concealed, is left to individual sagacity. This, no doubt, is sufficient, where great practical acquaintance with insanity readily suggests the course best adapted to each particular case; but the great majority of medical men will feel the need of some system or order of proceeding that will simplify their inquiries, and render them more efficient. The French arrange their means into three general divisions or classes, which are made use of, each in succession, when the preceding class has failed of its object. They are called the Interrogatory, Continued Observation, and the Inquest; and as no better arrangement has ever been offered, it may be well to describe it; and it may be added, in passing, that it would materially conduce to our success in inquiries of this kind, if they were always pursued in the course here indicated." So that he approves of the French method, and he thinks that it would be well if applied in all cases. First, there is the Interrogatory; and he says that that "embraces only those means of information which are appli-[52]-cable in a personal interview with the patient. After learning generally his moral and intellectual character, his education and habits of living, the duration and nature of his mental delusion (if it can be ascertained from his acquaintances), and the state of his relations to others, and after observing the

expression of his countenance, his demeanour, and general appearance, we may proceed to a direct examination of his case" (an examination of him upon Interrogatories). "He should be led to speak of his relatives and friends"; and so forth. He states the manner in which that examination should take place. Then, the next method is that of Continued Observation, frequent personal interviews, and constant watching, and inducing the suspected persons to write letters and statements of their wrongs and grievances. The last is the Inquest: "When the above means fail, our inquiries must take a wider range, and be directed to the previous history of the patient, as made known to us by the testimony of friends and relatives," and others. "For this purpose we consult his writings"; and so forth. So that, first, they are to interrogate the deceased; then, to consider his habits and manners, and to get information from other persons as to these; and, likewise, to consult any writings of his, if they can be obtained. Now, unfortunately, these French physicians do not seem to have had an opportunity of examining in all these respects. They examined the deceased in the form of Interrogatory; but it seems that they had very little besides. They had a letter from Sir James Clark, and that was all the instruction that **[53]** they had upon which this gentleman was examined by them.

The evidence given by Monsieur Delessert, the Prefet of Police, is this. He says: "On the 11th of October, 1843, the Commission appointed met in my office for the examination of Mr. Dyce Sombre. It was composed of myself, as President; Dr. Chermside, Physician to the English Embassy; Dr. Behier, one of the Physicians to the King of the French, and who, with Dr. Bouneau, was Physician Inspector of the Lunatic Asylums of this Department; Mr. Okey, English lawyer, Counsel to the Embassy; and M. Jennesser, Commissioner of Police. There was present also M. Baron Solaroli." Those were the persons who were present on the occasion. He then goes on to say, in reference to the deceased: "He looked very quiet; his features did not indicate any agitation. I began by explaining the state of circumstances under which the Commission met, the asserted lunacy of the deceased on the part of Mrs. Dyce Sombre, and the denial of it by Mr. Dyce Sombre himself. I then asked Mr. Dyce Sombre to tell us the reasons of his having been placed under restraint. He answered immediately, with the assistance of M. de Conches and Mr. Okey as interpreters, that he arrived from India in 1838; that he had subsequently married Lord St. Vincent's daughter; that for two years and a half he had lived very amicably with her, but then some friends interfered officiously in their private affairs, before any quarrel took place. He then said, that in April, 1843, he was placed under restraint in his hotel, watched day and **[54]** night by servants during twelve days, and then desired to leave the house he lived in; that he refused; and then one day, when out in a carriage, he was pulled out of it and taken to another house in Regent Street, where he was kept without inquiry from the 11th of April to the 1st of July, when a legal inquiry took place. During all the time that this restraint lasted he saw only Sir James Clark; papers placed in a sealed box had been taken from him and never given back; and that he had not been permitted to see a solicitor, whose assistance he had requested." Now it is quite clear that those were untrue statements on the part of this gentleman, for he had not been refused the assistance of a solicitor. He had been asked more than once whether he would have a solicitor, but he declined to do so. He said there was a gentleman of the name of Cockerell whose advice he would take, and nobody else, but Mr. Cockerell was in India. This circumstance is mentioned by the solicitor of the Committee; and it was also mentioned by Mr. Barlow, the commissioner, to him, that he might have the assistance of a solicitor, but he declined it altogether. Monsieur Delessert continues: "He added, that in that house where he was so kept, the servants endeavoured to frighten him; they entered his bedroom suddenly when sleeping, placed themselves before the fire just to appear as phantoms" (that is the way in which he explains away the spirits); "that he was awakened by their proceedings, though not frightened." To the question to what person he attributed these proceedings, and his restraint, he answered that he **[55]** "did not know, except it were to the East India Company" (so that the East India Company was the occasion of all this), "against whom he had a lawsuit."

Then he is questioned as to the duel, and his answer is, that he did, by one of his friends, demand satisfaction of a person from whom he thought he had received provocation; but a letter of explanation having been addressed to him by the person, the matter ended. That is all that is said about the duels; yet, according to

the evidence given, there can be no doubt of the fact that he had challenged a great number of persons; that he had sent challenges to several of the directors of the East India Company; and that he had called out, or challenged, various other persons.

Such is the account given by the Prefet. I come next to the account given in the Official Report. But I should state before I consider this, that it is laid down in that case to which I have already referred, the case of *Waring* v. *Waring*, that the account, and the statement, and the explanation of the parties themselves, cannot be received as sufficient, if they have any object whatever in view; that is, if they have an opportunity of imposing upon the parties who are examining them, and they have any object in view, they will deny that which they would otherwise have admitted; and that the insanity does not always come forth in the manner in which it was expected, because, generally speaking, if you touch the chord of insanity, it is immediately responded to, and then the parties betray themselves; but if they have any object in view—**[56]** for instance, escape from confinement—it is necessary to examine others, and to examine them closely, in order to ascertain what the real state of the case is.

Now, in the Official Report this is stated: "The Prefet having then invited Mr. Dyce Sombre to give him the history of the events which have caused the sequestration of which he complained, and from which he had escaped only by flight, the latter answered by the interpretation of Messrs. Okey & Feuillet: That he arrived from Calcutta in London, on the 15th of February, 1838; that he married the daughter of Lord St. Vincent, with whom he has lived on the best understanding during two years and a half; that, later, some friends had improperly meddled in their affairs in a manner which had caused such trouble as had never been before between them. He says that, in the month of April last, by order only of two physicians, he was confined in his hotel, and guarded day and night by servants; that this lasted about twelve days; that, finally, he had been required to quit the house he resided in, which he resisted; and that, at last, one day, whilst he was taking a promenade, he was violently pulled out of his carriage, and conducted into another house situated in Regent Street, where he was watched over, without inquiry, from the 11th of April till the 1st of July, the day when the legal Inquiry took place. That during the whole time while this detention lasted he only saw the doctor, Sir James Clark, of whom he solicited with earnestness, but in vain, the favour of a public process." Now, he had seen many other **[57]** persons besides Sir James Clark—Dr. Monro and others had visited him; and Sir Charles Trevelyan, who seems to have taken a deep interest in this case, and to have been very favourably inclined towards Mr. Dyce Sombre, calls upon him in Regent's Park; and Sir Charles Trevelyan is satisfied that at that time, when he so visited him, he was not of sound mind. However, this gentleman says that he was only visited by his physician; but it appears that his wife visited him during the time that he was in the Regent's Park; "that papers which he had placed in a sealed box, and necessary for his defence, had not been delivered to him when he demanded them from Dr. Clark, to whom he had entrusted them; finally, that he could not see an advocate, whose assistance he had required"—that advocate being in India, and that being the reason that he could not see him; and he was told that he was in India, and that he might have anybody else that he liked. He adds: "That in his house, the servants, no doubt in order to execute orders they had received, endeavoured to frighten him; that they entered unexpectedly into his room whilst he was sleeping; that they placed themselves before the chimney, in which there was a fire, in order to feign shadows; that all this awakened, but did not frighten him." That is the explanation which he gives as to the spirits; because he had told Sir James Clark and others that he was visited by a white spirit, and by a black spirit, and at another time, I think, by a blue spirit; and that he had been visited formerly, in India, by spirits in the form of the letter T. But now, all this is to be reduced to the mere statement **[58]** that the servants attempted to frighten him, by getting between him and the fire when he was in bed, and that this was done for the purpose of alarming him, and making him think that they were spirits. But it appears that these gentlemen had nothing before them but the statement of the poor individual himself; they had no evidence except that letter to which I shall presently refer, viz., the letter from Sir James Clark, upon which he was examined. The report goes on to say: "The Prefet having asked him to what persons he thought he ought to attribute his sequestration, he replied: 'I am ignorant as to who could have provoked this act, somebody, however, who must have

an interest in making me appear deranged; for whilst I was in this illegal manner detained, and two days before the legal inquiry, a physician, delegated by Sir James Clark, made me take a potion which gave me vertigo and giddiness—so much so, that I seemed to see the house turning over. Never before had I felt any similar thing, and never since this circumstance has it been renewed. This lasted three days: and it was under the influence of this draught that I appeared before the Commissioners of Inquiry. I do not know to whom to impute these facts, if not to the East India Company, against which I have instituted a process which has lasted seven years.'"

Now, certainly this is a most extraordinary statement upon the part of this gentleman. He directly charges Sir James Clark with sending another physician to give him a potion which was to upset his understanding and affect his reason for the space of three days; and that, during this time, they brought him before the Commission of [59] Inquiry, and the consequence was that he was incarcerated. Surely, contrasting this statement of Mr. Dyce Sombre with the evidence of Sir James Clark and the evidence of all the other physicians who have been examined, there is but one conclusion to be arrived at. For to suppose that Sir James Clark, or any other of those persons, had been guilty of such improper conduct, seems to me to be quite out of the question.

Then he is interrogated as to a challenge. "Interrogated regarding a challenge to fight a duel addressed by him to a person the name of whom was not asked, he said: 'Certainly I did address, by the intervention of a friend, a provocation to a person of whom I thought I had to complain; but a letter of explanation, which he addressed to me, appearing to me sufficient, this affair had no further consequences.'" These gentlemen think that, therefore, there was only a single duel: he was asked about duelling, and they think that there was only one occasion of this kind, and this is the explanation that he thought proper to give upon that occasion of one of his proceedings. It was an act of delicacy in this gentleman and of forbearance that he did not mention the person whom he called out, and with whom he was to have fought the duel. There is a total silence as to the challenges to the directors of the East India Company and the numerous other persons to whom he had sent challenges.

Then comes the paper with respect to Article 20, which is referred to in the examination of Sir James Clark. "The Prefet asked Mr. Dyce Sombre what had been his connexions with the Archbishop [60] of Canterbury, and he explained them immediately thus: 'On arriving from India, I was bearer of a letter of recommenda- from the Bishop of Calcutta for the Archbishop of Canterbury. I saw him in order to give it to him, and I found myself a second time in his presence at the time of my marriage. It is to these two visits only that my connexions with him are confined.'" So that he confined his connexion with the Archbishop of Canterbury to those visits —one on his arrival from India with a letter from the Bishop of Calcutta, and the other to the time of his marriage. Then he speaks thus: "'Regarding this matter, I ought to speak of a memorandum which I am deprived of, in order to make a weapon of it against me. During my detention, and for amusing myself, I wrote some jokes of this sort; I wrote, for instance, this among others: "The Archbishop of Canterbury should send me a young girl"—a bad joke, perhaps, but which was only for myself, and which should not have seen the day. Dr. Clark has preserved this memorandum.'" He knew that the memorandum was preserved, and he knew that it had been sent, because it had been sent with the letter of Dr. Clark to the French authorities, those being all the instructions which they had for the examination of Mr. Dyce Sombre. But which account is the Court to take? Is it to take the account of this gentleman, that this was a scrap of paper which he had written for his own amusement, that it was a mere fancy, and that Dr. Clark had improperly possessed himself of it? Or is the Court to give credence to the evidence of Dr. Clark, that the deceased seriously and deli-[61]-berately put this paper into his hand as a proposal, and that it should be carried into effect in the way which was described, and that in that manner a reconciliation should take place between himself and his wife? If Monsieur Delessert and the physicians of Paris had had Sir James Clark before them, they could have interrogated him upon the point, and would have heard the account which he could give of it, and they would not for a moment have given credence, as they appear to have done, to the statement of Mr. Dyce Sombre on this occasion. "The Prefet invited Colonel Dyce Sombre to relate to the Commission

the particulars of his flight and of his arrival in France. Mr. Dyce Sombre said: 'I was required to travel for my health, always accompanied by a physician and three watching servants. I have been to Bath, then at Liverpool, where I was detained in a house. In this latter town I found an opportunity to escape. I took advantage of it; I escaped eight days after my arrival at Liverpool. I returned to London. I remained there two hours, and not finding any steamer going to France, where I wished to go, I took the railway, which conducted me to Southampton, where I embarked for Havre; from there I went to Paris, where I arrived without money, so that I was obliged to sell the watch of my valet-de-chambre, which I had taken with me in my flight, as well as a pair of diamond buttons for shirt-sleeves, and a gold pencil-case.' Interrogated by the Prefet with all caution which delicacy prescribes, but however with all the authority which his character of magistrate gives him, regarding his position in respect to his wife, Mr. Dyce Sombre answered **[62]** that his relations with her were good; and in support of this assertion he gave to the Commission the reading of a letter, dated the 6th of October, 1843, addressed to him by Lady Dyce Sombre, the terms of which proved the good understanding." Mrs. Dyce Sombre, who seems to have been a most kind wife, was at all times writing most kind letters, and seeing whether she could do anything for his comfort or his convenience; he takes advantage of this, and he produces one of her letters as if they were on good terms. But what was the last interview between them? Why, according to the evidence which the Court has recently adverted to, when she called upon him in the Regent's Park, he withdrew from her as it were with a sort of abhorrence, as if he could not bear her presence in the room on the occasion. He now states, with great calmness, that the relations between them were very good, he having, up to that time, charged her with having committed adultery with all sorts of persons, including her own father.

The two other physicians who were present on the occasion deposed pretty much to the same effect as Monsieur Delessert has done. When he is examined on interrogatories, Monsieur Delessert says, on the thirty-second interrogatory: "I put my questions in French, and they were translated into English, as before deposed. The deceased was not questioned as to any particular persons with whom he had charged his wife with having criminal intercourse. He was not questioned as to a charge made against her by him of having had incestuous connexion with her own father, or of having had sexual intercourse with the lowest persons, both **[63]** before and after her marriage to him, and of having made a property of such conduct. The only question put to him on the subject of challenging to a duel, was that which I have mentioned. No name was introduced, none being contained in the letter of Sir James Clark." So that this was an exceedingly imperfect examination, for they had nobody to assist them even in interrogating, since they had nothing but this letter of Sir James Clark, and this paper about the Archbishop of Canterbury, which the deceased explained away as a joke. He represented that he had no charges to make against his wife; that they were upon the best terms; and that there was only one duel which had been likely to take place, and that was accommodated without resorting to violent means. And upon this evidence it was that Monsieur Delessert, Dr. Bouneau, and Dr. Behier, came to the conclusion that the deceased was of sound mind at that time. And, indeed, I think they rather came to the conclusion that he never was otherwise than of sound mind; because, when I look to the deposition of Dr. Behier, I find him saying: "I entered on the investigation with a strong belief that Mr. Dyce Sombre was a lunatic; but my opinion became completely changed. A letter was produced and read from Sir James Clark, suggesting the points of inquiry. The questions were proposed by Monsieur Delessert, having that letter in his hand; but the physicians suggested several as the inquiry proceeded. Monsieur Jennesser acted as secretary to the Commission for the civil portion of its members, and I took notes for the medical branch. I drew up the report **[64]** which we made, the draft of which, as originally prepared by me, I hold in my hand. Every question received a satisfactory answer from Mr. Dyce Sombre. Several of them were delicate and difficult and embarrassing. He answered all with great calmness, giving many details when required. As the inquiry proceeded, I found that we had been led into error respecting him; but we continued it throughout, in order to leave no part of the case uninvestigated. I might have been troubled to suppress my feelings, as he did his, had I been subjected to the same trial. I did and

do feel strong indignation at the manner in which it had been endeavoured, and successfully as it appeared in England, to make Mr. Dyce Sombre a lunatic." So that upon the mere statement of Mr. Dyce Sombre as to the manner in which he had been treated, and as to Dr. Clark's conduct to him, his getting a paper from him, and his giving him this potion, Dr. Behier thinks that he had been exceedingly ill-used, for he says that he felt very strong indignation at the manner in which he had been successfully made out a lunatic. "I thought, and I now think, him an oppressed man. The examination was conducted by Monsieur Delessert with great skill as well as kindness." I dare say it was from the very scanty materials that he had before him; and he says: "Agreeably to Sir James Clark's suggestion in his letter, the name of the Archbishop of Canterbury was mentioned. Monsieur Delessert having asked him a question accordingly, he voluntarily referred to a paper of which he gave us an account, very probably anticipating that it would be produced; he entered into it fully, and so as to have [65] an important bearing on my judgment respecting him." I have no doubt it had an important bearing upon Dr. Behier's mind. "Another circumstance struck me forcibly. When asked who had caused his confinement as a lunatic, he answered that he did not know. Was it Mrs. Dyce Sombre? He did not believe it of her, and so on; whereas it is observable with lunatics, that they have always someone on whom they fix as their enemy." But in the report drawn up by these gentlemen, it appears that he said that it was the East India Company. "One other circumstance I remember—he was very moderate in his expression of feeling towards Sir James Clark. When asked about poison, and if he believed anyone to have a design of it against him, he laughed at the suggestion—No, he had not; but he did think that previous to his examination on the Commission in England something had been given to him, not to do him permanent injury, but to take effect upon him for the time; and he explained how his head had been affected by it"; that is, he explained it in the manner stated in the Report, which was drawn up by Dr. Behier himself. Dr. Behier is exceedingly indignant at the manner in which this gentleman is treated. Now, I say, if this inquiry was conducted without Dr. Clark or any other witnesses being called to depose to the facts, without any of the writings of the deceased being before this Commission, and without their having any opportunity of knowing anything except what is declared by the deceased himself, this examination, as matter of evidence, cannot be put in competition with the evidence which was shortly before taken [66] in England; and it cannot have the effect of proving that the deceased had entirely recovered from the insanity under which he had laboured; and much less should it have the effect of shewing that he never laboured under any insane delusion whatever.

But, in truth, that this conduct of the deceased was for the purpose of concealment, and that he still entertained the same opinions as to his wife—that he still entertained them, even at this time, when in Paris—is to be found in the evidence of other witnesses, and in the conduct of the party during the time that he was at Paris: because, very shortly after this examination had taken place, we find, from the evidence of Mr. Okey, that he still entertained the same opinion as to the conduct of Mrs. Dyce Sombre. Mr. Okey speaks of the arrival of this gentleman at Paris, and the solicitor, Mr. Frere; and of the application which was made to have him delivered up; and, finally, of this inquisition being taken. Mr. Okey told him that he had received very kind letters from his wife, and the answer of the deceased was: "He did not doubt that his wife wrote fine sentimental letters, but her conduct towards him had been such, that it was impossible he could ever be reconciled to her again. Strangely at variance this declaration was with the continued preservation of her picture. In answer to my inquiry, what she had done so to excite him? he replied, that she had put him in prison, for which he would never forgive her; also, that she had done things for which he had often threatened to cut off her little nose (which was a favourite expression [67] with him). He added: 'I asked her to cover her face, as women do in my country, but she would not.' 'Do they?' I asked. 'Yes,' he said; 'my sister does.' Then he said: 'Her conduct when I was in prison, was most shameful; she used to lie about with men on the grass in the Regent's Park (Mr. Q. D. he named, and Sir F. B.) in the most indecent manner.'" This is directly after his examination at Paris, when he said that he was on the best terms with his wife. "When I told him that it was a delusion, he said it was not; he had complained to Sir James Clark about it. He proposed to leave their disputes to the Jockey Club

at Paris." This is immediately after his examination, when he was conducting himself to the entire satisfaction of Monsieur Delessert and of Dr. Behier and of Dr. Bouneau, and satisfied them that he was of perfectly sound mind; but when his object is answered in that respect, immediately afterwards he repeats all those charges against his wife. "I replied, that it might be very well if Mrs. Dyce Sombre was a horse, instead of his wife. On one occasion he told me he was almost sorry he had not treated her as she deserved, and put her to a lingering death. I inquired what he meant. He said: 'You know she is a little woman; I could have thrown her over my knee, and rasped her back, and then broken it with the butt-end of my pistol,' accompanying his words with the double action of scraping and then rapping, as representing both proceedings; upon which I told him that if he talked such mad stuff as that, I would give him up. On another occasion he said: 'Why does not the man take her; he is a rich man. I'll allow her [68] a handsome sum, say three thousand a year; then she can go her way and I mine.' On another occasion he desired me to write to my half-brother, the late Colonel Gurwood, to remonstrate with the Duke of Wellington for inviting her to his parties." "It was as early as about the 6th or 7th of November, 1843, that this insanity broke out respecting his wife, and it continued from that time, whenever her name was mentioned, as long as I continued to see him, till June, 1849." So that here is the evidence of Mr. Okey, deposing to these conversations immediately after the examination at Paris, in which he makes these charges against his wife, and his desire to refer their disputes to the Jockey Club at Paris; he speaks of that and similar conversations from that time, as long as this gentleman knew him, and down to the month of June, 1849, that month of June being the very month in which the will which is in dispute in this cause was executed by the deceased.

But there is also the evidence of Mr. Q. D., who happened to be at Paris at the time when this gentleman arrived there, and when he underwent his examination. It was in October, 1843, that the examination took place before Monsieur Delessert. To the Twenty-fourth Article he says: "In the latter end of 1843 and beginning of 1844 I met the deceased in Paris frequently; I went to the play with him, and met him at the Tuileries, as well as in private circles. He complained to me, at my first meeting him in Paris, that his fortune had been taken from him, and that he was not allowed enough to maintain him, and his wife was a party to it. He stated to me that it was a noto-[69]-rious fact that she was guilty of many infidelities. On my reasoning with him upon the impropriety and unreasonableness of such accusations, he stated that it was a matter of perfect notoriety that I and others were in a conspiracy to conceal the truth, that her father, Lord St. Vincent, had had connexion with her before her marriage. On my expressing indignant surprise at such a charge, he said it was quite true, and Sir James Clark would prove it." Now, again, this is directly after his examination at Paris that he makes these charges: he repeats them and he says that there is a conspiracy against him, and that he knew Mr. Q. D. was one of the conspirators; and that Sir James Clark would prove the facts. Sir James Clark was to be his witness on this occasion, to prove that his wife had been guilty of all those infidelities; and I cannot help thinking that it was with the cunning which belongs to madmen, that, having an object in view at the time of his examination before Monsieur Delessert and the physicians, he concealed the opinion he entertained, which possessed him at the very time.

Now, Lord Brougham, in that judgment to which I have before adverted, speaks of the manner in which insane persons will conceal insanity upon a particular occasion, when they have any object in view. He says that Dr. Willis on Mental Derangement, page 151, clearly states that men often mistake for a lucid interval the mere absence of the subject of delusion. Then he proceeds to mention the well-known instance, which is reported in the State Trials, of the indictment of Dr. Munro by a person of the name of Wood, for ille-[70]-gally confining him when he was of sound mind; that upon the first examination in court upon the indictment, a question was put to him which immediately elicited his insanity; and then it was perfectly obvious to everyone that Dr. Munro was justified in what he had done. But this person brought a second action, in which he again gave evidence, when it was found quite impossible to extract anything from him; they might mention to him the subject of his insanity, and try him in every possible way, but they could not elicit it from him in any way; and if they had not had an opportunity of calling in the shorthand writer who had

taken notes of the evidence on the former trial, Dr. Munro must have been convicted of having illegally confined this person as a lunatic when he was of perfectly sound mind.

This is a remarkable instance of the manner in which lunatics will, upon particular occasions, and when they have a particular object to carry out, deceive the parties who examine them; and this power of concealment is admitted by all the physicians who have been examined both on one side and the other in this case—very skilful, able, and experienced physicians. They seem to think that though in their own case they could always detect insanity, yet that others are very frequently imposed upon. And I cannot help thinking that Monsieur Delessert and the two physicians who assisted him had so little means of examining and knowing what the real state of facts was, that they were deceived upon this occasion, and that the deceased entertained but hid from them the same insane opinions which he held when he was in England, and that this is [71] pretty clearly shewn by the evidence of Mr. Okey and of Mr. Quintin Dick almost immediately after the examination had taken place.

Now, such is the evidence in 1843. Then in 1844 there is very strong evidence to shew that the deceased was then insane; but I need not refer to any particular evidence bearing upon that time. But it should seem that this examination, which took place in Paris, is not the only inquisition which has been taken in foreign countries; for it appears that the deceased, armed with this document from Paris, proceeds to St. Petersburg, and there an examination likewise takes place at his instance. He produces before certain learned physicians there this acquittal from Paris; and he also states that, owing to great misconduct in England and to a bribed jury, he was there found to be an insane person, and accordingly they are satisfied at St. Petersburg that he was of sound mind.

Then the same sort of thing takes place at Brussels, in the year 1845. Now at that time he had entered into a treaty with a gentleman of the name of Mahon, and he had contracted to pay Mr. Mahon the sum of £10,000, provided he should by his exertions in obtaining evidence and procuring physicians to certify to his sanity, obtain the supersedeas of the Commission, and be put in possession of his property. Accordingly, an examination of the deceased took place at Brussels in 1845; and it may be important to see what one or two of those persons who so examined him state. Mr. Blackwood is an English surgeon, resident at Brussels. He says that in 1845 the deceased, referring to the peculiar circumstances of his case, expressed a wish [72] to obtain a certificate, in order that the Commission of Lunacy in England might be superseded, and that he had already obtained a certificate of that kind at St. Petersburg. "Accordingly, on the 11th of June," he says, "I met Dr. Seutin in consultation, and we examined him together. On the 12th of June we again met, Mr. Mahon being then also present. On the next day, the 13th, I met Dr. Seutin again, the Advocate Theyssens being present for the purpose of legislation if wanted. The result was, that it was agreed to have a more extended and regular examination of the deceased, which took place accordingly on the 14th, Dr. Seutin having procured the attendance of Dr. Guislain, from Ghent; Dr. Vleminckx, President of the Royal Academy of Medicine in Belgium and Director of the Military Hospitals; and Dr. Crommelinck, proprietor of a lunatic asylum here; Mr. Mahon and myself being also present." So that upon these examinations, and upon all subsequent examinations which have taken place, except those which have been conducted under the authority of the Lord Chancellor himself, Mr. Mahon was a constant attendant upon the physicians. He was the person who had made a contract with the deceased to give up his time, in order to procure medical men, and through their means to obtain a supersedeas of the Commission against him. "On the 16th of June there was a still further examination of the deceased, in the presence of the last-named persons, excepting Dr. Guislain. On every occasion the deceased was examined as carefully and closely as was possible to us, and on all points which we had reason to think most likely to [73] make manifest a delusion, if any existed. I remember particularly that the report of his examination at Paris was here for our guidance," exactly as it had been at St. Petersburg. "There was no shrinking on his part from any point of inquiry, and no wilful omission on ours. His replies were prompt, collected, consistent, betraying no symptom of insanity or delusion. On the 14th, as I recollect, a certificate was signed by all of us as to the entire competency of the deceased to manage his affairs. That was Saturday; and we agreed to meet again on the Monday following, all but Dr. Guislain." So that they were all agreed upon this matter.

But now let us see what this gentleman says in a later part of his examination. It is upon the eighth interrogatory. "I did not understand from the deceased that he had seen Lord Lyndhurst; he spoke to me about his lordship repeatedly. At the time, or shortly afterwards, I could have fully complied with the direction to set forth what he told me concerning those interviews and concerning his lordship. All that I can now state specifically and distinctly is this: that he could have had his supersedeas and his divorce too, if only he would have bound himself to marry Lord Lyndhurst's daughter." Now really this is a most extraordinary thing to bring forward as an instance of the perfect sanity of this gentleman. They all testify to his being sane at this time; they are assisted by Mr. Mahon; they have got this certificate from Paris, and one from St. Petersburg likewise; and yet this poor individual gravely tells them that he could have got his supersedeas, and that **[74]** he could have got his divorce too, if he would have married Lord Lyndhurst's daughter. It seems to me, therefore, that we cannot rely upon this testimony, which was so got up at Brussels by Mr. Mahon—who had a deep pecuniary interest on the occasion, and who placed the examination before the physicians—who was present upon the occasion, as we shall find that he was on all subsequent occasions when the examination of this gentleman was to take place. They certify to the perfect and entire capacity of the deceased at this time; and yet one of the persons who signs this certificate gives this account of what the deceased said about what would have been the case if he had consented to marry Lord Lyndhurst's daughter.

So much, then, for the foreign examinations. The one at Brussels was in 1845. Then, I think, in 1846 an examination takes place at Dover by Dr. Bright and Dr. Southey, under the authority of the Lord Chancellor. What Dr. Bright says is this: that under the direction of the Lord Chancellor he visited Mr. Dyce Sombre in Half Moon Street—that was in the month of June, 1844; and he visited him there in conjunction with other physicians. I think one or two of the physicians call it Clarges Street, but it is quite evident that they mean the same place. Sir James Clark and three or four others visited him in 1844, and they found him under insane delusions at that particular time, and each of them has been examined; two of them, I think, speak of their visits as if in Half Moon Street, and two others as if in Clarges Street; **[75]** but they speak of having visited him at the same time, and therefore there can be no doubt that that examination took place in the year 1844, in one or other of those streets, and under the authority of the Lord Chancellor; and they came to the conclusion, from conversation which they had with the deceased upon that occasion, that he was then insane. Dr. Bright says: "There were present Sir James Clark, Dr. Monro, Dr. Conolly, and my colleague, Dr. Southey. On the 24th of July following I saw the deceased in company with Dr. Southey at the house, and in the presence of Lord Lyndhurst, in George Street, Hanover Square. I saw him again on the 21st and three following days of September, 1846, at Dover, in company with Dr. Southey. Again, in August, 1847, at Brighton, on more days than one, certainly two, with Dr. Southey only." Then he says that he again saw him at Mivart's Hotel, in November, 1848. With regard to the examination at Dover, he finds him to be of unsound mind at that time, and so does Dr. Southey, who was present upon that occasion; and he so conducted himself as to leave no doubt upon their minds that he was labouring under a delusion at that particular time. It is quite clear, also, from the evidence of the two persons in whose house the deceased was lodging at that time, that he was in a state of insanity, because both the husband and the wife hear this gentleman walking about his own room talking to himself and saying: "Damn her; I will kill her; I will murder her; she shall be no wife of mine"; and conducting himself in that manner. And they **[76]** speak of it so as to leave no doubt whatever that he meant his wife, during the time that such expressions were used.

I do not know that it is necessary to enter into the particulars of the evidence of these gentlemen at Dover, Dr. Bright and Dr. Southey, respecting what took place as to the deceased continuing to labour under delusions respecting his wife (to which they most distinctly depose), because, in a subsequent examination, in the year 1847, which took place at Brighton, when Mr. Dyce Sombre told them, or at least endeavoured to tell them, that he had got rid of those insane notions with respect to his wife, he distinctly admitted that it was since the time when he was at Dover; that he did entertain them at that time in Dover, viz., in 1846, at Dover; and that it was subsequent to that time (so he tells them at Brighton) that he had got rid of those

notions. So that there is the admission of Mr. Dyce Sombre himself, that up to the year 1846, and at the time of the examination at Dover, he did entertain the insane delusions as to the infidelity of his wife.

Now, with regard to what took place at the examination at Brighton, in the year 1847: Mr. Dyce Sombre came over from France for the purpose of being examined by Dr. Bright and Dr. Southey at Brighton, upon that occasion; and it is remarkable that upon his arrival at Dieppe, he there meets with Mr. Okey, and he tells him that he is going to England. He is asked the object of his visit, and he says it is to tell the Chancellor what a damned bitch his wife is; shewing, therefore, that he entertained the same opinion at that time as he had [77] done upon a previous occasion as to her fidelity. And yet when the physicians come to examine him, he tries to parry their questions, and says that he has got rid of that delusion; but this he does in such a way as to convince them that the delusion still prevails, for that is the opinion of Dr. Bright and of Dr. Southey; and they entertained no doubt whatever upon the subject, either when they saw him in Half Moon Street in 1844, or when they examined him at Dover in 1846, or at Brighton in the year 1847.

The Court has seen that Mr. Dyce Sombre had sufficient cunning of himself at that time to parry the examinations that were made of him, as he had done at Paris. But it is important to see whether that was not strongly advised and recommended; and whether it was not pressed upon him over and over again by Mr. Mahon and others, that he should conceal his delusion in this respect, that he had no chance of recovering his liberty unless he did conceal it, and unless he did state that that delusion had passed away. Over and over again is that caution given to him by Mr. Mahon and by many other persons; but it is given more especially and more emphatically by Lord and Lady C., who have taken an active part in this matter.

There is a letter from Lord C., which is dated in 1847; there are indeed earlier letters of the same kind, but this letter goes to the examinations which subsequently took place, namely, those in 1848, in December, and also in November, when he was examined by the Chancery physicians. Lord C.'s letter is to this effect: "You should [78] come to Dieppe, and there wait till you get the permission to come over to Brighton, to be examined by Drs. Bright and Southey." So that he was preparing him for this very examination at Brighton. "If you answer their questions coolly, and in a few words, they must declare you to be in such a state as to render you quite fit to have your liberty and property, which, I think, have been so unjustly withheld from you. I hope when you are examined, that you will say as little as you possibly can about Mrs. D. S. You should, I think, say that whatever delusion you laboured under some time ago, it has left you." It is advice not only about what he is to conceal, but what he is to say. He is to be prepared for these examinations. He is to be crammed for them, as it is sometimes expressed: "You should, I think, say that whatever delusion you laboured under some time ago, it has left you, as you became divested of your eastern notions and feelings about women; and further, that there is no longer any danger of your being jealous of her" (not that you are convinced that you have been under error and under delusion), "inasmuch as you have lost all love, admiration, and affection for her, and that no power upon earth should induce you to live with or go near her again. You should say, also, that it is your wish to go to India for the benefit of your health, and in order to look into and arrange your affairs. Let me know on what day you will be at Dieppe. I will go down to Brighton when I hear that you are to be there." So that he is to go down and assist him upon this occasion. Now it so happens, I suppose, that he did not render him that assistance, that he was [79] not there upon that occasion, because Mr. Dyce Sombre himself, when he is speaking of this examination, mentioning it in his book, says: "But what could I do when left by myself? I had nobody to support me, so that I was obliged to say what they would have me say." So that he did not conceal the delusion thoroughly and effectually upon that occasion; and the consequence was, that Dr. Bright and Dr. Southey reported in the manner which I have already stated. Afterwards, indeed, at the examination in December, 1848, he had that assistance, for he had Mr. Mahon there, who was present and assisting upon the occasion, and Mr. Prinsep was likewise present during part of that examination. He was called in when there was any difficulty; if there was any difficulty that wanted explanation, then Mr. Mahon and Mr. Prinsep were to give the explanation.

I have referred to the letter and the advice of my Lord C., who says that he will

go down to Brighton upon the occasion and assist the deceased. Then we have a letter from Lady C., and that is to this effect: "Dear Colonel Sombre, I write to congratulate you on the happy turn your affairs have taken lately." She alludes to the use of his whole income. The last Chancellor refused to let him have the income of his whole property; he was allowed to have part of the income, but that was all. "I write to congratulate you upon the happy turn your affairs have taken lately; be assured that we feel most sincerely rejoiced at the prospect of your speedy release from constraint and persecution. Lord C. is most anxious that you should take his and Mr. Mahon's advice [80] upon every point." That advice upon every point is, that he is to say that he gives up his delusions; that he no longer has any belief in them; that he does not think his wife has been guilty of the adultery with which he has charged her, and of incestuous intercourse with her father, and of connexion with the very numerous gentlemen who have been mentioned, who have utterly denied all appearance of it; and that he gives up his belief that she has had connexion with the waiters and with the common soldiers in Hyde Park in the open day. All that is to be abandoned. "Mr. M.," that is, Mr. Mahon, "is, I am sure, a trustworthy person, and seems to understand and feel for your position thoroughly. Now, my dear Sir, on your prudence in this emergency depends your fate through life. Guard every word and action; and whatever your opinions are" (not only whatever your delusions are, and you know they are, and you wilfully confess they are, and you are sure they are, but "whatever your opinions are"), "keep them to yourself, for there is no sort of comparison between the petty vengeance of expressing your suspicions and the far greater triumph of defeating your enemies now by your own liberation, and deferring to a later period the exposure of their evil intentions and unkindness towards you. No one will believe the possibility of anyone having made the confessions you so often alluded to." That is, he had not only charged his wife with committing these acts of adultery and with this incestuous intercourse with her father, but he had declared that she had confessed those acts to him, and at another time that Lord St. Vincent had confessed his own crime to him. "No [81] one will believe the possibility of anyone having made the confessions you so often allude to, and I have heard from a person used to such transactions"—I really do not know what these transactions are, or who the person is with whom this lady associates—"I have heard from a person used to such transactions, that the object of making those confessions was to induce you to repeat them, and thus, by asserting what appeared impossible, to give this proof of insanity; for who could believe that such self-accusations were possible! And yet they were made with the object I just noticed. Trusting that you will be prudent, and above all things very quiet and abstemious, I wish you all the success you can desire for yourself"; and so forth. I think that this is a way of preparing a man to carry his point. He is recommended not to follow his own opinions, as, if he does, he will not get free. Therefore it is quite clear that it is in obedience to this pressing by Mr. Mahon, to this pressing by Lord C., and to this pressing by Lady C., that he says he gives up these delusions, though in fact he still entertains them.

Then there is another letter from my Lord C. in 1846: "I regret much that you will not take my advice, as well as that of Prinsep, &c.; indeed there is only one mode of proceeding, namely, that of signing the amended petition, which will lead to a final, and, I trust, satisfactory settlement of your unfortunate affairs. As to my speaking privately to the Lord Chancellor, it would be of no use to you, even if he would listen to me, which it would be irregular and improper for him to do. I have only to repeat (and for the last [82] time) my recommendation to you to sign the amended petition without loss of time." This is the advice which is given by his lordship. He says in another letter: "Do not let anything irritate you, and when questioned by the Lord Chancellor, &c., avoid all remarks upon the past conduct of your wife, and say as little as possible upon the only subject that excites you." So that here is a preparation for these examinations by Mr. Mahon, by Lord C., and Lady C.; and he is to follow the advice of Mr. Mahon and of Mr. Prinsep when he undergoes these examinations. However, in 1847, the examination at Brighton failed, as it had done before. Dr. Bright and Dr. Southey reported against the propriety of superseding the Commission, and the consequence was that it was not superseded.

Another petition is afterwards presented to the Lord Chancellor, in order that this matter might be again investigated, and whether the Commission might not be superseded. I think there are no less than six petitions to the Lord Chancellor to

have this Commission superseded. I believe the sixth was not acted upon, Mr. Dyce Sombre having died.

After the examination to which I have adverted, by Sir James Clark and others at Mivart's Hotel, in November, 1848, there was an examination by physicians selected by Mr. Mahon—very eminent physicians, and whose character is entitled to great weight—namely, Dr. Paris, the President of the College of Physicians, and other very eminent men, who, no doubt, meant to depose, and have deposed, as far as their knowledge extended, to the facts of [83] the case with great truth and propriety. But, first of all, it will be necessary to see what was the position of those physicians who examined Mr. Dyce Sombre at Mivart's Hotel in November, in the year 1848, under the authority of the Court of Chancery. Those physicians are four in number—Sir James Clark, Dr. Bright, Dr. Southey, and Dr. Martin. I think Dr. Martin was selected by the deceased himself upon the occasion. Upon the forty-sixth and forty seventh articles, as to the examinations at Mivart's Hotel in November, 1848, Sir James Clark says: "On the 1st, 2nd, and 6th days of November, 1848, I was in attendance at Mivart's Hotel, and took part in the examination of the deceased, Dr. Bright, Dr. Southey, and Dr. Martin being also present for the purpose of that examination. I signed a joint report as the result of the inquiry. I do not doubt that the minutes or exhibits now shewn to me contain a correct account of what passed." And it is important that we should see those minutes, because, in point of fact, they contain the only information which was given to the physicians, Dr. Paris and others, as to the points to which they were to examine, except those other matters which might be suggested by Mr. Mahon and Mr. Prinsep, who were present upon the occasion. But as to the evidence of all that had taken place upon former occasions, of the nature of the charges, of his being visited by spirits, of his apprehensions of poison, and all the other subjects which have been adverted to, they do not seem to have had any information nor anything whatever laid before them, except what is to be derived from this examination and the report of what took place at [84] Mivart's Hotel. "I was and am very decidedly of opinion that the deceased at that time continued to be of unsound mind. It is to be remembered that latterly he got more cautious than he had been at an earlier period, and so he fenced with the questions." And I think that this is the true description of the examination, when you come to look at the minutes which were taken down by the shorthand writer upon that occasion. He fenced with the questions, and he had been prepared to fence with them by the advice which had been given to him by Mr. Mahon, and by the strong recommendations of Lord and Lady C. He had been advised to conceal his sentiments in that respect. "He professed to have given up as a delusion the infidelities which he had charged upon his wife." They told him, Whatever your opinion is, you must give up that, for nobody will believe it—nobody will believe these impossibilities: that she has had connexion with her father, and that she has confessed it, and that the father has confessed it. "He professed to have given up, as a delusion, the infidelities which he had charged upon his wife, but he did not impress me with the idea that he was less under the power of the delusion. On the 1st of November, he stated that he must have been under delusions with regard to her; that he exonerated the physicians who gave their opinion on his state of mind, in 1843, and that the conclusion of the jury was just as far as respected her conduct. But on being asked whether he was satisfied that Mrs. Dyce Sombre having confessed her guilt was a delusion, his reply was, 'I believe she denies that.'" Now one of the other physicians, upon a former occasion (Dr. Conolly, I think), who has [85] been examined, says that when he mentioned to the deceased his having given up this delusion, he immediately broke out and said, "Who the devil told you such a damned lie as that?" Therefore, upon this occasion he conceals his thoughts. He says, "I believe she denies that"; that is the way he answers it: he does not say, I was under a delusion; I confess that I was. I am very sorry that I made these charges against her. That indeed would have been the natural conduct of a man who had recovered from an insane delusion and had become a person of sound mind; but the answer is: "I believe she denies that." Then Sir James Clark says: "This reply, with several others, shewed that he was by no means satisfied of her innocence. His belief in spirits he then denied, but he appeared to be capable of dissembling his delusions, and even of inventing stories to explain them. His manner, I often found, during all my attendance upon him, remarkably quiet and

even self-possessed for ordinary purposes and subjects having no relation to his delusions." So these physicians say, upon other occasions, that he answered with great calmness. "On the subject of Madame Solaroli's illegitimacy, I must assume that the reasons assigned by him for knowing or believing in it were the offspring of his own mind, mere inventions, not only unfounded, but irrational. His manner appeared to me to indicate more caution, rather than less delusion." The impression, then, upon the mind of the witness was that he exhibited more caution; yet that upon these several points, and upon the point of the illegitimacy of Madame Solaroli, which is a point that did not arise till a later period of his [86] insanity, the deceased was insane. Then he goes on to say, that at that time Mr. Dyce Sombre considered that there had been something put into his food—not so much as a poison, perhaps, as to injure his procreative powers. That appears to have been the opinion which this poor man entertained—that sometimes it was for the purpose of poisoning him, and sometimes for the purpose of injuring his procreative powers. He believed that poison had been administered to him at the Trois Freres Provenceaux, where he had dined, at Paris: when he was ill at dinner, he thought that he had been poisoned. Again, Dr. Olliffe, who was examined on behalf of the executor to the sanity of the deceased, says that, upon one occasion, the deceased told him that the brandy had been poisoned, and Dr. Olliffe, to convince him to the contrary, drank some of it himself; the deceased was not satisfied, and Dr. Olliffe promised to take home some of it and analyse it, in order to prove that such was not the case. That he had a belief in poison is quite evident from the entry which he makes in his pocket-book or in his journal when he is at Naples; he considers that he has been poisoned there; "it is a remarkable thing, because it is exactly at the time and in the place" (he says) "that Baron Solaroli, at Venice, had told him that it would be so." So that it is quite clear that this delusion was going on at the time when he made that entry, and also when he published the book which must afterwards be referred to.

Dr. Bright, on the Fifty-sixth Article, referring to the examination at Brighton, says: "When urged to write or express regret at the pain that he must have caused his wife by his unfounded [87] suspicions, he said he would not do so without consulting his lawyers; and that if he acted upon the impulse of his own heart and feelings, he should never obtain his freedom from the Court of Chancery." That is, that he never should give up that idea. Therefore, it was only in consequence of the advice which was given him, and which was so strongly urged upon him, that he feigned to give it up.

Dr. Southey, who had examined the deceased at Brighton and at other places, says: "On every occasion when I was in company with him, I firmly believe that he was labouring under delusions which rendered him of unsound mind. Viewed by itself, I might hesitate to consider his conduct towards the Baron Solaroli, of whom he spoke in very strongly opprobrious terms, as the offspring of insane delusion; but taken in connexion with other delusions, and with the inconsistent reasons by which he attempted to justify his opinions, I can attribute it only to insanity."

One and all of these medical persons who examined the deceased on the occasion —Sir James Clark, Dr. Bright, Dr. Southey, and Dr Martin—came to the conclusion, in 1848, that he was of unsound mind. There is the evidence which was taken down on the occasion by a shorthand writer, who was admitted at the express request of Mr. Dyce Sombre himself. Probably he thought that he came fully prepared on this occasion, having received advice how to conduct himself, and he was prepared to make these admissions, so far as his state of insanity would allow him to do; and therefore, whatever his opinions might be, he was desirous that the evidence should be taken down, [88] to shew that he had given up those delusions. He is examined; many of the questions do not seem to be very important, or to elicit anything. "Up to the period when we saw you at Dover, you were labouring under certain delusions?" His answer is: "I had just returned from St. Petersburg, where I had been, and I had been reflecting on these things; on my return from St. Petersburg, I remained some time at Brighton, and I thought a great deal about these things. I went to Paris, and from there I came to meet you at Dover. The first day I saw you, I said that, having reflected upon the disinterested opinion you gave on the subject, my mind was quite clear that, whatever I might have thought before, I must have been labouring under delusions and acting on them." In another place he says, I think, "I was obliged to do it, for I was there by myself, and was obliged to speak

what they would have me say." The next question is: "Therefore I wanted you to state that in the presence of Sir James Clark, because that completely exonerates Sir James Clark and all the medical men who saw you in 1843: it exonerates them from the opinion you suppose they gave?" He answers "Yes." And then comes the question, "And it is your own conviction that the jury were justified in coming to the conclusion that you were of unsound mind when they did come to that conclusion?" The answer is, "As far as concerned Mrs. Dyce Sombre's conduct"; because that, it had been told him, was the only point which he had now to clear up; that if he would but admit that that was a delusion, then he [89] would get his supersedeas; so his answer is: "As far as concerned Mrs. Dyce Sombre's conduct." "There was ground enough at that time to suppose you were of unsound mind, at the time the jury found that verdict?" "Yes." "Therefore you do not entertain any hostile feeling towards the persons who sued out that Commission?" "I have none; only it would have been better if I was not so much worried and annoyed about those things. If it had been left quietly to one or two physicians, I would not, perhaps, have had my mind so much annoyed and worked up about these different things. But there were too many examinations, I thought; and there was not only Sir James Clark, I believe in 1844, but there were not less than ten or twelve doctors, who examined me at different periods." "That was after the Commission?" "Yes." Further on he is asked: "You stated that once to Drs. Bright and Southey at Dover?" "Yes, that those were my impressions." So that he had those impressions upon him. "They were effaced somewhat during our interview; they were not in full existence at the time of our first interview?" "That is your report." "At the first interview you did not seem to be fully convinced of Mrs. Dyce Sombre's purity?" "That was in 1844." That was an admission at that time that he did not think her pure. "Did you see Count Nesselrode at St. Petersburg?" "Yes." "Had you any communication with him?" "I was in the steamer with him; like other people he talked on different subjects." Now before he had said that Count Nesselrode had told him of all these matters as to his wife. "I was in the same steamer with him; like other [90] people, he talked on different subjects." "Concerning Mrs. Dyce Sombre, amongst others?" "He made some allusions to what the report was at the time." "Did he mention any particular person to you at the time?" "Not that I remember now." "Has that impression remained firmly on your mind ever since?" "Not since 1846." That was the time when he was at Dover; not since that time. "It has not remained?" "No." "You are not satisfied that it was a delusion before that period that you were labouring under?" "Certainly. What I have just been saying is, that when I came to Dover, it was with a firm mind to tell Dr. Southey and Dr. Bright, that after consideration I had come to the determination that I think I might have acted under delusions; that as I had no proof, the best thing for me was to consider it so. There was no proof of any guilt; but since then, as we are not of the same thinking, as our characters are not the same, why, it is much better that there should be no talk or proposal of our living together again." Exactly what Lord Combermere told him to say. "Still your mind continued satisfied since 1846. You have not changed your mind?" "No." The delusion was that he had seen her himself having sexual intercourse in the Park with common soldiers and with a variety of people. Now he puts it that there is no evidence, and therefore it is best to give it up. "You are satisfied that the confession on the part of Mrs. Dyce Sombre of her guilt—you are satisfied that that was a delusion, and that she never did make such a confession." He does not answer, Yes, I am satisfied of that; [91] the answer is, "I believes she denies that." Why, that is exactly fencing with the question: "I believe she denies that." Then the question is, "Because she denied it, you disbelieve it? You have that confidence in her veracity, that you disbelieve it because she denies it?" "Yes; just so." So that though he believed that he had seen it with his own eyes, yet now he disbelieves it merely because she says it is not so. "You think that you must have been mistaken, and that she was right?" "Yes." "To whom was the denial made?" "I do not know." He does not know to whom the denial was made; he had never seen Mrs. Dyce Sombre himself, excepting, on two occasions, after the first removal from the Clarendon Hotel. He had seen her once when he was in Hanover Lodge, in the Regent's Park, and then he shrank from her as something which he abhorred and abominated. Then he sees her at Dr. Martin's, in the year 1848, on the 10th of

November, and the very same thing takes place: he shrinks from her as if he could not bear to go near her, or even bear the sight of her. The examination proceeds: "Do you remember the confession having been made to you?" "I remember something of the kind." He remembers the confession being made; but whether by Lord St. Vincent, or whether by his wife, he does not say. "Would it not be more satisfactory to your mind if the denial were made also in your presence, and not to a second or third party?" "As far as I am concerned, I am quite satisfied; I would not wish to hear anything." "You would not wish to see her, to hear her denial?" "It would be no use." "Up to this time, you are quite **[92]** satisfied that Mrs. Dyce Sombre is quite innocent of all those charges?" "Yes." "And that it was all delusion, your speaking of her before?" "Yes." "And you were mistaken in supposing that she ever did confess?" "The impression on you and Dr. Bright was, that she was innocent, and I have no reason to disbelieve it. I have not seen any of those persons who ought to have been informed on the subject for some years now, and therefore I only go by what I hear." Now I cannot say that this is a candid admission and acknowledgment that he had been under a delusion, and that he was sorry for that delusion, and that he now saw his error. It appears to me that Sir James Clark and the other gentlemen have given a true account of this examination, that he is fencing with the questions. "Did she or not confess?" "You have told me that those were delusions, and I am satisfied with your opinion." That is what satisfies him. "You would rather take that than your own impression?" "After mature consideration, I think so—incompatibility of temper is the only fault." That is exactly according to the advice which had been given to him. He was told that, unless he did so, he never could recover his liberty. Then the question is put to him, "It is an affair rather of the heart and feelings. There is Lord St. Vincent—it was a terrible imputation upon him, having had incestuous intercourse with his daughter, that I should think you would be glad to have an opportunity of relieving him from as soon as you can?" What is the answer? "We have dropped all connexion." Not, I am very sorry for it, and I will make any apology for having made **[93]** such a charge against him; I was insane at the time. "Does it not pain you to have made such an atrocious accusation against your own father-in-law?" "I have no objection to saying that under the circumstances in which I was placed at the time, I am sorry that I accused him of this." Then the question is, "Knowing it to be unfounded?" and his reply is, "Hearing it to be unfounded." That is, you tell me so. I take your opinion, and I am ready to subscribe to it in that way. "I think you must know that it is unfounded. You must be satisfied that it was a perfect delusion. Of course one is anxious, for their sakes, that there should be as unequivocal a recantation as possible of such a charge; there ought to be a solemn disavowal?" "I do not know that I can say more than I have said." "Put it down on paper; you can do it when we are gone; you can say that you have a feeling of regret in having injured the feelings of Mrs. Dyce Sombre and Lord St. Vincent?" "I think it better not to mix Mrs. Dyce Sombre's affairs with her father's." "But they are mixed in the accusation?" "I am ready to express my sorrow. Lord St. Vincent can see that I am sorry for what I said at the time. As to my writing anything to Mrs. Dyce Sombre, that had better be left to the lawyers—there is Mr. Frere on her part, and Mr. Shadwell on mine." So that having made all these accusations against his wife of this incest and adultery, he makes no apology for it, but thinks that it had better be left to the lawyers—Mr. Shadwell on the one side, and Mr. Frere on the other. This is the tenor of the examination which takes place on that occasion. It goes further, but no importance **[94]** seems to me to arise upon the rest of the examination. There is a question about Lord Ward, and about his mistaking another person for Lord Ward. They ask him as to that, and he says that he had no doubt that it was the same Lord Ward. "There was no hesitation on my part that it was the same man." "You had no doubt that it was the same person that was introduced to you as Lord Ward at Lord Shrewsbury's?" "No." He met a man, who was not Lord Ward, at Rome, and he mistook him for him, and he engaged him for a certain sum of money to attend to his affairs, and to see that a statue, which was being prepared by Tadolini at Rome, was properly carried into effect. Then there is a question about Madame Solaroli, and Mr. Dyce Sombre says: "There was always some kind of mysteries and hints thrown out about it, that she was not really the child of my father's married wife, and Lord Metcalfe put it all at an end. He said to me when

he was going away to America, 'The last proof I can give you of my regard for you, is to tell you what I know about her.'" It appears as if Lord Metcalfe told him that she was not his lawful sister.

This is the examination which takes place in November, 1848, after the preparation made for Mr. Dyce Sombre, by Lord C. and his lady, and Mr. Mahon; and I think it is not to be wondered at that he did not quite satisfy those physicians that those delusions had entirely passed from his mind. Upon this examination, too, it is to be observed that the advisers of Mr. Dyce Sombre did not think it necessary or proper to bring on his petition—it came before the Court at **[95]** a later period—in the spring, I think, of the next year. But in December, 1848, an examination of a different kind takes place, an examination by Dr. Paris and several other very eminent physicians, who have given their opinion as to the perfect sanity of the deceased at that time; and undoubtedly, coming as it does from persons of their eminence, it is entitled to the greatest respect and to the greatest weight. It was in 1848 that Dr. Paris was applied to, and the application was made by Mr. Mahon—he was the grand conductor of these matters. He had entered into an engagement by which he was to receive a sum of no less than £10,000, if he succeeded in obtaining a supersedeas, and in obtaining the full possession of his property for Mr. Dyce Sombre, the deceased, by the 31st day of December, 1845. He did not succeed in this, as he fully expected to do; and notwithstanding this agreement, Mr. Mahon made an application to the deceased for payment, on account of the work and labour which had been done for him, though, according to the terms and tenor of the agreement, he was to have no reward whatever, unless he succeeded in his attempt. Mr. Dyce Sombre refused at first to make this payment, and the matter was agreed to be referred to arbitration. Mr. Prinsep was one of the referees, and Major Richardson was the other; and they decided that, though he had not been successful, yet it would be but fair and proper that he should be paid for the money which he had expended out of pocket, and also that he should have some remuneration for his work and labour. They accordingly awarded to him the sum which he had paid out of his **[96]** pocket, and they made him an allowance at the rate of about £400 a year for the time during which he had been employed, that being the rate which a Mr. Warwick, who had been employed to attend upon the deceased in the first instance, under the authority of the Court of Chancery, had been allowed. The consequence was, that they awarded him the sum of £2170, 7s. 6d. But very shortly afterwards that agreement is renewed, and Mr. Mahon is to conduct the business again, and he is to receive the £10,000, less the £2170, 7s. 6d., in case he is afterwards successful. And then this is the effort which he makes to get the opinion of these eminent men. Part of his business was to find medical men of eminence who would speak to the sanity of the testator.

Dr. Paris says: "In December, 1848, I was applied to by a Mr. Mahon, of whom I had no previous knowledge, to join with other physicians in examining into the state of the deceased's mind." And he goes on to say: "I suggested the addition of Dr. Mayo, who was called in accordingly. I had put into my hands the opinion of Drs. Bright, Southey, Martin, and Sir James Clark." It appears that this was the note of the examination which I have referred to: "I saw the deceased once or twice alone, and five times in consultation with the other physicians at Mivart's Hotel. My visits were of three or four hours' duration. I had had put into my hands the opinion of Drs. Bright, Southey, Martin, and Sir James Clark. My first object was to satisfy myself as to the deceased's general deportment and condition of mind. To me that was quite satisfactory. It had none of the character of **[97]** unnatural excitement or hallucination; his manner was tranquil, courteous, and gentlemanlike." It appears that such was his general character, and his general mode of conducting himself. Sir James Clark speaks of that; and also at Paris he seems to have conducted himself in the same tranquil and courteous manner. "The next object was to consider what had been communicated in the report of the physicians I have named, and the specific alleged delusions. The first was that of having seen and negotiated with Lord Ward at Rome for forwarding the monument to the memory of the Begum to India, when it was clearly established that Lord Ward was not in Rome at the time. Upon inquiry, we came to the conclusion that the deceased had either mistaken some other person for Lord Ward, or that a hoax had been played upon him." It is possible that it might have been so, though the deceased could not divest

himself of the notion that it was the same person whom he had met as Lord Ward at Lord Shrewsbury's. He was acquainted with him in this country; he meets with him at Rome; he thinks that he is the same person; and he employs him, believing him to be Lord Ward. Then Dr. Paris goes on to say: "What at first sight appeared extraordinary, as to the idea of a person of Lord Ward's high station accepting such or any sum, is explicable on the consideration that the deceased was a foreigner. But he was mistaken as to the man; and when Lord Ward was shewn to him in England, he at once admitted and never afterwards hesitated to acknowledge his mistake. His notion of the illegitimacy of Madame Solaroli had a foundation in fact. It may have been a mistake, but it was [98] not a creation of his own mind." Now we shall hear the reason: "Major Bere, of His Majesty's Hussars, affirmed that her illegitimacy was an admitted and known fact." The other witnesses say that there was a letter of Major Bere produced to show that it was an admitted and acknowledged fact. But what turns out to be the case when the genuine letter of Major Bere is looked at? Why, that Major Bere says that he cannot speak to that fact; his words are—"which I cannot speak to." This makes all the difference in the case. It shews how those learned physicians were deceived upon that point. There was this question as to insanity. I am not saying now whether it was an insane delusion, or whether it was not; but as to this delusion of the Baroness Solaroli being illegitimate, Dr. Paris and these gentlemen seem to consider that to be quite cleared up, and that it was no fiction and no delusion in the mind of the deceased, because it was asserted by Major Bere that it was an admitted and known fact, whereas Major Bere says no such thing. Major Bere, on being asked to speak to it, says that he cannot do so—"which I cannot do." "It has been regarded," Dr. Paris deposes, "as strangely inconsistent that, under such a belief, he should have permitted her to be called his lawful sister in the instrument settling on her £20,000." Now undoubtedly he made a very large settlement upon this lady, the Baroness Solaroli, after the Begum's death. They were always brought up together. Mrs. Troup is the admitted lawful sister of the deceased; and the Baroness Solaroli was brought up in the same manner in which Mrs. Troup was. She was always admitted by the deceased himself to be [99] his lawful sister in India, because it was not till a late period—according to his own statement, and under his own hand—it was not till about the year 1846, that he took into his head this notion of the illegitimacy of the Baroness Solaroli. That is the time from which he dates it; and the only evidence that there is even as to any report of the Baroness Solaroli, while in India, being illegitimate, is to be found, I think, in the evidence of Mr. Craigie, who says that he heard it mentioned in common conversation there; but there is no other evidence whatever. Her Highness the Begum always treated her as the lawful sister; so did Captain and Mrs. Troup; and the Begum's expression is spoken to by Dr. Drever, when speaking of these two girls and of Mr. Dyce Sombre: "They are all out of one womb." Now Mr. Dyce Sombre does not at all doubt that the Baroness Solaroli was the child of his father, but he says that it was by a different mother. That is a strong expression of her Highness the Begum, that they all came out of the same womb. She treated the Baroness Solaroli precisely in the same manner as she treated Mrs. Troup, the other daughter; and when the marriage took place between the parties, she treated her in the same way; and though there was a difficulty with regard to the baptismal certificate of Madame Solaroli, that matter was cleared up to the satisfaction of the parties at the time. There is no doubt that she was married as the lawful daughter, as Mrs. Troup was. The Begum gave the Baroness Solaroli and Mrs. Troup rather unequal sums, I believe, but she gave each of them a pretty large sum upon their marriage; and after the death of her Highness the [100] Begum, Mr. Dyce Sombre gives them still larger sums, so as to make them equal; for I think that the share which he gives to the Baroness Solaroli is larger than that which is given to Mrs. Troup. However, it was to put them upon an equality in that respect; and in the deed by which he conveys the property to her, she is described as his lawful sister throughout, and in that way she is treated and so considered by the deceased himself down to the year 1846. Then it is affected to be believed by him that she was illegitimate; and his assertions are most extraordinary in this respect. He says that this illegitimacy was communicated to him as a last act of favour by Sir Charles Metcalfe, before he left for Canada, and that is where he gets his information; but it does not appear that Sir Charles Metcalfe knew anything about

it. According to the account of Mr. Prinsep himself, when he is interrogated upon it, he says what he heard from Sir Charles Metcalfe was, that the children he saw running about when he called on the Begum were presented to him as children of Colonel Dyce and the Chotee Begum; that the deceased was one of the children whom he saw running about when he called on the Begum, and so probably was Mrs. Troup. He could not say whether Madame Solaroli was or not: Mr. Prinsep presumes, because she was the younger. And this is interpreted into Mr. Dyce Sombre being right, and that Sir Charles Metcalfe confirmed that opinion. But how does he act? He does not give a certificate or anything in his own handwriting to shew that such was his belief, or that he had any notion of that kind. But what does Mr. Dyce Sombre say? Why, that Sir Charles **[101]** Metcalfe, though he would not entrust him with a paper of that sort, sent it to my Lord John Russell; and that my Lord John Russell was in possession of this document, which would prove this part of the case; and he prints a letter in his publication, in the year 1849, about the time of his making his will. This letter is an application to Lord John Russell to give up this document, and a sort of hint that he shall have £1000 if he will do so, and this is in the handwriting of Mr. Dyce Sombre himself; there it is, "£1000" in the corner; and he makes this application for the paper which had been entrusted to Lord John Russell before Sir Charles Metcalfe sailed, in the imagination and according to the delusion of Mr. Dyce Sombre himself.

But to return to this examination. Dr. Paris says to the third interrogatory: "No one was present during the examination who was not professionally concerned in it." It turns out from the evidence of the other physicians, that when any difficulty arose, or anything required explanation, Mr. Mahon or Mr. Prinsep was called in. "No one was present during the examination who was not professionally concerned in it. I remember seeing a letter or letters upon the subject of the legitimacy of Madame Solaroli; that of Major Bere is the only one that I now distinctly remember. I think that in the course of the inquiry the statement in that letter was confirmed to us verbally by Mr. Prinsep." The statement was, that it was an admitted and well-known fact. Now I think Mr. Prinsep could hardly have done so; there must have been some mistake about that. He certainly, in his letter to **[102]** Mr. Dyce Sombre, says: "You are right in saying that that was Lord Metcalfe's impression." Here is this letter that is produced of Major Bere, where, as I stated before, it is quite the contrary. Bere says that he cannot bear witness to it. Dr. Paris says: "I think that in the course of the inquiry the statement in that letter was confirmed to us verbally by Mr. Prinsep. I think it probable that I did see the letter now shewn to me at page 486 of the volume,* or rather the exhibit No. 1, but I have no recollection of it." He does not know whether he saw the letter or not. Now that letter, in this book which was shewn to him, at page 486, No. 1, is not the letter of Major Bere. I presume that what did take place before these learned physicians was that they said: "There is a letter of Major Bere, in which he says that it is an admitted and known fact." Whether it was the genuine letter, or whether it was this mutilated letter, so mutilated by Mr. Dyce Sombre himself, does not appear with sufficient accuracy, though I am inclined to think, from a consideration of the evidence, that it was really the genuine letter which was upon the table at the time. Some of the medical gentlemen who have been examined say that there were certain letters and papers put upon the table, but beyond that they cannot speak to the handwriting.

Dr. Paris says, in another part of his evidence: "Lord C., in a letter to Mr. Mahon, distinctly states that the deceased was quite correct in saying that at Brighton, and he might also state **[103]** upon other occasions, he, Lord C., strongly recommended him to be very circumspect in his conduct." I have read those letters, and I think they are well described. "With respect to his suspicion of the hostility of the East India Company, on the ground of his presumed pecuniary claims, I am satisfied from documents that such suspicions might be very naturally entertained in a sound mind. I have reason to believe it anything but a delusion. The indecency and grossly indelicate language with which the deceased is charged in his quarrel with General Ventura is not unconformable with Eastern manners. An undue weight has been given to a very gross Hindostanee phrase, used by General Ventura as expressive

* This volume was "The Refutation," printed in Paris by Mr. Dyce Sombre, which was brought in as evidence, and is frequently referred to in the case.

of his contempt; and by giving to it a literal translation, its true meaning has been unwittingly distorted." Well, but he must have taken the account here given by this gentleman, Mr. Dyce Sombre, upon the occasion. He had no opportunity of knowing what the evidence of General Ventura was upon the occasion. Is it a mere gross Hindostanee expression, or anything of that sort, that takes place? Such expressions were used, but, according to General Ventura, they came from Mr. Dyce Sombre, and not from him. But it does not rest, as Dr. Paris seems to suppose it does, upon a mere conversation between these parties, or upon the gross expressions which may have been used by either the one or the other of them; but it is an act of indecency which this poor gentleman commits at Brussels upon this occasion. There had been a previous rencontre at Baden-Baden, and afterwards at the railway station at Malines, and then some **[104]** conversation takes place again at Brussels; it is in front of the hotel, where General Ventura and his wife and another lady are in a carriage; and in the presence of the landlady of the hotel Mr. Dyce Sombre comes up, he spits upon the carriage, and then he opens his dress and exposes his person to these ladies, and to all who are present. Therefore it does not resolve itself into a Hindostanee expression, or anything of the sort—it is the act of an insane man, for so I must consider him; because undoubtedly Mr. Dyce Sombre, had he been in his senses, having been brought up in a clergyman's family, having lived with officers, and having been some time in this country, must have known that it was not an act which he should have committed in Europe, and I apprehend that it was not an act that would have been committed in India or anywhere else: it does not arise from Asiatic feeling merely. An exhibition of this sort is made openly in the face of day, before the landlady, and before other persons who are assembled, and who might have been called to contradict General Ventura. Undoubtedly, I must give credence to General Ventura. I see no reason to discredit him whatever. He is a man whose character is entirely unimpeached; he is a man of high station; and he speaks to a fact which takes place in his presence. He acts upon it; he applies to the police; and the consequence is, that the police interfere.

Then, again, Dr. Paris, not knowing the whole facts of the case, refers to the statements as to the conduct of the deceased in the water-closet. That I do not dwell upon. I omit all the evidence both on the one side and on the other. I pass by that **[105]** which took place at Paris, where, undoubtedly, he was received in good society, and where, undoubtedly, he may have conducted himself with great propriety, because that is entirely consistent with a case of monomania. I put, likewise, out of sight the conduct of Mr. Dyce Sombre in the profligate life which he led with prostitutes of the lowest description. I do not think that either the one is to be considered as proof of his having been of sane mind, or the other of his having been under an insane delusion. Then Dr. Paris goes on to speak as to his jealousy: "Born in a harem and accustomed to its habits up to the thirtieth year of his age—a period of life at which the opinions and prejudices of early years are too deeply rooted to be easily altered or corrected by subsequent changes of residence or condition—jealousy of women is an overwhelming passion in the Asiatic mind, and evidently existed to an extreme degree in that of the deceased, and will go far to explain, if not palliate in some degree, various acts of violence. And although there was nothing in the conduct of the deceased's wife to excite a feeling of jealousy in a well-educated European, yet it is conceivable that a person circumstanced as the deceased, and to which I have before alluded, might take an unjust offence, and entertain suspicion, without falling within the category of insanity." Undoubtedly, any person, whether an Asiatic or European, may fall into an unfounded jealousy, and may entertain suspicion that his wife is guilty without any sufficient foundation, or without any foundation, and yet not be of unsound mind. But how is that to apply to a person who declares that his wife has been guilty **[106]** of incest with her own father before marriage; that she has lived with Sir F. B. (for which there is no foundation) for three weeks, or for three days, before the time of her marriage; that she was guilty of adultery with all the waiters in the Clarendon Hotel, and that she was guilty of the same crime with shopmen, and with soldiers, and with everybody, when there is no shadow of pretence for anything of the kind? That is a very different thing from merely considering this as a case of jealousy without sufficient foundation. It does not at all take it out of the category of insane delusions, whatever the opinion of Dr. Paris may be, because Dr. Paris did not know the extent of the delusion under which the deceased laboured.

As to the delusions having passed away, let us see what Lord C.'s own feeling was. "He answered," when Lord C. spoke to him, "more by a shake of the head than in words. He never would allow her innocence; he never yielded the belief that she had been unfaithful to him." Why, according to the evidence of Lord C. himself, who persuaded him to say that he had given up these delusions, he entertained them to the last moment of his life, and he never gave up the belief of her infidelity down to the latest period.

The other physicians depose very much to the same effect as Dr. Paris. Dr. Copland examines the deceased in 1848. He says that he was called to see him at Dover, in September, 1846. "That was at the suggestion to me of a Mr. Mahon, a stranger, whom I viewed in the light of an agent of the deceased; but exactly in what relation he stood to him I did not know, either then or at the more [107] recent date of which I will now depose, December, 1848, when I again saw the deceased, at his request." Then he speaks of having had five private interviews with him, and of having read the reports of Drs. Bright and Southey, and the notes of the examination in November, 1848. He goes on to say: "My examination of the deceased was most searching, and calculated to test the character, notions, prejudices, temper, and disposition, as well as to determine the existence, of any insane delusion." He says: "The charge of an indecent fracas with General Ventura could no more be considered a sign of insanity, than a quarrel between other persons respecting any matter, topic, expression, &c., can be so considered." So that he regards it as a mere common quarrel between two persons; and that the circumstance is not to be considered as more indicating insanity than such a quarrel would do, omitting all mention of the indecent action of this gentleman. He says: "The most important delusion imputed to the deceased, is his belief in the infidelity of his wife; and this belief, when duly considered with reference to the circumstances in which he had been placed in early life, and in this country, when viewed in connexion with his origin, his education, his society in India, and the society in which he was thrown in this country, amounted in its most exalted form merely to an exaggerated form of jealousy." And a pretty exalted form it was, I think, considering the nature of the charges. He says: "First, the deceased was three-fourths a native Asiatic" (that is rather more than he is proved to have been) "and one-fourth an European by descent." I suppose Mr. Mahon [108] or somebody told him so at that time. The deceased himself always insisted that he was an Englishman; and he said, though born in India, yet, from the blood which was in him, he had a right to be tried in an English Court and by Englishmen, and that he would not submit to the Indian Courts. "He was educated and lived among the higher class of native Indian society until he was 30 or upwards of 30 years of age." That is an incorrect account, again, which is given to this gentleman; it was not the case that he was educated by these people, and lived with them until he was thirty years of age. Dr. Copland says, as to the excitement of jealousy: "There may, too, have been circumstances arising out of the manners, bearing, and even conduct, of Mrs. Dyce Sombre, previously to and after marriage; which, although not admitting of an unfavourable construction in the society of this country, might yet have occasioned the most exaggerated jealousies in the mind of an Asiatic circumstanced as the deceased was from his birth up to his arrival in this country (soon after which period he became acquainted with his wife), jealousies which, however exaggerated and intense, would have nothing in common or to do with insanity, nor to be considered as any indication of unsoundness of mind. Much stress was laid on the fact of its being incestuous, but incest (and of that particular kind) is not so uncommon in India, or, as I regret to know, in this country." But with respect to all the other matters, his charges of the adultery of his wife in the open park, and his proposal of being restored to her through the means of the Archbishop of Canterbury selecting a virgin for him, and the other things which he demanded [109] —these, I think, can hardly be accounted for upon the plea of his being an Asiatic.

I believe the evidence of the other physicians all goes to the same effect. I do not think that they carry the matter any further; they are very eminent men. Dr. Paris is the President of the College of Physicians, and Dr. Mayo is a person certainly of very great eminence. They consider that the deceased was sane at the time. But then I say that they had not the whole matter before them. They had nothing but the examination which had taken place before the other physicians, in November, 1848, or, if they had, they had not a full account given them of all which had passed

in the year 1843, and of the proposal about the Archbishop of Canterbury, and of all those matters. With respect to General Ventura, also, they think that it was only a quarrel between him and the deceased, like any common quarrel in the streets. They are not aware that Mr. Dyce Sombre unbuttoned his breeches and exposed his person in the manner in which he is represented to have done to those ladies, and in public. I cannot, then, consider that this testimony, given by these gentlemen, however eminent they are, and however much to be relied on as speaking the truth, is sufficient to upset the testimony of the witnesses who examined the deceased so shortly previously in the very preceding month of November—persons of equal skill, who were acquainted with the particular nature and the extent of his insanity, who knew what his prevailing opinions and his prevailing delusions were, examining him apart from Mr. Mahon and apart from Mr. Prinsep, and knowing all that had before passed. The con-**[110]**-clusion at which they arrived, I think, must be deemed to be the right conclusion; and I therefore hold that at this time, in the year 1848, in December as well as in November, 1848, the deceased continued to be labouring under insane delusions, though he attempted to conceal them, according to the advice which had been given him by Mr. Mahon, and by my Lord C. and Lady C. He could not bring his mind to say that these delusions had passed away—he fenced with the questions that were put to him. There was not a frank and free admission that he had been labouring under insane delusions, and that he was willing to do the best he could to make compensation for the injuries and for the calumnies which he had thrown upon respectable people during the time that he had been labouring under these delusions. I think it was merely for the purpose of deceiving, and for no other purpose, that he conducted himself cunningly, as he did.

So, again, as to the physicians who were attesting witnesses to the will; they are, I think, four in number. Three of them attested the will, and two of those same persons attested the codicil, with the addition of Dr. Sigmond, who was then brought in for the first time. Dr. Olliffe is a physician who seems to have known more of the deceased than most of them, and he is one of the attesting witnesses. They made a joint report between them. Dr. Sigmond is an English physician of some eminence, resident in Paris; he had seen Mr. Dyce Sombre in England, but had a very slight degree of acquaintance with him, and he was called in to be an attesting witness to this codicil. Dr. M'Carthy was the person who introduced him. **[111]** He went to the lodgings of the deceased, and he says: "Dr. M'Carthy introduced him to me, or me to him rather, as a previous acquaintance. Mr. Dyce Sombre recollected our former meeting, and spoke of the health of the prince. He then told me that he intended to publish a work on the treatment that he had received from the lawyers and persons calling themselves his friends." Now this is a most important introduction, I think, the introduction of this subject between the parties; because the first thing the deceased tells him is, that he intends in a publication to expose this matter; and that publication actually takes place very shortly after this, for it is in the month of August, 1849, the very same month in which the codicil is executed, that he publishes this refutation, which of itself affords pretty conclusive proof, I think, of the insanity of the deceased at the time when it was published. Dr. Sigmond goes on to say: "He spoke of this with great calmness of mind and apparent knowledge of the subject. He then told me that he had already made a will, to which he now wished to add a codicil. Dr. M'Carthy added: 'And it is proposed that you (I, that is) should witness it.' I said that after the conversation that had passed between them and myself, I should have no objection to sign it, if the deceased declared that he had duly considered the nature of the codicil, and that it was his own free will, uninfluenced by others. He said that as those who might have expected to benefit by his will had not behaved well to him, he had made such disposition of his property as he thought best. Some further conversation followed, in which the deceased referred to the instrument itself, as it lay **[112]** before him: he had brought it into the room with him, and was then sitting with it before him on the table. Dr. M'Carthy remarked that it had been made or prepared with great care, and from the deceased's own instructions. Mr. Dyce Sombre made some observation upon the seal, of which the wax impression was, as far as I recollect, already affixed. I was in earnest conversation with him, and possibly it might have been done then in my presence, but I do not remember it, or the lighting of a candle. It was then about the middle of the day; the appointment had been made for twelve o'clock. The topics of conversation

with me and the deceased were chiefly the book" (that is "The Refutation") "and the codicil, together with his reason for making the disposition contained in the codicil and the will." Upon the subject of the book, he says: "I have seen the book inquired of and shewn to me. I have read parts of it. I forget when exactly it was, but sometime in the year before last (1850). I received from the deceased a message that a copy was left for me at Galignani's. I had heard him say, when he signed the codicil, that he was writing a life of himself, which I suppose might have reference to this volume. I gave him no advice as to not publishing it. I merely said that I thought it would be interesting for everyone to know what he had to say upon his own case. I told him that whatever he did should be done with great temper and forbearance, for there were plenty of people ready to find fault. I have really no means of judging or giving any but a conjectural opinion on the subject of his delusions, real **[113]** or alleged, having purposely avoided all inquiry into them. I have not read enough of the book." So that this gentleman will not undertake to depose either one way or the other. "I have really no means of judging or giving any but a conjectural opinion" as to the state of the deceased's mind. He says, that his opinion from what he saw on that particular occasion was, that at that time he was of sound mind; but as to his being sane or insane at other particular times, he says that he cannot give any but a conjectural opinion, and that he can say nothing whatever about it.

Dr. Olliffe is another person who subscribed this will. They all say that they believe the deceased to have been of sound mind, but Dr. Olliffe is a person who states that he was labouring under a delusion as to poison. He had attended him before when he was labouring under delusions, and he thought there was poison in the brandy, and he was not satisfied in that respect. Then he says: "What influenced me, I must confess—and as I believe the others also—was, that the act of the Lord Chancellor, in conceding to him the control of all that was available as income, was a virtual admission of his capability to make a will." Now that is what he goes upon, and he says he believes that the others went upon it also; that the Lord Chancellor, who at first allowed him only £4000 a year, was induced afterwards, considering that his property had been managed well—that is, that the income had been well expended—to give him the whole of his income, but refused to give him the power over the fund. Dr. Olliffe says **[114]** that is what influenced him and he believes that it influenced the other physicians; that as the Chancellor thought he was sane enough to have the management and expenditure of his own income, he ought to be entrusted with the power of making a will—that he was sane enough for that purpose. But that would be contrary to all the principles which are applicable to cases of this kind. A person may have the power of managing his property to a certain extent exceedingly well, and of spending his income, and yet be labouring under insane delusions. And if there is any insane delusion whatever, operating on the mind of the party, and he still entertains any opinion founded on delusion, he is, according to the law and practice of this Court, and all the decided cases, incapable of making a will. Therefore Dr. Olliffe, founding his opinion chiefly upon this circumstance of the deceased being intrusted with his income, and believing that the others do so too, detracts very much from the weight which would otherwise be attributable to the opinions of these learned persons. He goes on to say, not only that that is what operated upon his mind, but he adds this: "Had all then come to my knowledge of which I have since been informed, I might have made a more searching examination; but I was satisfied with the inquiries I made in reference to what I then knew, which included the reports of the physicians in England on either side, and the judgment of the Lord Chancellor in the spring of that year." So that what he had before him—namely, the examinations of the physicians—that is to say, the examinations of the physicians on the one side **[115]** in November, 1848, and on the other side in December, 1848, and the decision of the Chancellor as to the management by Mr. Dyce Sombre of his property, and the circumstance of his being entrusted with the power over his own income, induced him to attest the execution of this will.

I think one of the other physicians, instead of speaking of the expenditure of the income, thinks that the Lord Chancellor had given Mr. Dyce Sombre the entire property, and the entire control over it. However, undoubtedly the execution of this will and of the codicil in the presence of those four physicians, is a very important circumstance in this matter.

But supposing these gentlemen thought, as no doubt they did think, that

Mr. Dyce Sombre was in a sane state at the time of the execution of this will, in June, 1849, and again in the month of August, 1849, when he made this codicil, what are we to say to the publication of the book, "The Refutation," which took place very shortly afterwards, which was in a state of preparation at the very time at which this will and codicil were executed? This "Refutation" was in progress at the time, and the deceased was assisted in the compilation and manufacture of it by a Mr. Montucci. According to many statements in that "Refutation," the deceased could hardly have been of sound mind when he issued it. But take it only as to the point respecting the Baroness Solaroli, to which I have before adverted, which was one of his recent insane delusions, supposing it to be an insane delusion. He had always considered her legitimate till the year 1846, and there was every **[116]** reason to believe that she was so; but, forsooth, all at once the deceased takes it into his head that she is illegitimate, and in the book it is stated (though the fact was quite the contrary) that she had always been reputed to be illegitimate; but he says that all at once she is made to come out as a lawful sister, whereas she had always been reputed, until that time, as illegitimate. But when he comes to give an account of this illegitimacy, it is founded upon that which I have before mentioned—namely, the communication from Lord Metcalfe, before he left England, as a last mark of his favour to the deceased; and then there is this letter, which is left in the custody of Lord John Russell; and we have this poor insane person writing to Lord John Russell, and intimating that he may receive £1000, if he will produce the document. Lord John Russell can do nothing of the kind; and that matter drops to the ground.

Again, in this "Refutation" there is a republication and repetition about the poisoning, and a number of other things, and about his meeting with General Ventura at Kissingen and Brussels, in 1845; of Mr. Dyce Sombre's suspicions and quarrels with him, all of which, according to the evidence of his own valet, Roulin, had no foundation whatever in fact, because up to the latest moment (I am going back to the Clarendon Hotel now), after he had taken his wife down to her father's, Lord St. Vincent's, at Meaford, he returned to the Clarendon Hotel, and he desired to be called in the morning, in order that he might see his friend, General Ventura, off, who was going to India; and yet when General Ventura is gone, he takes it into his **[117]** head that he has been committing adultery with his wife, he despatches a challenge after him. There is a second challenge; he assaults him at Baden-Baden; and finally there is the scene at Brussels to which I have already alluded.

Again, the deceased says that this "Refutation" is to be forwarded to everybody, and he has 1000 copies of it left in the lobbies of the House of Lords and the House of Commons. He writes to Her Majesty the Queen upon the subject of his disputes with the East India Company. Of course he has a letter in reply, by command of Her Majesty. But the whole train of these matters is repeated over again in this book, which is called "The Refutation," which is published immediately after the execution of the will and the codicil.

Therefore, under these circumstances, I can come to no other conclusion than that the deceased did, in the year 1843, labour under the various insane delusions which have been adverted to; and that those delusions, or at least many of them, had not passed away, but that he continued to entertain them at the time when he executed this will and codicil; and at a later period, when the book called "The Refutation" was issued for distribution by him. I make no mention of the other book, namely, the "Memoir," which he wrote against Baron Solaroli in three different languages, English, French, and Italian, and his going before him to every town, and distributing it at the different hotels, to prejudice Baron Solaroli. That appears to me an act of insanity in itself, looking at the charges contained in that "Memoir," because Baron Solaroli seems to have been a person of very high character. He **[118]** bore a high commission in the army; he is now a member of the House of Representatives, or the Senate, in his own country, and he appears to stand very high in the estimation of all persons there. And yet these papers were distributed by this poor man, giving an account of the Baron Solaroli as if he was a person of the lowest extraction, and guilty of the gravest crimes; stating that he had been a cook in the service of the Marquis of Hereford, and that he had been guilty of murdering his own father, specifying the time and place, and making various other charges against him. Under all these circumstances, therefore, I can come to no other conclusion than that the deceased was labouring under insanity at the time in question, though he attempted

to conceal it, according to the advice which he had received; that the delusion was still present in his mind; and consequently, according to the principles which prevail in these courts, and according to all the cases which were cited at the Bar, and most of which are referred to in the case which I have mentioned, namely, the case of *Waring* v. *Waring*, according to the principles there laid down, I must necessarily come to the conclusion, that this gentleman was incapable of making his will. I therefore must pronounce against the will and codicil.

With respects to the costs in this case, I must confess that I have found considerable difficulty; but I think that I should not discharge my duty with the firmness with which I ought, unless I were to condemn the parties in the costs of this suit. When I see how this poor man was prepared for the pur-**[119]**-pose of undergoing his examinations—how he was urged by various persons to conceal his thoughts—not to give up his delusions, but to conceal them, and to pretend that he had none remaining, in order that he might pass his examination, might get his supersedeas, and might recover the whole of his property—when I see what has taken place with regard to Mr. Mahon, and with respect to Mr. Prinsep, though, undoubtedly, the letters which were written by him were not precisely of the same tenor, and I think not so blameable as those which were written by my Lord Combermere and Lady Combermere, urging the concealment of the delusion—I say, that I think, under all the circumstances of the case, I am bound to pronounce against the will with costs. I certainly should not have thought of condemning the East India Company in the expenses which have been occasioned by them with respect to this will. It might, perhaps, have been their duty to have an investigation to see whether this will was well founded, whether it was the act of a capable testator or not, since the contents of it tended so much to the benefit of the persons living within their jurisdiction and under their government. But they have thought proper to make altogether a common case with the executor who has propounded the will, and therefore I cannot well distinguish the one from the other. They have come to a mutual agreement that the expenses are to be borne, if I understand it rightly, by the East India Company; they are the parties who are to bear them; and this investigation would, probably, not have gone on, or not have gone to this length, unless it had **[120]** been for that understanding between the parties. I think, therefore, that I am bound to condemn the executor, and also the East India Company, in the costs of these proceedings. And I accordingly condemn those parties in costs.

This case was appealed, and on the 1st of July the Judicial Committee affirmed the sentence, pronouncing against the will and codicil; but varied the decree as to costs, giving no costs against the appellants (the executor and East India Company), but allowing them one set of costs only, including the costs of the appeal.

**[121]** HUNT *v.* HUNT. Arches Court, Feb. 13th, 1856.—Husband and wife—Adultery—Nonconsummation of the marriage—Medical evidence.—A. and B. were married in 1845, and lived together till 1853. In a suit brought by A. against B. for adultery, B. pleaded her virginity, and recriminated. A. admitted that he had not consummated the marriage, and the medical evidence proved the virginity.—Held, that B. was not guilty of adultery, and was entitled to a separation from A. on the ground of his adultery, which was proved.

[S. C. 2 Jur. (N. S.) 239; 4 W. R. 356.]

This was a cause of divorce by reason of adultery promoted by W. G. Hunt against his wife C. M. Hunt. The libel pleaded the marriage in January, 1845, consummation and cohabitation at different places till February, 1853; the commencement of a criminal intercourse in the summer of 1852 with M. B. P.; that in July, 1852, the wife and P. remained for one or two hours locked up alone in a private sitting-room, with the blinds down, at the Foley Arms at Malvern; in July and August, 1852, frequent visits by the wife alone to the lodgings of P. in Worcester, on all or most of which occasions the blinds of the room in which the parties were were pulled down; in September, 1852, visits by P. two or three times a week to the wife whilst staying alone for three weeks at the Belle Vue Hotel, Malvern, and his remaining there with her till 10 or 11 o'clock at night; that in December, 1852, the wife, accompanied by P., went to Oldbury, and remained locked up together in a sitting-room at the Talbot Inn with the blinds down; and the

commission of adultery on each of such occasions; a verdict, and **[122]** £50 damages. The libel also pleaded a letter from the wife to the husband, written at the time of separation, in which she admitted her attachment for P.

A responsive allegation was brought in on behalf of the wife, the 1st article of which pleaded as follows:—"Whereas it is pleaded in the 3rd article of the libel given in and admitted in this cause on the part and behalf of W. G. H. that the said W. G. H. and C. M. H. his wife consummated their said marriage, and from and after the same lived and cohabited together as husband and wife at the several places and times therein mentioned; and whereas in the 4th, 6th, 7th, 8th, and 9th articles of the said libel it is pleaded that the said C. M. H. committed adultery at different times and places with a person therein set forth. Now, the same is therein falsely and untruly pleaded, for the party proponent expressly alleges and propounds that although the said W. G. H. and C. M. H. did from and after the said marriage live and cohabit together as husband and wife, yet that the said W. G. H. and C. M. H. never did in fact consummate their said marriage, and that the said C. M. H. now is a virgin, and hath never been carnally known by man, as will appear on inspection of her person by physicians, surgeons, and other competent persons," etc. The 2nd article pleaded admissions by the husband to several persons that the marriage had never in fact been consummated. Several following articles pleaded the knowledge by the husband of the intimacy subsisting between the wife and P.; the commission of adultery by the husband; and "that no evidence was taken in the action brought by the said W. G. H. against the said M. B. P.; **[123]** that the verdict was for £50 nominal damages; that the said M. B. P. was at the time in Mexico, and had been at the time, as stated by his counsel, when the said verdict was given, sent abroad by his relatives before the said action was brought; that the said verdict was given by consent of the relations of the said M. B. P., and that he was wholly unaware of the said verdict having been consented to.

This allegation was admitted after opposition. The evidence of two medical men proved the first article of the responsive allegation. The facts pleaded as to the wife's intimacy with and the visits of and to P., as well as the circumstances alleged to have occurred at the Foley Arms and the Talbot Inn, were generally established, but there was no proof of any single act of indecent familiarity. The adultery of the husband was established and admitted by his counsel.*

Addams and Curteis for the husband.

The facts proved against the wife, taken with her admitted attachment to P., established her adultery. The evidence of virginity cannot be relied on, for many cases shew that those signs, upon which the medical witnesses here rely, may exist, and yet sexual intercourse have taken place. To allow such a defence would be not merely dangerous as a precedent, but in the present case would enable the wife to take advantage of her own wrong; she has denied her person to her husband, and so been the cause of the adultery he has committed. The result **[124]** of the case should be to pronounce for the divorce at the suit of the husband.

Sir J. D. Harding, Q.A., and Deane, for the wife.—The adultery of the husband having been admitted, the only question is whether the wife has been guilty. The circumstances are against her, but it is impossible to reconcile the medical evidence with the fact of her guilt. The case is not one of casual intercourse like those referred to in the argument for the husband, but of long-continued intimacy and frequent opportunity. The husband admits he did not consummate the marriage, and the proved state of the wife is inconsistent with any other intercourse.

*Judgment—Sir John Dodson.*—The suit was commenced by the husband charging his wife with the commission of adultery, and praying a sentence of separation on that ground. A libel was given in by him, and upon that libel fifteen witnesses were examined. The wife denies her guilt, and she recriminates, and makes a charge of adultery against her husband. Upon her part an allegation was given in containing those averments, and fifteen witnesses were likewise examined upon that allegation. The guilt of the husband, so far as the commission of adultery is concerned, or rather, I should say, the commission of adultery by the husband, is admitted. I cannot,

* An allegation exceptive to the testimony of one of the witnesses produced to prove the husband's adultery was brought in, and after opposition admitted on behalf of the wife, by whom the witness excepted to was produced.

however, make any distinction between the fact of adultery and the guilt of that adultery; he is proved to have committed adultery, therefore there is an end to **[125]** that part of the case, and it is wholly unnecessary to enter upon it. The only point the Court has to consider is, whether the wife has been guilty of adultery, or any such conduct as should bar her from the remedy which she now seeks at the hand of the Court, namely, that she may be separated from her husband on the ground of his adultery. The marriage took place on the 3rd of January, 1845, and the parties cohabited together till February, 1853. The consummation of the marriage has been pleaded in this case by the husband in his libel. It is said that was a mere matter of form and a matter of course, and of no importance; that it was not expected it would be denied; but it is distinctly admitted by the counsel in the case arguing for the husband that that marriage never was consummated; indeed, it is proved by a conversation which the husband had with Mr. Hyde, whose testimony has been very much eulogised as a witness of truth. A similar admission is made to the two brothers-in-law—the brother-in-law of the husband as well as the brother-in-law of the wife; in point of fact, it is agreed by all parties, that though these persons were married in 1845, and were living together for a space of eight years, yet no sexual intercourse took place between them. I am sorry to say that in the answers of the husband there is not that distinct admission I should have expected, because, having pleaded that the marriage was consummated, he says in these answers that he entertains doubt on that subject, whilst it seems he entertained no doubt whatever when he conversed with Mr. Hyde and the other gentlemen whose names I have mentioned, and his counsel now enter-**[126]**-tain no doubt upon the subject. The adultery of the wife is charged to have taken place with Mr. Portman first of all at Edgar Street, in the city of Worcester; it appears that he was visited there by Mrs. Hunt, and frequently visited. It appears also from the testimony of the witnesses that it was not only Mrs. Hunt who visited him there, but she was occasionally attended by her mother or sister, and upon one occasion by her husband. However, it is undoubtedly clear, from the evidence of two of the witnesses living nearly opposite, and also from the testimony of Miss Norris, who was the daughter of the person who kept the house, that Mrs. Hunt not unfrequently came there by herself and remained there for a very considerable time. Mrs. Norris, the lady of the house, did not observe anything remarkable; she never found the door locked or anything of the kind; but the testimony of the two witnesses residing nearly opposite is, that they observed that this lady frequently went there, and on all occasions of her going there, whether morning or evening, whether the sun was on the windows or not, the blinds were pulled down; there they continued together a considerable time, and when the lady quitted the blinds were drawn up. Now, certainly these are circumstances affording very great suspicion of misconduct between the parties. I do not say they are conclusive evidence of adultery, or that they would be presumptive evidence of adultery, if standing by themselves; but there are other charges made, namely, of improper intercourse at the Foley Arms at Malvern, and the Belle Vue Hotel at Malvern, and also at the Talbot Inn, Oldbury. It appears that Mr. Portman **[127]** and this lady drove over to the Foley Arms at Malvern, and upon the same day Mr. Hunt, the husband, drove over a young lady who was staying on a visit with Mr. and Mrs. Hunt, and they all went to the Foley Arms. When they all arrived there the visitors' book was presented to Mr. Portman to inscribe the names, which is usual at that place; and he thereupon wrote down his name, and then the name of Mrs. Portman, in that book, as Mr. and Mrs. Portman, and also the name of this young lady. Whether Mrs. Hunt knew anything of this, or Mr. Hunt knew anything of it, does not appear. It is a matter of little importance; it was not pressed by counsel as having a forcible bearing on the question; it was a mere joke of a young man writing down "Mr. and Mrs. Portman," he having driven Mrs. Hunt there, and no unfavourable inference is to be derived from that. But it does appear that they were on another occasion alone together at that hotel, and upon that second occasion the door was found locked; that certainly is a strong ground of suspicion. And again: what is still stronger is, what took place at the Talbot Inn at Oldbury, for that is the last time they were detected acting in any clandestine manner. Upon this occasion Mr. Portman had driven her over in order to call on a gentleman, who had been his tutor, and who, it so happened, was not at home, and they proceeded to the Talbot. The only room that was unoccupied was one behind the bar, used as a

coffee-room, or for more parties than one. They went into that room; the lady ordered some refreshment. After that they remained there; and there being occasion for the niece of the land-[128]-lady to go to the room to get her umbrella, the door was found to be locked. There is no doubt they remained in the room with the door locked for a considerable time, for she is not the only person who deposes to that fact, she is confirmed by other witnesses. The room, when they come out, is found to be in a disordered state; it is found that the blinds are drawn down; but the learned counsel say that is nothing at all, it is common to draw down the blinds if the windows look, as those windows did, into the street or into a stable yard, and therefore no unfavourable inference is to be derived from that. It appears, likewise, that a pin from the lady's hair was found on the floor, or on a sofa in that room; this is said to be of common occurrence—not to be taken as proof against any particular lady. Again: as to the state of confusion in which the sofa is represented to have been found, it is said that it had a loose covering, and that any one sitting upon it would disorder it. The sofa was removed from the window, but it was urged there was nothing in that. Taking each of these circumstances separately, they do not amount to much; but, taking them all together, when a young married woman goes with a young man to an inn, and the blinds are pulled down, the room is in confusion, the door is locked, and they are there for a considerable time, these circumstances offer a case of very strong suspicion. I do not say that they amount to more than presumption. But this is not the whole of the evidence, for there is other evidence in this case, and other most important evidence—that upon which I think I can place the most implicit reliance—the testimony given by [129] Dr. Farr, one of the most eminent physicians; and by Dr. Frere, a man likewise of considerable eminence, who can have no interest in the case, and who depose most positively, after an examination of this lady, that she has never had sexual intercourse with man, that she is a virgin intact. It is said they have defined, and correctly defined, in what complete sexual intercourse consists. They both admit that there may be quasi sexual intercourse, that pregnancy may take place notwithstanding there has not been this complete sexual intercourse, notwithstanding the hymen may not have been perforated, or not have been broken. They give cases within their own knowledge in which these matters have occurred, and they fully confirm and fully admit the cases which are given by Dr. Blundell, in his work on the subject. But they say that in this case not only is the hymen unbroken, but that the condition of all the parts satisfies them that sexual intercourse has never taken place. With respect to the husband, with whom this lady cohabited for eight years, it is now admitted there never was sexual intercourse with him. The conclusion necessarily is, however imprudent the wife may have been, however reprehensible her conduct may be and must be considered, that she has not been guilty of adultery. I do not enter into other parts of the case —into what is called his connivance or encouragement. I think that was pressed against him rather more than is necessary. I am unwilling to enter upon this case, either on the one side or the other, beyond what its necessity requires. I will state that I am of opinion he has been guilty of adultery, and he has admitted [130] it; I am of opinion that she is not proved to have been guilty of adultery, that there never was sexual intercourse with man; and upon these grounds I pronounce for the prayer of Mrs. Hunt.

LOWE *v.* LOWE. Consistory Court of London, Nov. 10th, 1855.—Cruelty—Practice—Answers.

[S. C. 4 W. R. 92.]

The libel of the wife in a cause of separation by reason of cruelty, pleaded certain acts of cruelty; and that the husband was only prevented from further violence by the interposition of A. L., their servant, who was present.

The answer denied the cruelty, and went on to allege that the said A. L. was evidently in collusion with the wife, and at hand and ready to witness her lying on the floor on the occasion when she falsely stated she had been knocked down by the respondent; and that from a given time the wife had adopted a systematic course of provocation, [131] evidently with the view to induce the respondent to act with violence towards her.

The libel further pleaded, that a summons having been obtained by the wife against the husband, the husband was convicted of the assault and fined. The

answer admitted the conviction, and averred that the charge was supported by the grossest false swearing, and that the magistrates were not unanimous in giving their judgment.

Addams and Spinks, in objection to these answers.—The respondent cannot introduce the charges of evident collusion, and of the adoption of a systematic course of provocation; nor can he allege that the conviction was obtained by perjury, and that the magistrates were not unanimous.

Sir J. D. Harding, Q.A., and Jenner, contrà.

*Dr. Lushington.* You have a right to say that the wife and her servant were acting in collusion; but you should not go on to say that the wife adopted a systematic course of provocation, because if you state in answer anything which you can prove, and do not prove it, the statement in the answer goes for nothing. You may however answer that you believe the conviction was obtained by false swearing, and that the magistrates were not unanimous.

**[132]** DAVIDSON *v.* DAVIDSON. Consistory Court of London, May 17th, 1856.—Adultery—Attachment—Criminal intention—Opportunity—Interrogatories—Credit of witness.—Where there is proof of attachment, criminal intention, and opportunity, the presumption is, that adultery has been committed. Statements made in interrogatory are generally to be taken as admissions; and though a witness be in part discredited, yet where such witness is corroborated by circumstances or statements in interrogatory, the witness is to be relied on.

[S. C. 2 Jur. (N. S.) 547; 4 W. R. 590.]

This was a cause of divorce by reason of adultery promoted by the husband against the wife. The libel pleaded the marriage on the 20th of February, 1855, and cohabitation till the 22nd of May in the same year. That the wife had been partly educated in France, and there formed an acquaintance with a young Frenchman named E. Lalouette; that since leaving France she kept up a correspondence by letter with and had two portraits of him; that notwithstanding the great kindness shewn by her husband to her, she treated him with indifference. That in May she induced her husband, much to his inconvenience and against his wishes, to take her for a short visit to Paris. That previous to leaving home for Paris she destroyed her papers, and packed up and took with her all her clothes, trinkets, books, and drawing-room ornaments. That when the time of their visit to Paris had expired, and the husband was obliged to return to England, she refused to return with him, alleging that she was a Roman Catholic at heart, and would not leave France before she was formally admitted a member of that church. That at daybreak of the 22nd of May she accompanied **[133]** her husband to the station of Paris, and saw him leave by the train for Boulogne, parting with him with every expression of kindness. That Denman her maid remained with her, the husband having refused the wife's repeated suggestion that he should take Denman back to England with him. That immediately the husband left with the train, Lalouette joined the wife on the platform, and at noon of the same day called on and remained with her for about an hour in her apartment. The remaining material articles pleaded the facts occurring during the night of the 22nd and morning of the 23rd, which are fully stated in the judgment. The additional articles pleaded a correspondence in April, 1855, with the authorities of the Post Office respecting the missing halves of bank notes sent in a letter addressed to E. Lalouette, and a Mr. D'Alcorn acting under the directions of the wife. The receipt of foreign letters by the wife through D'Alcorn with envelopes initialed E. L., such envelopes having been made at a stationer's in London by the wife's orders, and the sending a writing-desk and her picture as a present to Lalouette in March and April, 1855.

No counterplea was given in on the part of the wife; but an allegation exceptive to the evidence of Denman was admitted on her behalf, pleading that whereas, in answer to the 13th interrogatory, the witness answered "That when Mrs. W., the ministrant's mother, arrived in Paris on the 29th of May, and I opened the door to her, she did, I think, say, the very first thing, 'Oh! Denman, tell me, is it as bad as we think?—is she guilty?' or something to that effect. I did not reply 'Comfort yourself, madam, she is not guilty.' No; I am sure I did not. I will **[134]** venture to swear that I never told the ministrant that those were my very words." She hath therein knowingly, etc., for that she did reply in those very words. And that

whereas, in answer to the 18th interrogatory, the witness answered, "I have not expressed to Mr. and Mrs. W., the father and mother of the ministrant, my belief that she is innocent of the charge of adultery. I have never expressed that belief to them. I have only told them, as near as I could, everything as it occurred, the same as near as possible as I have in my evidence, but never expressed to them the belief interrogate." She hath therein knowingly, etc., repeated expressions on several occasions of the witness's belief in the innocence of the wife being pleaded in contradiction. This allegation was admitted after opposition.—See post, page 167.

Addams and Bayford for the husband.

Twiss and Spinks, for the wife, contended that there was no evidence of adultery except that given by Denman; that she was a single witness, and discredited. And they cited *Rix* v. *Rix*, 3 Hagg. 74; *Hamerton* v. *Hamerton*, 2 Hagg. 8; *Simmons* v. *Simmons*, 5 N. C. 347; *Evans* v. *Evans*, 1 Rob. 165.

*Judgment—Dr. Lushington.* In the course of the argument addressed to the Court in this case, two or three questions of law were mooted, and before I proceed to the evidence in the case, I think it may be expedient to dispose **[135]** of them, though indeed, according to my own judgment, the case must be determined by very simple considerations; whether or not criminal intention is proved, and whether or not there was adequate opportunity for the parties to have indulged that criminal intention.

Now, I apprehend, that with regard to the proof of adultery, the doctrine has long been settled. It is not necessary to prove, that the adultery with which a party is charged should have occurred at any particular time or place. The Court must be satisfied that a criminal attachment subsisted between the parties, and that opportunities occurred when the intercourse in which it is satisfied the parties intended to indulge, might with ordinary facility have taken place. Ocular proof, as was said by Sir George Hay, in *Rix* v. *Rix*, is very seldom to be procured; almost every case is a case of presumptive proof, though such proof varies in every possible shape and degree. There was a case, of which I am not aware there is any printed report, in which this question was very greatly discussed. I mean the case of *Trotter* v. *Trotter*, which occurred before my time, and which, when I first came to this profession, was frequently mentioned.

Now, in the case of *Hamerton* v. *Hamerton*, which has been so much discussed in argument, Sir John Nicholl said, it is true that the law does not require direct evidence of the very fact, committed at a specific time and place—repeating almost the very words of Sir George Hay—but it does require to be satisfied that actual adultery has been committed. And I entirely accede to this doctrine. It is, in other words, that no proof of criminal intention **[136]** will suffice, the parties must be placed in a condition, as to opportunity, when such criminal attachment may be indulged.

To understand the judgment in *Hamerton* v. *Hamerton*, it must be borne in mind that the suit commenced in the Consistorial Court of Gloucester, and the libel was there admitted, and so framed that Sir John Nicholl said, as to the most important part of it, that it was impossible for the party charged to defend herself.

In fact the case of *Hamerton* v. *Hamerton* was this—very different from what this is represented to be on the face of it—there was conclusive proof of criminal intention on the part of Mr. Bushe, the alleged adulterer, there was less stringent proof with regard to the feelings of Mrs. Hamerton, and there was no satisfactory proof of opportunity at all. One opportunity was alleged to have taken place at Cheltenham, at the house of Mrs. Matthews. That case wholly failed, because it was admitted on all hands that Mrs. Matthews was a woman of irreproachable character, that she was in the condition of a mother or guardian to Mrs. Hamerton; and the only interview that took place was in the drawing-room in the middle of the day.

With regard to the parties being brought together at any other place, the evidence wholly failed. It had been alleged that Mr. Bushe had taken a house, which he certainly had taken, with a view of carrying on criminal intercourse, but there was no proof that Mrs. Hamerton was there. With regard to Paris, the same observations may be made, for the evidence only went to this, that Mrs. Hamerton was seen coming from that house on one occasion, **[137]** and three or four hours afterwards Mr. Bushe was seen coming out, without anything like evidence to shew that the parties had ever been in the house together. Therefore, I say, I adhere to the doctrine which was promulged in that case. I approve of Sir John Nicholl's judgment when he required further proof.

But the circumstances of that case are not only of course different, but, as I shall have occasion to shew in the course of further examination, wholly and altogether distinct.

Reference was made to the rules which prevail, I lament to say, in this Court as to the effect to be attributed to the evidence of a single witness. I am very clearly of opinion that the circumstances of this case do not admit of the reception of such an argument; for I apprehend that it has been held, even in these courts, on many occasions, that the evidence of a single witness, as to a particular fact, might be sufficient to establish that fact, if there was adminicular and corroborative testimony; of what kind may be matter of argument. However, to prevent misconception, I will make a few observations on this topic.

With respect to the case of *Simmons* v. *Simmons*, which was decided by myself, I must observe, that it was one of very great peculiarity, the whole question being hinged on the supposed commission of adultery at a particular time and place. Lucy Peacock, who cohabited with Mr. Simmons, deposed that the connexion did take place; but there were no circumstances whatever, either admitted or proved, legally speaking, corroborative of her evidence. The existence of a prior intercourse dis-**[138]**-continued was not evidence of a particular renewal; and more especially, as interviews were proved to have taken place for a totally different purpose, namely, the maintenance of a child, which had been the fruit of loose intercourse with her antecedent to the marriage. What was wanted in that case was, proof of a continued attachment; and there was not the least evidence to shew that the intercourse which had been abandoned was likely to be revived.

As the law has not been altered, I must abide by the law as laid down by the Court of Arches. I did so abide in determining myself in that divorce; I acted under the constraint of a superior court, and against my own judgment; I said so at the time; and I should now act on the law as it stands, if I found circumstances admitted of its applicability; and I should do so even though the result might be, as in the case of *Evans* v. *Evans*, decided by Sir Herbert Jenner Fust, that a court of common law gave a verdict of £500 and an ecclesiastical court dismissed the wife; the consequence of which might be, that the husband might be compelled to take her back, notwithstanding the verdict.

When I come to examine the particulars of this case, I shall be able to shew what appears to me to be a very essential distinction between this case and that of *Simmons* v. *Simmons*.

There was another point adverted to, which might, under the circumstances, be one of considerable difficulty; I allude to the question, how far interrogatories can or ought to be taken as admissions.

It has been said, that I must not take facts admitted in the interrogatories without the colour **[139]** put upon them. To this I cannot give my assent, at least to the full extent to which it has been carried. I conceive that where interrogatories have been put, I must first look to the evidence of the witness to whom the interrogatory has been administered, and that such answer, in the first instance, is the best evidence. Next, I must enquire, whether the interrogatory was framed for the purpose of trying the credit of a witness, and that only, or as a *bonâ fide* admission of a fact, in accordance with the rest of the evidence, and only so admitted for the chance of an experiment, for the purpose of putting a different construction upon it.

I cannot adventure upon a general rule; the Court must judge in each case, as I believe to be the practice in other courts of justice. There is only one other case, to the best of my recollection, in which this point has ever been mooted: that case was decided by myself, and consequently is no authority for me to rely upon; it was twenty-four or twenty-five years ago; that was *Story* v. *Story*. In that case I had no hesitation in assuming as proved the facts stated in the interrogatories. I have since referred to the interrogatories in that case in the original depositions. I find in pencil the observations which I made at that time on these interrogatories. I need not read them all; but my observations were, such interrogatories as these, by implication, necessarily admit the general facts. Again, on the ninth interrogatory, the question was asked, how a man was dressed when he was found under the bed by a lady, a witness, and who was the single witness in the case. This appeared to be an admission that the man was so found, and to **[140]** assist the main evidence in the case. There were

many interrogatories of the same kind, but I had no hesitation in dealing with these as admissions—from the desperate condition in which the party pleading was placed—for there was the very strongest evidence of the witness having found him in the middle of the night, and concealed under the bed of the person charged with adultery; however, no doubt, under these circumstances, it would seem advisable to run many risks in order to get rid of the evidence. I need not occupy time in going into that case.

I now proceed to the facts of this case. It is clear, beyond all doubt, that one of the most important considerations to which I have to direct my attention is, the credit to be given to Ann Denman; but I must consider how far that credit is impeached—how far her statements are shewn to be consistent with probability, and with the other admitted facts and circumstances.

Now, her credit has been attacked in several ways: First, by the acceptive allegation; secondly, by shewing she is contradicted by one of the witnesses who has deposed to a declaration denied by Denman; thirdly, by her own letter; and fourthly, by alleged contradictions in her own evidence.

Now, I mean to consider these objections briefly in the order stated.

The exceptive allegation does not contradict any of the facts pleaded, nor any of the facts given in evidence—not one. That allegation is confined to a contradiction of certain declarations deposed to by Ann Denman, and is framed for the sole purpose of discrediting her testimony—not to shew she had deposed erroneously as to any fact or circum-**[141]**-stance, but in order to shew that the Court ought not to give credit to the statements which she has made.

Now, admitting for a moment the whole evidence of Mr. and Mrs. W. to be correct, it would still be a question how far it should discredit Ann Denman, whether she was not to be believed as to the facts deposed to. As a general principle, the doctrine of falsa in uno falsa in omnibus has not, as I believe, prevailed in any of our courts; that in particular cases the evidence of a witness, proved to have sworn falsely and wilfully also, may be wholly rejected I doubt not, but each case stands on its own particular circumstances. The question I have to consider is, whether this witness is, to use a short phrase, so perjured in some particulars that she is to be wholly discredited as to all other matters. This will depend on several considerations, and more especially whether she is confirmed directly or indirectly by other evidence in the cause.

It appears that Mr. and Mrs. W. did give credit to Ann Denman's statement of facts; they continued her in their service; they were anxious that no opposition should be made by her daughter to this suit. I think that the letter of August 28, 1855, goes further. To that letter I must refer: "Dear Frederick, I am sorry to trouble you with this, but we are very anxious to know about what time in November Katherine's unfortunate case is likely to come on, and if it is likely to come out in the public papers at once. I am told these matters take a long time to settle; if such is the case, and you think it won't come on till after Christmas, we could then remain here till that time. My reason for asking is," so and so "is expecting her confine-**[142]**-ment the end of November, and she expects to come here at that time; but as we wish to be away during this dreadful trial, I shall arrange my future movements according to your letter. Can you suggest anything to me that I might in any way check her opposition to the suit, and by that means prevent publicity and cruel exposure to both families?"

Now, it is perfectly obvious that when this letter was written, which is August the 28th in that year, Mr. and Mrs. W. were anxious and desirous that no opposition should be made by their daughter to this suit. According to the statement in his evidence, which I need not refer to again, he says, "I was willing and desirous all along, very much so, that the producent should not be an opposing party, at least not actively so, to the ministrant's suit against the producent. I was so, because being satisfied from Denman's repeated statements to us that she was innocent of any criminality, I looked forward to a reconciliation between the parties; and I thought that her refraining from offering any active opposition to his suit would best promote that result. It is only in consequence of its appearing by Denman's evidence, when it was published, that she stated respecting my daughter what, according to her (Denman's) own previous statements to us, we have every reason to believe to be false, that we have been obliged to come forward in opposition to that evidence. We could not stand aloof when we had reason to believe that there was false evidence against

her tending to prove her guilty—when we believed, and, from the statements of the very [143] party who had given that evidence, had reason to believe her innocent."

Now this is a most extraordinary statement, whilst Mr. W. believed the evidence of Ann Denman, taking it to be such as he has represented it to be, that Mrs. Davidson was entirely innocent of the great offence, so long he withdraws from all opposition to the suit commenced for the purpose of proving she was guilty of adultery, and Mr. Davidson obtaining a divorce. It does appear to me most strange, that a father, convinced of the innocence of his daughter, by the declarations of this witness, should, at the very time when he is expressing his belief of that innocence, say, "Can you not furnish any means whereby I can assist in putting a check to these very unhappy proceedings for both families?" His opinion is now shaken—why? Because he says that he finds that Ann Denman, as to her declarations to him and Mrs. W., has sworn falsely. I must say here, it is not a little singular that Mr. W. should have acted in the manner I have stated. If Denman did make the declarations to which he has sworn, and he did believe them, I can scarcely believe it possible that he could have advised, or been a party to the withdrawment of all opposition to this suit, and leave a daughter, whom he believed innocent, undefended and unprotected in such a suit. I will not dwell upon this.

I must confess that I can place no very great reliance upon evidence which appears to me so wholly inconsistent, and so contrary to all probability; but, looking at the evidence of Denman herself, I should think it is very likely that she may [144] have expressed herself in very doubtful terms as to the guilt or innocence of Mrs. Davidson, I think that she, not having had ocular demonstration of the fact, may have stated, though we have not the terms in which she did not express it, a doubt as to whether the offence was committed. I apprehend she did not choose to draw a direct conclusion as to guilt, and that she expressed herself accordingly, and it may be she went still further. She now denies that she declared that Mrs. Davidson was innocent of the fact. I believe the truth to be, that Denman did use ambiguous expressions; that they are now represented by Mr. and Mrs. W. to be stronger affirmations of innocence than they really were, or than they themselves believed them to have been; and that Denman has swayed from the strict truth in denying them altogether, instead of admitting them in a mitigated form. That I believe to be the truth.

Now then, it is, I think, clear that Denman did make a similar, or somewhat similar, declaration of innocence to the witness Carr, and that she has now denied such declaration generally; but I concur in thinking that the question was not fairly put to Ann Denman, and that according to all rule, as well as all reason, the question ought to have been put more specifically, whether she did not make a particular declaration in such terms to such and such a particular person at such a time, and in such a place.

With respect to the letter in Denman's handwriting, it may be expedient that I refer to the words of it—the terms in which it is expressed. It is not necessary to go through the whole of [145] the letter, it relates to many things which are irrelevant to the issue in the cause. "I know you are kept short of money. The dear Pets I have not seen yet, but when I do, I will kiss them for you. Do, my dear Mrs. Davidson, keep up as well as you can, there is one above who knows you are innocent, and will, if you look to Him, protect you through all your trouble." Now, I think it is impossible to deny that this is a strong declaration of Mrs. Davidson's innocence, the witness has admitted that she did write that letter, as far as it is admitted, it is inconsistent with the evidence now given, it operates against her credit; but she has not denied writing it, and therefore she is not to be charged with false swearing in that respect. I think, therefore, that I must consider that this letter is in strong contradiction of what she has now sworn in the course of her evidence; and I shall deal with this case, and with her evidence accordingly.

Lastly, there are alleged contradictions in the long evidence which she has given. Now, these I do not attempt to notice in detail. They were very properly brought forward by the learned counsel in great and minute detail, every circumstance importing the pettiest contradiction, in evidence of this great length, was brought under the notice of the Court. I do not attempt to look at them minutely, but I shall give my opinion as to their general effect.

I will now state what is the result of the consideration of all these circumstances, and of the whole evidence of Ann Denman. According to my [146] opinion, Ann

Denman has not been actuated by any malicious determination falsely to accuse Mrs. Davidson; that as to the commission of the offence itself, her mind and opinion has fluctuated because actual guilt was a conclusion to be drawn, and was not a visible fact. That she has made declarations importing innocence, or rather negativing knowledge of guilt. That she has most imprudently, and without due regard to the obligation of her oath, denied such declarations, and that, consequently, her credit is to some degree affected, and it becomes especially the duty of the Court to see that the main facts deposed to by her are, as far as the case will admit, supported by probability, and other facts not denied. In truth, this is the great point of the case, to ascertain the credit of Ann Denman. It is a most remarkable feature in this case, that the general statement made by this witness is not impugned. Some statements, of which I doubt the importance, have been questioned; but the stress of the attack has been upon the conclusions drawn by the witness, and not upon the facts deposed to by her.

I say, in my view of this case, it will not be necessary to travel minutely through the whole of the evidence. I think that the conclusion I am to draw, whatever it may be, must be drawn from facts which have scarcely been made matter of dispute, and not from circumstances, the truth of which has furnished so large a field for argument.

It was contended by the counsel for Mr. Davidson, that there was a deliberate plan on the part of Mrs. Davidson to abandon her home in the Regent's Park when she went to Paris, and to throw herself **[147]** into the arms of Mr. Emile Lalouette. It appears to me also unnecessary to trace all the circumstances from which that inference is drawn; the course I shall pursue is, to trace the origin and continuance of the attachment to Mr. Lalouette, and, as intimately connected therewith, her conduct during her married life. It is from this source that the evidence of criminal intention, if it existed at all, must be drawn.

I see nothing particular in the state of Mr. W.'s family that should induce me to adopt the suggestion that this lady was peculiarly disposed from circumstances to form a romantic though innocent attachment; nor do I see why Mrs. Davidson should be in any extraordinary degree the victim of girlish fancies. She, it is true, is one of a large family of daughters; but not, as far as appears, brought up or educated as a recluse.

The period and circumstances under which Mrs. Davidson's acquaintance with Mr. Lalouette originated are wrapped in some obscurity. Mrs. W. deposes that about a twelvemonth, more or less, before her daughter's marriage, she discovered a letter and a portrait in her possession, and about the same time she received a letter cautioning her against going abroad, as Miss W. was about to elope with a young Frenchman. Strange to say that of the circumstances connected with these letters, she has now a very indistinct recollection. I must say I think they were calculated to make a much more permanent impression, taking the deposition of the witness herself. I do not collect more specific information from Mr. W.'s evidence; according to his account, the matter ended in a **[148]** reprimand and the return of the picture, This is said to have been a twelvemonth before the marriage. Of what may have passed in the interval there is no evidence; but in October or November preceding the marriage, which took place in February, 1855, the precise period matters not, about this time, we find that Miss W. was carrying on a clandestine correspondence with Mr. D'Alcorn, a music seller, for he states that the letters he wrote to her were addressed to Miss W., at Mr. Beidermann's at Newnton, and not to her father's house; and through the assistance of this person, so clandestinely carried on, she forwarded her letters to this Mr. Lalouette, then residing in the Rue de la Paix, at Paris.

I think it necessary to refer to the letter, which is the letter written by this lady, that is annexed to the additional articles. This is it—"I have enclosed a letter for France, which I should feel extremely obliged to you if you would post for me as soon as you conveniently can. I have enclosed 1s. for you to get a 10d. stamp to put on it for me. You must pardon the trouble I have given, but having within the last few days fallen a victim to injustice and severity, I am not allowed to do anything without the interference of others. My letters are all read before I receive them, and all I write is also pryed into." To what injustice, to what severity this letter refers, the Court has no means of judging. If I am to trust the evidence in this case, it could not have referred—I repeat, if I am to trust that evidence—to the former

discovery of the inter-[149]-course that had taken place—the letter between Miss W. and Mr. Lalouette, but it refers to something else. "I must, therefore, beg you never to mention having received this letter, and if ever you have occasion to write again, let it be as few words as possible. You can write me a few lines to tell me you have received this, and also that I am forgiven for the liberty I have taken, to the address I have enclosed; enclose the letter to me in that sealed, and write For Miss W. on it. The stamps for the music shall be sent to-morrow, I shall not be allowed to do so, but someone else will. I expect I may have to live in London in a few months; should such be the case, you shall find me a better customer than I have been yet. I may probably live in town after I am married, at all events some part of the year. I must beg you to preserve the strictest secresy, and never allude to this letter." Now, perhaps, erroneously, the Court, when it first read this letter, and having no information before it as to the commencement of the attachment between Mr. Davidson and Miss W., was inclined to think it must necessarily have referred to that attachment; and, I think, for the most obvious reason, because the lady speaks of going to reside in London, and speaks of being about to be married, or rather, she says, after I am married, at all events. Now it turns out, according to the argument of counsel, that this had no reference to any acquaintance between Mr. Davidson and Miss W. at all, it was either a pure invention of the lady to curry favour with Mr. [150] D'Alcorn, or it must have adverted to somebody else. These are matters of minor importance. The important point of the letter is, that in October or November, according to the representation of the parents, the intercourse having been broken off, as they believed a year before, we find the correspondence carried on, and that two or three months before the marriage. It is conclusive proof, and it would be a mere waste of time to comment upon it.

Now the marriage takes place in February, and what follows? I proceed with Mr. D'Alcorn's evidence—the box and the portrait, and a conversation which fixes the matter to Mr. Lalouette. Now this has taken place very shortly before the visit to Paris, not an unimportant date. In March preceding money was forwarded to this gentleman. I need not trouble myself, after stating these facts, with going into the evidence as to the box and the desk. Here is, in fact, undeniable proof of the continuance of this connexion immediately after the marriage, or nearly immediately after the marriage with Mr. Davidson, and carried on up to the very last moment of time.

I must slightly advert to the conduct of Mr. Davidson after the marriage. That Mr. Davidson was kind, affectionate, and indulgent to a fault, is the evidence of all of Mrs. Davidson's nearest relatives. Now what return does Mrs. Davidson make? An utter disregard of all the duties which, by her marriage vow, and by every tie of gratitude, she was bound to discharge; and to such an extent does she carry her misconduct, that she is the subject of just and severe reprehension from her own father. Towards her husband, she shews not a [151] spark of affection, regard, or just deference. To him she is cold and heartless, and what is the cause of all this? Can it be other than a disgraceful attachment, commenced before marriage, and shamelessly carried on afterwards. This is the state of things when the visit to Paris takes place. I shall not prolong this judgment by discussing the preparation for this visit, or the quantity of things taken, or the letters burnt, or the intended duration of the visit; that is no part of my judgment; though it may be perfectly true, that all this was a preconcerted plan, it is no part of my judgment, and is not the fact or circumstance on which I intend to rely. They go to Paris, the week expires, Mr. Davidson is compelled by his professional engagements to return to London, Mrs. Davidson refuses to accompany him. Now what is the excuse for this gross act of disobedience, this acknowledged breach of all duty. Surely there must have been some very powerful motive, some extraordinary strong feeling in operation, to induce so unjustifiable a resolution as that of deserting her husband, with whom she had cohabited but four months; no ordinary cause could possibly account for this; a husband, too, who had proved himself so devoted to her and so dedicated to the promotion of her happiness. I repeat, there must have been some powerful cause to work such an effect. What is a powerful cause? A criminal attachment, sad experience shews, can sever the strongest ties by which God and man can consecrate the marriage union.

To avoid this solution, this probable explanation, probable, because of all the circumstances I have already mentioned, Mrs. Davidson invents, and her [152]

counsel, in the distress to which they were driven, adopt the explanation, that religious obligations were at the bottom of the whole affair, and that a regard for conscience has dictated a step apparently so much at variance with all conscience. Mrs. Davidson appears in the new character of a Roman Catholic.

Now, I admit the motive to be strong enough, if the religious conviction is established. I am well aware that bonds the most sacred may be readily broken asunder, in the manner suggested. I deny not, that a violation of the marriage vow, the separation from a kind and affectionate husband, may be brought about by a conversion to that faith; but I must have strong proof of the reality of such conversion; I must be convinced that the assumption of such character is not a pretext put forth for the occasion, but a bona fide abandonment of a former faith, and the sincere adoption of another church.

But what are the proofs of this great and all-important change? The lady's own letter. I have not one word of any previous attachment to the Roman Catholic faith; I have not a single syllable from any of the witnesses of this lady intending to become a professor of that religion. It bursts out in the shape of the lady's own letter, the letter E to which I now refer. This is that extraordinary letter which this lady wrote on the 24th of May, Mr. Davidson having then left Paris and proceeded to England: —"My dear Madgwick, I hope you arrived home safely without being very ill in crossing. The rain must have calmed the sea, I think. I am expecting to hear from you every day to know what arrangements you **[153]** have made. I do not see that these rooms we have are quite the right sort for me, the entresole is not quite the proper place for a lady, which I did not know when I took them. There is a very nice little apartment in the same house on the 4 ieme étage which is let at the rate of £18 a month; it is very much better than this, and not so public, being higher up. I could go into it from Saturday or Sunday, if you have no objection, or I could look out elsewhere, for I do not think this one is the right one for me; but the other is just the one you would like, very private, and clean and comfortable. Write, and tell me what you think; I also must have a servant, and no time should be lost. She must be French, and one of my own choosing." I will come to that presently. "I do not think I am bound to submit to be kept in the custody of anyone." And that also: "and if you choose to part with me you cannot force me to be your prisoner. I never shall change my determination of being a Roman Catholic, and as soon as I can I shall be received into the church." So the lady was not a Roman Catholic at this time, she was only bringing up for that extraordinary change at that period. "Now, from force of circumstances, I am a member of none; I cannot buy even a prayer book, but you must not think that poverty can make me change; no, never!" Now, this is the first intimation we have, in this letter, ever breaking forth of her determination to become a Roman Catholic. I will look at the other evidence presently. Then she goes on, "I hope that **[154]** the dear little children are quite well"; and in the whole of this letter now comes one train of thought: "Oh Madgwick, do not let them hate me too! no, speak kindly of me to them; sweet little Jessie, how I should like to see her, but no! I shall never see any one of my once kind friends again. I shall never consent to return to England with the world scoffing at me and my friends neglecting me; no, such being the case I must submit, and here I remain."

But it is said all this is to be attributed to a change of religion. I confess I cannot arrive at that conclusion; but I arrive at this conclusion, that she had determined at that period never more to return to her husband's house, nor to his bed; and that this is expressed, according to the evidence in the case, for the first time; for not a single syllable is elicited from any one of the witnesses that there was any such intention on the part of Mrs. Davidson at the time she was residing in Regent's Park; and I must say, this letter is strong corroborative proof of the argument that was addressed to the Court by the counsel for Mr. Davidson, that the fact of leaving Regent's Park was part of a plan which was afterwards carried into effect, never to return to her husband, but to throw herself into the arms of Mr. Lalouette on arriving at Paris. "If I have ever said anything in a hasty moment to offend you, and for all my past conduct, I must humbly ask your pardon and repent, every unkind word I retract, and only remain firm to my faith. I never shall change that now."

This is part of the evidence strongly relied upon by Mrs. Davidson's counsel, in order to shew **[155]** that she was actuated by such strong religious motives to separate herself from her husband, to whom she had been married four months.

I cannot believe that if there had been any truth in this averment we should not have found some evidence leading to its probability at an earlier period, some preliminary circumstances rendering so great a change consistent with probability. But what are the circumstances relied upon? It appears that in Mr. W.'s letter reprimanding Mrs. Davidson for disobedience, he speaks of attendance at Wells Street chapel. This is the subsidiary evidence on which Mrs. Davidson relies in order to prove her a convert to the Roman Catholic faith. I know none of the merits or demerits of that chapel. I know it is a chapel where the service of the Church of England is performed, and that by episcopal authority, and I do not think I am entitled to assume that the attendance on any church of that description is demonstrative proof that its congregation either have become or are about to become Roman Catholics: I do not think I am entitled to go so far as that. I am told it is a place of notoriety; but surely it cannot be that the services are conducted in such a manner that anyone who goes there is at once to be described as abandoning the faith they are worshipping under. This is proof the second. Now what is proof the third? It really does appear to what stress counsel are necessarily driven, for it is quite necessary in these cases that everything which the ingenuity or eloquence of counsel can urge in favour of their client should be brought forward. The last pretence is, that Mrs. Davidson was once heard to say she knew a lady **[156]** who had been a convert to the Roman Catholic faith.

I am of opinion that this excuse, even if it stood alone and were not to be construed with all the circumstances proving the previous attachment to Mr. Lalouette, even if it were an isolated fact opposed to none, would utterly and entirely fail to prove the fact upon which so much has been assumed. Then, what are the consequences? That a false pretence has been put forward to justify Mrs. Davidson's refusal to accompany her husband, that I must seek for some other cause to account for that refusal, and what other cause had been assigned, or could be assigned, except her attachment to Mr. Lalouette? If there is an effect, there must be a cause; and if there be but two possible causes, and one wholly fails, you must necessarily resort to the other.

Here too, it must be remarked also—proved by this letter, proved also by Denman's evidence, that this lady was not only desirous of severing herself from her husband, but of being removed from all possible control, from anyone known to the husband; for what does that letter state? She desired Denman might be dismissed, and a French maid of her own choosing might be substituted. This, too, is sworn by Denman—a French maid of her own selection.

Now, such is my view of the facts up to the 22nd of May.

I now proceed, though not in minute detail, to examine the evidence of Ann Denman. It is, in my opinion, needless to go into a detail of all the evidence which has been given on this occasion, for **[157]** I do not found my judgment upon minute circumstances, but it will be founded upon and I trust justified by the leading facts which have been deposed to by her, and which, as I conceive, have neither been controverted, nor can be controverted, in this case. My judgment will be founded rather upon the inferences I draw than from endeavouring to shew that the facts have been proved which have been disputed by Mrs. Davidson's counsel.

Mr. Davidson departs by the train; no sooner is he gone than Mr. Lalouette appears on the stage. Now, was this a fortuitous event, was this a mere accident, that at the moment the husband departs the lover appears—a lover with whom a correspondence is proved to have been carried on till the very eve of Mrs. Davidson's departure for Paris, as proved by D'Alcorn. I can hardly suppose that counsel seriously believed that the Court would come to the conclusion that this was all purely accidental.

But be it so; strange and improbable as such a solution is, what is the next step? Between 10 and 11 o'clock, this gentleman is received by Mrs. Davidson in her lodgings, for what time it matters not. Now, who is received? Stop and look at these circumstances. The lover before marriage, the beloved after marriage, the donor and the donee of gifts and presents. Who receives him? The wife who has just abandoned her husband without reasonable pretext, who has clandestinely, as to her own family, corresponded with him before marriage, clandestinely as to her husband afterwards. These facts have not been grappled with.

Now, what stretch of credulity can induce anyone to believe that parties so circumstanced met for **[158]** an innocent purpose? All knowledge of human nature, all past experience, all experience in these courts, point to but one end. On what

terms must the parties have been for such an interview to take place? Where was Mrs. Davidson's sense of her own honour, left in her own keeping, of which she ought to have been more particularly cautious when her husband was away? Where is her sense of fidelity to her husband when she so received the lover at the very time and very hour of her husband's departure? Can I believe that a woman so acting would be an exception from all ordinary frailty, an almost unexampled instance of female chastity?

I pursue the history. It verifies, and more than verifies, all I have said. In the evening—again I say, I care not at what hour, be it 9, 10, or 11 o'clock—and I care not whether Mrs. Davidson was dressed or half dressed, or undressed—Mr. Lalouette comes again, and is admitted by Mrs. Davidson. What signifies it how he got the key? He came, and was by her received. This is the substantive fact. No remonstrance of Ann Denman availed, and I will add that no remonstrance could have been made too strong.

They remained in the sitting-room till two o'clock in the morning—a fact which it will presently appear from the interrogatories is an admitted fact. Now I come to one which may be doubtful. "Mrs. Davidson was sitting on the young man's knee," says Ann Denman, "and kissing him in my presence." Now very little has been said or could be said as to this evidence—indeed none. Now suppose I omit this improper behaviour; suppose the Court should **[159]** be of opinion that Ann Denman was not to be credited in any particular except where she was corroborated. Why, what then? It leaves the case much where it was—much where it was—for I should not for one moment doubt the certainty of such familiarities from the circumstances I have detailed, whether a witness had deposed to them or not. The circumstances I have referred to perfectly convince my mind that the indulgence of such familiarities was a necessary and inevitable sequence to the familiarities and to all the facts to which I have before adverted, and the continuance of the parties in them.

Now what is the next step? Mr. Lalouette undresses and goes into Mrs. Davidson's bedroom. What matters it whether she asked him or not? What ought to have been her conduct had she not been carried away by her unlawful passion, and divested of all sense of duty to herself and to her husband? Why, to have separated from him instantly—to have left the room and kept aloof from all such contact at any time, at any hour of the night, if she had had a sense of duty to herself. Assume what has been the excuse—that Mr. Lalouette was ill, though I do not credit one iota of that supposition. Her duty remained the same, and all that humanity in such a case, with due regard to decency and modesty, could have required, was to send for a doctor, and have left him in the care of Ann Denman.

Now let me see the version given at the end of the 11th interrogatory, where it is asked whether Ann Denman did not authoritatively interfere to induce Mrs. Davidson to send Lalouette away, **[160]** admitting therefore the fact of such remonstrance, which is deposed to by Denman. Then the interrogatory goes on,—"Did not Mr. Lalouette say to you, you ought to know better, and if he were your mistress he would turn you out of doors? Did not Mrs. Davidson beg him to be quiet, and take no notice of what you had said?" This is the interrogatory addressed to the witness.

Now mark the effect of this interrogatory. In the first place the continuance of Mr. Lalouette in the apartments is admitted; secondly, that Ann Denman from a sense of its gross impropriety remonstrates in the strongest terms; that, thirdly, Mr. Lalouette, disappointed for the moment in his views, threatens Ann Denman. And what does Mrs. Davidson? Why, so dead was she to all sense of her own honour and duty, so entirely forgetful of what she ought to have done, that instead of listening to that faithful voice which might by possibility have saved her, she takes part with her lover—repudiates that interference which might have saved her from destruction.

One more quotation from the interrogatories, and I might multiply them tenfold. Look at the 12th interrogatory, a very long one; I am not going through it, but a part I must read. Look at the 12th interrogatory, "Was not Mr. Lalouette asleep during the whole of the night, except at two or three short intervals? Is it not the fact that throughout the night the ministrant sat in a chair between the bed and the table reading a book? Did not you, Ann Denman, sit the greater part of the night at a little distance from the ministrant? **[161]** Is it not the fact that throughout the night you never left the room but for a few minutes?"

Now let me pause and survey the picture as drawn by Mrs. Davidson and her

advisers, Lalouette fast asleep for hours in her bed. Where is the illness which has been conjured up for the occasion, and proved by no one? Where is Mr. Lalouette himself?—Undressed in Mrs. Davidson's bed. Where is Mrs. Davidson?—Sitting by the side of that bed for hours, watched if you please by her servant—for such is the picture—a married woman, a wife of four months' duration, the day she quitted her husband, that day and that very night receiving the object of her affection before and after marriage.

Can anyone not fit to be an inmate of an asylum for idiots, doubt the feeling which subsisted between these parties? Give them the opportunity of the criminal indulgence of passions already so little restrained that all sense of duty and delicacy were gone, must not anyone be satisfied what of necessity must be the case?

I have enough, and more than enough, to satisfy me of the criminal intention.

I will say a word or two more as to Denman's evidence. Much observation has been made upon her evidence, at the conclusion of the examination in chief, on the 22nd article. Now I read this, and I continue this rather for the sake of shewing that I have not spared my trouble in the consideration of this case, much more than from any necessity which the case itself requires.

Now this was her further deposition on the 22nd article:—"There is one circumstance respecting one **[162]** of the visits of the said Emile Lalouette to Mrs. Davidson which I have omitted to mention, and which I must confess did raise my suspicions as to something wrong having taken place between them. It was the only occasion on which I can say that I had direct reason to suspect it. I knew it was very wrong their being together as they used to be, but till this time I cannot say that it occurred to me to suspect that they had been criminal together. It was I think on the occasion of the second morning visit. While Mrs. Davidson and the said Emile Lalouette were together in the sitting-room, on that occasion I thought I heard the door of the room locked, and when the said Emile Lalouette was gone, I asked Mrs. Davidson why they had locked the door, and she said that Emile wished it, but that she found it would not lock, as I should find if I tried it, she said. She came to me in my room on this occasion directly after the said Emile Lalouette was gone, and I noticed that her dress was" so and so, and then she says she suspected adultery.

Now it is said this is an afterthought, this is a malicious feeling of Ann Denman—for some reason never explained, and quite inconsistent with her general conduct, and wholly inconsistent with the letter produced—entertained towards Mrs. Davidson; that this is a malevolent exaggerated statement for the purpose of destroying her case.

Now it does so happen that there is something here like a corroboration of this statement, and in a very extraordinary manner. I refer now to the evidence of Mr. Henderson:—"Mary Ann Denman **[163]** has not, as suggested, more than once or indeed ever admitted or declared to me her conviction of the innocence of the ministrant of the crime imputed to her in this cause. She stated when speaking of the night scene between the parties described in the libel that she did not see adultery committed, and that she could not say whether or no adultery had been committed on that occasion; but she stated her impression or belief to be, that on the occasion of one of the morning visits paid to the ministrant by the young man Emile, adultery had been committed by them; and she stated to me the ground of such her impression and belief, which, as she stated them, were, that while the ministrant and the young man were in the room together she heard the door locked; and that she observed, on the young man leaving, on that occasion, that ministrant's face looked flushed, and that her dress was extremely tumbled; and that on her, Mary Ann Denman, asking the ministrant why she had locked the door, the ministrant had said that Emile, the young man, had told her to do so."

Now this is a remarkable confirmation, to which I am by all the rules of law entitled to resort to shew that Denman has spoken the truth. If, indeed, the credit of Denman had not been impeached, it would not be consistent with the principles of law to refer to any declaration she had previously made for the purpose of shewing that her evidence was consistent with truth; but if you impeach witnesses' credit, and charge them with wilfully inventing a story, it is then competent to refer to other evidence to shew that at an earlier period **[164]** they have made statements similar to and entirely in conformity with their evidence.

Now, this is a remarkable confirmation—a confirmation of what fact? why,

a confirmation of this fact, that according to the evidence the statement of Mrs. Davidson herself was, Mr. Lalouette had proposed the locking of the door. And for what possible purpose was the door to be locked when Mr. Lalouette and Mrs. Davidson were together alone, except for purposes which I need not further specify.

Now, then, I proceed to the conclusion of this judgment. I speak now as to the proof of opportunity, which I have incidentally glanced at as I went along. Presuming for the moment, though I am by no means satisfied rightly that the adultery was not actually committed on the night of the 22nd of May, that is, up to six o'clock in the morning; yet I see no reason whatever to discredit Ann Denman, that at six o'clock she left the room for two hours; that the parties remained together; and she did not return till eight o'clock. Now, here was ample opportunity, and I doubt not Mrs. Davidson availed herself of it.

What was the attempt to get rid of this evidence? Why, reference was made to the answer to the 12th interrogatory, which was, whether she had not remained in the room all the night, and because the witness happened to answer, as she naturally would do, in the following terms—I had better read it to be accurate:—"It is the fact that throughout the night ministrant, whenever I went in, was sitting in a chair which is between the bed and the table"—what is said, and what is the argument? That **[165]** the witness has said throughout the night, including the two hours in the morning, after six o'clock. I cannot say I think that is an argument which ought to overthrow the testimony of this witness.

Now, I entertain no doubt about the adultery being committed at that time; but there were other opportunities. I have noticed one, when the door was attempted to be locked, and there was ample opportunity on all subsequent visits. Denman states that Mr. Lalouette visited this lady every day, and sometimes twice a day for the whole week. Why, to speak of want of opportunity, and compare the case with *Hamerton* v. *Hamerton*, where the parties were never brought together but on one occasion, and that in the house of a lady of irreproachable character, in her own drawing-room, in the middle of the day—to compare these cases together, and say the preponderance is in favour of Mrs. Davidson! There is as wide a difference as by possibility there can be in two cases. That case failed because the parties were not brought together; but this case will succeed, because they were brought together over and over again.

What is more—Mr. Lalouette accompanies this lady from the house—they are out for hours together, nobody knows where they go. Again, Mr. Smart traces them to a house where there was ample opportunity. In such a case as this, any practicable opportunity suffices where the ground is laid so clearly, so distinctly—where it is impossible for any man to doubt there was a criminal attachment which had entirely destroyed all Mrs. Davidson's just feelings of regard for her husband—extinguished her sense of propriety—for less stringent terms **[166]** would not suffice. To suppose, when opportunity occurred, as it did, to suppose there was not a consummation of that which had been sought for for so long a time, would be to suppose that which never occurred in cases of which I have had cognizance in this Court, nor I believe in the annals of human nature.

I entertain no doubt; I believe the adultery is most clearly established, and I pronounce for the separation.

The wife appealed from the sentence in the Consistory Court, but the husband having petitioned the House of Lords before the Court was inhibited, the process was transmitted to the House of Lords, and the husband obtained a divorce, the cause never having been brought up to the Court of Arches.

**[167]** DAVIDSON *v.* DAVIDSON. Consistory Court of London, March 6th, 1856.—Exceptive allegation—Pleading.*—Where a witness is asked in interrogatory whether he has not made admissions, if the admissions are pertinent to the issue, and he denies having made them, an exceptive allegation to prove the fact of his making such admissions is admissible.

*Dr. Lushington.* I have read the whole of the papers and the evidence in this

* See antè, p. 133.

case, but it is right I should state that I have not read the whole of the evidence and the papers with any view of making up my mind on the matter in issue, because that can be done only at the ultimate hearing of the case, when the evidence is discussed, and I have also heard the arguments of counsel. But it has always been expedient in these cases, though it has not always been customary, that the Court should be in possession of the evidence before it hears and determines the admissibility of any exceptive allegation.

My experience in these matters undoubtedly is, that generally speaking exceptive allegations answer very little purpose. There are very few instances on the records of this Court, though there are some, in which the case has been in any degree affected by the admission of an exceptive allegation. But, however that may be, if an exceptive allegation is offered, and it be framed in conformity with the established rules which govern these matters, the Court has no option and no right on its own part to reject such allegation; and it is not necessary that the Court, in admitting an exceptive allegation to proof, should come to the conclusion that the witness shall be proved to be utterly unworthy of credit. That is not neces- **[168]** sary to be determined beforehand, but in admitting the allegation to proof the Court must determine this question, whether the witness may not have his credit to a certain extent affected, if the allegation which is offered be admitted and proved.

It is impossible to doubt that this witness, against whom the exception is offered, is the most material witness in the whole case, for without her it would not be contended for a single moment that there would be any evidence as to the actual commission of adultery.

Let us see what are the rules which have been acted upon in this Court and in other Courts. I remember the time when, I regret to say, there was some doubt as to the rules which governed the admission of an exceptive allegation in this Court. I think I can find instances where they were admitted where now upon principle they would be rejected. For that principle I cannot refer to a better authority than the authority of the judges in the *Queen's case*, 2 Br. & B. 285. The result of that case on this point I conceive to be this, that if upon cross-examination, in chief it could hardly arise, a question be put to a witness touching a fact or a declaration, verbal or written, foreign to the issue to be tried, the party so putting the question must abide by the answer, and cannot be permitted to contradict it by other testimony for the purpose of discrediting the witness.

This was the judgment of the whole of the judges upon that occasion, and it was founded upon a series of cases at common law, of which there was one very memorable case, *Spenceley* v. *De Willott*, reported in 7 East, 110, where Lord Ellenborough said—the **[169]** case is not before me, but I remember it very well, when an attempt was made to move for a new trial on this account—"I have overruled it over and over again; I hope the next time it arises a bill of exceptions will be tendered, for I am sick of overruling the point." That is the doctrine so laid down; but I apprehend the converse of the doctrine to be true: that upon cross-examination, if a question be put to a witness touching a declaration, verbal or written, pertinent to the issue, in that case, you are not forced to abide by the answer, but you are at liberty to contradict it.

Now, in this Court we have generally expressed ourselves to the same effect, though rather in a different manner, because we have always said this, if you except to the evidence of a witness, the fact must be pertinent to the issue, and not pleadable before publication; and we have said also, with respect to a declaration, if you except to a declaration, that this must be pertinent to the issue. The question, therefore, which the Court has to determine is, whether what is pleaded in this exceptive allegation was that which could have been pleaded before publication, whether it be pertinent to the issue or not, and whether, if pertinent to the issue, it is sufficiently stringent in any degree to affect the credit of the witness; because the Court never can say that the admission of the allegation if proved would utterly destroy the credit of a witness, and for many reasons this would be so. I take it that nothing would be more clear than this, that a witness may be produced in order to establish a case, and may swear falsely in one part altogether, and truly in another part, and that that witness **[170]** may be believed when he or she swears truly, though it may be admitted he is actually perjured as to part; and if it were necessary to seek for an authority on that question I could at once give it, though my memory does not

suggest the precise name ;* but it will be found in a case, where the Common Pleas laid down, that you are not entitled to ask for a new trial though it is admitted that the witness may be perjured in part, because the other evidence the witness gives may be credible, the jury may have believed it, and the judge not thought fit to except to it. Therefore the Court is not to say in all these cases that the credit of the witness is to be destroyed, but to be affected ; and that being the case, it must see how far the evidence of the witness is strengthened and corroborated, or weakened, by all the rest of the testimony. There may be many facts and circumstances appearing from the evidence of other witnesses which may have an effect one way or the other, but on that it is not my business to enter.

I know of no case which militates against what I am saying in the slightest degree. The case of *Burgoyne* v. *Free*, 2 Hagg. 456, I could not altogether place much reliance on, and for an obvious reason, that the case of *Burgoyne* v. *Free* was a case in which there was a prosecution against a clergyman for immoral practices, and had reference to what we call in this Court a criminal proceeding, which is governed by principles and rules somewhat varying from those to be considered in proceedings of a different nature ; and moreover, **[171]** Sir John Nicholl stated in that judgment, he did not mean to go into the whole doctrine of exceptive allegations, but only so far as was pertinent to the admissibility of that plea.

With regard to the case of *Atkinson* v. *Atkinson*, 2 Add. 487, I confess I do not see its bearing on the present case. Now, if it was a mere question as to the belief of the witness or not, it has been truly argued on former occasions, and indeed decided, that the mere belief of a witness is not a necessary matter in the case at all one way or the other, because the Court founds its judgment upon facts deposed to, and not upon, as Lord Stowell expressed it, the logical deductions of the witness, and most rightly and most properly was it so decided. But there is another matter in *Atkinson* v. *Atkinson*, which is this, the examination in chief was on the 15th and 16th articles, and the facts in the exceptive allegation might have been pleaded before publication. I take it to be an indisputable principle that you shall not plead after publication that which might have been pleaded before ; and that could not be done in this case. Again : in *Atkinson* v. *Atkinson*, the witness was not interrogated as to any admissions. "Suppose," says Sir J. Nicholl in that case, "that an interrogatory had been addressed to Hobbs to this effect : 'Have you never stated so and so, namely, your belief that the defendant never committed adultery with Mrs. Rolls either generally or a fortiori specifically ; that is, have you never so stated to such and such persons, and so on ?' Why, the witness might then not improbably have admitted that she had so said, and might have accounted for her having deposed differ-**[172]**-ently." It evidently was the opinion of the learned judge, who decided that case, that the matter ought to have been put in interrogatory. What would have been the effect of the contradiction on that interrogatory in the opinion of the learned judge is clear. In this case the question is put to the witness, who negatives the admission.

Then I examine this exceptive allegation for two purposes. I lay out of the question that it is impossible the contradiction could have been pleaded before, and I come first to see whether it is pertinent to the case ; and secondly whether in itself it is a stringent contradiction. "When Mrs. W.," these are the words of the witness, "when Mrs. W., the ministrant's mother, arrived in Paris on the 29th May, and I opened the door to her, she did I think say, the very first thing, 'Oh, Denman, tell me, is it as bad as we think ? is she guilty ?' or something to that effect." So far as the witness admits the words of this interrogatory. Then the interrogatory goes on : "Did you not reply, Comfort yourself, madam, she is not guilty ?" and the witness answers, "I did not reply, Comfort yourself, madam, she is not guilty ; no, I am sure I did not." Now, that I apprehend to be a complete contradiction to the interrogatory which has been put ; and I cannot help thinking that it is a very material interrogatory with respect to this case. It is pertinent to the issue, because it relates to the commission of adultery, which is the very issue in the case ; and it is of importance for this reason, the witness can hardly be supposed to have forgotten so very material a declaration, if she did make it, as "she is not guilty."

**[173]** It has been mixed up very ingeniously by the counsel for Mr. Davidson with a subsequent part of the interrogatory. "If nay, will you venture to swear

* See *Bradley* v. *Ricardo*, 8 Bing. 59.

that you never told the ministrant that those were your very words.' That is a totally different and distinct inquiry altogether. The one inquiry is as to the fact, did you declare to Mrs W. that in your opinion Mrs. Davidson was not guilty. The witness has answered; then the interrogatory goes on to a separate and distinct declaration of a different kind: "Will you venture to swear that you never told the ministrant that those were your very words?" Then she says, "I will venture to swear that I never told the ministrant that those were my very words."

It appears to me, with all my reluctance to admit exceptive allegations, that I have no power, looking at the rules and practice which have governed this Court, to reject that article. The contradiction is complete; it propounds that she did reply in the words following: "Comfort yourself, madam, she is not guilty"; and that such reply was made in the presence and hearing of the said B. W. It is a complete contradiction, and pertinent to the issue.

With regard to the other, the 18th interrogatory, the answer to the interrogatory is: "I have not expressed to Mr. and Mrs. W., the father and mother of the ministrant, my belief that the ministrant is innocent of the charge of adultery. I have never expressed that belief to them; I have only told them as near as I could everything as it occurred the same as near as possible as I have in my evidence, but never expressed to them the **[174]** belief interrogate." The alleged contradiction is that "on several occasions since her return to England in attendance on the said Katherine Ann Davidson, party in this cause, as well as previously, she has expressed to the said Mr. and Mrs. W., the father and mother of the said Katherine Ann Davidson, party in this cause, her belief in the innocence of the said Katherine Ann Davidson."

Now, it is said this is immaterial; and it is said the question to the witness is in respect to immaterial matter. So it is as to the facts, but not at all immaterial with regard to the credibility of the witness, whether she has made a declaration to that effect; it is the most material fact of all. It does not require, in order to effect the declaration of a witness, that the declaration should be matter of great importance; it must be pertinent to the issue or it falls within the bann of Lord Tenterden; but if pertinent to the issue, it need not be of such materiality as to affect the whole case.

Looking to the whole of the allegation, I regret to say that I feel myself under the necessity of admitting this allegation.

**[175]** FYLER *v.* FYLER. Consistory Court of London, Aug. 8th, 1856.—Husband and wife — Separate income — Costs. — Where the wife is plaintiff and fails in her suit, if her income is large in proportion to the income of the husband, the Court will not order her costs to be taxed as against the husband, but will leave her to pay those costs herself.

In this case the wife instituted a suit for separation, on the ground of adultery, against the husband. The husband recriminated. The witnesses were examined vivâ voce*; and the adultery of the husband and wife having been proved, the Court dismissed both parties. Before sentence, but whether before the witnesses were examined was doubtful, the proctor for the wife applied for payment of costs in the usual manner; when the matter was directed to stand over. The question now was, whether the wife was entitled to have her costs paid. The facts were stated in act on petition and affidavit.

Bayford and Twiss, for the husband. The wife's income is £157, 10s., made up of £55, 10s., received by her of her trustees, and £102 paid by the husband. His net income is £308; out of which he has to pay for policies of insurance to secure money advanced by the trustees of the marriage settlement £160, he allows his wife £102—this leaves him £46 a year. (They cited, upon the general principle, *Wilson* v. *Wilson*, 2 Cons. Reps. 203; *Davis* v. *Davis*, ib. n. [Dr. Lushington.—There and in other cases the Court kept the power as to costs in its own hands till the end of the suit]; **[176]** *Beevor* v. *Beevor*, 3 Phill. 261; *Belcher* v. *Belcher*, 1 Curt. 444; *Walker* v. *Walker*, ib. 564.)

Phillimore and Spinks, for the wife. The whole of the husband's income may be said to be derived from the wife, for the husband contributed nothing to the settlement; and it has been by borrowing the wife's money from the trustees that he has attained his present rank. He has paid the costs in the suit up to the time when

* This is the first instance in which the examination was throughout conducted vivâ voce in court. [See 2 Sp. Ecc. & Ad. 69.].

the wife's proctor was changed, and thereby admitted his liability to pay the whole. There is nothing to take the case out of the regular course, according to which the wife would be entitled to her costs de die in diem: *Barrow* v. *Barrow*, 17 Jur. 240.

*Dr. Lushington.* I must decide this case according to the ordinary practice of the Court. The general presumption is, that the wife has no means, and then the husband must bear the burden; but to this there are exceptions, as where the wife has a large income in comparison with the husband. If in such a case the wife is plaintiff, the Court will hold its hand till the end of the proceedings; and if the wife succeeds, the husband is condemned in the costs, as in ordinary cases between parties not husband and wife. And when the wife has no income whatever, however great her demerits, whether she be plaintiff or defendant, the husband must pay the whole costs, even the costs of vexatious appeals.

This case I shall deal with exactly as I should have done, had the question been raised on a question of costs de die in diem, entirely irre-**[177]**-spective of the merits of either party, and I shall look merely to the means of the husband and wife. So far as the facts are before me, the husband has scarcely any income at all. The insurance is a proper deduction and of essential value to the wife, as it is the security for advances made out of the settled funds. *Davis* v. *Davis* is the authority which I shall follow; and as the wife has not succeeded, I shall not allow her costs to be taxed now against the husband.

IN THE GOODS OF C. COCKAYNE. Prerogative Court, May 15th, 1856.—Revocation —Intention—New will unexecuted.—A. having a will and codicil, cut off the last page of the will, on which were the names of A. and the witnesses, and desired B. to burn the page so cut off. A. then made some alterations in the remaining pages of the will, desired B. to write out a new will, and send for A.'s solicitor. B. wrote the new will, but did not burn the part cut off, as A. knew. A. died before executing the new will. Held, on motion, that the former will was entitled to probate, there being no intention to revoke, except in connection with the completion of a new will.

[S. C. 2 Jur. (N. S.) 454; 4 W. R. 555.]

On Motion.

This deceased made her will, dated the 21st of May, 1839, and also a codicil, dated the 7th of October, 1852. The will was written on seven sides of letter paper; the seventh side, upon which were the signature of the deceased, and subscription of the witnesses, and a memorandum as to the place **[178]** where the deceased desired to be buried, contained no dispositive part of the will. On the day before her death the deceased cut off this seventh sheet in the presence of her servant, who deposed that on that day the deceased took from a locked portfolio the will and codicil, and that after having read the will, the deceased with a pair of scissors cut off the last sheet and gave it to the deponent, saying, "Take and burn that, that's nothing." But that the deponent, being the only person present, did not like to take upon herself the responsibility of destroying the paper, and accordingly left it on the table near the deceased; that the deceased gave no reason for so cutting off the last sheet, but deponent believed, from previous recent conversations with her, in which deceased expressed a desire to be buried in Brislington Cemetery; that her reason for so doing was, that the said half sheet contained a direction that she should be buried at Stapleton. The deponent, after stating that the deceased then made some alterations in the remaining six sides, deposed that shortly after the alterations had been made, she, by direction of the deceased, sent a letter to Mr. Knapp, the deceased's solicitor, requesting his attendance on the following day; that the deceased then said to her, "I wish you would write this paper for me, in case I may not be well enough to tell Mr. Knapp when he comes to-morrow"; whereupon deponent proceeded to write, from her dictation, the paper, which, when completed, the deceased endeavoured to sign, but from weakness was unable to do. The deponent folded up in an envelope the will, including the half sheet cut off, the codicil, and the paper or intended new will, and placed them in **[179]** a drawer, where they remained until after the death of the deceased, save on the occasion when they were on the following day produced to Mr. Knapp. This gentleman deposed, that in compliance with the letter sent to him, he came to the deceased; that the papers having been produced by the servant of the deceased, she, the deceased, pointed to the paper written by the said servant,

but was unable further to express her intentions. And deponent, finding his assistance of no avail, shortly afterwards left the deceased, who died on the same day.

In some particulars the proposed new will was copied from the former will, but the instruments differed materially. The specific legacies were different; and the second paper appointed neither executor nor residuary legatee—the former will appointed both.

Jenner moved for probate of the former paper as originally executed. The deceased had no intention to revoke that will unless she could execute another; and this she at once attempted, but was prevented by death. The codicil remained untouched; and the seventh sheet, though separated from the will, was preserved with the rest of the will, as the deceased well knew. The act of revocation was not completed; and the intention to revoke was dependent on being able to give effect to another will. The case came within the principle in *Winsor* v. *Pratt*, 5 Moore, 484; *Onions* v. *Tyrer*, 1 P. Wms. 445; *Brooke* v. *Kent*, 3 Moo. P. C. C. 348.

**[180]** *Sir John Dodson.* The circumstances of this case, looking to the preservation of the part cut off and the subsisting codicil, are singular; and I am strongly inclined to agree with you that the deceased had no intention to revoke this will, unless she could execute another. But I do not like to dispose of the case on an ex parte motion, and in the absence of parties who may be injured by the upholding this instrument, and who may call in the probate at any time hereafter.

The motion was granted subsequently, on the Court being satisfied that very great delay and inconvenience would be incurred if all the parties interested were cited.

**[181]** IN THE GOODS OF A. M. ASH.* Prerogative Court, May 26th, 1856.—Incorporation of papers.—Lists of plate signed by the testatrix, but not attested, and written on the same sheet of paper with the will which referred to them, as in existence, the will and schedules being in the handwriting of the testatrix, admitted to probate. No evidence could be obtained to shew whether the lists were written at the time of execution.

[S. C. 2 Jur. (N. S.) 526. Commented on, *Watson* v. *Arundell*, 1877, Ir. R. 11 Eq. 60.]

On Motion.

This deceased left a will in her own handwriting, written on two sides of a sheet of paper, and dated 23rd March, 1849, by which she "gave and bequeathed unto my sons Edward, John, William, and James the articles of plate set down under their respective names in the annexed schedule." On the third and fourth sides of the same sheet of paper on which the will was written were lists of articles of plate, headed with the words "list of plate for ——," the name of each son being added; and at the end of each list was the deceased's signature, but without date or attestation. The subscribing witnesses were unable to depose whether these schedules were written at the time of execution or not.

Robertson moved for probate of the will with the schedules.

*Sir John Dodson.* These schedules are on the same sheet of paper with the will, which refers to them as in existence at the time when the will was written. They may, therefore, be considered as incorporated, and as such entitled to probate.

**[182]** IN THE GOODS OF THE COUNTESS DOWAGER OF PEMBROKE. Prerogative Court, May 26th, 1856.—Incorporation of papers.—A paper written before the will referring to it, signed and dated but not attested, and not found with the will or produced at the time of the execution of the will, not admitted to probate.

[S. C. 2 Jur. (N. S.) 526. Referred to, *Allen* v. *Maddock*, 1858, 11 Moore P. C. 461.]

On Motion.

Lady Pembroke left a will dated 29th of July, 1853, and three codicils dated 29th of August, 1853, 21st of February, 1856, and 17th of March, 1856. By the first codicil she gave "to my daughter Elizabeth, Countess of Clanwilliam, such articles of plate as should be enumerated in any list or catalogue found with my will or among my papers, and marked or intended for her." No such list or catalogue was produced at the execution of any of the codicils, or found with the will; but in a plate chest was found a sealed envelope indorsed "July, 1851. List of plate to be divided off

* See *In the Goods of Hunt*, 17 Jurist, 720; *In the Goods of Hakewell*, 4 W. R. 304.

and given to Lady Clanwilliam"; and inside the envelope was a list of articles of plate, headed "Lady Clanwilliam," and signed and dated "Catherine Pembroke, July, 1851."

Addams moved for probate of this list, as clearly identified and in existence when the will and codicils were executed.

*Sir John Dodson.* There is a case in 2 Curt. 831, *In the Goods of Sotheron*, which is an authority against this motion; indeed, the facts in that case were much stronger in favour of the incorporation of the **[183]** papers in question than the facts are here. In rejecting that motion, Sir H. Jenner said he was not aware of any case in which it had been held that a paper should form part of a will by merely being referred to. I must reject this motion.

IN THE GOODS OF JAMES SHILLING. Prerogative Court, Aug. 4th, 1856.—Survivorship—1 Vic. c. 26, s. 33.—A. and his son were found dead, and no evidence could be given as to which survived. A. by will had appointed his son executor and universal legatee. The son left a widow and children, but no will. Administration of the effects of the father, with will annexed, granted to the widow, as administratrix of her husband, whilst living the sole executor and universal legatee in the will.

[S. C. 2 Jur. (N. S.) 1052; 5 W. R. 8.]

On Motion.

James Shilling died in July in the present year, having made and executed his will, and appointed his son Thomas Shilling sole executor and universal legatee. The deceased died a widower, and had no other issue. The deceased and his son Thomas were driving home in a gig near the river Medway; the next morning the horse and gig were found in the river, and the bodies of both father and son drowned! No person saw the accident, and there was no proof as to which might have been the survivor.

Thomas Shilling left a widow and several children, and died intestate.

Robertson moved for letters of administration (with the will annexed) of the goods of James Shilling, deceased, to be granted to Charlotte Shilling, the administratrix of Thomas Shilling, **[184]** deceased, whilst living the sole executor and universal legatee named in the will of the deceased. He relied upon the 1 Vic. c. 26, s. 33, which provides that if any person being a child or other issue of the testator shall die in the lifetime of the testator leaving issue, and any such issue shall be living at the time of the death of the testator, the devise or bequest shall not lapse; that this was a remedial enactment, and there were no facts before the Court to exclude its operation, so that it would govern the present case.

*Sir John Dodson* granted the motion.

IN THE GOODS OF JOHN POYER POYER. Prerogative Court, Aug. 7th, 1856.—A. was appointed executor and residuary legatee in trust; his appointment as executor was revoked by a codicil. Administration granted to the guardian of minor children, who were the residuary legatees in preference to A.

[S. C. 2 Jur. (N. S.) 1052; 5 W. R. 9.]

On Motion.

This was a question respecting the administration, with the will and codicils annexed, of the unadministered goods of the deceased.

By his will, made in 1838, the deceased appointed S., C., and K., executors and residuary legatees in trust.

By the first codicil, dated December, 1844, after reciting that by his will he had appointed such persons as executors and trustees, the testator revoked the appointment of K. as an executor and trustee, and every devise, bequest, interest, power, and **[185]** authority thereby given to or vested in him, and gave the real and personal estates comprised in his will to S., C., and N., upon the same trusts, and with the same powers as declared in the will, in all respects confirming the will except as to the substitution of N. instead of K. as executor and trustee. By the second codicil, dated March, 1847, he desired that C. and K., named in his will as his executors, be no longer regarded as such, and in their place he nominated D. and R. to succeed them; and after bequeathing an annuity and giving some legacies, he ratified and confirmed his will except as the same was thereby altered. On the 6th of July, 1850,

the will and last codicil were proved by S. alone, D. and R. having renounced the probate. On the 13th of February, 1854, probate of the first codicil was taken by S., power being reserved to N., the executor and trustee therein substituted, to come in and prove. D. and R. renounced probate of this codicil also. S. and N. are since dead; and a grant of letters of administration of the unadministered goods of the deceased was required. The children of the testator, the residuary legatees named in the will on attaining the age of 21 years, were minors, and had elected their mother as their guardian to take administration of the unadministered goods of the deceased for their use and benefit. Upon this the question arose, whether the appointment of C. as residuary legatee in trust was revoked either expressly or by implication by the second codicil, and whether in that character he would not be entitled to the grant though his appointment as executor was revoked. It appeared by a decree of the Master of the Rolls, in a suit **[186]** respecting the trusts under the will, that the Master of the Rolls declared that the appointment of C. contained in the will of the testator, as one of the trustees thereof, and the devises and bequests to him as such trustee therein contained, were not revoked or affected by the codicils to the said testator's will, or either of them; that the appointment of K. contained in the will to be one of the trustees thereof, and the devises and bequests to him as such, were revoked by the codicil of December, 1844; and that such appointment was not set up or revived by the codicil of March, 1847.

Swabey moved the Court to grant the administration to C., as surviving residuary legatee in trust therein named. He cited *Hutchinson* v. *Lambert*, 3 Add. 427, and relied on the general practice of granting administration, with the will annexed, to the residuary legatee in trust where an executor fails to represent a testator.

Deane, on behalf of the guardian of the children, opposed the motion. (He cited *Coussmaker* v. *Chamberlayne*, 2 Lee, 243; *Boddicott* v. *Dalzeel*, ib. 294; and *Fawkener* v. *Jordan*, ib. 327.) The practice as to grants to residuary legatees in trust is correctly stated, but C. is a mere trustee; for the testator, by revoking his appointment as executor, has shewn that he did not intend C. to take probate of, or interfere with the proving of his will. C. is not to get in the estate, though when got in it may vest in him. The testator evidently knew the distinction between the office of executor and that of mere trustee. He has revoked the appointment in one **[187]** character, and C. remains but a trustee, and to a trustee, merely as such, this Court does not grant administration.

*Sir John Dodson.* I am of opinion that the appointment and revocation as executor distinguishes this case from those under the ordinary practice as to residuary legatees in trust, and that I cannot grant the administration to a person who was clearly intended by the testator not to be entrusted with it by this Court at least. I shall decree the administration to the guardian of the children.

FARMER v. BROCK. Prerogative Court, June 9th, 1856.—Evidence—Corroborating facts—Witness discredited.—The two subscribing witnesses were the only witnesses produced in support of a will. One of them was discredited. There was no evidence of instructions. Will pronounced for on the evidence of the single witness, corroborated by the probabilities of the case.

[S. C. 2 Jur. (N. S.) 670; 4 W. R. 676.]

Perren Mehew left a will dated July the 3rd, 1854, in which he appointed R. A. Farmer sole executor and residuary legatee, and by which he gave several legacies to various persons, and an annuity to F. W. Brock, who, as residuary legatee in a former will dated January, 1853, now opposed the will of 1854. There was also a codicil to the **[188]** will of 1853, made in June, 1854, by which Farmer was appointed executor of the will of 1853.

The will of 1854 was propounded in an allegation in common form, upon which the two subscribing witnesses were produced and examined. They deposed to the due execution of the will, but differed as to some not very material circumstances noticed in the judgment. There was no question as to the capacity of the deceased, nor was it contended that his signature was forged; and the attestation clause was complete. There was no evidence of instructions, and the evidence tended to shew that the body of the will was in Farmer's handwriting. No counterplea was brought in before publication, but an allegation was brought in excepting to one of the witnesses, Ball, on the ground that he had admitted that the will was not signed by the deceased in

the joint presence of himself and the other witness, and that on interrogatory he had denied having made such admission. Upon this exceptive allegation several witnesses were examined vivâ voce: the admission as pleaded was proved; and at the same time it was also proved that the witness Ball was 18 or 19 years old, and a potboy in the employ of a man named Wagener—had been tampered with by this Wagener, who had no interest in the result of the case, but expected he might make money out of one of the parties. At the time of execution both witnesses were in the employ of Farmer—Bird as nurse, and Ball as porter.

Jenner and Deane, for the will, submitted that the evidence of the unimpeached witness was sufficient to establish the will of a testator whose **[189]** capacity was not disputed, and whose signature to the will was admitted to be genuine.

Bayford and Phillimore, contrà.—The evidence of a single witness, however credible, if unsupported by corroborating circumstances, was never admitted as sufficient proof of a testamentary act. Here there were no corroborating circumstances, but everything to raise a suspicion; no proof of instructions, yet the will written by the party propounding it, and who took the largest benefit under it, both witnesses being in his employ. (They cited *Theakston* v. *Marson*, 4 Hagg. 291.)

In reply, *Hatchwell* v. *Hatchwell*, 2 N. C. 513, and *Gove* v. *Gawen*, 3 Curt. 151, were cited.

*Judgment.—Sir John Dodson.* After stating the facts. The discrepancy between the two witnesses is such that it cannot be explained away. They differ as to whether Farmer was present or not at the time of the execution of the will; whether they came once or twice into the room—the first time to sign their names, the second time to add their descriptions. Bird says Farmer was present all the time, and that they came up a second time at the request of the deceased himself, to "figure in their descriptions." Ball deposes that Farmer was not present, and that he, Ball, went but once into the room, and then wrote his name and address as they now appear. If these were matters of importance to the issue, and I were bound to decide between these two wit-**[190]**-nesses, I should have little hesitation in trusting Mrs. Bird rather than the other, and for this reason, that her testimony throughout is consistent, whilst Ball contradicts himself. The material point, however, is whether the deceased signed the will in their presence, and they in his; and they both depose in the affirmative. But it is quite clear, from the evidence given upon the exceptive allegation, that Ball, in describing what took place at the execution of the will, has not kept to one story throughout; and one of the questions for my decision is, which of Ball's statements is true. I think the truth will be found where he is corroborated by Bird, and not in those accounts of the transaction which he gave whilst in the employ of a man who was clearly shewn to have endeavoured to make money by inducing this young man to give a false history. Still Ball is discredited; and I am pressed with the argument that the Court cannot pronounce for this will on the testimony of a single witness; and in support of that argument, and to shew the practice of this Court in this respect, cases were cited, as *Theakston* v. *Marson*, 4 Hagg. 291. The marginal note of that case is correctly drawn. It was the case of an unfinished pencil memorandum; very different, therefore, from the present case. There were no adminicular circumstances whatever; and the whole depended upon the bare testimony of one witness. In *Moore* v. *Payne*, 2 Lee, 595, it was held that one witness was sufficient if corroborated by circumstances. So in *Mackenzie* v. *Yeo*, 3 Curt. 125, the evidence of one witness was held not sufficient to sustain the paper, in the absence of any circumstance leading up to **[191]** the probability of the transaction, there being, on the contrary, various facts adverse to the validity of the will; and in the very next case in the same volume, *Gove* v. *Gawen*, where the two witnesses differed, the will was pronounced for on the evidence of one, the probabilities of the case shewing that testimony to contain the real account. In no case, then, has it been held that there must of necessity be more than one witness. "The solemnity of the civil law is not requisite with us," observes Sir G. Lee, in *Moore* v. *Payne*, "it is sufficient if there be adminicular proof to corroborate the one witness." What, then, are the circumstances in this case? There is the codicil to the first will, where Farmer is introduced as an executor, and that codicil was prepared by a solicitor, and is unimpeached. Brock takes under the will propounded, in the shape of an annuity, a very considerable benefit, and so do other friends of the testator. The signature is not disputed, the capacity is not denied; nor, in fact, can I altogether

disregard the evidence of Ball himself, given on oath, in support of a proper execution, and agreeing with the testimony of Bird. I, therefore, pronounce for the will.

**[192]** BREMER *v.* FREEMAN AND BREMER. Prerogative Court, March 31st, February 1st, 5th, 19th, August 16th, 1856.—Will—Domicil by the law of nations—Domicil by the law of the country in which the testator resides—Costs.—A., a British-born subject, left England many years before her death, resided in Paris for the last 15 years of her life, and died there; assumed for many years an Italian name, and described herself and was described in legal documents as widow of an Italian. There was no evidence of the fact of marriage; and the statements made by the deceased in respect to the marriage were contradictory. She had real property in India, the bulk of her personality in England, and made her will in the English form, disposing of her property, with the exception of four small legacies, amongst English persons.—Held, that by the law of nations the deceased was domiciled in France; but that as she had not been naturalized, nor obtained an authorized domicil in and as required by the law of France, she might by the French law make a will in the English form, and that such will was entitled to probate in this country.

[Reversed, 1857, 10 Moore P. C. 306; 14 E. R. 508 (with note).]

The deceased died at Paris, in April, 1853. She left a will made according to English law, and executed in Paris on the 19th of September, 1842, in the following words: "I, Fanny Allegri, née Calcraft, the only surviving child of the late H. F. Calcraft, a lieutenant-general in Her Majesty's service in the East Indies, and who resided and was buried at Brighton, in England, at present residing in Paris, in the kingdom of France, widow, do make and declare this my last will and testament in manner following." She then devised certain real property in India to D. A. Freeman, gave 1000 francs each to the two persons who might be with her in her last illness, 500 francs to two charitable institutions in Paris, and the remainder of her property "unto and equally among the said D. A. Freeman and my cousins, E. A. Bremer, Susan Bremer, James Grignon Bremer, and H. Bremer, children of the late Captain Bremer, R.N., or such of them as shall be living at my decease." And she appointed D. A. Freeman and J. G. Bremer (one of such **[193]** cousins) executors. This will was prepared by Mr. T. Freeman, the solicitor of the deceased, and the father of Mr. D. A. Freeman.

Mr. D. A. Freeman and Mr. J. G. Bremer took probate of this will in the Prerogative Court on the 24th of June, 1853; but some doubt having subsequently arisen respecting the domicil of the deceased, and consequently the validity of her will, Susan Catherine Bremer, who was also one of the next of kin and entitled in distribution, on the 28th of October, 1853, called in the probate. This probate was brought in, and Mr. Freeman denied Miss Bremer's interest; an appearance was also given for Mr. Bremer, who was the brother of Miss Bremer, and he declared he did not propound the will.

The suit then went on as an interest cause, in which Mr. Freeman was ultimately condemned in the costs.

The interest cause being ended, the will was propounded in an allegation in common form, upon which the two subscribing witnesses only were examined, the drawer of the will, Mr. T. Freeman, not being produced. A responsive allegation on the part of Miss Bremer was, after opposition admitted, which pleaded—

1. The death of the deceased, leaving property invested in her name as Fanny Allegri.

2. Her birth at Calcutta in 1795; her residence in England from an early age until the year 1825, when she left England and never afterwards returned.

3. Her residence in Italy, and her marriage to an Italian named Allegri; that she lived and cohabited with him; and that she and Allegri on all **[194]** occasions, save as regards her family and friends in England, owned and acknowledged each other as husband and wife, until the death of Allegri, six months after the marriage; that by reason of the marriage having been clandestine and kept secret from the knowledge of her father, &c., neither the exact time or place of the marriage and cohabitation can be ascertained; and that the deceased throughout her subsequent life referred to her marriage, and the death of her husband.

4. Pleaded a letter from the deceased to J. G. Bremer, dated 1st of October, 1840, in which occurred the passage, "I had requested my dear Mrs. C. to write to inform

you of my great calamity * which had befallen me, and to tell you also of my change of name, and that I have been a widow more than ten years; but my loved sister never would acknowledge my marriage, because I did not ask her father's consent. I very much regret not having done so, and I own I did wrong."

5. That the deceased, after the death of her father (which occurred in April, 1834), was known and passed by the name of Allegri, was described in legal documents, prepared by and in the possession of T. Freeman, as Fanny Allegri, widow, and was so described by the said T. Freeman in two letters written by him to J. G. Bremer and S. C. Bremer, respectively, on the 7th and 8th of March, 1848.

6. That on the death of General Calcraft, in 1834, the sister of the deceased left England and resided with the deceased at different places on the Continent, until the summer of 1838, when they, **[195]** the two sisters, took up their final and permanent abode in Paris.

7. Pleaded various letters.

8. Occupation of apartments in Paris under leases; and the renewal of the last lease for three years, from the 1st of July, 1851.

9. Permanent residence at one house in Paris.

10. Declarations of intention to remain permanently in France, and never return to England; purchase of a vault in perpetuity on her sister's death, and declarations of her own intention to be buried in that vault with her sister.

11, 12. Pleaded various letters.

13. Description of deceased as "Fanny Allegri, born Calcraft, widow," in an act of notoriety on her decease, executed by T. Freeman and another, at the instance and with the concurrence of D. A. Freeman, in July, 1853, and forwarded for registration in Paris, by D. A. Freeman.

14, 15, 16. Exhibits.

17. That by reason of the premises the deceased was, at the date of her will and death, domiciled in France; and that no paper was valid as her will unless executed according to French law.

18. Set out the French law, and pleaded that such law applied equally to natural-born subjects of France as to foreigners who have become domiciled in France by fixing their residence with an intention of permanently remaining.

19. That the paper propounded was not executed according to French law.

The witnesses produced upon this allegation were cross-examined by Mr. Bremer; and application was made to the Court, on behalf of Mr. Freeman, to **[196]** direct the evidence given upon such cross-examination to be struck out on the ground that the will was in reality opposed by Mr. Bremer, who was in fact the party in the cause though using his sister's name, and that to allow him to interrogate her witnesses was in fact allowing him to interrogate his own witnesses. This application was rejected by Sir John Dodson.

A further allegation was brought in on behalf of Mr. D. A. Freeman, pleading—

1. That the deceased left England in 1827 and not in 1825.

2. That the deceased was never married to Allegri.

3. Residence abroad.

4. That during her residence in Paris she constantly expressed her intention of leaving as soon as her health would allow her, and that she had very trifling property in Paris.

5. Her expressions of dislike to climate, habits, &c., of France.

6. Various particulars as to deceased's mode of dealing with her property during her life as tending to shew that she considered England as her home.

7. Exhibits.

8. That the deceased was not by reason of the premises ever lawfully domiciled in France so as to have acquired a domicil of succession according to the laws of that country.

9. That by the laws of France the succession to the personalty of all deceased persons, whether testamentary, or ab intestato, is dependent upon, and is governed and regulated by, the law of the place of the domicil of the deceased.

**[197]** 10. That the laws of France in force at the time of the death of the deceased with respect to the validity of testaments, do not apply equally to natural-born subjects

* Referring to the recent death of her sister.

of France as to foreigners who have become domiciled there by fixing their residence with an intention of permanently remaining, but that the succession, whether testamentary, or ab intestato, of a foreigner, who was neither naturalized nor authorized to establish his domicil in France, is governed by the law of his own country.

11. That although S. C. Bremer and J. G. Bremer are appearing in this suit by separate proctors, yet that the suit, so far as concerns the said S. C. Bremer, has been and is in fact and in truth conducted by J. C. Bremer, who is acting on her behalf herein; that he has throughout communicated with her legal advisers, and has given them every assistance in his power, and that he is desirous of securing and has throughout so acted as to secure her success and to oppose and prevent the success of D. A. Freeman.

12, 13. Exhibits.

14. That the materials of the allegation given in on behalf of S. C. Bremer were chiefly furnished to her or her advisers by her brother, J. G. Bremer, or someone acting on his behalf; that he has supplied the money necessary for defraying her expenses, and is responsible to the proctor of S. C. Bremer for the same.

15. That the interrogatories administered by J. G. Bremer to the witnesses produced upon the allegation of S. C. Bremer, were prepared after conference and consultation with the legal advisers in **[198]** this suit of S. C. Bremer; that the French advocate who acted on behalf of J. G. Bremer, in preparing the said interrogatories, had previously assisted S. C. Bremer in collecting evidence, and also by seeing, conversing with, and interpreting on behalf of the witnesses produced by S. C. Bremer, upon the allegation.

16. That J. G. Bremer has frequently declared and admitted that his interest in opposing the will propounded is identical with that of his sister, S. C. Bremer; and that he hoped she would succeed, and was doing all he could to help her.

The admission of this allegation, which was admitted as above after reformation, was opposed as originally brought in on behalf of Miss Bremer, and also Mr. Bremer.

Sir John Dodson, however, after hearing Miss Bremer's counsel, refused to hear Mr. Bremer's counsel in opposition to the admission.

Upon these allegations, besides the several witnesses to facts, were examined eight members of the French bar, Messrs. Frignet, Senard, and Paillet, on the part of Miss Bremer; and Messrs. Marie, Blanchet, C. de Lisle, Hebert, and Vatismesnil, for Mr. Freeman.

Sir J. D. Harding, Q.A., and Phillimore, for Mr. Freeman.—The domicil of origin is retained till a fresh domicil is acquired by fact and intention; the mere act of residence will not effect a change of domicil, without the intention of permanent residence: *Munroe* v. *Douglas*, 5 Madd. 379; *Somerville* v. **[199]** *Somerville*, 5 Ves. 759; *Munro* v. *Munro*, 7 Cl. & Fin. 842; *De Bonneval* v. *De Bonneval*, 1 Curt. 856; *Attorney-General* v. *Dunn*, 6 M. & W. 527; *Craigie* v. *Lewin*, 3 Curt. 435; *Stanley* v. *Bernes*, 3 Hagg. 373. In the present case the deceased had, neither in fact nor by intention, abandoned her original domicil, whether Anglo-Indian or English, and acquired a French domicil when she made the will. The will was valid therefore when executed; and even admitting that she subsequently acquired a French domicil, that would not revoke the will. If the marriage of the deceased was meant to be relied on to shew the change of domicil, the opposers of the will should have proved the marriage, which they have not done; for the bare passing by the description of Madame Allegri, widow, is no proof of the marriage. Again: Supposing the deceased to have been domiciled in France, then the case is met by *Collier* v. *Rivaz*, 2 Curt. 858, which is directly in point, and shews that under the Code Civil the will of a British-born subject domiciled where the code is in force, is valid, if executed according to the law of England.

But this deceased was not, according to the evidence of the French lawyers in the case, domiciled in France. She had obtained no authorization from the Government to establish her domicil there; and that authorization, they depose, is an indispensable condition, without which the foreigner is considered by the French law as a mere resident. Nor does the case rest upon the bare evidence of these French advocates, for their opinions are supported by several French cases; and the text-writers also state that under the Code Civil the foreigner has no **[200]** means of acquiring a French domicil other than by the authority of the Government (Demangeat, Hist. de la Condition Civile des Etrangers en France, 369; Demolombe, Cours de

Code Civil, vol. i., b. 1, tit. 1, ch. 3). And as the deceased had not obtained the authorization of the Government, it follows that she was not domiciled in France, and consequently the will is valid, being executed according to the law of England, the domicil of the testatrix.

Jenner and Spinks, for Miss Bremer.—One contention in this case is, that a residence fixed and permanent for fifteen years in one country, and an absence from the country of original or subsequently-acquired domicil, coupled with expressed intentions of never returning to the latter, are not sufficient to constitute a domicil in the places of such continued residence. Every case cited on the other side from an English Court, on domicil, negatives that contention. Apart, then, from the question of marriage, and by the law of nations, the deceased was domiciled in France at the time of her death; and this reflects back upon the time when the will was executed, for she never moved from Paris in the interval. But how stands the case upon the marriage of the deceased? If this were a case in which a question of legitimacy or of inheritance depended on the proof of marriage, possibly the marriage could not be deemed established; but here the marriage is pleaded but as a circumstance in the case shewing how completely the deceased had given up her English domicil when she assumed a foreign name. But is, in a question of marriage, reputation not to be considered? She was treated and de-**[201]**-scribed by all persons, including her solicitor, as a widow, in letters, in legal documents, as mortgages and conveyances—in the very will before the Court—in the jurat and affidavit of Mr. D. A. Freeman, when he proved the will.

Five French advocates have been examined on the part of Mr. Freeman; three on the part of Miss Bremer; and, upon the point whether a domicil can be acquired in France by a foreigner without authorization, they are totally opposed; it is clear, then, that from the opinion of these learned persons the Court can derive no great assistance, nor arrive at any satisfactory conclusion. But there were cases cited from the French Tribunals, and these, it is said, went to determine the question. These cases, however, are not easily reconciled with each other; and when the French advocates were pressed on interrogatory with the conflict between their own cases, they answer, "That there are many decisions of a contrary nature, but they do not place much reliance upon them"; or, "That they were cases in which French interests were concerned, in opposition to the interests of foreigners"; or, "That those decrees were made in special cases, and come under the practical adage, that decrees are good for those who obtain them." There is, however, one case upon which this Court can rely (*Laneuville* v. *Anderson*, 17 Jur. 511), and since affirmed by the Judicial Committee. There the deceased had no authorization of the French Government; the point was directly raised in the case; and yet this Court and the Court of Appeal both pronounced for the French domicil, and the will was referred to the French tribunals to pronounce upon.

**[202]** Deane, for Mr. J. G. Bremer, after submitting that for testamentary purposes domicil might be acquired by a foreigner in France without authorization, and that the deceased was so domiciled, referred to the general practice in cases of co-plaintiffs and co-defendants, and cited *Wood and others* v. *Goodlake and others*, 2 Curt. 82; *Dyce Sombre's case*, antè, p. 22; and *Hyde* v. *Cates and Hyde*, not reported, but decided in this court in June, 1853, in which last case the will of a single woman without a parent was opposed by a niece, and also by a brother, who had originally joined in taking out probate as one of the executors. The rule of practice, therefore, justified the course pursued by Mr. Bremer.

At the close of the argument, Sir John Dodson directed that Mr. Freeman, the drawer of the will, should be produced and examined vivâ voce. This gentleman deposed to the deceased having stated to him that she was not married, but that she would not use her maiden name. He proved the instructions for the will.

The French cases cited throughout the argument were,—

*Lynch's case*, reported in Sirey, 1851, of which the abstract is,

"La loi qui régit la succession d'un étranger décédé en France, quant aux meubles qui sont situés dans ce pays, est la loi du pays du défunt, alors surtout que celui-ci n'avait pas un domicile légal en France, et qu'il n'a aucun héritier Français. (Cod. Civ. 3, L. 14 Juill., 1819.)

**[203]** "En conséquence, les tribunaux Français sont incompétens pour connaître d'une demande en liquidation et partage d'une telle succession.

"Par suite encore, un acte émané du tribunal étranger compétent, qui autorise l'un des héritiers à administrer provisoirement la succession du défunt, doit s'appliquer aux meubles situés en France, quand même ils ne seraint pas spécialement désignés dans cet acte; pourvu, bien entendu que l'acte dont il s'agit ne contienne rien de contraire aux principes du droit Français.

"Ainsi, si cet acte attribue à l'héritier administrateur le pouvoir de disposer des biens du défunt, les autres héritiers ne peuvent demander aux tribunaux Français l'autorisation de faire procéder eux-mêmes à la vente des meubles situés en France.

"Et si le tribunal étranger a assujetti l'héritier administrateur à fournir caution pour sa gestion des biens situés à l'étranger, il convient que les tribunaux Français exigent aussi de lui une caution à l'égard des meubles situés en France."

*Thornton* v. *Curling*, Dalloz' Reports, 1827:—

"Doit être réputée ouverte en France la succession d'un étranger qui y est mort depuis la loi du 14 Juillet, 1819, après avoir obtenu du gouvernement la jouissance des droits civils et y avoir transféré son domicile, conformément à l'autorisation qu'il avait obtenue, et cela, encore bien que cet étranger ne serait pas naturalisé Français. En conséquence, c'est devant le tribunal dans le ressort duquel il est mort que doivent être portées les contestations qui s'élèvent entre le fils du défunt et le légataire étranger qu'il a institué, au sujet de sa succession, et, par exemple, sur la validité **[204]** ou invalidité du testament qu'il a laissé; le legataire demanderait en vain le renvoi devant les juges du pays du testateur. (C. C., 13, 110; C. pr., 59.)"

*Carlier D'Abaunza*, Sirey's Reports, 1842:—

"1°. Les consuls étrangers ne jouissent pas en France des prérogatives et immunités attachées à la qualité d'agens diplomatiques; en conséquence, ils ne sont pas affranchis de la contrainte par corps, ni de la saisie conservatoire de leurs meubles, à raison des dettes qu'ils ont contractées—Res seulement par le trib. de 1re instance.

"Dans tous les cas, ils ne pourraient prétendre à ces prérogatives qu'autant qu'ils auraient obtenu l'exequatur du Gouvernement Français.

"2°. La résidence prolongée d'un étranger en France et l'établissement par mariage qu'il y a formé, n'équivalent pas pour lui à un domicile, susceptible de l'affranchir de la contrainte par corps, à raison des condamnations rendues contre lui. (Loi du 17 Avril, 1832, art. 14.)

"Ces circonstances ne suffisent pas davantage pour l'affranchir de la saisie conservatoire de ses meubles, à laquelle est soumis tout débiteur forain. (Cod. proc. 822,)"

*Breul's case*, Gazette des Tribunaux, 21st July, 1852:—

"L'article 13 du Code Napoléon, qui dit que l'étranger admis par le Gouvernement Français à établir son domicile en France, y jouit de tous les droits civils, n'a pas eu pour objet de déterminer les conditions que devait remplir un étranger pour acquérir un domicile en France.

"L'étranger qui a fixé depuis près de trente ans **[205]** son habitation réelle en France, qui ne l'a pas quittée pendant cet intervalle de temps, reunit tous les conditions légales et constitutives du domicile. C'est donc aux tribunaux Français que doivent être soumises les questions relatives à la succession de cet étranger mort en France."

*Lloyd's case*, Sirey's Reports, 1849:—

"Le mari, étranger de naissance, mais domicilié depuis longtemps en France, qui se marie sans contrat dans ce pays, avec une Française, doit être réputé avoir consenti à la communauté légale établie par la loi Française, et cela, encore que le fait de son domicile n'ait pas été accompagné de l'autorisation du gouvernement nécessaire à l'étranger pour établir son domicile en France; cette autorisation, requise pour que l'étranger jouisse de tous les droits civils Français, n'est point nécessaire pour l'établissement de la communauté, qui est purement du droit des gens. (Cod. Civ. 13 et 1393.)"

*De Veine* v. *Routledge*, Sirey's Reports, 1852:—

"1°. La possession d'état, à défaut d'acte de naissance, est un élément essentiel de de la preuve de la filiation légitime.

"Spécialement:—Lorsqu'il n'a pas été tenu de registres de l'état civil dans le lieu et à l'époque de la naissance d'une personne (une fille) qui se dit enfant légitime d'un homme qui aurait été marié, il ne saurait être pleinement supléé à son acte de naissance par des déclarations du prétendu père, consignées dans des actes authen-

tiques dressés pour le mariage de l'enfant réclamant, et portant qu'il est né en légitime mariage du déclarant et de son épouse décédée . . . , alors que cette **[206]** déclaration n'est pas corroborée par une possession d'état conforme, suffisamment caractérisée. (Cod. Nap. 319.)

"2°. La déclaration faite dans un acte authentique par un individu, qu'il se reconnait le père légitime de tel enfant dénommé, insuffisante à elle seule pour établir une telle filiation légitime, peut au moins valoir comme acte de reconnaissance d'enfant naturel. (Cod. Nap. 334.)

"Et, bien qu'une telle reconnaissance fût faite par un étranger au profit d'une autre personne pareillement étrangère, et qu'elle fût dans le principe inutile et sans effet légal à cause de la législation personnelle des deux parties, qui ne donnait aucun droit aux enfans naturels à l'égard de leurs parens, si ultérieurement l'enfant a acquis la qualité de Français, il peut invoquer cette reconnaissance et réclamer le bénéfice qu'y attache la loi Française.

"3°. La succession d'un étranger, quant aux meubles situés en France, est régie par la loi Française, alors que le défunt avait son domicile légal en France, et que sa succession est réclamée par un héritier Français contre des légataires universels étrangers. (Cod. Nap. 3, L. 14 Juill., 1849.)

"4°. Un testament olographe fait par un étranger en France, et dont l'exécution est demandée devant les tribunaux Français, ne peut être déclarée valable qu'autant qu'il réunit toutes les conditions de formes reconnues essentielles dans la législation Française, et quel que soit à cet égard l'état de la législation du pays auquel appartient le testateur; en conséquence, un tel testament est nul s'il n'est pas écrit en entier de la main du testateur, ou s'il n'est pas daté. (Cod. Nap. 970, 999.)

**[207]** "On ne peut voir un testament olographe valable dans une lettre qui ne contient pas formellement les dispositions du testateur, mais qui annonce seulement d'une manière générale et sommaire ses volontés, en se référant au surplus pour les détails à un autre acte testamentaire. (Cod. Nap. 970.)"

*Onslow* v. *Onslow*, Dalloz' Reports, 1836:—

"L'étranger qui se trouvait, lors de la promulgation de la loi du 30 Avril, 1790, établi en France, y avait un domicile continu depuis cinq ans, et y avait épousé une Française, était naturalisé de plein droit, sans qu'il fut tenu de prêter le serment civique. Ce serment n'était exigé, par cette loi, de l'étranger qu'elle naturalisait, que pour être admis aux avantages de la qualité de citoyen actif.

"Les lois postérieures à celle du 30 Avril, 1790, et notamment la constitution de 1791, qui exigeaient des étrangers la condition du serment, n'ont disposé que pour l'avenir, et n'ont pu enlever la qualité de Français à l'étranger qui, aux termes de la loi de 1790, avait été naturalisé sans prêter serment.

"Un état peut, en vertu de son droit de souveraineté, déférer à un étranger qui a fixé sa résidence dans son territoire, la qualité de régnicole, sans le consentement ou la volonté de celui à qui une pareille qualité est attribuée.

"L'étranger qui ne veut pas accepter la qualité de régnicole à lui déférée par l'état sur le territoire duquel il est venu s'établir, doit quitter le territoire de cet état. S'il continue d'y demeurer, il est censé s'être soumis à la loi qui lui attribue de nouveaux droits en lui donnant une novelle qualité.

"La simple mesure d'ordre public, par laquelle il a **[208]** été enjoint à un étranger naturalisé Français de sortir de France, n'a pu avoir pour effet d'enlever à cet étranger la qualité de Français que la loi lui avait conférée.

"L'étranger qui, avant le Code Civil, a fixé sa résidence en France, et manifesté par plusieurs actes l'intention d'y rester à perpétuelle demeure, a acquis irrévocablement un domicile légal en France, et ce, nonobstant toutes lois postérieures qui auraient exigé d'autres conditions. Il en est de même depuis la promulgation du code civil, encore bien que l'étranger n'ait pas obtenu l'autorisation du gouvernement. (C. Civ. 13.)

"La succession d'un étranger naturalisé Français, qui s'est ouverte en France où il avait son domicile légal, est régie par la loi Française, tant à l'égard des biens meubles que des immeubles situés en France, dont la succession se compose.

"On doit considérer comme meuble faisant partie de la succession d'un étranger domicilié en France, et soumis, par conséquent, à la loi Française, le prix d'immeubles situés en pays étranger, et spécialement, en Angleterre, lorsqu'il a été payé par l'acquéreur transporté et placé en France. C'est en vain qu'un des héritiers pré-

tendrait avoir le droit de réclamer ce prix comme propriétaire, par suite du privilége du statu réel de l'Angleterre."

*Thomas Gil de Olivarez's case*, Le Droit, 11th October, 1854:—

"1. Toute succession est régie, quant aux immeubles, par la loi de la situation, et quant aux meubles, par celle du domicile. (Art. 3 du Code Napoléon.)

"Spécialement, la succession mobilière d'un étranger décédé en France doit être partagée entre les divers [209] cohéritiers selon les proportions établies par la loi Française, si le défunt avait son domicile en France.

"2. L'acquisition par un étranger d'un domicile en France est indépendante de l'autorisation qui peut être accordée aux étrangers par le gouvernement d'y fixer leur résidence. Le domicile tient au droit des gens; il est toujours déterminé par le lieu du principal établissement.

"3. Les droits et actions purement mobiliers, bien que recueillis en France, doivent, comme tous les autres meubles, être partagés d'après la loi du domicile de l'étranger.

"Il n'y a lieu pour les cohéritiers Français d'invoquer l'application de l'art. 2 de la loi du 14 Juillet, 1819, s'il n'y a pas dans la succession d'immeubles situés en France, surtout quand il s'agit de la succession d'un Espagnol."

*Querieux* v. *Riencourt*, 1 Sirey, 109; *Duke of D'Aremberg's case*, 1 Dalloz, 382; *De Laurencin* v. *Liot*, 1 Sirey, 118; *The Harmony*, 2 Robins. 322; *Dalrymple* v. *Dalrymple*, 2 Cons. Rep. 54; *Duchess of Kingston's case*, 2 Add. 21; *Whicker* v. *Hume*, 15 Jur. 567.

After the argument the *Duke of Mecklenbourg's case* was sent to the Court. The abstract of the case, as determined by the Tribunal Civil de la Seine, 1re ch., was, "La succession de l'étranger doit être considérée comme étant ouverte en France, lorsqu'il est constant en fait que le décédé avait dans ce pays son principal établissement, et ce alors même qu'il n'aurait pas obtenu du Gouvernement Français la jouissance des droits civils.

[210] "Par suite les tribunaux Français sont seuls compétens pour connaître des difficultés relatives à l'ouverture de cette succession."—Le Droit, 16 Mars, 1856.

From this decree there was an appeal to the Cour Impériale de Paris, 1re ch., and the abstract of the decree of that Court was, according to the report in the Gazette des Tribunaux, 27 Juillet, 1856, "La succession de l'étranger, décédé en France, sans avoir été autorisé à y établir son domicile, et à y jouer des droits civils, est régie par la loi de son domicile d'origine, s'il a manifesté par des actes exprès l'intention de conserver sa nationalité et l'esprit de retour dans son pays natal, si ses héritiers sont étrangers et si les immeubles dépendant de la succession sont situés hors de l'empire Français.

"Le long séjour de cet étranger en France, et ses importantes spéculations dans des entreprises fondées en France n'entrainent pas sa renonciation au domicile d'origine."

And according in the report in Le Droit, of the same date, "Les tribunaux Français sont incompétents pour statuer sur les difficultés relatives à l'ouverture de la succession d'un étranger décédé en France, lorsque les héritiers sont étrangers, que les immeubles sont situés hors de France, lorsqu'il est constant, en fait, que le défunt a conservé avec le gouvernement dont il était sujet les rapports qu'il jugeait les plus propres à maintenir sa nationalité.

"En vain opposerait-on que depuis longtemps il habitait la France et qu'il avait pris part à des spéculations de diverse nature.

[211] "Ces circonstances ne sauraient entrainer la renonciation au domicile d'origine." *

*Judgment—Sir John Dodson.* After stating the contents of the several allegations. From these averments by Miss Bremer on the one side, and on the other by Mr. Freeman, the executor, it is quite obvious that there are two principal questions

* It would seem that the Court of Appeal reversed the sentence, upon the ground that the deceased duke had by express acts manifested his intention of returning to his native country, and had maintained such relations with the government of his own country as proved his intention to preserve his original domicil. The fact of his not being naturalized or authorized was a proof of his intention to adhere to his original domicil, rather than a legal defect in his French domicil.

for the decision of the Court. First, in what country was the deceased domiciled at the time of making the will and at the time of her death; and, secondly, what was the nature of that domicil, and the legal effect thereof, upon her testamentary acts.

The first point for consideration then is, in what country had this deceased lady her legal domicil? It is admitted on all sides that she was born in the East Indies in 1795, where her father was then serving as a military officer in the service of the East India Company. There can, therefore, be no doubt that her domicil of origin was Anglo-Indian. In 1805, she together with her sister and mother, came to England, where her father afterwards came, and she resided with him and the family until some time in 1825. It is, therefore, I apprehend, equally clear, that, down to that period of time, **[212]** namely, 1825, her domicil was, to all intents and purposes, English. Her father had sustained her; he had personal property as well as real property; and it was the sole abode of himself, his wife, and two children down to 1825, when this lady quitted England, her mother having died, and went to the continent with Miss Pickar, who had been her governess. She proceeds then to Rome and to other parts of Italy; and it is alleged, that there is not any evidence to shew in what particular state of Italy she took up her abode; nothing to shew that she fixed her domicil or continued her residence within the dominions of any particular state or government in that part of Europe. She was a mere traveller, going wherever curiosity, or pleasure, or any other motive might induce her. If the matter had rested here there would have been no pretence for asserting that the lady had cast off her English domicil, and acquired an Italian domicil. There is, however, a circumstance of very grave importance averred by Miss Bremer in her allegation, namely, that this lady whilst in Italy intermarried with an Italian gentleman, named Allegri. The fact thus averred, if supported by adequate proof, would, in the opinion of the Court, be sufficient effectually to change the domicil of the deceased, to destroy the English and establish the Italian; for the domicil of the wife would, by necessary implication, follow the domicil of her husband. Having married with an Italian in Italy, she would immediately acquire the Italian domicil. But how stands the proof in respect of the alleged marriage? Where was it celebrated? Was it at Rome or Naples or Genoa, or in what other town **[213]** or place of the Italian States? There is no evidence of it on either side. Was any entry made in the parish books of any place there or elsewhere? Who performed the ceremony, or was present on the occasion? Was there any acknowledgment or repute? Upon all these matters there is an entire absence of proof. It is true that the deceased has asserted it, both orally and in writing; but surely such assertions, unsupported by other testimony, can hardly be deemed satisfactory or conclusive. But how stands the matter upon the representation of the deceased herself? The marriage is said to have taken place in 1830, but it was not announced to her relations for many years afterwards, I think not till the year 1840 or 1841. It is said that she concealed it, because she had not her father's consent; but her father died in 1835, and the marriage, in point of fact, was never declared till after the death of the sister in the year 1840. It is true that in 1840, upon the death of her sister, she used the name of Allegri, but she did not do so till after the death of her sister. The sister always denied her belief in the truth of any such marriage; she never would admit it. In 1840 the deceased assumed that name in Paris.

The first avowal she makes of it to any of her friends or relations in England is to be found in a letter which is before the Court among other documents, and addressed to Mr. James G. Bremer in these terms, "Boulevard des Capucines, No. 17, Thursday, 1st October, 1840. My dear cousin, I had requested my dear good Mrs. Connell to write to inform you of the great calamity which had befallen me, and I cannot imagine why she neglected to do so, and to tell you **[214]** also of my change of name and state. I have been a widow more than ten years, but my loved sister never would acknowledge my marriage because I did not ask her father's consent. I very much regret not having done so, and I own I did wrong. My loved sister had been ill for several months," and so forth. Then she states—it is, perhaps, better to read the whole, for there is some reference to a return to England, the only reference I can find—"No words can express how wretched I am, for I loved her more as my child than my sister. I have not any intention of returning to England"—this is a declaration which may, perhaps, have some effect when we come to consider the question of domicil, or the intention of returning to England—"I shall leave France

when I can." Leaving France when she could looks as if she had not taken up her abode there. There is in the testimony of some of the witnesses an explanation of what she means by leaving France—that she did not mean to leave it permanently, so as to give up her abode in that country, but only for the temporary purpose of travelling. "But that does not depend upon me, but upon the arrangement of the property which she has left me, which is of course in the hands of her executor. Your letter, dated the 23rd ult., I only received this morning. I hope you will not accuse me of negligence." It concludes in a formal way, nothing having any bearing at all on the present question. Therefore, it is clear from this, though she says she was married as early as the year 1830, that her sister never would believe she was married, or at least never would admit the marriage.

**[215]** From that time, from the time of the death of the sister in Paris, she assumes the name of Allegri; and we find in the very commencement of the will itself she describes herself as Fanny Allegri née Calcraft, and at the termination of the will her signature is Fanny Allegri née Calcraft. From that time she appears to have passed by the name of Allegri in Paris, and to have been known almost entirely by that name.

Upon this evidence, even so far as it goes, I think the Court could not come to the conclusion that this lady had been married to this gentleman, Signor Allegri, in Italy, or that there was any contract of marriage between them which would have changed her domicil. The sister does not seem to have given credit to it; and if she had any connexion with Signor Allegri, if she lived with him at all, it does not appear there is any evidence that she married him. Prætexit nomine culpam. She may have called him her husband, though there is no evidence of their living as husband and wife, or pretending so to be. But in point of fact there is evidence in this case to show that the deceased herself admitted she never had been married to Signor Allegri. After the case had been argued, I thought it right and convenient that Mr. Freeman, the solicitor, who drew the will, and who seems to have had an intimate knowledge of many of the proceedings of the family, should be examined, and the Court, availing itself of the power which it has under the Act of Parliament, thought proper to have Mr. Freeman called before it, and have him examined vivâ voce in this Court. In the course of that examination he was asked, amongst other things, with respect to the **[216]** marriage of Madame Allegri, whether she was married, or whether she was not. His examination upon the point is this: He is asked, "You called the deceased Madame Allegri just this moment; was she a married woman or a spinster, or what was she?"—The answer to that is, "I should state to you, when I first acted for her, her property at Millbrook, near Southampton, had been sold in the lifetime of Miss Emily Calcraft, of whose will I was the sole executor." *Q.* "What was the date of that sale?"—*A.* "It was, I should say, somewhere about midsummer, or the latter part of the year 1840; and it remained incomplete. I was not acting at that sale. Messrs. Barney were the solicitors; but in consequence of the death of Miss Calcraft, I had to communicate that event to them, and it occasioned my being joined in the assignment as the executor, and upon that occasion the draft was sent to me. I altered it from Fanny Calcraft to Fanny Allegri, widow, it having been stated to me, on the occasion of the will being sent over, that she was a widow." *Q.* "It having been stated by whom?"—*A.* "By Mr. Connell, in a letter he wrote me on the occasion of the death, sending me a copy of Miss Calcraft's will." *Q.* "Is that all you know, the only reason for describing her as a widow?"—*A.* "That was all I knew at that time. I had never heard she had that name till I got that letter." *Q.* "In point of fact, that is all you know about it?"—*A.* "The purchaser here desired to have the deed executed before some witnesses resident in England, and that occasioned me to go to Paris with my son, and then I inquired of her where Signor Allegri was buried, as I thought that evidence might be wanted. She **[217]** appeared very much agitated, and said it could not be necessary—it was quite unnecessary; she would not listen in fact to there being anything of that sort required; and the consequence was, that she executed the deed, and I left her that day." *Q.* "How did she execute it—in what name?"—*A.* "As Fanny Allegri; and the next day she sent for me, and then she said she had had no rest, that she was not married." *Q.* "Do you know at all where Signor Allegri died?" The answer is, "I was never able to learn. I wished her to take the name of Calcraft, but that she was not willing to do; and I never could learn where Signor Allegri was, whether he was

living or dead, further than she represented, when her sister joined her, she heard he was dying in Russia. Whether that was the case or not I had never any means of ascertaining." But here it is, when he pressed her, when there was a necessity for executing these deeds he pressed her to make use of the name of Calcraft as a spinster and an unmarried person. He then pressed her to know where Signor Allegri was buried; he thought the evidence might be wanted; she was greatly agitated on the occasion, and she insisted on executing the deed in the name of Allegri; she did so. The next morning she calls on him and states she has had a sleepless night—that she had not been married. Therefore I think there is quite an end of the Italian domicil; for, in point of fact, upon her own confession—her own admission—she never was married to Allegri.

The next question is, whether any other foreign domicil has been established? I think it is quite clear there is no other foreign domicil, unless it be a domicil from residence in France, having quitted **[218]** Italy after the death of her father, and being joined by her sister, they went to reside at Paris, and at Paris she continued to reside down to the period of her death. It is not pretended that the deceased was naturalised in France, there is no averment of that kind; neither is it said that it was a domicil by the authorization of the French Government. It is a domicil de facto only, a domicil by the jus gentium; that is, she had taken up her abode meaning to remain there the rest of her life, and not to return to her former domicil in England. The question is, whether it was her fixed place of abode, and whether she had made up her mind to live there?

Perhaps it may be convenient here just to restate a few of the facts. It seems that in 1834 General Calcraft, the father, died, leaving his fortune in equal shares to his two daughters. Emily, who was appointed sole executrix, shortly after joined her sister on the continent, and they are said to have lived together at various places for short periods; and finally, in 1838, to have taken up their abode in Paris until the periods of their respective deaths, namely, Emily in 1840, and the deceased herself in April, 1853; that is, she lived at Paris for the last fifteen years of her life.

As to the length of time she lived there, it was justly observed by the Queen's advocate that time alone will not constitute a domicil, that a person may continue in one place for fifty or any greater number of years, and yet may always have an intention to return to his or her own country; that the original domicil is not considered and proved to have been abandoned merely from the length of time the party has resided in a foreign country. **[219]** Undoubtedly this is quite true. The long duration of residence in one place is a material ingredient, from which intention may be collected; but a person may live fifty years in a place and not acquire a domicil, for he may have had all the time an intention to return to his own country. But the question here is, whether the deceased had not taken up her abode in France, and had no intention to return to England. The letter to Mr. Bremer, which I have already read, from the deceased declares she did not mean to return to England, and I cannot find any declaration of a contrary tendency in any part of the evidence before the Court. There she was not detained by business for any particular time, no necessary avocations kept her in France, she might have quitted it at any time she thought proper, but there she continued for fifteen years according to the evidence. Her sister having died, and having been buried there, she having purchased a grave in Père la Chaise, she determined to be buried in the same grave, the same spot with her sister, and she meant to live and die at Paris. The question is, whether that is borne out by the evidence in the case. She had no other home; it was the sole place of her abode. When she was at Paris she must be considered as at home; if she went away, had gone away from Paris, it must be considered that she had gone away from home; and when she returned, that she came back to home. She did not, however, leave France, and therefore there is no necessity to make inquiries as to that.

The evidence in this case is given by some of the persons who knew her about the year 1842; there is no witness who goes back further than that. She went to Paris in 1835; and the first witness who has **[220]** been examined on this point is a witness of the name of Derville, who was acquainted with the deceased, and in fact waited and attended upon her, she being a nurse. This witness has been examined by Miss Bremer, the lady who opposes the will. She says, on the 8th article, "I do not know when Madame Allegri first came to Paris, or where she lived before she resided in the Boulevard des Capucines. The deceased hired her apartments there unfurnished,

and furnished them with her own furniture." That is not taking merely temporary lodgings or ready-furnished lodgings; she hired apartments according to the evidence of this witness, and they were furnished by herself. In point of fact they were furnished by herself and her sister originally. "At the time I knew the deceased her sister was dead, but she had a lady's maid living with her whom she discharged about seven years before her death. I do not know on what terms the deceased held the apartments she occupied in the Boulevard des Capucines, but she told me she rented them on a lease of three, six, or nine years, and that it was renewed as the term expired." That is the declaration as coming from the deceased—not that she had hired apartments for a week or a month, but upon lease for three or six years, and so forth; and they were renewed. It is clear from other evidence in the case that at the time of the death one of the leases was still subsisting, one of them had not expired. "Madame also told me that the last term would expire in July last, and that she should not then renew it, as the noise of the Boulevards annoyed her." That is something like leaving these apartments; but she goes on, however, to state, "but that [221] she should remove to the Place Vendôme." The reason assigned by this witness for removing to the Place Vendôme would be, because it was more quiet, but there is no change whatever of domicil—it is only a change from one part of Paris to an adjacent part.

On the 10th article she says, "Madame Allegri used to tell me latterly, that if she recovered her health, she should travel, and go to Switzerland, Italy, Savoy, or some other such place"; that is, if she recovered her health she would go to these places to travel, not that she would go to settle in any of these places. "And that she should take an apartment in the Place Vendôme in Paris, and reside there six months out of the twelve. I used to say to her sometimes, 'But, if you were to die, madame, whilst you are travelling?' 'Oh, then,' she said, 'I should be brought back to Paris, and buried near my sister, in the Cemetery of Père la Chaise.' She often spoke to me of England and of the Brazils, but she never spoke to me of her going back to England." What the meaning of speaking to her about Brazil is I cannot tell; whether it is some mistake of the witness I do not know; but she declares she never spoke to her about going back to England. "She never spoke to me either for or against England, but she told me, 'I am like you, I have become a Roman Catholic.'" So she had changed her religion after she left England, but she does not seem to have been a very strict Roman Catholic, for when she was dying, she declined to have a Roman Catholic priest to attend on her. "She never said anything to me against the climate or religion of [222] England. The only thing she said about it was, that persons were cleaner in England than in France. She felt the loss of her sister very much, and could not speak of her without tears. Only four days before her death," she says, "the deceased, then referring to her lamentable state of health, said, 'I have one consolation, I shall be buried near my sister'; and the deceased frequently before that, and at long periods before that, spoke of being buried near her sister."

Again, as to quitting France, upon the 6th interrogatory she says, "She often, as I have before deposed, spoke of travelling in Italy. She frequently spoke of Italy as a country where she should like to travel, but she always spoke of spending six months of the year in France." She repeats, on a later interrogatory, that the deceased told her over and over again she should return to France for six months.

Another witness of the name of Chappé deposes very much to the same effect. "The deceased was living at No. 19 Boulevard des Capucines. I never knew her to reside anywhere else from the period of my first becoming acquainted with her. She has several times told me she wished to be buried near her sister, or alongside of her. She constantly spoke to me in that way during her last illness, and on the very last night of her life. She did not see Maillochon during her last illness." Maillochon was a person who was employed to take care of the grave of the sister. It appears that she was in the habit of paying Maillochon a trifle annually or periodically for taking care of the sister's grave. Upon the 6th interrogatory, she [223] says, "I never heard the deceased express any intention of returning to England. I never heard her speak on subjects of that description. I never heard her say that she preferred France to England. She never spoke to me about England, or anything connected with that country." There are one or two other witnesses who depose very much to the same effect, but there is nothing opposed to them, so it really would be a waste of time to go through the testimony of those persons.

The case comes to this, that the deceased lodged for the last fifteen years of her life—that she herself furnished the apartments, in Paris, that she never quitted them, that she declared she should never return to England. She writes to her relation, Mr. Bremer, that she should never return to England. Though she spoke of leaving Paris, yet it was only for six months of the year; and that she should keep a house at Paris; namely, at the Place Vendôme, a short distance from the Boulevard des Capucines, where she had been residing, and where she continued to reside down to the period of her death. Then, I think, upon this evidence I am bound to hold that the deceased was domiciled at Paris both at the time she made the will and also at the time of her death. She was there for the last fifteen years, which includes the date of the will.

Accordingly, the Court having arrived at that conclusion with respect to the fact of domicil, then the next point for consideration is, as to the making of her will, by what law that was to be made, being domiciled in France de facto, according to the jus gentium. In France she was not naturalized, and was not domiciled by authorization; and the **[224]** question is, what is the effect of that upon the will of the deceased, and whether the will ought to be in the English form or according to the French form, in order to be a valid testamentary paper. Now it may be as well to see the contents of the will itself before I enter upon this question, for I find in many of the cases decided in the French courts that the contents of the wills of persons making their wills in France, in the circumstances stated, have been considered of importance, to see whether there were French executors, whether there were French heirs, the amount of the property, and so forth.

The will of the deceased commences by describing her as "Fanny Allegri née Calcraft, at present residing at the Boulevard des Capucines in Paris, in the kingdom of France"—so that it was the place of actual residence according to that—"the only surviving daughter of the late Henry Fox Calcraft, lieutenant-general in his late Majesty's service in the East India Company, who resided and was buried at Brighton in England." Then she proceeds to devise to Daniel Alexander Freeman a house at Calcutta and all other property in the East Indies. So that in the first place here is a property of considerable value, £300 per annum, in the East Indies—that is, in the British dominions, and not within the territory of France. She then goes on to give one thousand francs each to the two persons who shall be with her in her last illness. They might very possibly, probably would, be French. There is a legacy of £40, that being one thousand francs, to each of the two persons that might be with her—not describing them by name **[225]** or national character, but who might accidentally be in attendance at the time. Then it goes on to give 500 francs each to the bureaux of the first and second arrondissements at Paris. These were for charitable purposes, for the poor belonging to the first and second arrondissements; and she gives 500 francs to the English Charitable Fund.

The residue of the property, whether in England, France, or elsewhere, she gives equally between Daniel Alexander Freeman and her cousins Eliza Ann Bremer, Susan Bremer, James Grignon Bremer, and Henry Bremer. Of the last four, I apprehend, only two are living, according to the testimony of Miss Bremer, for she describes herself and her brother as the only two next of kin of the deceased. Then she appoints Mr. Daniel Alexander Freeman and Mr. James Grignon Bremer the executors of her will. So that the executors are English; the property is all in the British dominions, with the exception of £38; and the whole property is left to English people, except the trifle left to the two persons who might be in attendance upon her at the time of her death; and these little charities of 500 francs each to the bureaux of the arrondissements, and the charity for poor English persons. The property in India is considerable. There was also very considerable property in England. In short, the whole is in England, and is left to English persons, and English persons are appointed the executors.

By what law is the validity or the invalidity of this will to be decided, so made by a person so circumstanced as to domicil as she was?

The law of England, I apprehend, as applicable to a case of this kind, is clear. That the will must **[226]** be deemed good or bad according to the law of the country where the deceased was domiciled, that is to say, in this instance in the view which the Court takes of it according to the law of France. What that law may be, it is certainly a matter of some difficulty to ascertain; for notwithstanding the great

industry and research of the counsel, and the very able and erudite arguments addressed to the Court on this occasion—and for which the Court feels greatly indebted to them—and the authorities cited both from English law and also the cases decided in the French courts, the matter may well occasion some hesitation to a person not conversant with French law, and make him extremely anxious to ascertain what is the real state of that law; since many of the cases that have been cited are so irreconcilable on some points that it is difficult to ascertain what the real law is, and the opinions of the very eminent and learned French advocates examined are directly opposed to each other.

The 13th article of the Code Napoléon is the foundation of the French law, or rather constitutes the French law, on this matter—that is, in these words, "L'étranger qui aura été admis par le gouvernement à établir son domicile en France y jouira de tous les droits civils tant qu'il continuera d'y résider." So that a stranger who has received the authorisation of the government, and established his domicil in France, is to enjoy all civil rights there. I apprehend among those civil rights is the testamentary right, and this right he will enjoy, provided he has received the authorization of the government to establish his domicil there. It seems to follow, as a necessary consequence, that those [227] who have not that authorization, or have not been naturalized, will not enjoy the same rights. Upon this law Dr. Phillimore cited some eminent authors who have written upon it, and he has favoured me with their works. The first of these is Mr. Demolombe. In his work called Cours de Code Civil, in the First Book, relating to persons, the title is, "De la jouissance et de la privation des droits civils." He divides this title into three chapters: first, what persons enjoy these civil rights; secondly, how those persons who enjoy them can be deprived of them; thirdly, what is the legal condition of strangers in France. At page 143, section 140, are these words, "Nous avons vu que la législation de chaque pays se compose de deux éléments, savoir, du droit public et du droit privé. Le droit privé, ou le droit civil, suivant l'acception moderne de ce mot, est celui qui règle les intérêts des particuliers, la propriété, la famille, les conventions, etc.: il est la source des droits civils, c'est à dire, des facultés, des avantages, dont la jouissance appartient à tous les Français." I have cited this partly to show the law, and partly to show that the droit civil applies not only to political rights, as was contended by the counsel for Mr. Bremer, but embraces other civil rights—that it is not confined. Certainly the words are used by some authors with no small degree of ambiguity. Sometimes droit civil is put in opposition to political rights, and sometimes it includes them; but, according to this author, the droit civil is what I have mentioned. It goes as to the quality of Frenchmen, p. 144, "La qualité de Français ne suffit donc pas pour avoir les droits politiques; il faut de plus être citoyen." There must be something more; it is not domicil [228] that will give political rights, but in order to enjoy political rights he must be a citizen. "Et ce titre, dans ce cas, n'est plus, comme très souvent, le synonyme de Français, de regnicole; il indique spécialement l'aptitude à exercer les droits politiques. Ainsi, tous les Français jouissent des droits civils, mais les Français citoyens seuls des droits politiques." There are other passages which were cited by the learned counsel having a bearing on the same question, but it is quite unnecessary to go through them. What I have read is quite sufficient for the purpose.

There is another author, M. Demangeat. He goes through the whole of the matter, and comes to his résumé. The résumé is in these words, p. 369: "En résumé, je crois donc qu'il faut dire que, sous l'empire du code civil, l'étranger n'a d'autre moyen d'acquérir un domicile en France que d'obtenir la permission du gouvernement; et c'est à ce principe que je rattache comme conséquences les règles que nous allons parcourir." So that it is quite clear, from the writings of these gentlemen, that the mere fact of the domicil, according to the law of nations, is not sufficient—that there must be the authorization of the government in order to confer the civil rights.

Various witnesses have been examined, both on the one side and on the other; and perhaps it may be convenient to refer to some of their testimony, in order to see the view which they take. In the first place there are the witnesses who have been examined on behalf of Miss Bremer. The first of these witnesses is M. Frignet. Upon the 17th article he says he is an advocate at the bar of the Council of State, and of the Court of [229] Cassation—the highest court—and successor to Monsieur

Bonjean, formerly minister and president at the Council of State. He is, therefore, a person very high in office, a person of great eminence; and of course anything coming from him is well worthy of attention. He says, "I am also a docteur en droit, the highest legal title known in this country. I knew nothing whatever of Madame Allegri, the party in this cause, deceased. The will of a person domiciled in France, to be considered valid there, must be in conformity with the laws of France, in virtue of the principle locus regit actum, and more particularly so when the will is brought under the cognizance of French tribunals." Then he says, "this was so ruled in the Court of Cassation last year in the case of *Browning* against *De Veine*";* in which the will of an Englishman domiciled there was held by that Court to be invalid, in consequence of its not having been made conformably to the laws of France

It will be necessary that the Court should examine that case with some degree of particularity afterwards. I may here state that this gentleman refers to a decision of the Court of Cassation in 1853. I have not been able to see a copy of the decision of that Court in 1853; but there is the decision of the Court immediately below the Court of Cassation—the Appeal Court of Paris. The highest court to which you can appeal on a point of law is the Court of Cassation. As I understand the matter, they affirmed the decree of the Court below. So, in fact, the report of 1852 is in con-**[230]**-formity with this decision, to which he refers in 1853—the decision of the Court of Cassation. I observe that every one of the witnesses examined in this case on the one side and on the other, when they refer to the case of *Browning* v. *De Veine*,* speak of it as in 1852 before the inferior court. I apprehend, as far as I can make out the statements of these gentlemen, the decision really is to the same effect.

Then he goes on to depose, "There is no difference in the law of France as to the execution of wills in or since the year 1842 and the present time. We are always ruled by the Code Napoléon in reference thereto. It is necessary to distinguish the various forms by which wills may be made in France." Then he proceeds to describe that there are three forms of making a will in France, namely, the authentic, the mystic, and the holograph form. It is unnecessary to go through his evidence on that point, for that is an admitted fact. It is well known as being the law of France. He goes on again, "The laws of France as to the execution of wills, as I have just stated them, apply as well to foreigners domiciled in France as to French subjects." That is put generally to those domiciled in France, whether domiciled by naturalization or not. He goes on, "In as far as the law of the country to which they belong requires them to conform to the law of the country in which they are domiciled. It is necessary to attend to the distinction between the law as to property and the law as to persons." So **[231]** that locus regit actum is the principle. Then there is to be domicil; and it is the law of France which is to govern that as far as the law of other countries allows. Then he states the distinction between the law as to property and the law as to persons. "The law attaching to property is always the lex loci rei sitæ." So that is always the case. Locus regit actum, whether a party is domiciled or not, is to apply. So that to any stranger being in France and making his will there, unless this is to be qualified by what has been said as to domicil, the rule locus regit actum would apply—even to the testament of any person dying in France, if he had only been there twenty-four hours. That certainly is not the law followed with regard to British subjects. Then if the rule is what it is stated to be, that it is valid or invalid according to the law of France, according to the place where the party is domiciled, and the law attaching to property is always the lex loci rei sitæ, that would be a qualification. Supposing it to be always the law of the country where the property is situated, then, according to M. Frignet, this will made in France would not operate on property in England—not at all, because that is always according to the law of the country where the property is situated; and locus regit actum applies to all personal property whatever. Then he is examined on interrogatory, and inquiries are made of him as to the Code Napoléon. Upon interrogatory (the 17th) he goes back to the case he before mentioned, *Browning* v. *De Veine*, and he speaks of it in this way: "First, when the foreigner makes his will in France, it must, according to the case I have before cited, *Browning* **[232]** v. *De Veine*, be made conformably to the law of France, because locus regit actum; and in that case the Courts of France are competent to adjudicate on the validity or invalidity of the will," and so forth. Upon the next interrogatory he

* *De Veine* v. *Routledge*, antè, p. 205.

says, "The law of France, on the principle that the personal law follows the person, and that moveable property is dependent on the personal law, would, in case of a foreigner dying intestate in France without a French domicil, distribute his moveable property according to the law of his own country. Conformably to the principle locus regit actum, a Frenchman in a foreign country must make his will according to the law of the country in which he is residing, though this rule of law is doubted among jurists of eminence in French law." So that a Frenchman must always, whether domiciled or not in a foreign country, make his will in that form. "The rule is laid down upon the principle locus regit actum, and not upon any hypothesis of convenience to the testator."

He goes on, in answer to the interrogatories, to cite other cases, to which the Court will presently refer; the case of *D'Aubanza*, which is an exhibit annexed to the interrogatories; and also to the decision of the Superior Court upon the same case; but I do not think that that case of *D'Aubanza* has any strict application to the present He then goes into the case of *Lynch*, which must be examined by the Court.

Such is the evidence, then, of M. Frignet; and the evidence of the next witness, M. Senard, an advocate of the Court of Appeal, is, I think, very much to the same effect. He goes on the principle **[233]** locus regit actum. "When a foreigner has fixed his principal establishment in France, and has resided there for a long time, he will naturally as it seems to me, come to adopt the forms of instruments as used in that country, as he has adopted the habits and customs of the place itself; but this is of course optional, not obligatory upon him. It is not the fact of domicil that creates the necessity for his conforming himself, in the execution of instruments, to the forms of French law. That necessity is derived from the maxim, locus regit actum." So that he puts it quite as strongly as the first witness.

The third and the last witness who has been examined on that side is M. Paillet, who is an advocate of the Cour Impériale. He gives his evidence very much in conformity with the two witnesses whose evidence I have adverted to, and he puts the law on the same principle. Now, on the other side, five eminent jurists have been examined; and I must briefly advert to the result of their testimony, and then consider the cases referred to by them, and which have an important bearing on the case. The first of those who has been examined is M. Marie. He is an advocate of the Imperial Court at Paris, and a Minister of Justice of the Order of Barristers of the Imperial Court. He expresses his opinion thus: "According to my opinion, the party deceased referred to was not, by reason of the premises just read and translated to me" (that is the statement as to her having been resident in France for the time I have stated, and not being domiciled by authorization and not naturalized), "ever lawfully domiciled in France, **[234]** so far as to have acquired a domicil of succession according to the laws of that country. I say, that she had not a legal domicil. A distinction, a great distinction, must be made between a domicil in the ordinary meaning of the word—which is the place where a person generally resides—and his domicil in the legal sense." He, therefore, takes the distinction, and he seems to come exactly to what one would naturally suppose is the meaning of the Code Napoléon, article 13, that it applies to those who are domiciled there by the authorization of the government. "This latter domicil," he says, "consists—as very properly stated by M. Demante, professor of the School of Laws—in the connection established by law between the person and the place where he resides. Thus, for example, when the law of France declares, in the article 10 of the Code Napoléon, the place where the succession shall be opened shall be determined by the domicil, the law refers to the legal domicil we have defined above, which is constituted, not by the caprice of the residing party, but by the observation of certain legal dispositions which the Code Napoléon has clearly defined in articles 102 and the following, and not to the actual or de facto domicil above described, constituted by mere residence. As an instance, suppose a person having his legal domicil at Bordeaux, came to reside at Paris, and died at Paris, that would not be a domicil at Paris, but it must be considered according to the real domicil at Bordeaux." Then he says, "There are in France foreigners who are established without the above authorizations, but who have resided for a long **[235]** time past in a permanent manner, without any intention of quitting." That seems to describe the state in which this lady was. She had resided in France for a long time without any intention of quitting it. "It has been asked, whether an

exception should not be made with regard to the above foreigners. My opinion is, that even in such cases the article 13 must still receive its application. M. Proudhon has given a qualification to this class of foreigners; he has called them 'Incolats'; and he says, 'It is just that their persons and their acts should be subjected to the legislation of the country where they have come to reside in a permanent manner.' This idea may be very liberal, but in presence of the law as it stands it is arbitrary and false." So that he does not at all yield to that. Then, as to the case and the decrees, which are referred to by M. Proudhon and M. Merlin, speaking of these, he says, "There are to be found objections raised to the above doctrine, supported by some decrees of the Courts of Justice; but these decrees are, in my opinion, to be considered more as having been made in view of special cases, than as containing the general principle of law on the subject. These decrees, thus made, in special cases have given rise to the practical adage, that decrees are good for those who obtain them. Therefore, in applying the above principles to the present case, I maintain that Madame Calcraft, the deceased, had obtained no legal domicil in France, because she did not obtain an authorization from government to establish one, which I consider an indispensable condition to a legal domicil in France." His opinion, therefore, **[236]** is strong; and in reference to these cases, he says they form exceptions, and there were reasons why they varied; and, I think, when the cases come to be examined, it does appear that the general rule is, that the party must be domiciled by authorization; that, under particular circumstances, where there are French interests concerned, and especially if the property is immovable property in France, then the French law would consider the matter in a different point of view.

Upon the interrogatories the witness says, "I have, from having had read to me the first eight articles of the allegation upon which I have been examined, expressed an opinion to the effect that the deceased in this cause was not, by reason of the premises contained in these articles, ever lawfully domiciled in France so as to have acquired a domicil of succession according to the laws of France. I mean to express thereby, that as the deceased had not obtained an express authority to establish a legal domicil in France, no act of hers could supply the deficiency of that authority. I do mean to give it as my opinion of the laws of France, that no foreigner can obtain a lawful domicil in France, so that the succession to his property shall be regulated by the law of that country, unless he shall have received the express authorization of the government of France, although a contrary opinion has been expressed by Proudhon and other writers." So that he adheres to that opinion, notwithstanding these cases which are referred to, and notwithstanding the opinion entertained by M. Proudhon. He then refers to the case of *Onslow*, to *Lloyd's case*, and *Thornton's* **[237]** *case*, which was very much discussed in the course of the argument, and to which the Court will shortly advert; and also to *Breul's case*. He speaks of *Routledge* v. *De Veine*, as the other witnesses do, as having been decided in 1852.

The Court does not think it necessary to go through the other witnesses examined. There are five witnesses, and they all take the same view of the case, opposed to that taken by M. Frignet, M. Senard, and M. Paillet. There are five of them express their opinion one way, and three the other. With such differences the Court must have some difficulty in deciding the points of course. But it may be as well now to refer to the cases upon which the advocates have been examined—the French jurists —and which were also discussed before the Court in the argument in this case.

The first of these cases was one from Sirey's Reports in 1851, *Brown Lynch* v. *Martin Lynch*. The summary of the case, which is put at the commencement of it, and I take that summary to be what we should put in our reports as the marginal note, is this: "Foreigner—Succession—Moveables—Competency—Provisional administrator —Bail.—The law which regulates the succession of a foreigner deceased in France, as to moveables which are situated in that country, is the law of the country of the deceased, especially if such person had not a legal domicil in France, and had not any French heir." So that there are two distinctions; and this will account for some of the distinctions in the other cases, since the having a French heir seems to make some difference. "Consequently, the French tribunals are incompetent to take cogni-**[238]**-zance of a demand in liquidation and division in such a succession. Consequently, an instrument emanating from the foreign competent tribunal, which authorizes one of the heirs to administer provisionally the succession of the deceased, ought to be applied to the moveables situate in France, although even they should not be specially

named in that instrument; provided, however, that the instrument in question does not contain anything contrary to the principles of French law. Thus, if that instrument attributes to the administrative heir the power to dispose of the goods of the deceased, the other heirs cannot demand from the French tribunals the authority to proceed themselves to the sale of the moveables situate in France."

Now, the tribunal of the Seine, from which this was an appeal, had decided as follows:—"As to the demand for an account, liquidation, and division—Whereas Francis Lynch was born in Ireland, and had his domicil there during a long time; whereas he had never been naturalized a Frenchman, and did not even obtain from the king the right to establish his domicil in France; that thus, therefore, he died an Englishman." That seems a direct decision in point. This man was born an Irishman; though he was resident in France he was not naturalized by any law, and he was not domiciled by any authority of the government; the consequence was, he died an Englishman, therefore he might make his will in the English form. "Whereas his fortune is all personalty, and therefore regulated by the personal statute, that is to say, by the English law, which **[239]** followed him on to the soil of France, as the French law follows the Frenchman into a foreign country, and continues to regulate there his capacity and his status;" so that it is not only a consequence, but it is here stated as a necessary consequence, that he may make his will according to the law of England, just as a Frenchman may make his according to the law of France. "Whereas the law of the 14th of July, 1819, is without application in this case, because, on the one hand, his succession is all personalty; and on the other hand, Francis Lynch leaves no French heir." Neither is there in this case any French heir, neither is there immoveable property. All the property the deceased has in France is personal property, and that of small amount, the bulk of the property being in England.

Now it is, I think, hardly necessary to go further into this case, it cannot be clearer; but look at the decree of the Appeal Court, "The Court, adopting the reasons of the first judges, confirms, and nevertheless orders, that Martin Lynch should be called on to give security for 20,000 francs in respect to the valuables found in France"; that is, he was the executor appointed, and he had taken probate in England, he had given security for the amount of property in this country, and the French adopted the English will; they only said he must give security for the due administration of the property in France, but they pronounced for and held the English will to be good.

The next case that was adverted to by the jurists was that of *Thornton* v. *Curling*. The summary of that case is, "Civil rights—Foreigner—Competency **[240]**—Succession.—Ought to be held opened in France, the succession of a foreigner who died there since the law of the 14th of July, 1819, after having obtained from the government the enjoyment of civil rights, and having transferred to that country his domicil conformably to the authorization which he had obtained, and that, although the foreigner was not a naturalized Frenchman." So that is the point in that case; he had been domiciled in France; he was not naturalized but domiciled by authorization; and being so domiciled he must be considered a Frenchman, and must adopt the French form. That is exactly the converse of the other case. In *Lynch's case* the deceased had obtained a domicil but not authorization, therefore the English law prevailed; but here, in *Thornton's case*, was an Englishman who had obtained a domicil by authorization, and it was held that he was to be considered a Frenchman, and was to make use of the French form.

The decree of the Court of Paris in this case was: "Considering that Thornton was not naturalized a Frenchman, and was only admitted to establish his domicil in France, he died a stranger; that in all cases the disposition of the moveables of a stranger existing in the place where he dwelt is submitted to the legislation of his country, declares the judgment incompetently rendered, and sends the parties to proceed before their natural judges."

The Court of Paris reversed in this judgment the decree of the Court of the Seine, which had held that Thornton was domiciled in France, that moveables are regulated by the law of the domicil, **[241]** and that it was for the French tribunals to take cognizance of the question. But the Court of Cassation, the last court of appeal, reversed the judgment of the Court of Paris, and made this decree: "The Court having looked at the articles 13 and 110 of the Code Civil, and 59 Code de Procédure,

considering, first, that the judgment of the first instance, not contradicted on this point by the decree appealed from, recognises in fact that Thornton had been authorized by a royal decree to establish his domicil in France; that he had effectively established and preserved it there; also, that he died in Paris; and that thus, under the terms of the article 110 of the Code Civil, it was at Paris that his succession opened; secondly, that the actual proceedings are between the son of Thornton, his natural and legitimate heir, and Curling, in his quality of testamentary heir; and that the question is, to pronounce on the validity or invalidity of the testament of the deceased; and that, under terms of the article 59 of the Code de Procédure, this question ought to be carried before the tribunal of the place where Thornton had acquired his domicil, and consequently before the tribunal of the Seine. Thirdly, that these principles are so much the more applicable to the case, although Thornton had not been naturalized a Frenchman, in that the royal decree which admitted him to establish his domicil in France, conferred on him, conformably to article 13 of the Code Civil, the enjoyment of civil rights; and that having been in consequence of that disposition subject during his life to the jurisdiction of French tribunals, **[242]** as well in reference to his person as to the goods which he had in France, the difficulties relative to the succession to these goods are necessarily subject to the same jurisdiction; whence it follows, that in sending the parties before other judges, the decree appealed from has violated the laws above cited, which makes it unnecessary to examine the first point, which remains reserved to the parties; pronounces the judgment erroneous, and reverses it." So here is a clear decision on that point in *Thornton's case;* he having been domiciled by authorization, the law applies to him in the manner stated.

Now, these two cases so far are perfectly clear.

The next case is that of *D'Abaunza*, which has been referred to, but which has very little application and very little bearing on the present case, and which the Court will not think it necessary to go through.

The same may be said as to another case, that of *Verity* v. *Mackensie.*

Another case is *Breul's case*, and which is referred to by several of the witnesses examined both on the one side and on the other. That came on for hearing in July, 1852, and was a question as to domicil, and the competency of the French tribunals. The summary of it is this: "The article 13 of the Code Napoléon, which says that the foreigner admitted by the French Government to establish his domicil in France enjoys there all civil rights, had not for its object to determine the conditions which a foreigner ought to fulfil in order to acquire a domicil in France. The foreigner who has fixed his residence for more than 30 years in France, and who has not quitted it during that **[243]** interval of time, unites all the legal conditions constituting domicil. It is, therefore, to the French tribunals that ought to be submitted questions relative to the succession of that foreigner who has died in France." This is apparently in direct contradiction to the two former cases which I have commented upon; but it is necessary to see the whole of the facts of it. The following are the circumstances in which the question presents itself: M. Justin Breul, born in 1799, a Hanoverian subject, came to establish himself in Paris; there he established a manufactory of bronzes and porcelains. On the 10th of April, 1847, he married at Paris a Frenchwoman. No contract was entered into for regulating the pecuniary conditions of the marriage. This is the important circumstance, this is what gives the colour to the case—the marriage in France to a Frenchwoman, and with regard to the effect of a marriage so contracted in France as to a community of goods. On the 8th of September, 1851, Breul died in Paris. He left a will, made in the holograph form, deposited with a notary—that is, according to the French law. The natural heirs of Breul were strangers. Some were domiciled in Hanover, another at Frankfort-on-the-Maine, another at Brunswick. A suit was brought by the widow against the natural heirs. The question of incompetency was there raised. The decision of the Civil Tribunal of the Seine was as follows:—"Considering that according to the article 110 of the Code Napoléon, the place where the succession is opened is determined by the domicil; that according to the article 102 the domicil is the place of the principal establishment—considering that in fact Breul had **[244]** inhabited Paris more than thirty years; that at a very early period he established there an important house of commerce; that he never ceased directing it up to his death, and in it he realized important profits; that it has been articulate, and not

contested, that in this long interval Breul never quitted Paris, not even in order to make a journey to Hanover, where he was born; that he married at Paris a Frenchwoman; that he therefore united all the conditions constituting a domicil; that it is in vain to oppose the dispositions of the 13th article of the Code Napoléon; that in effect this article, which says that the stranger who has been admitted by the French Government to establish his domicil in France, enjoys there all rights which are found under the rubric of civil rights, has not for its object to determine the conditions which a stranger must fulfil in order to acquire a domicil in France; that it has always been recognized by jurisprudence, that the stranger who had fixed his real habitation in France, and who had the intention of fixing it there, even without the authority of the government, did not the less acquire a domicil in France." Certainly that seems to go directly the reverse of the former cases, and the considerations there stated. But the decree goes on: "Considering, on the other side, that according to the article 19 of the same code, the widow Breul, who had lost her nationality by the fact of her marriage with a stranger, had, by her widowhood, recovered her quality of a Frenchwoman." So that was one of the considerations, that he had married her without any agreement or any stipulation as to community of goods, and that upon his **[245]** death she recovered her condition of a natural subject of France; therefore there were the interests of a French subject concerned. "That on these two grounds the tribunal has been rightly resorted to. For these reasons, without delay nor having regard to the exception taken of its incompetency, it retains the cause for decision." That is all the Court does. Then it is upon these two grounds, not upon a consideration of a domicil without authorization, but upon these two grounds, that there was a marriage between the parties without any agreement or stipulation as to a community of goods, and that the wife was a Frenchwoman, and the moment the husband died her natural character of a French subject returned to her, that the Court retained the cause for decision. It is not an absolute decision on the facts or law at that time, but the Court retained the cause for decision.

But at a later period a decree is made by the Imperial Court of Paris. This decree that I have alluded to was upon the 11th of July, 1852, and the decree on appeal on the 17th of December, 1853, and what fell from the latter Court is this: "Considering that the husband and wife Breul were married at Paris on the 10th of April, 1847, without having regulated by deed their matrimonial conventions; that thus under the terms of articles 1393 and 1400 of the Code Napoléon, their marriage is submitted to the rule of community—considering that the quality of a foreigner which belonged to Breul could not prevent the application of these articles; that, in effect, the law, in disposing as it has done, supposes that the parties voluntarily abstained from establishing by writing **[246]** their conventions, and that there has been formed between them a tacit contract which the law alone consecrates, and of which it regulates the consequences; that foreigners, capable of stipulating in all contracts dependent on the law of nations, as that which is in question, can, on marrying in France, accept tacitly the rule of community established by the law in the same manner as they might have stipulated it expressly in a deed—considering, however, that in order to apply these principles to foreigners it does not suffice that the marriage should have been contracted in France; that it is necessary also that the will of the contracting parties should be manifested by certain acts—considering that the establishment of a domicile in France has always been considered as the most positive manifestation of that will; that, without doubt, this domicile ought to have an importance which distinguishes it from a simple residence, but that it is not necessary that it should have been authorized by the government in the terms of article 13 of the Code Napoléon, since that authorization has for its object to confer on the foreigner all the civil rights belonging to national persons, and that these rights are not necessary for the regulation of matrimonial conventions purely of the law of nations—considering that, in the case for decision, Breul, at the time at which he was married, inhabited Paris, where he had founded, more than twenty years since, an important commercial establishment; that this establishment was the only one which he carried on; that he had never preserved either domicil or residence in the country of his birth; that having collected in this country before his marriage an **[247]** important succession, he had realized all the value of it, and had placed the products in France, where already was placed the remainder of his fortune; that these facts shew, in an incontestable manner, that Breul had in France, at the time of his

marriage, a settled domicil," not naturalization, but "un domicile sérieux"*—"considering also that Breul preserved that position up to his death; that in his will he declared it in express terms, and at several times, that he was married under the rule of Community; that thus wishing to maintain, as far as he could, even after him, the seat of his fortune in France, he ordered, by this act of his last will, that the capital of which he disposed in usufruct should be placed either in French rentes or on mortgage on goods situate in France; that there cannot, therefore, exist any uncertainty as to the wish of Breul to submit to the French law the regulation of the civil conditions of his marriage; that therefore there was community of goods between the husband and wife Breul." That is the conclusion to which they came after these considerations, simply that there was community of goods between husband and wife, and in consequence of that "the Court pronounces that there is community of goods between the husband and the wife Breul conformably to the articles 1393 and 1400 of the Code Napoléon." That is the sum total.

There is no absolute decision there, though they state the consideration of his being domiciled, the great number of years he had lived in France, and likewise that the marriage was without an agree-**[248]**-ment as to community of goods, his desire that his property should remain in France, and the fact that the widow was a natural born Frenchwoman, and on that ground they pronounce there was a community of goods. Certainly there are facts in that case that do not appear to be in accordance with the cases I before cited, but the judges do not seem to rely upon them; and the decree that was made, and the only decree that was made, respects this community of goods.

*Lloyd's case* comes next, and the summary is this; "The husband, a foreigner by birth, but domiciled from a long time in France, who marries without contract in that country with a Frenchwoman, ought to be considered to have consented to the legal community established by the French law; and that, although the fact of his domicil was not accompanied by the authorization of the government necessary to enable a foreigner to establish his domicil in France, this authorization, required in order that the foreigner may enjoy all French civil rights, is not necessary for the establishment of the community," that is, the community of goods, "which is purely of the law of nations." Therefore that seems to be a case very much to the same effect as the Breuls' case. As to Mr. Lloyd himself, it really seems to be hardly known to what country he did belong, though I think he turns out from one part of the case to have been an Englishman, but where he was born or came from no one knows. He married in France without any stipulation, and the French tribunal came to this decision upon the community of goods; and beyond that the case of Lloyd does not go.

**[249]** The next case, which is the first mentioned by M. Frignet, is *De Veine* v. *Routledge*. That came before the Court of Appeal, and is reported by Sirey, and is stated to have been decided in the Court of Cassation in 1853. I have no doubt it was so, but it seems, according to the statement of M. Frignet, that the decision was the same as that which took place in 1852 in the first Court of Appeal, and subsequently in the Court of Cassation, the next highest court, and the decision seems to have been sustained by the Court of Cassation according to the evidence before me.

There are various points in that case which it is not necessary to go through, but the third is this: "The succession of a foreigner, as to moveables situate in France, is regulated by the French law, when the deceased had his legal domicil in France, and his succession is claimed by a French heir against foreigners as universal legatees." This is one of those cases referred to by the counsel where they speak of the variations in these decisions, some of them in consequence of there being French heirs, and in other cases because there are moveables in France. In this case, though there was no domicil by authorization, yet in point of fact the deceased was domiciled there according to the law of nations; but there was a French heir in the case, and the Court held that the French heir should not be injured by a disposition leaving the property in the way in which it was disposed of in the will.

"Fourthly, a holograph will, made by a foreigner in France, of which execution is demanded before the French tribunals, cannot be declared valid **[250]** unless it unites all the conditions of form recognized as essential in French law, and whatever may be in that respect the state of the law of the country to which the testator belongs;

* Sérieux: Terme de Jurisprudence. Que n'est pas simulé.—Dict. de L'Académie.

consequently, such a will is null, if it is not written entirely in the hand of the testator, or if it is not dated." They adhered to the French law on that point.

Now, another case which was cited was, I think, from the journal Le Droit; that was *Olivarez's case*. I do not know that it carries the case at all further, or puts it in any different point of view at all.

But the case of *Onslow* was very much discussed, and perhaps it may be as well to advert to that; it was a case of naturalization. The summary of it is this: "The foreigner, who was at the time of the promulgation of the law of the 30th of April, 1790, established in France, had had there a continuous domicil for five years, and had married there a Frenchwoman, was naturalized of full right, without being bound to take the civic oath." The sum and substance of this case of *Onslow's* was, that he was domiciled in France, but never domiciled according to the requirements of the Code Napoléon—never domiciled there by authorization of the government. But it turns out he had acquired a domicil, and he was domiciled there before the Code Napoléon was in force; in fact, before there was any Code Napoléon at all, he had become a naturalized Frenchman; therefore, the law applied to him as it would to a French citizen or French subject, *Onslow's case* is given at great length. It seems to have been taken before the Court of Cassation; it goes to the **[251]** highest court; and it is upon the ground I have stated that he was to be considered a Frenchman, to be domiciled there as if he had been domiciled there by authorization, because he had been domiciled at the time when this act of authorization was not necessary, being domiciled in another form, and he did not lose that domicil.

Then, other cases have been cited, very especially the case of *Laneuville* v. *Anderson*, but I think it is hardly necessary for the Court to enter into that discussion. Mr. Anderson, who went to France and made his will there, left property in France to a lady to whom he had been long attached, with whom he had resided. He obtained immoveable goods in France, real property, and he left them to that lady; therefore, the French Court declared itself competent as to the property which was in France, and pronounced the property to be the property of Madame Laneuville.

There was also a case, which I think was not mentioned in argument, but which Dr. Deane, one of the counsel in this case, was kind enough to give to the Court; a case which seemed to be very much in point, and directly contrary to the conclusion which the Court has rather intimated its intention of arriving at. It is contained in the Journal des Tribunaux. This is a decision of the Civil Tribunal of the Seine upon the 14th of March in the present year. The case is this: "Tribunal Civil de la Seine. Étranger — Domicile — Succession — Ouverte en France — Compétence.—La succession de l'étranger doit être considérée comme étant ouverte en France, lorsqu'il est constant en fait que le décédé avait dans ce pays son principal **[252]** établissement et ce alors même qu'il n'aurait pas obtenu du Gouvernement Français la jouissance des droits civils." That is the first part of the summary, and it is quite clear that it is in direct opposition to several of the cases I have mentioned, because there is an express declaration that a domicil without authorization of the government will have the same effect as, in point of fact, the authorization has. Then, "Par suite les tribunaux Français sont seuls compétens pour connaître des difficultés relatives à l'ouverture de cette succession."

Then the report proceeeds to state the case; it is very short. On the 21st of June, 1854, died at Paris the Baron de Mecklenbourg. He left neither ascendants nor descendants; his heirs according to the French law were four. "Ses héritiers, d'après la loi Française, étaient quatre, pour un quart, 1°. Mme. la Baronne veuve de Mecklenbourg; 2°. M. le Baron Christian de Mecklenbourg; 3°. Mme. la Baronne Elisabeth de Mecklenbourg; 4°. Conjointement Mme. la Baronne de Reischach née de Rœder, et Mlle. de Rœder; ces deux dernières par représentation de Julie Anne, Baronne de Mecklenbourg, décédée, épouse du Baron de Rœder. Mais, aux termes du statut Mecklenbourgeois, Mlle. de Rœder se trouvait exclue de la succession, cette loi n'admettant la représentation en ligne collatérale que jusqu'au premier dégré"; so that according to the French law they were divisible into four. The Mecklenbourg law did not quite agree with the French law, because that does not admit a representation so far off as the French law does.

"Lorsqu'il il fut procédé à l'inventaire, Mlle. de Rœder n'était pas présente, et le notaire, sur la **[253]** réquisition des héritiers, crut devoir appliquer aux parties les qualités que leur attribuait la loi du pays auquel appartenait M. le Baron de Mecklen-

bourg"; so that she not being present, the notary thought proper to apply the Mecklenbourg law, not the French law, and therefore excluded Mlle. de Rœder.

"Mlle. de Rœder a vu là une atteinte portée à ses droits, et avec l'assistance de Maier, son tuteur, elle a assigné ces cohéritiers pour voir dire que l'inventaire serait continué en sa présence, comme habile à se porter héritière pour un huitième du Baron de Mecklenbourg. Les autres héritiers ont conclu à l'incompétence du tribunal en se fondant sur ce que toutes les parties étaient étrangères, et que les biens que le défunt possédait en France ne se composaient que de meubles. Le tribunal, sur les conclusions de M. le substitut Pivard, après avoir entendu M. Dufaur pour Mlle. de Rœder, et M. Bethmont pour les défendeurs, a rendu le jugement suivant."

Then we have the judgment: "Attendu qu'il résulte, soit de toutes les circonstances de la cause, soit des documens produits, que le Baron de Mecklenbourg avait à Paris son principal et même son unique établissement; que, depuis 1828, il n'en avait conservé aucun à l'étranger. Attendu qu'il résulte de ce fait la conséquence légale que le dit Baron de Mecklenbourg avait son domicile à Paris, et que sa succession s'y est ouverte." So that, considering that he lived there—that he was under the French law and was domiciled there, though there was no authorization—considering that—"Attendu qu'il importe peu que le Baron de Mecklenbourg n'ait pas perdu la qualité d'étranger, et n'ait pas été autorisé par le Gouvernement Français à jouir en France des droits **[254]** civils; que, en effet, la jouissance légale de ces droits est indépendante de la question de domicile, qui ne repose que sur celle de savoir où est en France le principal établissement de l'étranger qui y réside—par ces motifs, le tribunal rejette le déclinatoire, se déclare compétent, dit qu'il sera plaidé au fond, renvoie la cause à quinzaine pour les plaidoiries; condamne les parties de Laperche aux dépens de l'incident." So that this Court clearly decided in this case that a domicil was sufficient without any authorization; and though it was opposed, and though it was argued by counsel on the one side and on the other, the Court was quite clear in the decision, and condemned the other party in the costs of the proceedings.

Certainly I was rather surprised, for I could not by any possibility at all reconcile this case with any of the cases which have been referred to, some of which went a very considerable length. There was a discrepancy on some points between this case and those which I have been referred to; but I was very much surprised, and did not know how this matter could be sustained. However, it does so happen that there has been an appeal from this decision, and that the superior court has reversed the judgment; they came to a different conclusion there. The heading of the case is this, and it was under the presidency of M. Delangle, the first president of the Imperial Court of Paris—"Audiences des 15, 22, et 26 Juillet, 1856. Succession ouverte en France—Étranger—Domicile—Compétence—Succession du Baron Frédéric de Mecklenbourg.—Les tribunaux Français sont incompétens pour statuer sur les difficultés relatives à l'ouverture de la **[255]** succession d'un étranger décédé en France, lorsque les héritiers sont étrangers, que les immeubles sont situés hors de France, lorsqu'il est constant, en fait, que le défunt a conservé avec le gouvernement dont il était sujet, les rapports qu'ils jugeait les plus propres à maintenir sa nàtionalité. En vain opposerait on que depuis longtemps il habitait la France et qu'il avoit pris part à des spéculations de diverse nature. Ces circonstances ne sauraient entraîner la renonciation au domicile d'origine."

The superior tribunal comes therefore to the decision of reversing the sentence that was so pronounced by the inferior court.

Well, then, this comes to be a case directly in point, and shows that this domicil by authorization is necessary by the French law; and therefore the conclusion to which the Court would arrive upon the evidence which has been given upon the testimony supplied by the French witnesses, by these eminent jurists, five on the one side and three on the other, considering the nature of the several cases which have been adverted to, and especially considering the last case that was decided, is, that it seems to me to be quite clear that it is necessary in order to establish such a domicil in France as to affect the succession of the testator and the mode of making wills, that that domicil should be by authorization.*

---

* In the course of his judgment, in *Wright's Trusts*, 25 L. J. Ch. 631, Vice-Chancellor Wood observes: "I have been but very little assisted by the French opinions. M.

[256] In this case it appears to me that the deceased was domiciled in France according to the jus gentium, but no further; that there was no domicil by authorization, and consequently she was entitled to the privilege of making an English will, more especially when all the relations and all the parties who were benefited under the will, with some trifling exception, were English people, and domiciled in England; and considering that all the property was not in France, but, with the small exception of the goods in the apartments, was in England, I think the fact of making the will in accordance with the English form was perfectly right and proper, and it will be the duty of the Court to grant probate of the paper propounded.

I should have mentioned, in addition, the case of *Collier* v. *Rivaz*. In that case my learned predecessor came to a similar decision. It is quite true that did not relate to a domicil in France, it was in Belgium; but it appears that in Belgium the Code Civil of France is adopted, it was therefore under the same law. There were two eminent jurists examined in that case, and they came to the same opinion as the five gentlemen in the present case. Therefore the Court pronounced for the will in the English form, made by an English subject domiciled according to the law of nations in Belgium, but not domiciled there by the authority of the government of that country. It is the duty of the Court to follow in the same course, and accordingly I give my sentence for the will which was executed by the deceased, for there is no doubt whatever of the due execution of the will and the capacity of the deceased. The gentleman has been examined who [257] got the instructions from the deceased, who drew up the will, and was present at the execution, and he deposes in such a way as to leave no doubt on this subject. I therefore shall pronounce for it.

There is only one matter more to be considered, that is with respect to the question of costs. I think it was quite right on the part of Miss Bremer to contest this will. There was so much doubt in the opinion of the French jurists and some of the French decisions as to the validity of an English will in the English form, that I think she was justified in calling in the probate of the will, and, therefore, I shall not condemn her in the costs of the proceedings.

But there is another part of the case, and that is with regard to Mr. James Bremer, who was one of the executors of the will. He took probate of it, and he was acting under it while it was an outstanding probate. I do not say there was anything improper after he brought in the probate in obedience to the monition that was served upon him. I do not say he was bound to defend the will, if he took a different view of the law. He had been advised that it was not a good will, that it could not be sustained, therefore I do not know that he was called upon to join Mr. Freeman, his co-executor, in supporting this will. I think he might have been justified in joining Miss Bremer, who was also a legatee. I think he might have been justified in joining her in opposition to the will, but I think that the course which he has taken is hardly that which can receive the sanction of the Court. It is left to Miss Bremer to carry on the suit; Mr. Bremer did not join her, but he conducted the cause on her behalf; and then when her plea is given in, [258] and witnesses are produced and examined, he takes it upon himself to cross-examine them as if he was an adverse party.

Now, an application was made to the Court in the course of the proceedings to prohibit Mr. Bremer from addressing interrogatories to the witnesses, who were in point of fact his own witnesses. The Court, however, thought it was not at liberty to take that step, and to prohibit him from the course which he thought proper to take. The interrogatories which he might address to them might have been very proper. I thought it better that he should be allowed, if he chose, to pursue that course, but I confess at the same time the Court did not see with perfect satisfaction the course pursued, it did not quite become him, not that anything essentially wrong was intended, but I think the Court must do something to mark its sense of that proceeding. I shall not visit him with a serious penalty, but I think I must condemn him in

---

Cremieux has assumed throughout the domicil to be English. M. Dutilleul has not assumed that, but has argued upon it in this way, in which he appears to be clearly wrong: he says that without a licence from the government the rights of domicil cannot be acquired. Now, three authorities have been cited which contradict that; and therefore I have not been able to derive any assistance from the opinion founded upon that hypothesis."

something nomine expensarum. I think I shall not do injustice if I condemn him in £50 nomine expensarum.

I pronounce for the will. Of course Mr. Daniel Alexander Freeman, the executor, is entitled to the probate; whether Mr. Bremer will join him I do not know; the Court has not the power of excluding him.

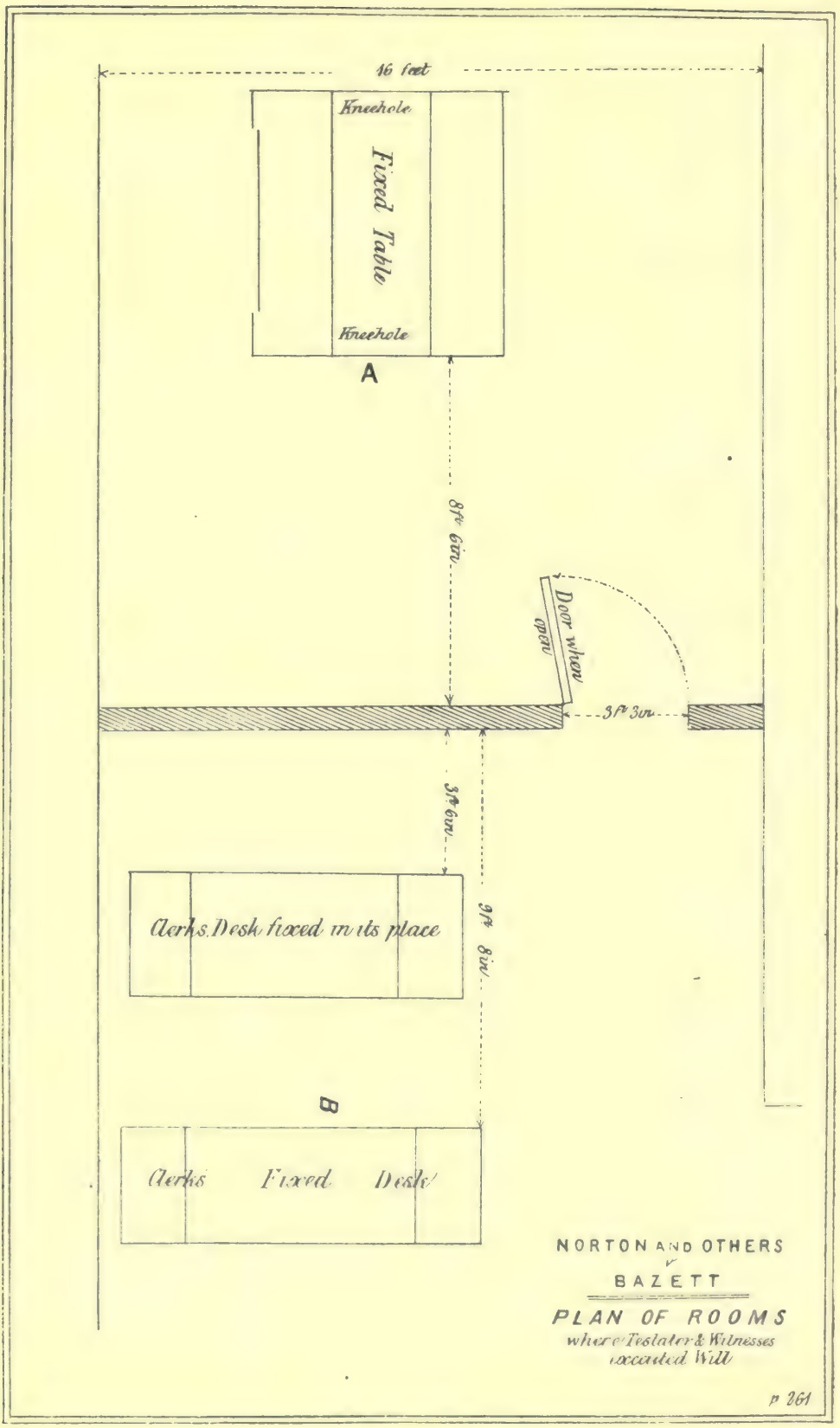
**[259]** NORTON *v.* BAZETT.* Prerogative Court, July 19th, August 4th, 1856.—7 Wm. 4 and 1 Vic. c. 26, s. 9—Subscription in the presence of the testator.—Where the subscription of the witnesses takes place in a different room from that in which the testator is, he must be proved to have been in a position whence he could have seen the witnesses as they subscribed their names.

[S. C. 2 Jur. (N. S.) 309; 4 W. R. 830. Referred to, *Carter* v. *Seaton*, 1901, 85 L. T. 76.]

The deceased left a will in his own handwriting, executed according to the evidence of the subscribing witnesses, under the following circumstances:—

During the morning he was engaged in writing in the private or inner room of the office, in which room the deceased and his partners usually sat. The outer room was the clerks' office, where the witnesses sat; the private room was entered from the outer room by a door which was habitually kept wide open, that is, the door was habitually rather more open than it would be if standing at right angles with the wall. The deceased was a particular man with reference to his clerks, and the door was kept thus open to enable him to look after them. It stood open in this way on the morning in question, and during the morning the witnesses passed into the deceased's room several times, and observed that he was engaged writing on his private affairs. This was apparent to them from the nature of the paper on which he was writing. Between two and three o'clock in the afternoon the deceased, being still in his room, called to the witnesses to come to him, and on entering they saw him sitting at his **[260]** table with two sheets of the said paper before him, both written upon. His table was in the centre of his room, and he was sitting at it, with his back towards the partition wall between his room and theirs. As they passed through the doorway his chair was a little on their left hand. Immediately as they entered, the deceased said, "This is my last will and testament which I have made, and I request you to witness my signature." The two sheets of letter paper before mentioned lay before him at the time, and he at once signed his name "William Norton" at the end of the will on the second of the two sheets of paper, in their presence. They were both standing by his side at the time, and he remained sitting in his chair. He then handed to them the last sheet of the will, and requested them to sign their names to it, and to add the words, "Witnesses to the signature of William Norton." The table in the deceased's room was full of papers, and so, for convenience in signing, they took the said last sheet to their desk in the outer office; the other sheet of the will remained on the deceased's table. They went into the outer office and there signed their names respectively to the said last sheet in each other's presence, standing, while they did so, at the corner of the desk which was nearest to the said doorway. They so signed their names as witnesses, and added the words, "Witnesses to the signature of William Norton." The desk could be seen from some parts of the said private room, but not from all parts of it, and not from that part at which the deceased was sitting when they left the room to sign their names. He was then sitting with his back to the door; his chair was not two **[261]** yards from the partition wall; and if he had moved a yard to his right hand from his chair, he could have seen the desk and witnesses as they signed their names; whether he did so move, the witnesses had no means of saying. As soon as they had signed their names, one of them returned alone into the inner room with the second sheet of the will, and gave it to the deceased, who then read over the signatures. When the will was brought back the deceased was standing up at that side of his table which was parallel with the said partition wall, with his back to the wall, and exactly in front of the chair on which he had been sitting when they left the room. He was apparently arranging his papers before leaving the office. How long he had left his chair they could not judge. They neither saw nor heard him between their leaving and returning to his room. The door between the two rooms remained open

* This case has been accidentally misplaced.


16 feet
Kneehole
Fixed Table
Kneehole
A
8ft 6in
Door when open
3ft 3in
3ft 6in
Clerks Desk fixed in its place
9ft 8in
B
Clerks Fixed Desk
NORTON AND OTHERS
v
BAZETT
PLAN OF ROOMS
where Testator & Witnesses executed Will
p 261

during all the transaction. They were absent from the deceased's room about two minutes whilst so signing their names.

Annexed to the interrogatories was the plan of the two rooms, on which the witnesses were requested to mark the places where the deceased sat and stood in the inner room, and they subscribed the will in the outer room.

A. was the place where the deceased was.

B. was the place where the witnesses wrote their names.

Sir J. D. Harding, Q.A., and Twiss, in support of the will.—Every presumption is in favour of a due execution of the will; the presence, if not actual, was constructive, and there was nothing to **[262]** shew that the testator did not move to some part of the room from which he might have seen the witnesses subscribe the will. The cases in which the question of presence has been considered may be divided into two classes, those in which the deceased was bedridden, or prevented from seeing by some physical impediment, in which the will has been pronounced against; and those in which, there being no physical impediment, the will was pronounced for, on the ground that as the deceased might have seen the witnesses, if he pleased, the presumption was that he did see them; and the present case is of this latter class. (They cited *Shires* v. *Glascock*, 2 Salk. 688; *Casson* v. *Dade*, 1 Br. Ch. Ca. 98; *Newton* v. *Clarke*, 2 Curt. 320; *Tribe* v. *Tribe*, 1 Rob. 775; *Hudson* v. *Parker*, ib. 14; *Tod* v. *Winchelsea*, 2 C. & P. 488; *Winchelsea* v. *Wauchope*, 3 Russ. 441.)

Jenner and Deane, contrà.—The distinction taken on the other side is unsound. The true principle to be extracted from the cases is this, that if all the persons concerned are in the same room, the act shall be presumed to have been done in their presence; and that presumption requires to be rebutted by proof that they could not, from some cause or other, see each other. But if the testator and the witnesses are in different rooms at the time of their respectively signing the instrument, then the presumption changes, and you must shew that they could, as they were placed, see each other. Thus, in *Casson* v. *Dade*, had the carriage not been put back, the proof would have failed. The true and only safe test is, whether the witnesses and the **[263]** testator were within the line of sight; unless this be proved, the execution is bad. (After commenting on the cases already referred to, they cited *Davy* v. *Smith*, 3 Salk. 395; *Doe* v. *Manifold*, 1 M. & S. 294; *In the Goods of Ellis*, 2 Curt. 395; *In the Goods of Colman*, 3 Curt. 118.)

*Judgment—Sir John Dodson.* The question in the present case is, whether the witnesses subscribed their names to the paper propounded in the presence of the testator within the meaning of the word "presence" used in the 9th section of the Wills Act. The will is in the deceased's handwriting, on two sheets of paper, dated at the beginning the 13th, and at the end the 14th of July, as if he had been occupied two days in writing it out. The witnesses state that on the 14th he was busy in the inner room of his office writing on private affairs during the morning; that in the afternoon he called them into that inner room, from the outer room in which they sat, signed his name in their presence, and desired them to attest his signature, whereupon they returned to the outer office, wrote their names, and one of them brought back the paper. The door between the two rooms was open; but it appears from the evidence, and the plan which was brought in, that the place where the deceased sat in the inner room, with his back to the wall between the two rooms, was not visible to the clerks standing at the desk where they wrote their names. They could not see the deceased, nor could he see them, unless he had got up from the chair, and moved some two or three steps towards the open **[264]** door. The evidence is, further, that when the clerk who brought the will came into the room, the deceased had risen from his chair, but was standing in front of that chair—had in fact merely got up to sort his papers, or for some such purpose; and there is no evidence whatever to shew that he moved from the table to any part of the room from which he could see the witnesses.

In the course of the argument many, if not all, the cases which could assist the Court in forming its judgment were cited. In *Newton* v. *Clarke*, 2 Curt. 320, the whole transaction took place in one small room, with only the curtain at the foot of the bed to interrupt the view; and Sir H. Jenner held the will to be well executed, observing that it would be somewhat strange to say that what was done by a person in the same room, and in the hearing of another person, was not done in his presence. *Hudson* v. *Parker*, 1 Rob. 14, has not, I think, any very great bearing upon the

present case. *Tribe* v. *Tribe*, however, in the same volume, p. 775, seems, until closely examined, at variance with *Newton* v. *Clarke*; but it is clear that in *Tribe* v. *Tribe* it was proved that the deceased could not by any possibility have seen the witnesses, and on that ground it was held that although the witnesses subscribed in the same room, still they did not so subscribe in the presence of the deceased. I should observe that most of the cases cited by counsel were also cited in *Newton* v. *Clarke*. In 3 Curt. 118, there is the case *In the Goods of Colman*, which very closely resembles the present; and I can find no more sure or certain guide for my instruction than that case. The only distinction is, that there the deceased could not have moved—**[265]** here he was in a situation where he could not see without moving; and upon this distinction it has been suggested that he might have moved, and then he would have seen; but there is no proof in support of the fact suggested; there is no proof whatever that he did move; and I think it is too much for the Court to presume, that in the short space of time occupied by the witnesses in signing their names he did move. The conclusion to which I must come is, that where the witnesses subscribe in a different room from that in which the testator is, they must be shewn to have subscribed in a position visible to the testator; that is not proved here, and I must pronounce against this will. I do so with much regret, but I have no discretion; and judging for myself, and in my own conscience, I cannot hold that there was a constructive presence such as would justify this Court, whatever the Court of Appeal may do, in pronouncing for this will.

**[266]** IN THE GOODS OF W. GREATA. Prerogative Court, Nov. 14th, 1856.—15 & 16 Vic. c. 24—Operative signature—Words below signature.

[S. C. 2 Jur. (N. S.) 1172; 5 W. R. 42.]

On Motion.

The deceased left a will, in which there was no appointment of executors. There was no attestation clause; and in the place where this clause is generally written were the words "John Greata, executor," these words being written on the left of and a little lower than the signature of the testator. One of the subscribing witnesses deposed that the words were so written before the will was executed.

On the 6th of November Deane moved for probate to John Greata as executor. He cited *In the Goods of Powell*, 1 Rob. 421, and submitted that since the words were not underneath, and did not follow the signature, they came within 15 & 16 Vic. c. 24, s. 1, and were entitled to probate.

*Sir John Dodson* directed the motion to stand over, and on the 14th rejected the motion, observing that the words were not strictly speaking underneath the signature, but they were below; and though they did not follow, they certainly did not precede the signature, therefore they could not be included in the probate. The case was so far fortunate, that John Greata was one of the residuary legatees, so that he might take the administration with the will annexed.

**[267]** IN THE GOODS OF JOHN TONAR. Prerogative Court, Nov. 6th, 1856.—Executor—Revocation of appointment.

[S. C. 5 W. R. 42.]

On Motion.

John Tonar made his will with a codicil. By his will the deceased gave the residue of his property of every description to A. B. C. and D., upon the trusts in his will declared concerning the same; and of his said will he appointed the said A. B. C. and D. executors. By his codicil he revoked the gift of the residue of his property so given to A. B. C. and D. and in lieu thereof gave the same to A. B. C. and E., upon the trusts in his will and the codicil expressed and declared. And he appointed the said A. B. C. and E. executors of his will, and confirmed the same in all other respects.

Spinks submitted that as by the will A. B. C. and D., the residuary legatees in trust, were alone appointed executors, the revocation by the codicil of the bequest of the residue to them, and the bequest of such residue to the said A. B. C. and E., and the appointment of the said A. B. C. and E. as executors, was a revocation of the appointment of D. as an executor by the will.

*Sir John Dodson.* I perfectly agree with your interpretation, and decree the probate in accordance with the prayer.

**[268]** JENKYN *v.* JENKYN. Consistory Court of London, Nov. 18th, 1856.—Adultery—Verdict for goods supplied to the wife after she had left her husband's house—Pleading.

[S. C. 5 W. R. 43.]

This was a cause of divorce, by reason of adultery, brought by the husband against the wife. Several pleas had been given in, and an allegation was now before the Court on behalf of the wife, pleading that "W. brought an action against the husband, for the board and lodging of and for money lent to the wife; that the husband defended the action on the ground of the wife's adultery; that the wife was examined as a witness for the plaintiff and cross-examined by the defendant's counsel, and several witnesses examined on the defendant's part to prove the adultery, and notwithstanding their evidence the jury found for the whole amount claimed."

Bayford opposed the admission of this allegation.

Addams and Spinks, in support.—*Fraser* v. *Fraser*, 5 N. C. 20, was cited, where the wife had been allowed to plead a verdict for the defendant in a crim. con. action.

*Judgment—Dr. Lushington.* The present allegation is offered as responsive to **[269]** certain additional articles brought in on behalf of the husband: and if the matter of this allegation be legal evidence, I am bound to admit it; if it be not, I am bound to reject it. There can be no doubt that verdicts against the alleged adulterer have been frequently admitted in pleading here—not however as proof of the adultery, but to shew that the husband has not shrunk from exposing his witnesses to a vivâ voce examination in another Court. But I repeat, the verdict is no evidence of adultery; and I well recollect a case before Sir H. Jenner Fust, in which he pronounced the husband to have failed on the ground that he had but a single witness; and though the husband had obtained a verdict and damages, yet he would not admit the verdict as adminicular evidence: *Evans* v. *Evans*, 1 Rob. 165. In *Fraser* v. *Fraser* the Court admitted the fact, that the husband had brought his action and failed—to be pleaded, not to shew that no adultery had been committed, but to shew that perhaps the verdict against the husband was founded on his neglect or connivance. But here is a verdict in an action between different parties, and for a totally different purpose. The very fact that the wife was examined shews that the jury gave their verdict from other facts which were brought before them, since she would not be a witness to prove her own innocence. All the usual objections to verdicts being pleaded apply to this case; and it would indeed be a grievous error to admit such an allegation. I therefore reject it.

Bayford applied for the costs of the allegation, but the application was refused.

**[270]** IN THE GOODS OF ELLEN STEINORTH. Prerogative Court, Nov. 22nd, 1856.—Administration to the Crown's nominee decreed, but not extracted, revoked at the instance of a creditor, without a fresh warrant; and an administration granted to the creditor, with the consent of the Queen's proctor, and upon the original decree and advertisements on behalf of the Crown.

[S. C. 3 Jur. (N. S.) 72; 5 W. R. 123.]

On Motion.

This deceased died intestate and without any known relation, and on the 26th of April administration was decreed to Her Majesty's nominee after the usual decree and advertisements. It was afterwards ascertained that the deceased had died almost insolvent, and the Queen's proctor declined to take out the administration. A creditor then applied for administration; and on his behalf, and with the consent of the Queen's proctor, the Court was moved to revoke the administration decreed to the Queen's proctor, and to decree the administration to the creditor, without compelling him to take out a fresh decree or advertise. But the motion was directed to stand over, on a suggestion that the administration granted to the Queen's nominee could not be revoked without a warrant under the sign manual.

Deane renewed the motion, and referred to the case of *John George Stockwell*, in which case administration was, on the 6th of November, 1847, decreed to Her Majesty's nominee. The Queen's proctor did not take out the administration; and a **[271]** creditor then took out a decree with the usual intimation against the Queen's proctor; and on the 28th of April, 1848, no appearance being given to that decree, the administration was decreed to the creditor. Again, *In the Goods of Goldham* administration was, on the 14th of June, 1849, decreed to Her Majesty's nominee;

the Queen's proctor did not take out the administration; and on the 17th of January, 1850, the administration was revoked, and administration granted to a creditor. In neither case was a fresh warrant required.

*Sir John Dodson.* If it had not been for the precedents referred to I should have hesitated a long time before granting this motion, which may now go as prayed.

ERNEST *v.* EUSTACE. Prerogative Court, Nov. 22nd, 1856.—Administration—Practice—Judgment—Simple contract creditor.—Where a judgment creditor and a simple contract creditor are both applying for administration, the Court will decree the administration to the simple contract creditor if his debt be the largest, and the majority of interests be in his favour.

[S. C. 2 Jur. (N. S.) 1172; 5 W. R. 123.]

On Motion.

Sir W. C. Eustace died in February, 1855, leaving a will and codicil. One of the executors **[272]** and the residuary legatee was abroad, and gave no appearance to a decree served in the Royal Exchange on his agent; the other executor renounces. The deceased died possessed of shares in the Universal Salvage Company, which, in the year 1848, was ordered to be wound up by a decree of the Court of Chancery, under 11 & 12 Vic. c. 45; and in November, 1848. Mr. Ernest was duly appointed official manager. The deceased was made a contributory; and in June, 1855, an order was made on him for payment of the sum of £23, 15s., as a contributory, to the official manager. This order was alleged to have been since registered as a judgment. The death of the deceased having been notified to the Master charged with the winding-up of the company, he, in November, 1855, made a further order, directing the proper steps to be taken for obtaining letters of administration, with the will and codicil annexed; and the usual decree, with intimation, was thereupon taken out by Mr. Ernest as a creditor.

Bayford moved the Court to decree the administration to Ernest, as a judgment creditor. (He referred to the Affidavit of Debt; The Orders of the Master in Chancery; 11 & 12 Vic. c. 45, ss. 93, 95; and 1 & 2 Vic. c. 110, ss. 18, 19.)

Addams, for Robert Fitch, opposed the motion, and asked for the administration to be decreed to Fitch, as a simple contract creditor to the amount of £115, 0s. 6d. The will and codicil were brought in in obedience to a monition against the solicitors of **[273]** the deceased, extracted by Fitch before any steps were taken on behalf of the official manager.

*Sir John Dodson.* The question is, whether the administration shall be granted to a simple contract creditor for £105, or to a judgment creditor, assuming Mr. Ernest to be so, for £23—the simple contract creditor being also the person in this case preferred by other creditors. I am not aware that there is any rule in this matter binding upon the Court. The registrar stated that the usual practice of the Court was to prefer the judgment creditor; but that I do not hold to be imperative upon the Court when the body of the creditors prefer the simple contract creditor, and the judgment debt is small. There are two cases in 2 Lee: *Kearney* v. *Whitaker*, 324; and *Carpenter* v. *Shelford*, 502; which, so far as the marginal note goes, seemed decisive as to the right of the judgment creditor; but when examined, they fail entirely, and leave the point untouched. In this case I shall not grant the administration to the judgment creditor, but to the simple contract creditor; and I take this course because the latter is the largest creditor, and is supported by a majority of interests.

**[274]** IN THE GOODS OF H. P. COLLETT. Prerogative Court, Dec. 9th, Jan. 23rd, 1856-7.—Practice—Executrix during widowhood—Executors according to the tenor.—A. appointed his wife executrix during widowhood; C. and D. residuary legatees in trust "to pay debts, funeral and testamentary expenses," &c. The widow alone proved, and died without having married again, leaving B. executor of her will.—Held, that C. and D. were executors according to the tenor, and entitled to probate of A.'s will.

[S. C. 3 Jur. (N.S.) 72; 5 W. R. 251. Distinguished, *In the Goods of Punchard*, 1872, L. R. 2 P. and D. 370.]

The deceased died in March, 1855, leaving a will in his own handwriting, of which he appointed his wife as executrix "during her widowhood, and so long as she shall continue unmarried." After legacies to his wife, he left his real and personal property

to residuary legatees, upon trust, among other things, to pay debts and funeral and testamentary expenses. The consent of the widow in writing was made necessary in case the trustees thought fit to dispose of or convert any of the property, or in case another trustee was to be appointed. The widow proved the will in May, 1855, and died in September, 1856, without having remarried. She left a will of which she appointed an executor.

Phillimore, for the residuary legatees in trust.—The residuary legatees in trust, by the direction in the will to pay debts and funeral and testamentary expenses, were constituted executors according to the tenor; they would therefore have been entitled to have been joined in the probate with the widow in her lifetime, and after the death of the executor who proved would be entitled to come in to take probate: *Grant* v. *Leslie*, 3 Phil. 116; *Lynch* v. *Bellew*, 3 Phill. 424; *In the Goods of Fry*, **[275]** 1 Hagg. Eccl. 80; *Wms. Exors.* 250; *Harrison* v. *Harrison*, 10 Jur. 273, 1 Rob. 406. Again, the widow had no transmissible interest; the limitation of her executorship during widowhood, and so long as she continued unmarried, would prevent her executor from keeping up the chain of representation: *Bond* v. *Faikney*, 2 Lee, 371.

Bayford, for the executor of the widow.—The widow was executrix in the fullest sense of the word during widowhood. The contingency which might have determined her character as such not having occurred, she remained in the full enjoyment of that power up to the last moment of her life. Admitting that an appointment to pay debts and funeral and testamentary expenses would, standing alone, constitute an executor according to the tenor—still, in this case the limitations on the power of the trustees on those matters, where the widow's consent in writing was necessary, entirely altered their character.

*Judgment.—Sir John Dodson.* On looking through the cases cited by counsel, I am of opinion that the residuary legatees in trust are, by the direction in the will to pay debts and funeral and testamentary expenses, constituted executors according to the tenor, and as such entitled to take probate of the will of the deceased. That the consent of the wife was necessary to enable them to do certain acts does not seem to me sufficient distinction from the decided cases.

Bayford asked for the costs of his party, on the **[276]** ground that it was a question that could not be decided in the registry, and arose out of the ambiguous wording of the will itself.

*Sir John Dodson* decreed costs out of the estate.

SPRATT *v.* SPRATT. Consistory Court of London, Jan. 27, 1857. — Pauper — Surgeon.—A surgeon was admitted a pauper, and swore that he had no patients or income. The Court refused to dispauper him on the allegation of the adverse party, that he was capable of earning an income.

[S. C. 5 W. R. 323.]

This was a cause of divorce by reason of adultery, promoted by the husband against the wife. The husband had been admitted a pauper; and the wife prayed that he might be dispaupered. An Act on petition was brought in, from which it appeared that the husband was a surgeon, and had been recently discharged under the Insolvent Debtors' Act. The wife however alleged that he was again in practice, and receiving or earning or at least capable of earning an income. The husband denied that he had any income whatever, and swore in affidavit that he had no patients since his discharge.

**[277]** Deane, for the wife, cited *Walker* v. *Walker*, 1 Curt. 560.

Tristram, for the husband.—The distinction between the present case and *Walker* v. *Walker* is, that here the husband cannot go into the market and sell his labour; he must wait till patients come to him. In *Walker* v. *Walker* the man was a skilled artisan, and if he chose to work and earn an income, had nothing to do but to offer his labour and be employed.

*Judgment.—Dr. Lushington.* I think the counsel for the husband has taken the true distinction between this case and that referred to. I entirely disbelieve the husband's statement in that case, that no one would employ him; but in the absence of all proof to the contrary, how can I disbelieve the statement that the husband here has no patients, and consequently no income. The difference lies in the occupation of the two men. If proof can hereafter be given that Mr. Spratt is earning an income, the case may be brought before me again, but at present I cannot dispauper him.

**[278]** PAGE *v.* DONOVAN AND HANKEY. Prerogative Court, Feb. 9th, 1857.—Will—Execution—15 Vic. c. 24.—The deceased made her will in France, and signed her name in the presence of a sufficient number of witnesses, not at the end of the will, but at the end of a notarial minute which followed in the same sheet with the will, and which minute was also subscribed by the witnesses.—Held, a good execution.

[S. C. 3 Jur. (N. S.) 220; 5 W. R. 324.]

The question before the Court, and raised on the admission of an allegation propounding the will, was, whether the signature of the deceased was in any position with respect to the end of the will so as to give effect to that will under the 15 & 16 Vic. c. 24, s. 1. The will was prepared by a French notary at Bordeaux; and after writing the will, he added, on the same sheet of paper and immediately following the end of the will, a notarial minute in these words: The present will has been dictated by Madame Lovelace, born Vanneck, to Mr. Verrière Chaisy, the undersigned notary, who has written it with his own hand such as she dictated it to him; and who, after having finished writing it, read it over to the testatrix in the presence of the witnesses, who declared that she well understood it, and persisted in the dispositions which she had just made. All that is above expressed and mentioned took place in the presence of Mr. Pièrre Cirode, tinman, of Mr. Matthieu Henri Hughes, stationer, of Mr. Jerome Latapie, furniture dealer, and of Mr. Pièrre Mignel, sworn interpreter—all **[279]** dwelling and living at Bordeaux, Rue Huguerie, the first at No. 9, the second at No. 4, the third at No. 6, and the last-named at No. 61—witnesses hereunto required, called by the testatrix, previously informed by the notary of the conditions prescribed for their capacity, of which an Act done and passed at Bordeaux, at the residence already mentioned of the testatrix, the said day, the 14th of April, 1852, about three o'clock in the afternoon; and the testatrix has signed, with the four witnesses and the notary, the minute of these presents, which remains with the latter, after reading over the whole will already mentioned by the notary to the testatrix in the presence of the witnesses. The minute is thus signed: Maria Lovelace, Pièrre Cirode, H. M. Hughes, Latapie Jerome, P. Mignel, and Verrière Chaisy, the latter a notary.

Addams, in opposition to the admission of the allegation.—Under 1 Vic. c. 26, s. 9, and especially with reference to the construction put upon that section of the Act by the late judge of the Prerogative Court, probate would have been refused of this will as not duly executed; but the Wills Act Amendment Act subjects the case to different considerations. Section 1 of that Act enumerates various circumstances, under none of which shall the position of the signature of the testator be held to effect the due execution of the will. But the position of the signature of the testatrix in this case falls within none of the enumerated circumstances, unless indeed it is the following: that the due execution of the will shall not be effected by the circumstance of the signature of the testator **[280]** being placed among the words of the "testimonium clause, or of the clause of attestation." It may possibly be contended that the signature of the testatrix is among the words of the testimonium or attestation clause in this case. But such is not the fact. After the enumeration of circumstances, the Act proceeds: "And the enumeration of the above circumstances shall not restrict the generality of the above enactment." What is the "generality" of the enactment which is so not to be restricted by this enumeration of circumstances? If it had been this: "Every will shall, so far only as regards the position of the signature of the testator, be valid if the signature shall be so placed that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will"—then perhaps this will would have been well executed. But the enactment is this: "If the signature shall be so placed at, or after, or following, or under, or beside, or opposite to, the end of the will as to make it apparent"—and so on. To let in the generality of the enactment, the signature must be in one of those positions. But the signature in this case is in neither of those positions. It is neither at, nor after, nor following, nor under, nor beside, nor opposite to, the end of the will. It is, and purports to be, not under the will, but under a notarial minute of the will having been written from the dictation of the testatrix, and of its having, when written, been read over to and approved by her in the presence of certain witnesses; and it is this minute, and not the will itself, that the signature of the testatrix and the signatures of the witnesses both are and purport to be appended to.

**[281]** Jenner, contrà.—Even if the Act were not a remedial Act, and entitled to a liberal construction, this case would fall within the very words of the first section.

The signature is at the end of the minute, and the minute immediately follows the will. The minute is but a publication of, and an attestation clause to, the will. Why was the minute written? To give effect to the will. Why was the minute signed? To complete and give effect to the whole. Then it is apparent on the face of the will that the testatrix intended to give effect by such signature to the writing signed as a will. But supposing there was no minute at all, but a blank space left where the minute now appears, still the signature would have effect under this Act.

*Judgment—Sir John Dodson.* The argument against you was, that this signature was written to give effect to the minute only, apart from the will. However, taking this as a remedial Act, I have no doubt that the signature is in a position to give effect to the will; and I admit the allegation.

**[282]** HARMAR *v.* HARMAR. Consistory Court of London, Feb. 14th, 1857.—Deduction from alimony—Practice.—The husband cannot deduct from permanent alimony sums paid by him on account of debts incurred by the wife before the allotment of alimony pendente lite.

[S. C. 3 Jur. (N. S.) 168; 5 W. R. 413.]

This was an application on the part of the husband to be allowed to deduct from permanent alimony certain sums which he had paid for debts incurred by his wife before either the allotment or the payment of alimony pendente lite.

Addams and Twiss for the husband.

Bayford and Spinks for the wife.

*Judgment—Dr. Lushington.* The parties to this suit were divorced at the instance of the wife, on the 2nd day of July, 1856; and on the 8th day of August following permanent alimony was allotted, at the rate of £160 per annum. The citation was returned on the 10th day of November, 1855, and alimony pendente lite was allotted on the 10th day of February, 1856. It is alleged that the alimony (not specifying whether alimony pendente lite or permanent alimony) has been paid as it became due.

The first inquiry is, whether this fact so pleaded is true. As to **[283]** alimony pendente lite, this averment is clearly contrary to the truth, and so appears to be from the records of the court. I will not repeat at length the averments contained in the answer to the act on the part of the wife, and which are not controverted. The result is, that so far from the alimony being paid when due, it was only obtained after much delay and frequent application to the Court. I am somewhat surprised that under such circumstances so erroneous a statement, if it refers to alimony pendente lite, should have found its way into these pleadings. With respect to permanent alimony, nothing whatever has been paid; and therefore the allegation is, to use an expression scarcely sufficiently strong, wholly erroneous. It is under these circumstances, not certainly the most auspicious, that the Court is asked to stop the payment of permanent alimony, by deducting from it certain debts incurred before alimony pendente lite was decreed. I believe this application to be entirely novel; I am not aware of any case in which an application in any degree similar has been made to any ecclesiastical court. In *Brisco* v. *Brisco*, 2 Hagg. Cons. 199, Lady Brisco had incurred very large debts, for which her husband was made responsible, and that for the purpose of putting her husband to expense. There the application was made before alimony was allotted, and the Court very properly took the misconduct of the wife into consideration in allotting the amount of alimony pendente lite. This, however, is a very different case. Here I am asked to deduct from permanent alimony expenses incurred by the wife, principally on account of her maintenance from the period of **[284]** separation up to the allotment of alimony, which if duly paid would exempt the husband from responsibility. It is not alleged that during that period the husband furnished the wife with any means of subsistence whatever; and it is now established by the decree of this Court, that by reason of his cruelty, the wife was justified in separating herself from him. Under such circumstances, I will not enter into a consideration whether the expenses were extravagant or not; the whole fault is at the door of the husband; he compelled her to leave his home, and left her without the means of subsistence, and so situated it might be difficult for her to get credit and live economically. But be this as it may, the application is altogether too late, and such a deduction from permanent alimony would be without precedent; and as many such causes must de facto have occurred, and no such application made, it is unwarranted by the practice of the Court.

**[285]** CAMPBELL *v.* CAMPBELL. Consistory Court of London, March 16th, 17th, Apr. 22nd, 1857.—17 & 18 Vic. c. 47—Practice—Condonation—Delay.—As a general rule, the Court will always accede to an application to examine witnesses vivâ voce; and where such application is intended for the whole cause, the pleadings must be concluded before any of the witnesses are examined. Condonation, or the renewal of conjugal intercourse, requires strict proof. In matrimonial causes there are few reasons for delay.

[S. C. 5 W. R. 579.]

This was a cause of divorce by reason of adultery, brought by the husband against the wife. She pleaded condonation; and an application was made on her behalf, for a requisition to examine witnesses in Italy and Australia. The libel was brought in on the 31st of November; the wife's responsive allegation was brought in on the 13th of March; and a further allegation, on the part of the husband, containing fresh charges of adultery, on the 14th of March.

Addams and Twiss for the husband.

Jenner and Deane for the wife.

*Judgment—Dr. Lushington.* Before I address myself to the particular circumstances of this case, I think it right to make a few observations upon the 17 & 18 Vic. c. 47, which directs a particular mode of taking evidence in ecclesiastical courts which did not exist before. I am not surprised that there has not been a clear understanding as to this statute, because it gives no directions whatever as to the manner in which its provisions shall be carried into execution. It is manifest that it embraces the whole cause from the **[286]** beginning to the end, in part or altogether and at any time. The case may be heard entirely vivâ voce, or in part by deposition or affidavit; and the Court is at liberty, even after there have been depositions or affidavits to examine the persons who made them vivâ voce. It appears advisable, when the application to take the evidence vivâ voce is intended for the whole of the cause, that all the pleadings should be concluded before any evidence is received. A different course may be followed where the application is made in the course of the cause. With respect to applications of this kind, it is primâ facie the duty of the Court to apply the Act, and direct the evidence to be given vivâ voce whenever the application is made. This must be the general rule, for it is clear that the inconvenience of stating special reasons would be very great; much delay and expense would be incurred; and indeed such a course would in many cases be very prejudicial, as it might disclose the nature of the case. With regard to the proof of adultery in the present case, it appears to me wholly unnecessary to enter into any detail of the evidence; indeed it is not and cannot be contended, that the proof of criminal intercourse is not clear and decisive. The parties were originally resident in Australia. In 1856 Mrs. Campbell with six children left Australia, and arrived in this country in April. Mr. Smith, who had been in partnership with Mr. Campbell, received her, and took her to lodgings at 17 Bloomfield Road. Mr. Garstin immediately made his appearance, and became an inmate of that house. There is no direct evidence how that acquaintance commenced; but from the **[287]** declaration of Mrs. Campbell, she and her children received much attention from him during the voyage from Australia. Mr. Garstin remained in the house with Mrs. Campbell about a fortnight; and in the beginning of May she with her children removed to No. 41 in the same street, and at No. 41 Mr. Garstin is again. On the 27th of May Mr. Campbell arrived from Australia, and joined his wife in Craven Street. About the 6th of June, having taken a house in Porchester Terrace, he removed his children, but Mrs. Campbell refused to accompany him. A few days afterwards a sister of Mrs. Campbell arrived in London, and by the joint persuasion of that sister and Mr. Smith Mrs. Campbell was induced to join her husband in Porchester Terrace. According to the evidence of Mr. Smith, some time after Mrs. Campbell had gone to Porchester Terrace circumstances came to Mr. Campbell's knowledge which induced him to prosecute further inquiries; the result was, that Mrs. Campbell left Porchester Terrace and went to the Colonnade Hotel, whence she was removed by Mr. Campbell to Hampstead, and there, so for as relates to the intercourse between Mr. and Mrs. Campbell, the history ends rather abruptly. That was in July. There is evidence of Mrs. Campbell living in various lodgings up to November, and Mr. Garstin constantly being with her. I am not about to recapitulate the acts of indecent familiarity, or the circumstances which lead to the conclusion that an adulterous intercourse was carried on between

the parties; the proof of guilt is undeniable. Then what are the circumstances in this case which should induce the Court to delay pronouncing a [288] decree of separation? The evidence already produced on the part of Mrs. Campbell clearly will not suffice to establish condonation. Does justice require that I shall delay the decision of this cause until witnesses are examined in Australia and in Italy? Upon what are they to be examined? Not to prove Mrs. Campbell's innocence; if that were the object, no expense, no delay, no inconvenience, would justly be a reason for refusing the present application; but her guilt is admitted. The question is, whether there has been condonation of that guilt. Condonation is connubial intercourse with full knowledge of all the facts. Innocency and condonation are inconsistent pleas, but they may be pleaded. But the case then resolves itself into this: You cannot prove my guilt, but if you can you have pardoned me. It is pleaded on behalf of Mrs. Campbell, that from the 26th of June, and for several days afterwards, Mr. Campbell visited his wife at the Colonnade Hotel; was seen to approach her for the purpose of kissing her; spoke of having a bed made up for him in his wife's bedroom; that he remained in her bedroom for several hours, and renewed his conjugal intercourse with her. These averments are contradicted in plea by Mr. Campbell, on whose behalf it is pleaded that he never saw Mrs. Campbell at that hotel except in the presence of witnesses. Looking at the evidence, the Court is left somewhat in the dark as to what took place at that hotel; and certainly, so far as appears, Mr. Campbell did not act under the circumstances with great discretion in having those interviews with his wife. Possibly that apparent indiscretion may be explained by the fact that this [289] lady was at this time attended by a physician eminent for his treatment of diseases of the mind, and that the husband was seriously apprehensive on that account. But looking at the case as it stands, has the Court good reason to believe that if the delay asked were granted, the plea of condonation would be established? I have not from the pleadings or the evidence the least reason to conclude that the witnesses now vouched will give any evidence material to the only issue remaining. What has the Court a right to expect, and what is offered? The most undoubted proof of conjugal intercourse; and a statement, perhaps an affidavit, from the wife, upon which however I could not place much reliance, that the witnesses would depose to particular facts, which would leave no doubt of renewed intercourse; but this is wholly wanting. Nor does the case stand favourably in other respects. The citation was returned on the 18th of November; from the service of the citation she knew a defence must be prepared. On the 31st the libel was brought in; she then knew the specific charges. Her proctor then applied that the witnesses might be examined vivâ voce, and so postponed the examination of the witnesses on the libel. But her defensive allegation was not brought in till the 13th of March, and that after repeated notices to her proctor, and though every fact was necessarily well known to Mrs. Campbell herself. For there is a wide difference in the matter of dealing between testamentary and matrimonial causes: in the first the facts and the evidence may be unknown to the party who has to set them up and procure it; but in matrimonial causes every fact and circumstance is [290] known. The proctor has used all diligence; his party has not. It is the duty of the Court to discourage these delays, and, unless justice most clearly demands it, to prevent a wife putting her husband to expenses, which might in some cases be ruinous. I am satisfied that justice requires me to reject the prayer of Mrs. Campbell, which I do not think is well founded, and which, if granted to a wife admitted guilty, will impose a most onerous expense on her husband, and procrastinate this case to an indefinite period. I must conclude this cause and pronounce for the separation.

IN THE GOODS OF ANN DADDS, Widow, Deceased. Prerogative Court, April 18th, 1857.—Will—Revocation under 20th section of Wills Act.—Probate decreed of draft copy of codicil, which had been burnt by testatrix's order, with intent to revoke, but not in her presence.

This deceased died on 7th December, 1856, having made a will and codicil thereto, and thereof appointed Thomas Davis and George Sanders executors. The codicil, executed in 1852, was attached with sealing-wax to the first sheet of the will, and deceased, within a week of her death, ex-[291]-pressed to a niece, Miss Osborn, who resided with her, a wish and intention to revoke the same; but being under an impression that some form was necessary to be observed on the occasion, delayed

the revocation until she had an opportunity of consulting Mr. George Sanders, one of the executors, about it. On the day of deceased's death Mr. Sanders and his wife, also a niece of the deceased, were at her house, when she in their presence repeated her wish to revoke the codicil, and directed Miss Osborn, who had her keys, to fetch it from the drawer of a secretary in which it was locked up, and which was in a room below stairs. The will, with the codicil attached to it, was there found by Miss Osborn in an unsealed envelope, and handed to Mr. Sanders, who, on opening them, observed that the codicil was written on one side of half a sheet of foolscap paper, and in the handwriting of Mr. Davis, the sole executor. Mr. Sanders then, in the same room below stairs, the deceased being in her bed in a room above, detached the codicil from the will and read the same, which bore the signatures of the deceased and of William Hewson and Francis Hewson as attesting witnesses; and on Mr. Sanders' suggestion that a disinterested witness should be present at the revocation, Catherine Harvey, a neighbour, was sent for, and attended at the deceased's house. Miss Osborn, accompanied by Catherine Harvey, then went upstairs to the deceased, who, in the presence of both of them, desired that the codicil should be burnt and destroyed; but as there was no fire in the bedroom at the time, she directed that it should be taken back to the room below stairs for the purpose. **[292]** Mr. Sanders being still in the room below stairs, the codicil was again handed to him; and he being again informed of the deceased's wish that it should be burnt, threw the codicil into the fire, whereby it was burnt and wholly destroyed, in the presence of his wife, Miss Osborn, and Catherine Harvey, but not in the presence of the deceased; so that the requirements of the 20th section of the Wills Act as to revocation were not observed, "or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same," and the codicil not legally revoked. The only existing copy of the codicil was the original draft of it written by Mr. Davis, at the deceased's request and by her instructions, when she was on a visit at his house in the latter part of February, 1852, and which draft had been in Mr. Davis's possession ever since. Shortly after the deceased left Mr. Davis's residence at the period mentioned, he copied this draft out fairly for execution on half a sheet of foolscap paper, and read it over, and as he did so compared the fair copy with the original draft; but having varied the language in and made some additions to the copy, Mr. Davis made corresponding alterations in and additions to the original draft; and the interlineations, obliterations, and additions appearing in the draft before the Court were the alterations and additions then made by Mr. Davis, except the word "lives," obliterated in the 14th line of the first page of the draft, which was inserted in the copy and by mistake obliterated in the draft; there were some words appearing in pencil in the draft, inserted in contemplation of **[293]** further alterations in the copy, but which were not made therein. The codicil so prepared for execution was inclosed in an envelope and forwarded by post to the deceased with a letter from Mr. Davis, wherein he brought to the deceased's notice and directed her to fill in the blank spaces left in the codicil for the recital of the date of the will, also for the date of the execution of the codicil; and Mr. Davis afterwards received information from the deceased, either by letter or otherwise, that the codicil had been executed by her. Some time in March, 1852, the deceased took a paper writing which was on half a sheet of foolscap paper, and which she described as a codicil, to the house of Francis Hewson, and there duly executed such paper in the presence of Francis and William Hewson, and then took the paper away with her. The deceased frequently mentioned, in the spring of 1852, to Mr. Sanders and Miss Osborn, that she had made a codicil, but they did not then see to it. Mr. George Sanders, who read the codicil before it was burnt, believed the draft as altered to be a true and correct copy of it. On the above statement, verified by affidavit,

Middleton moved the Court to decree probate of the will and copy of the codicil without the obliteration of the word "lives," and the interlineation in pencil of the words "trust aforesaid" in the said copy, limited until a more authentic copy of the said codicil should be brought into and left in the registry of this court, to be granted to Mr. Thomas Davis and Mr. George Sanders the executors.

*Sir John Dodson* decreed probate as prayed.

**[294]** IN THE GOODS OF SARAH LEACH, Widow, Deceased. Prerogative Court, May 5th, 14th, 1857.—Practice.—L. appointed R. sole executrix and residuary legatee. R. died without proving, and appointed A. and B. executors. A. alone proved R.'s will, power being reserved to B.—Held, that B. must be cited as well as A. before administration with will annexed of L. could be granted to a legatee.

[S. C. 5 W. R. 679.]

On Motion.

Sarah Leach died on the 20th of October, 1856, having made her will, dated 20th of December, 1844, and therein appointed her daughter, Mary Jeffs Read (wife of George Read) sole executrix and residuary legatee. Mrs. Read died in the lifetime of the testatrix, leaving issue living at the time of the death of the testatrix; and the residuary bequests thereby became vested in her under the 33rd section of the Wills Act. Her husband, Mr. Read, survived her and is since dead, having made his will and appointed Charles Poulton and Edmund Pullein executors, but Poulton alone proved the will in August, 1856, power being reserved to Pullein, the other executor. Under these circumstances H. A. Deane, a legatee, applied for and obtained on the 19th of February a decree with intimation against Poulton (as the sole legal personal representative of Mr. Read, who was the husband of Mrs. Read, the daughter and residuary legatee of Sarah Leach) to accept or refuse letters of administration (with the will annexed) of the goods of the said testatrix. The question raised was, whether Pullein, who had not proved, should not be cited as well as Poulton, who had disappeared.

**[295]** Bayford moved the Court for a decree against Poulton only, as the acting executor and sole legal personal representative of the testatrix.

*Sir John Dodson.* I am clearly of opinion that the administration should not be decreed without citing the executor to whom power has been reserved. The citation must, therefore, be taken out against him, as well as against the acting executor.

ANONYMOUS. Consistory Court of London, May 16th, 1857.—Impotency—Responsive allegation—Pleading.—The husband brought a suit of nullity of marriage, by reason of impotency, against the wife, who pleaded in answer matters in contradiction to the husband's case, and also the adultery of the husband. Held, that it was not competent to the wife to plead the husband's adultery at that stage of the cause.

[S. C. 5 W. R. 750. Referred to, *M.* v. *V.*, 1885, 10 P. D. 77.]

This case came on for hearing on admission of the wife's responsive allegation in the circumstances fully set out in the judgment.

Addams and Twiss for the husband, in opposition to the allegation.

Jenner and Phillimore, for the wife, contrà.

**[296]** *Judgment—Dr. Lushington.* The only question which I have now to decide is, whether the responsive allegation given in on the part of the defendant is or is not admissible in whole or in part; but it appears to me that I cannot properly decide that question without looking to the whole proceedings in this case, and briefly referring to the principles and authorities applicable to cases of this description. This is a suit brought by the plaintiff for the purpose of having his marriage with the defendant declared null and void, by reason of her incurable malformation and consequent inability for sexual intercourse. An appearance having been given to the citation, a libel was brought in on January 17th. I now propose to state what I apprehend to be the contents of and objects sought to be ascertained by the libel and allegation. The libel stated the marriage to have taken place in July, 1840, plaintiff being at that time 27 years of age, and the lady past 21. It pleads cohabitation save as to sexual intercourse at various places in England, Ireland, the Continent, and Canada; that they so cohabited, save with occasional separations, until January 19th, 1855; and then, in the usual form, the inability of the lady for sexual intercourse from unnatural contraction. The 7th article pleads special facts to account for the delay in bringing this suit: it pleads that the plaintiff was aware of this defect, but believed it to be capable of remedy; that plaintiff consulted divers medical persons, who so assured him that he remained in that belief until he was informed to the contrary by medical persons who had been consulted by defendant; that this information was received **[297]** shortly before the month of January, 1855; that he thereupon

separated himself from her, and gave instructions for the suit before he went on service to the East; that he returned in June, 1856; and the citation issued in August following. The 8th article pleads, in supply of proof, a letter alleged to have been written by the defendant in March, 1851, after consultation with Dr. R. The Court admitted this libel after consideration; and it is not necessary now to repeat the reasons which induced the Court so to do. It appears, however, that no witness has been examined upon it, nothing done; why or wherefore the Court is not informed. In this Easter Term an allegation was given in on behalf of the defendant, the admissibility of which was debated on May 7th. The objects sought to be attained by this allegation were twofold: it pleads facts which, it has been contended, ought to bar the husband from prosecuting and succeeding in this suit; and, further, certain facts which will entitle the defendant to a decree of separation, on account of cruelty and adultery. These are two distinct and separate objects. It cannot be denied that defendant is entitled to plead all facts which could bar the suit of the husband: whether she is entitled to proceed for a divorce by reason of adultery and cruelty, is a question subject to different considerations. I have said that defendant is entitled to plead all facts which can legally bar the husband from succeeding in his suit. That some facts would have this effect no one can doubt, as, for instance, denial of malformation, averment of sexual intercourse. But there are other facts which, in this as in all other cases of a similar kind, when offered as a bar to the suit, give [298] rise to questions of great difficulty. Such a case may be generally described to be of this kind. True it is that the wife may be incapable of sexual intercourse, but the husband is barred by his delay or other conduct. This is the doctrine laid down, as I apprehend, in *B.* v. *B.*, 1 Eccl. & Adm. Rep. 248. So far is clear. But when the inquiry is pushed further, and it is asked what is the delay and what is the conduct which shall bar the suit, I feel that all is involved in doubt and obscurity. If I consider the question of time, I do not find that any period has been fixed. If I look to other circumstances I am still more in the dark, for I am not aware of any authority which has attempted to define them. I know nothing more painful than to have to exercise a judicial discretion without landmarks to guide the judgment. If I look to the principle by which the institution of these suits is governed, it affords me little light to discover my way in such a combination of facts as now presents itself. What is the principle, the foundation, of the right to claim a decree pronouncing a marriage void where one of the parties is incapable of consummation? It is partly stated in the case already referred to; and to that judgment I am justified in referring, for it is the judgment of all the Judicial Committee who heard the case: first, because the great chief purpose of marriage cannot be fulfilled; secondly, because by such a marriage the temptation to evil courses is not removed; thirdly, because in some cases, especially where the defect is on the husband's side, continued cohabitation would be destructive to the health and comfort of one of the parties. There was one such case a few years since of a very distressing [299] character. There are many other reasons which I need not recapitulate. If either party cognizant of disability married, the Courts have considered the so doing such a wrongful act, that they have condemned the party in costs. The Judicial Committee in *B.* v. *B.* laid down a general proposition, that such a suit may be barred; and it is equally my wish as it is my duty to carry out that judgment, to which I was not only a party but in which I was the organ of the Court. But there are inherent difficulties in the subject-matter which render the application of the principles so laid down a very anxious task. Time is one. What combination of circumstances constitutes insincerity, another. Assuming all the facts in this allegation proved, do they together form such a state of facts as the Judicial Committee intended to be comprised within the general principles laid down? Except in case of extreme old age, it is obvious that the refusal to allow a remedy on account of the remissness of the husband, though he personally may not be entitled to complain, leaves untouched one reason for entertaining the suit, the prevention of illicit intercourse. Then, with regard to what is called in some preceding cases, and in *B.* v. *B.* the insincerity of the suit, I have great difficulty in saying what would constitute insincerity and what sincerity. Suppose a man anxious for issue, that motive would not constitute insincerity. Suppose a man anxious to marry another woman, I could not hold that to be insincerity. Suppose a man to indulge in illicit connections, could that be proof that he was insensible to the incapacity of his wife for conjugal intercourse? I do not think that pro-[300]-position maintain-

able; it might rather bear the other way. Could such criminal connection alone bar the suit? No such argument has ever been advanced, and there is no precedent for so holding. Insincerity is therefore something different. I cannot attempt to define it; it must be a combination of circumstances which shew that the alleged grievance was not the motive which led to the commencement of the suit, but what would constitute such a case cannot be defined beforehand. Governing myself so far as I can by the judgment of the Judicial Committee, and being of opinion that after the lapse of so many years the wife is entitled to a large indulgence for her defence, I think it right to admit—first, so much of this allegation as contradicts the malformation; secondly, so much as may possibly form a bar to the suit, on the ground of the conduct of the husband shewing it to be insincere. I will presently point out the articles which I think ought to be admitted, some with reformation. I will now address my attention to the important question, which has been raised in this suit for the first time, namely, whether the wife proceeded against can allege adultery committed by the husband, and pray a separation from bed and board on that account, and that too at the same time when the other question which necessarily arises in such a suit as this is under investigation and not decided, the validity of the marriage. The absence of all precedent, where similar cases must have occurred, calls upon the Court to be careful that it does not establish one without great consideration; for the presumption is, that there would have been a precedent if, in the opi-[301]-nion of the profession, such a course of proceeding could have been maintained. We all know that in suits for separation by reason of cruelty or adultery, the first thing to be proved is the marriage; it is called the foundation of the suit. If the marriage be denied, it must be proved before the proceedings can go further; publication of the evidence as to the marriage is decreed, and the question of marriage decided before the suit goes further. The usual and appropriate issues in a cause of this description are: Is the malformation proved? and is the party proceeding barred personali exceptione? Suppose this allegation admitted as it stands, two things must be proved to justify the Court in pronouncing for a separation: first, that there has been a valid marriage; secondly, that the husband has committed adultery. But suppose that it should be proved, as is pleaded in this case, that the husband is barred personali exceptione, such a decision would prevent, whatever be the merits of the case and truth of the charge, the husband from obtaining a decree of nullity; but would such circumstances authorize the Court to pronounce the marriage valid? I exceedingly doubt if the Court could do so, and such a decree I apprehend to be indispensable to a decree for divorce. But suppose another state of things, that the malformation should be proved as well as the bar, could the Court pronounce for the validity of the marriage under such circumstances? That I do doubt exceedingly. Take the third case, that the malformation was disproved, and the bar proved also, there would then be less difficulty, but still in effect the proceeding would be the commencement [302] of a new suit. It may, however, be asked, In what position is a woman left when the husband from any cause has failed in a suit of this description? Is she without remedy? I think not where the malformation is disproved. I think that in such case the wife would be clearly entitled to bring a fresh suit for divorce, and that the husband would be barred from setting up the malformation by the decree in the former suit. What would be the case if the wife brought the suit after a decree that the husband was barred personali exceptione, but the malformation proved, I will not venture to speculate upon: it is a very different thing to pronounce affirmatively, and to dismiss a suit by reason of a bar. I will now examine the cases cited. *Best* v. *Best*, 1 Add. 411, determines only that where a suit is brought, the basis of which is a valid marriage, as for cruelty, the husband may plead the wife's adultery, not only as a defence, but also for the purpose of obtaining a decree for separation against her. In *Robins* v. *Wolseley*, 2 Lee, 149, Sir W. Wolseley sued his wife for a divorce for adultery; she denied the marriage, and pleaded that it was void by reason of a prior marriage. Sir G. Lee was of opinion that Sir W. Wolseley should not be permitted to prove the adultery till the question of marriage should be disposed of. This is a strong case; for Sir W. Wolseley was prior petens, and moreover he asked to examine witnesses de bene esse, whose evidence he might have lost. Sir G. Lee said it would force the wife into a suit, whilst it was still sub judice, whether she was subject to such suit or not. I think this case has some bearing on the present, because here the validity of the

marriage is denied [303] by the husband; and he commences this suit to prove its validity, and until that question is decided it cannot be known whether he is, to use Sir G. Lee's words, subject to such a suit or not; that is, a suit for separation by reason of adultery. I am unable to perceive any distinction as relates to this question between a void and what is called a voidable marriage; a voidable marriage is equally void ab initio, but for civil consequences there must be a decree pronouncing it so to be. In *Guest* v. *Guest*, 2 Hagg. Cons. 322, the validity of the marriage had been already pronounced for in a cause of divorce, and Lord Stowell held that it was a bar to a suit of nullity by reason of malformation. But the decision would have little bearing upon this case were it not for the expressions of Lord Stowell; speaking of divorce by reason of adultery, he says: "The validity of the marriage is the foundation of the whole proceedings; there can be no adultery if there was no marriage." It has always been held, both here and at common law, that the first point to be proved is the marriage; to which I will add, that if in a suit for adultery the marriage be denied, it must be proved before the party can go into evidence of adultery. *Mayhew* v. *Mayhew*, 2 Phill. 11, is to the same effect. *Clowes* v. *Clowes*, 2 N. C. 77, is to the effect, that in a suit of nullity, if the libel be rejected, the wife may give in an allegation praying restitution; and if the libel here had been rejected I should not have doubted that the wife, without further citation, might have prayed for restitution, or proceeded for a divorce for adultery. In *Catterall* v. *Catterall*, 5 N. C. 468, 1 Rob. 304, 9 Jur. [304] 951, I rejected the libel pleading the nullity of the marriage, but allowed the husband to proceed with a suit for divorce by reason of adultery. But the distinction between this and other cases is, that in this case the validity of the marriage is a question pending before the Court, and undecided. In *Catterall* v. *Catterall* the question of marriage was disposed of. The results of these cases were twofold: first, if the marriage be denied, that question must be disposed of before evidence can be taken as to adultery or cruelty; second, that without fresh citation the Court may, in any matrimonial suit where the validity of the marriage has been disposed of, receive an allegation pleading adultery or cruelty, and separate the parties if it be proved. Therefore, I am of opinion, both upon principle and authority, that I ought not now, at this stage of the cause, to admit the article pleading adultery to proof; but I am equally clear, for the same reason, that the Court might possibly come to a decision in this case which would justify the Court in receiving this, or an allegation to the same effect. This allegation must therefore be reformed by omitting the article pleading adultery. Were I to admit them hoc statu (I mention this not as a reason guiding my judgment, for that is governed by the reasons already stated), the husband could not defend himself by pleading condonation of the wife's adultery, which matters would require consideration. Dr. Phillimore pressed the Court not to order an inspection. I am very sensible how painful this must be to any lady, and certainly would make no such order save ex debito justitiæ. If the allegation had pleaded merely matters in bar, [305] not putting in issue the malformation, I might have deliberated whether I would not have delayed ordering the inspection until publication had passed as to the plea in bar, for if that plea were good and proved there would have been an end of the suit; but this allegation puts in issue the malformation, and all the facts to prove the contrary: how is it possible I could receive evidence on one side, and not legal evidence on the other? It was said in the course of the argument that Professor S. had seen the defendant since the suit commenced; that may be so, but still that is ex parte evidence only as to the evidence between the parties. There is still an additional reason the defendant has brought with reference to this very question of malformation, a most serious charge against the plaintiff. She has charged him with having caused an appearance of malformation, by giving her the venereal disease. Surely it would be against all justice to allow that article to go to proof, and not permit the plaintiff by the only possible process to rebut that charge, and prove his original case. I shall admit all exhibits which are in the handwriting of plaintiff; they are legal evidence, and their applicability to this case will be best discussed when publication on the whole case passes: one article will be sufficient for the purpose of introducing these exhibits.

[306] RUDALL *v.* WARREN (by his Guardian). Prerogative Court, May 26th, June 4th, 1857.—Will—Void devise and bequest attending it—Gift over—

Administration.—Where a devise of realty for a charitable foundation is void under Mortmain Act, a bequest to residuary legatees in trust to carry out the purposes of the devise fails too; and a bequest over, where the prior bequest is defeated by contingencies other than those provided for by the testator, is also void. Administration, with will annexed, granted to next of kin in preference to residuary legatee, for the purpose of carrying out the intended charity.

[S. C. 3 Jur. (N. S.) 822.]

This was a business of granting letters of administration (with the will annexed) of William Hall, deceased, promoted by Sarah Rudall, wife of Thomas James Rudall, the sister and only next of kin of the said deceased, against William Hall Warren, a minor (by Emma Badnell, his guardian lawfully appointed by the High Court of Chancery), claiming to be the residuary legatee named in the said will.

The deceased died on the 23rd of October, 1856. The will was dated in October, 1853; by it he bequeathed all his real and personal estate, of whatsoever kind, to William Unsworth and John Atkinson, "to be my executors of this my will; and I do appoint the said Messrs. Unsworth and Atkinson, their executors, administrators, or assigns, my executors or administrators to this my will." Mr. Unsworth predeceased the testator, and Mr. Atkinson renounced probate and execution of the will. The deceased died a widower without child or parent.

**[307]** The clause on which the present question arose was as follows:—"I will that my freehold house, No. 71 Queen's Road, Bayswater, be given to the inhabitants of Bayswater to found a lying-in asylum for unmarried women, or poor married women, if there is more than three beds to spare. I will that there shall be no paid parson, priest, or chaplain, whose services is not given gratis, attend the said asylum. I will that the same be called 'Hall's Maternal Asylum for Unmarried Women.' I will that my said executors do call a meeting of the neighbours and inhabitants of one mile round the said house, as soon as convenient, to appoint a committee and trustees to carry out the same. I do appoint my godson, William Hall Warren, one of the said trustees, leaving to the inhabitants to make choice of as many more as they please. But in the event of the said inhabitants not appointing a committee, or not willing to carry out the same scheme, I then will that all my said property so given to said maternal retreat or lying-in asylum shall absolutely belong to my said godson, William Hall Warren; and I will that the deeds of the said house be given to the said trustee or trustees. I will that the said trustee or trustees be my residuary legatees to this my will."

The will proceeded to give further legacies—some to the legatees only for life, to revert "to my residuary legatee or legatees for asylum mentioned." There was no further disposition of residue.

It was agreed that the devise of the freehold house was void under the Mortmain Act.

Deane, for Mrs. Rudall, the sister and only next **[308]** of kin of the deceased, contended that a personal bequest attached to a void charity as an endowment must fail with the principal: *Attorney-General* v. *Whitchurch*, 3 Ves. 141; and *Attorney-General* v. *Hinxman*, 2 Jac. & W. 270. In the latter case Sir Thomas Plumer held that a bequest of money in trust for the use of a schoolmaster was void as being connected with the devise of a freehold house as the residence of such master. Further, that when in such a case there is a gift over of the personal property, and the prior gift fails, not through the contingencies contemplated by the testator, but through an operation of law not foreseen by him, the gift over fails also: *Philpotts* v. *St. George's Hospital*, 21 Beavan, 131, where the Master of the Rolls concluded: "I wish that my view of the will should appear perfectly clear and distinct, viz. that the original gift fails by reason of its being contrary to the Statute of Mortmain, and that the gift over fails by reason of the events on which that gift over is directed to take effect not having arisen."

Bayford, contrà, contended that William Hall Warren appeared on the face of the will to be the residuary legatee; that it would be for the Court of Chancery to determine whether he was beneficially entitled or otherwise. He referred to White's Law of Legacies, c. 24, and prayed administration, with the will annexed, to be granted to the guardian of W. H. Warren, now a minor, the residuary legatee named in the said will; but if the Court should be of opinion that the said Warren was not residuary legatee, that this guardian should have adminis-**[309]**-tration as

guardian to him, a principal legatee named in the said will; for he submitted that the Court was not bound by the statute, in the case of administration with the will annexed, to grant it to the next of kin; and that there were reasons in this case, as appeared by affidavits, why the Court should not grant it to Mrs. Rudall.

*Judgment—Sir John Dodson.* Considering the words of the will and the cases cited, I am clearly of opinion that the bequest attending the void devise fails, and the bequest over to Warren under these circumstances will also be of no effect. Neither does it appear from the whole will that Warren is residuary legatee or one of the residuary legatees, except for the purpose of carrying out the scheme for the charity; he has no beneficial interest in this character; and the next of kin is entitled to the grant. It has been contended that there are reasons in this case for the Court to depart from the ordinary rules it has laid down for itself in such cases, and to pass over the next of kin. It certainly appears that neither the deceased's sister nor her husband are very fit people to be intrusted with the administration of property; but as in this case they can only act under the direction of the Court of Chancery, no inconvenience can arise from that; and there is no sufficient reason to depart from the ordinary rules. I decree administration with the will annexed to the sister. Costs of both parties out of the estate.

**[310]** CRUTTWELL AND OTHERS *v.* CLANCY. IN THE GOODS OF ALFRED BRETTLE, Deceased. Prerogative Court, June 12th, 1857.—Will—Appointment of excutors and trustees—Codicil—Partial revocation.—A., by will and first codicil, appointed four executors and trustees, and left them £500 each. By a second codicil he substituted B. and D. in the place of two of the original executors and trustees, and varied the £500 legacies accordingly. By a third codicil he revoked any codicil or codicils empowering B. to act as trustee, and appointed C. one of his trustees and executors.—Held, on a view of all the papers, that the third codicil was a revocation only of C.'s appointment, and not of the whole codicil in which it was contained.

The deceased in this case died on the 31st October, 1856, having made his last will and testament with three codicils thereto, and therein named executors and trustees, as follows:—

By his will, dated the 13th November, 1852, he appointed and named Francis Burdett, Esq., Charles Sedley Burdett, Esq., Thomas Cruttwell, and Robert Cruttwell, executors and trustees, and thereby bequeathed to them, as such executors and trustees, the sum of £500 each.

By the first codicil, dated the 18th April, 1855, the testator bequeathed certain pecuniary legacies, but did not alter the appointment of the executors and trustees of his said will.

By the second codicil, dated the 24th July, 1856, the testator appointed John Clancy, the younger, Esq., and William Augustus Sadler Pemberton, joint trustees and executors of his said will with the said Thomas Cruttwell and Robert Cruttwell, in lieu and in place of the said Francis Burdett and Charles Sedley Burdett, whose legacies he hereby expressly revoked, and gave the same to the said John Clancy and W. A. S. Pemberton, as a compliment for undertaking the trusts and executorship of his said will.

**[311]** The third codicil, dated 21st October, 1856, in the testator's own handwriting, was in the following words:—

"I, Alfred Brettle, residing in Paris, at number Ninety-one, Champs Elysees, declare that I revoke any codicil or codicils to my will empowering John Clancy, Esq., to act as one of my trustees to the said will. And I appoint Colonel Francis Burdett, mentioned in the said will, one of my trustees and executors of the same.

"Witness, Robert Burdett. "ALFRED BRETTLE.

"Witness, William Willis.

"Paris, 21st Oct., 1856."

Annexed to the affidavit of scripts was a letter from the deceased to Mr. Pemberton, as follows:—

"91 Champs Elysees, Paris, 9th Sept., 1856.

"MY DEAR PEMBERTON,—I wish you to receive this communication with a strictly professional view. I will thank you if you shall have prepared for my signature, before your expected arrival in Paris, a codicil to my will (in your possession),

composed of a few words, stating that I entirely cancel the appointment of executorship on the part of John Clancy, Esq. (identification following), to my said will, and that I appoint in his stead Francis Burdett, late lieutenant-colonel in Her Majesty's service (identification to follow), to act in concert with the two executors named by me in a previous will executed by me, to wit, Thomas Cruttwell, solicitor, of Bath, county Somerset, and Robert Cruttwell, solicitor, of Bath, county Somerset, and with William Augustus Sadler Pemberton, Esq., of **[312]** No. 8 Southampton Street, Bloomsbury Square, London, solicitor, appointed by me in a subsequent will co-executors with others, the said W. A. S. Pemberton, now holding possession of the same, so that the executors of my will shall be as follows:—

"Thomas Cruttwell, Esq.

"Robert Cruttwell, Esq.

"William Augustus Sadler Pemberton, Esq.

"Francis Burdett, Lieutenant-Colonel.

"The above mentioned to receive the sum of £500 sterling each from my estate."

These instructions were never carried out by Mr. Pemberton, owing to the unexpected illness and decease of the testator, and were only embodied in the above-recited third codicil drawn by the testator himself.

On the 3rd of September of Hilary Term, Robarts, as proctor for Thomas Cruttwell, Robert Cruttwell, W. A. S. Pemberton, and Francis Burdett, alleged them to be executors named in the said will and codicils, and prayed probate thereof accordingly.

An appearance was given for John Clancy, Esq., alleging to be one of the executors named in the second codicil, and praying he might be joined in the probate. The usual steps were taken till the second session of the present term, when a proxy of renunciation under the hand and seal of Mr. Clancy was exhibited, and it was declared that he proceeded no further.

**[313]** Accordingly Deane moved the Court to decree probate of the will and three codicils of the deceased to be granted to the said Thomas Cruttwell, Robert Crutwell, W. A. S. Pemberton, and Francis Burdett, the executors named therein. The only difficulty was, whether the words of the third codicil did not entirely revoke the whole of the second codicil. From the letter to Mr. Pemberton it was clearly the testator's intention only to revoke so much of the second codicil as contained the appointment of John Clancy, and to substitute Colonel Burdett. He submitted that, under such circumstances, a testamentary Court would not shut out any duly executed paper, but grant probate of it, and leave it to the Court of Chancery, if necessary, to determine its operation.

*Sir John Dodson* granted the motion as prayed.

**[314]** IN THE GOODS OF JONAS WELCH, Deceased. Prerogative Court, June 12th, 1857.—Will—Codicil—Date of will misrecited in codicil.—A. made a will in September, 1854, another in February, 1855. In a codicil of the 12th February, 1857, the latter will was referred to as of September, 1854.—Held, under the circumstances set forth, to be an error of the clerk who drew the codicil, and probate of the will of February, 1855, granted.

On Motion.

Jonas Welch, of Banbury, made a will dated the 4th September, 1854, prepared by his solicitor Mr. Aplin, of Banbury. On 14th February, 1855, he called at Mr. Aplin's office with this will, and instructed him to make certain alterations therein. Mr. Aplin finding that the testator only wished to substitute one executor and trustee in the place of another, and to make slight alterations in some pecuniary legacies, did not make a draft of a new will, but with a pencil made the alterations in question on the original will of the 4th September; and from this will so altered a new will was then and there engrossed and executed by the testator. A codicil was at the same time drawn up and executed, giving a legacy of £50 to Mr. Forbes, but no draft was made. The will and codicil were then inclosed by Mr. Aplin in an envelope, and taken away by testator. Prior to this 14th February, 1855, the testator told Mr. Brickwell (his most intimate friend) that he had appointed him his executor and residuary legatee, and shortly after the 14th February 1855, the testator told Mr. Brickwell that he had made another will, and he then gave him an envelope sealed up,

which he said contained his will; and Mr. Brickwell, by his desire, placed **[315]** it in a tin box containing the testator's private papers; he at the same time gave Mr. Brickwell a paper writing, folded up, which he said was his former will, and told him to burn it, which Mr. Brickwell then and there did in the testator's presence, but he did not open or read it. On the 12th February, 1857, Mr. Aplin, by desire of Mr. Welch, called on him at his house and found him very unwell, and he then directed Mr. Aplin, to prepare a codicil to his will bequeathing a legacy to his servant Elizabeth Burnham. Mr. Aplin being very busy, told his clerk, John Barton, to prepare a codicil to Mr. Welch's will to the above effect for immediate execution. Mr. Barton searched the papers in Mr. Aplin's office for the former will, and finding the draft will of the 4th September 1854, and none of a subsequent date, and not remembering that the testator had made a will of later date, he presumed that to be the date of testator's will, and accordingly described such codicil as a codicil to the will of testator, dated "on or about the 4th September, 1854." The codicil thus prepared was taken at once by Mr. Aplin to the testator, who executed it in the presence of Mr. Aplin and two of his clerks. Prior to the execution Mr. Aplin read the codicil over to the testator, and asked whether the date of the will was correctly recited, to which the testator answered, "Yes; it's all right"; but did not refer to the will. This codicil was left with the testator, and after his death delivered by his servant to Mr. Aplin, and by him to the executor's solicitors. Mr. Welch died on the 20th February, 1857; Mr. Brickwell was constantly with him during his last illness, and Mr. **[316]** Welch then told him that at his death his will would be found in his tin box, and that there was a codicil giving £50 to Mr. Forbes, and told him to take charge of the box at his death and gave him the key. Mr. Brickwell heard of the execution of the last codicil, but did not see it until after testator's death, when, on opening the tin box, Mr. Brickwell found the envelope sealed up as he had placed it there, and on opening it, found the will and codicil of the 14th February, 1855, but no other testamentary paper. He made a careful search among all the testator's papers and repositories, but has not found the will of 4th September 1854. Mr. Aplin searched his papers with a similar result. These facts were verified by the affidavits of Mr. Aplin, Mr. Barton, and Mr. Brickwell, who further swore to their belief that the reference in the said codicil to the date of the will, as being the 4th September, 1854, was an error, and that the testator meant and believed it to be a codicil to his will of 14th February, 1855, and that from illness and presuming the date must be correctly recited, he did not refer to his will or discover the error.

Deane moved for probate of the will of 14th February, 1855, and the two codicils.

*Sir John Dodson.*—I have no doubt that the reference in the second codicil to the will of 4th September, 1854, is an error of Mr. Barton, caused by the draft of that will remaining in Mr. Aplin's office and unnoticed by the testator at the time of executing the codicil, and decree probate as prayed.

**[317]** IN THE GOODS OF PETER RAINIER, Esq., Deceased. Prerogative Court, June 20th, 1857.—Administration with will annexed—Administration bond—Inventory and account.—Application to the Prerogative Court of Canterbury to confirm and allow an account of administration with will annexed, and to declare the administration bond null and void, on suggestion that the property under the will was fully administered.—Held, that the Court had no authority to declare the bond null and void.

On Motion.

Peter Rainier died in April, 1836, having made a will and codicil, and therein named his widow Elizabeth Crow Rainier, John Rainier, and John Bowler, executors and trustees.

After giving certain legacies to his wife and executors, the deceased dealt with the residue of his personal estate in moieties:—As to one moiety, he bequeathed the interest thereof to his wife for life; and after her death, the principal thereof absolutely to his daughter Caroline Rainier, now Caroline Jones, widow, on the condition of her surviving her mother, and attaining the age of twenty-four years, which events happened. The other moiety of the residue the testator bequeathed to his executors, in trust to pay the interest and dividends to his said daughter Caroline for her life; and on her marriage, in trust to settle the same for her separate use for her life, and after her death to and among her children, subject to certain provisos.

Mrs. Rainier, the widow, alone proved this will and codicil, and acted in execution of the trusts thereof.

Mrs. Jones married in July, 1841, her late husband, by whom she has four children, minors, **[318]** now living. By her marriage settlement, Mrs. Jones, with the consent of her husband, assigned the moiety of the residue, to which she would become absolutely entitled on her mother's death, to the trustees therein mentioned, in trust for the benefit of such of her brothers and sisters as should survive their mother, and they were Peter Rainier and Ellen Catherine, afterwards wife of William Yolland.

No mention was made in that settlement of the other moiety, bequeathed to Mrs. Jones and her children; but Mrs. Rainier, as the acting trustee of the said estate, continued to hold such trust funds until her death, in October, 1852.

In May 1853, letters of administration (with the will and codicil annexed) of the goods of the deceased left unadministered by Mrs. Rainer the widow were granted to Mrs. Jones, on her exhibiting an inventory and her sureties justifying to the amount of a moiety of the deceased's unadministered estate; and the usual administration bond was given by her husband and by William Pottinger and Archibald Weir, as her sureties. Messrs. Pottinger and Weir, the solicitors of the parties, having required some security from Mr. Jones to cover their responsibility as to the sureties to the administration bond, Mr. Jones, by indenture in April, 1854, directed, limited, and appointed an estate called Knolton Hall, with its appurtenances, belonging to and vested in him, to Messrs. Pottinger and Weir, to hold them for a term of 1000 years, upon trust, and as an indemnity for any losses they might be put to by reason of such their suretyship, with the proviso that, upon the per-**[319]**-formance of such trusts, the term should cease and determine.

In May, 1855, on the petition of Mr. and Mrs. Jones and the other parties interested, an order was made by the Court of Chancery, appointing R. P. Jones and the Rev. Ambrose Jones trustees of the estate of Peter Rainier, Esq., deceased. The estate left unadministered by Mrs. Rainier consists of the stock and moneys set forth in the inventory thereof made and sworn to by Mrs. Jones, and about to be exhibited to the Court; the moiety thereof passing under the deceased's will to Mrs. Jones absolutely, she has paid over to her brother and sister, pursuant to the covenants of her marriage settlement, and the other moiety she has paid over to the new trustees of the deceased's estate appointed by the Court of Chancery, to be held by them in trust for her and her children, as directed by the will, so that the deceased's estate has now been fully administered; and by an indenture of release, dated 26th May, 1855, those parties have respectively acknowledged to have received the sums of money and stock therein and in the said inventory stated, forming together the deceased's estate heretofore unadministered, and have discharged Mrs. Jones as administratrix therefrom, so that the deceased's estate has now been fully administered, and Mrs. Jones has duly made and sworn to an account, setting forth such her distribution thereof.

Mr. Jones died in January of the present year, having duly executed his will, and therein named his wife, Mrs. Jones, executrix, who has since proved the will in the Prerogative Court. As such **[320]** executrix she is desirous of selling the estate of Knolton Hall, and it has been advertised for sale; but for the purposes of a beneficial sale thereof, it is of great importance that the term of 1000 years, created therein for the benefit of Messrs. Pottinger and Weir, should determine, and be reassigned to attend the inheritance of this estate; but it appears that they declined to reassign it, on the ground that the bond to which they became sureties is still in force.

Phillimore moved the Court that the accounts of the administration on oath by Mrs. Jones might be allowed and confirmed by the Court; that Mrs. Jones might be discharged from further suits in respect thereof; and that the bond given by her husband and his sureties, on such administration being granted to her, might be declared null and void, and of none effect. He admitted that, as to pronouncing the bond null and void, he could find no case precisely in point as a precedent, but cited *Younge* v. *Skelton*, 3 Hagg. 782, and *Archbishop of Canterbury* v. *Tappen*, 8 B. & C. 151, as shewing by analogy how the testamentary Court deals with administration bonds. He submitted that all the conditions of the present bond had been complied with, and that, as there was nothing remaining for it to operate upon, the Court would be warranted in declaring it null and void.

*Sir John Dodson* was of opinion that, as to declaring the bond null and void, he had no power or authority so to do; and it was impos-[321]-sible to say that no questions should hereafter arise under the administration. As to the account, it was very inconvenient to allow and confirm it merely on the ex parte statement of the administratrix herself, and without the parties interested being cited. However, when he should be satisfied that all these were before the Court, or cited, and that the account was correct, he should have no objection to confirm and allow it.

N.B.—In this case, the trustees appointed by the Court of Chancery appeared by a proctor, who exhibited a proxy under their hands and seals, and acknowledged that they had received the several sums of money and stock in the before-mentioned inventory account and deed of release.

[322] ALFORD *v.* ALFORD (by her Committee). Prerogative Court, July 6th, 1857.—Intestacy—Administration—Widow and next of kin—Committee of lunatic widow.—A. died intestate, without child or parent, leaving his widow, his brother, and others entitled in distribution, him surviving. The widow became lunatic, and a committee of her person and estate was appointed by the Court of Chancery. On the question of grant of administration, it was held, that the ordinary preference exercised by the discretion of the Court in favour of the widow would extend to such committee, unless the next of kin could shew special cause to the contrary.

[S. C. 3 Jur. (N. S.) 990.]

Philip Alford died intestate, without child or parent, on the 11th February in the present year, leaving him surviving his lawful widow Eliza Alford, his brother James Alford, three sisters, and two nieces, children of a deceased brother; so that the widow would be entitled to five-tenths, the brother to one-tenth, the three sisters to one-tenth each, and the two nieces to one-tenth between them of the deceased's personal property. The present question was to whom the grant of administration should be made? It appeared that shortly after the husband's death it was thought necessary to remove the widow to a lunatic asylum; and by an inquisition under the authority of the Court of Chancery, dated 21st March, in the present year, Eliza Alford, the widow, was found to be a person of unsound mind, and not competent for the management of herself or her estate; and Charlotte Elizabeth Parsons, the widow of a deceased brother of Mrs. Alford, now living as housekeeper in a gentleman's family in Portland Place, was appointed committee of her person and estate. The deceased's personal property was under £4000 in value, principally consisting of leasehold houses. James [323] Alford, the brother, had been coachman in several gentlemen's families, and was now a cab or fly driver.

The grant of administration was claimed for the use and during the lunacy of the widow by Mrs. Parsons, as the committee of the person and estate of the lunatic widow, fully representing her, and so preferably entitled according to the usual practice of the Court in the exercise of its discretion under the Act, 21 Hen. 8, c. 5, s. 3, by James Alford, as one of the next of kin, and holding the proxies of the rest entitled in distribution, on the ground that the lunacy of the widow would determine the discretion of the Court in favour of the next of kin. The personal qualification of the respective parties was also matter of discussion.

Addams and Spinks for the committee of the widow.

Deane and Swabey for the next of kin.

It was admitted in argument, that there was no decided case exactly in point; but it appeared from the statement of the deputy registrar, that it is the practice in the registry to grant administration on the application of the committee of a lunatic widow without citing the next of kin.

*Judgment—Sir John Dodson.* The first question is, whether the Court has any power of choosing between the parties. I think the result of the discussion that has taken place at the bar is, that it is in the discretion of the Court [324] to grant the administration to either of the applicants. It appears that the practice in the registry is to make the grant to the committee of the widow without citing the next of kin; the Court, however, is not bound by that practice, but may, where the next of kin appears and shews sufficient reason, grant administration to them. I am inclined to hold the committee of the widow entitled preferably, as the widow herself would be, unless good cause is shewn by the next of kin; and on a full consideration of the

special circumstances of the present case, I see no sufficient reason to deprive the committee of the widow of that preference. I grant the administration, limited till the lunacy of the widow determines, to her committee. I make no order as to costs.

**[325]** MADDOCK *v.* ALLEN. Prerogative Court, July 9th, 1857.—Will—Unattested paper—Reference to, by subsequent duly executed codicil.—A. signed a paper intended for her will, in 1851, which was attested by only one witness. In 1856, on the day before her death, she duly executed a codicil "to my last will and testament." The paper of 1851 was not produced at the time the codicil was executed, but was found after A.'s death in a locked chest in her room; the codicil in a drawer. On a view of the two papers, and on evidence of the circumstances attending the factum of the codicil—Held, that the paper of 1851 was sufficiently identified as the last will and testament referred to by the codicil, and that it required validity from the due execution of the codicil.

[S. C. 3 Jur. (N. S.) 965. Affirmed, 1858, 11 Moore, P. C. 427; 14 E. R. 757. Approved in principle, *In the Goods of Greves*, 1858, 1 Sw. & Tr. 250. Distinguished, *Newton* v. *Newton*, 1860, 5 L. T. 224. Applied, *Van Straubenzee* v. *Monk*, 1862, 3 Sw. & Tr. 12; *In the Goods of Sunderland*, 1866, L. R. 1 P. & D. 200; *In the Goods of Lady Truro*, 1866, L. R. 1 P. & D. 205; *Anderson* v. *Anderson*, 1872, L. R. 13 Eq. 385; *In the Goods of Heathcote*, 1881, 6 P. D. 32; *In the Goods of Kehoe*, 1884, 13 L. R. Ir. 17; *In the Goods of Smart*, [1902] P. 238. Referred to, *In re Trotter*, [1899] 1 Ch. 764.]

This was a cause of proving the last will of Annie Allen, formerly Foote, widow, wife of Joseph Emanuel Allen, late of New King Street, in the city of Bath, deceased; promoted by Sir Thomas Herbert Maddock, one of the executors named therein, against Mr. J. E. Allen, the husband of the deceased. The will, in the handwriting of the deceased, was dated 1st December, 1851, and attested by only one witness, and so by itself invalid. The codicil, dated 13th September, 1856, the day previous to the testatrix's death, was duly signed and attested by two witnesses. The question was whether, under the words of the codicil and the circumstances of the case, the informal will was so sufficiently referred to and identified as to acquire validity from the due execution of the codicil. Her property was just over £2000. The papers were propounded in an allegation given in on behalf of Sir Thomas Herbert Maddock, which pleaded—1. The settlement on the marriage of the deceased with Mr. Allen, under which she was empowered to dispose of certain property by will. 2. The custody of the original indenture. 3. A **[326]** copy of such indenture in supply of proof and the identity of the parties. 4. The factum of the will, that it was written by the deceased herself on the day it bears date, and was signed by her in the presence of F. W. Hoare, who in her presence, and at her request, subscribed and attested the same. 5. That the codicil was drawn up by her directions and instructions, and duly executed and attested on the day on which it bears date. 6. That since 1846 she had lived apart from her husband, Mr. Allen, since which time she had assumed her maiden name of Foote, and had been generally known by such name and no other (the will and codicil were signed by her in that name). 7. That after separating from her husband she declared her intention of benefiting her relatives by will, and frequently spoke of Sir Thomas H. Maddock as the friend who would manage her affairs in case of her death, and that since 1851 she spoke of having made her will, and of having appointed Sir Thomas an executor. 8. That the testatrix, in executing her aforesaid codicil to her will, meant and intended to confirm and give effect thereto, and that by the words "This is a codicil to my last will and testament" appearing written at the beginning of the said codicil, the testatrix meant and intended to refer to her aforesaid will as being such will. 9. That the testatrix having been in a state of ill-health for some short time before her death, became seriously ill on the 8th September, 1856, and on the following day was attended at her residence in Bath, by Mr. F. Field, a surgeon, who visited her daily from that time until her death, which took **[327]** place on the 14th of the same month; that on the morning of the previous day the testatrix being desirous to make a codicil to her will, spoke to Mr. Field on the subject, and in direct allusion to her will, addressing him, said, "I wish you to do something for me in respect to my will," or to that effect; and Mr. Field having consented to comply with her desire, proposed visiting her again in the course of the same day, and he accordingly did so, when

testatrix entered on the subject of her riches, and stated that she desired to leave something to her servant, and also some other trifling legacies to friends; and added, "I wish to do this by a codicil to my will." From the dictation of the testatrix Mr. Field then proceeded to write the codicil, and on reaching that part in which the testatrix desired that her servant Eliza Baker should have as much furniture as her executor might deem sufficient for furnishing a sitting-room and bedroom, he inquired of the testatrix who was the executor of her will, when she immediately replied, "Sir Thomas Herbert Maddock," and at the same time said there was another executor, but did not mention his name, and added that Sir Thomas Herbert Maddock would be the acting person. That the codicil having been completed and executed as pleaded in the 5th article, the testatrix on being asked by Mr. Field where the will was deposited said, "Oh, my will is in safe keeping." And then by her direction the codicil was placed in a chest of drawers in the testatrix's bedroom, and locked up therein. 10. That on the occasion pleaded in the next preceding article the testatrix was very ill, and was fully aware that her life was in danger, and that her **[328]** death might occur in a very short time; that in allusion thereto she requested Mr. Field immediately on her death to apprise her friend Sir Thomas Herbert Maddock, whose address she gave him, of the event; and at the same time directed the servant Eliza Baker to take charge of her keys, and not to give them up to anyone except Sir Thomas Herbert Maddock. 11. That testatrix had in her possession several Indian trunks, two of which, bearing an inscription on a brass plate, "No. 1, Mrs. A. Foote," and "No. 2, Mrs. A. Foote," were exactly similar in size and appearance, and were kept locked in testatrix's bedroom; that about a week before her death the trunk No. 2 was removed from such bedroom into a bedroom adjoining and communicating therewith, and was so removed to make room for a sofa for the use of testatrix. 12. That testatrix died on Sunday, 14th September, 1856; and that Mr. Field immediately communicated the fact to Sir Thomas Herbert Maddock, who shortly afterwards arrived at Bath, and repaired to the testatrix's residence, and caused a search to be made for the will and codicil, and that in a small box in the Indian trunk No. 2 was found, with other papers, the will now marked A, and propounded in this cause, inclosed in a sealed envelope, with indorsement, "Mrs. Anne Foote's will"; and that in a drawer of the chest of drawers in the bedroom of the testatrix was found the codicil now marked B; that diligent search had been made as well in the Indian trunks Nos. 1 and 2, as in all other depositories of the testatrix, and all due inquiry made with regard to testamentary papers, and that no other paper of a testamentary character **[329]** of the testatrix, save the will and codicil pleaded, had been discovered. 13. That the testatrix, when she alluded to her will and declared that Sir Thomas Herbert Maddock was an executor thereof, and further declared that such will was in safe keeping, meant and intended the very will so found in the Indian trunk, No. 2, and, with the aforesaid codicil propounded in this cause, as the last will and testament and codicil thereto of the testatrix.

The will, dated 1st December, 1851, left pecuniary legacies to certain persons of the name of Drew, her brothers and nephews, and certain articles of jewellery to friends, and appointed "the Rev. —— Wood, Curate of Christ Church, of Bath, and Sir Thomas Herbert Maddock, executors thereof." The codicil was as follows:— "This is a codicil to my last will and testament. I bequeath to my faithful servant, Eliza Baker, now residing with me at No. 29 New King Street, in the city of Bath, the sum of one hundred pounds, with as much of my furniture as in the opinion of my executor will be sufficient to furnish a sitting-room and a bedroom; I bequeath the sum of one hundred pounds to Nicholas Drew, residing in the city of Worcester, tailor. This legacy is to be duty free. I bequeath one hundred pounds to Edward Drew, of the city of Bristol, brightsmith. This legacy is to be duty free." The Drews seemed to be two of those to whom legacies were left by the will. The codicil went on to bequeath certain articles of furniture and dress—some to Mr. and Mrs. Taylor, friends and neighbours of testatrix, who were in the room at the time of its execution.

The codicil was subscribed by Mr. Field and **[330]** Thomas Hull, an inmate of the house in which testatrix died.

The evidence of F. W. Hoare, the subscribed witness to the will of Eliza Baker, of Mr. Field, of Mr. and Mrs. Taylor, and others, sufficiently established the plea, and they were not cross-examined.

Phillimore and Deane, for the executor, contended that the executor in this case had discharged the requirements which the principles applicable to such references and decided cases laid on him: first to shew that the paper or document referred to was in existence at the time the duly executed paper was drawn up, which was not disputed in the present case; secondly, that the reference must be distinct, and such as to leave no reasonable doubt on the mind of the Court as to the identity of the paper described; thirdly, to give reasonable negative proof that no other document is in existence answering to the description.

Jenner and Twiss, contrà, argued that on the face of the papers the reference was not absolute or free from doubt, and that since the Wills Act the Court would be very cautious in admitting parol evidence to supply the formal execution required by the statute: *Smart* v. *Prujean*, 6 Ves. 561; *Utterton* v. *Robins*, 1 Ad. & El. 431; *In the Goods of Lady Durham*, 3 Curt. 57; *Ferraris* v. *Lord Hertford*, 3 Curt. 468—on appeal, 4 Moo. P. C. C. 366; *Ingoldby* v. *Ingoldby*, 4 N. C. 493; *Sheldon* v. *Sheldon*, 1 Robert, 81, were cited.

**[331]** *Judgment—Sir John Dodson.* The Court certainly has not the same extent of liberty as it had before the Wills Act in dealing with testamentary papers. Then the intention of parties, however arrived at, was the polar star to guide the Court in coming to a conclusion. It is now more strictly tied; but I have yet to learn that the executed paper must, on the face of it, refer to the other, so as to leave no possible doubt, and that no evidence of circumstances can be received. The sole question in this case is, whether the codicil so sufficiently refers to the unduly executed will as to make it a component part of itself. The contents of the instruments have been referred to as supporting one another. Certain legacies are increased by the codicil in accordance with her declarations as established in evidence. [Here the Court went at some length into the evidence, especially that of Mr. Field.] As to the discrepancy of her talking of Sir Thomas Herbert Maddock as her executor and as the person to manage her affairs, while in fact another executor was absolutely named in the will, it is clear that she did look upon Sir Thomas as the person whom she wished to act, and was likely to do so if he survived her. The will was not then before her, and had been made some years back. The request to Mr. Field to write immediately on her death to Sir Thomas, explains her view of the matter. On the whole, I have no reasonable doubt that the will of 1851 was the document referred to in the codicil. There is no trace of any **[332]** other document. Eliza Baker mentions a still earlier will made in favour of deceased's sister, but she also distinctly states that that was destroyed after the sister's death. I cannot think that the Court is so barred of its discretion as not to be free to consider the circumstances under which the codicil was made. In the *Marquis of Hertford's case* there were several codicils, some duly executed and others unduly executed, and it was held that the expression in the last duly executed paper, "I hereby confirm all my wills and codicils," would only apply to the duly executed codicils, because such papers were in existence to satisfy the strict meaning of the word. Here there is nothing before the Court but the one unattested paper. I decree probate of the two papers as together containing the last will and testament and codicil of the deceased. Costs out of the estate, as the suit was occasioned by the deceased's own act.

**[333]** ANONYMOUS. Consistory Court of London, Aug. 13th, 1857.—Impotency of wife.—Decree for inspection.—This case, the particulars of which are reported antè, 296, came before the Court on act on petition against the issuing of a decree for a monition against the wife to submit to a personal examination.

[S. C. 5 W. R. 829].

Jenner and Phillimore in support of the petition.

Addams and Twiss contrà.

*Judgment—Dr. Lushington.* I am of opinion that this case is brought before me, not upon any misapprehension of what the Court did upon a former occasion, but upon an expectation of what the Court would do, without the slightest foundation for any such expectation. I admitted the allegation of the wife after it had been twice reformed, because I was of opinion that if the facts pleaded in that allegation were proved the suit of the husband would be barred. Upon this admission of the allegation the proctor for the husband prayed a monition against the wife for a personal examination. The Court said nothing. Then the proctor for the wife prayed to be

heard on his petition against the issuing the decree. The Court was surprised at that prayer, which appeared to be perfectly superfluous. Now, to my astonishment, comes before me a minute from the registry, in which the Court is made to say what it never did say or intended to say. The only question which I have to decide is, whether I [334] shall order the inspection at once, or wait till after publication. I have no hesitation now, as I should have had no hesitation before, in refusing the monition for inspection at present; and in so doing I am only doing what I am bound to do in sparing the feelings of the wife, where it is not absolutely necessary that she should submit to an examination. The husband will not be prejudiced by the delay, should it be necessary to have recourse to this inspection hereafter.

DENISON *v.* DITCHER. Arches Court, April 23rd, 1857. Clerk in holy orders.—Limitation of time in criminal proceedings under 3 & 4 Vict. c. 86.—Held, that a "suit or proceeding" under 20th section of 3 & 4 Vic. c. 86 is commenced by the service of the citation on the party accused, to appear at a certain time and place, before a competent Court, to answer certain definite charges; that from the service of such citation the two years limited by the section must be reckoned; that a commission to inquire, issued under the statute, and intermediate steps between the report of such commission and the citation, form no part of the same suit or proceeding.

This case came before the Court of Arches on appeal from a sentence of the Archbishop of Canterbury, acting for the Bishop of Bath and Wells, under 3 & 4 Vic. c. 86, pronounced at Bath, in Oct., [335] 1846, by which the Venerable G. A. Denison was deprived of the Archdeaconry of Taunton and of the Vicarage of East Brent, in the County of Somerset and Diocese of Bath and Wells, for advisedly maintaining and affirming doctrines directly contrary to the twenty-eighth and twenty-ninth articles of religion, referred to in 13 Eliz. c. 12. The point here determined did not go at all to the merits of the case, but was raised on the question of lapse of time since the last offence charged on the construction of 3 & 4 Vic. c. 86, s. 20.

This point was argued by Phillimore and Deane for the Archdeacon. They contended that the case was clearly within the limitation of the 20th section; that the commission of inquiry was distinct from the suit or further proceeding; that though notice of the issuing of the commission and of its sitting was required by the statute to be given to the party accused, yet that the commissioners had no power to compel his attendance, or to inflict any punishment; that on the report of the commissioners neither Archbishop nor Bishop had power to punish without the consent of the party accused; that the filing the articles whether in the registry of Bath and Wells, or in the registry of the vicar-general of the Archbishop, and notice thereof given to the Archdeacon, did not call upon him to answer at any given time or place before any persons authorised to adjudicate; that such notice, the necessary commencement of a suit, was only effected by the requisition to appear at Bath, served on 10th June 1856.

[336] Bayford and Spinks, contrà, argued that the issue of the commission to inquire was the commencement of the suit or proceedings mentioned in the Act; or, if not that, at least the filing of articles in the registry of Bath and Wells, or the service of the copy of these on the Archdeacon; that the cases cited had come before the Arches Court by letters of request, which distinguished them from the present proceedings, and made them inapplicable as precedents.

*Sherwood* v. *Ray*, 1 Moore, P. C. C. 98; *Bishop of Lincoln* v. *Day*, 4 N. C. 299; *Brooks* v. *Cresswell*, 4 N. C. 429; and *Bishop of Hereford* v. *T*——, 2 Robert, 595, were cited.

The judgment contains a sufficient statement of various previous proceedings in the cause.

*Judgment.—Sir John Dodson.*—This case came by way of appeal from a sentence pronounced by the Archbishop of Canterbury, sitting pro hac vice as and for the Bishop of Bath and Wells, under the provisions of the statute the 3 & 4 Vic. c. 86, commonly called the Church Discipline Act. The proceedings in the case, so far as it is necessary to state them for the present purpose, are shortly these. The Reverend Joseph Ditcher, Vicar of South Brent, in the County of Somerset, in the Diocese of Bath and Wells, having, on the 20th of October, 1854, made complaint to the Archbishop that there [337] was a scandal and evil report against the Venerable George

Anthony Denison, Archdeacon of Taunton, and Vicar of East Brent, in the same county and diocese, for having offended against the statute of the 13th of Elizabeth, intituled, "An Act for the Ministers of the Church to be of sound Religion," by advisedly preaching and publishing doctrines repugnant to the articles of religion agreed upon in convocation in the year 1562. The præsertim of the charges against the Archdeacon being that, on the 7th of August, 1853, and on the 6th of November in the same year, 1853, and on the 14th of May, in the year 1854, he had preached three several sermons in the cathedral church of Wells, containing unsound doctrine, and that he had afterwards published the same. And Mr. Ditcher thereupon prayed that his Grace would grant a commission of inquiry into the grounds of the scandal; and it was agreed by the consent of counsel on both sides in the case that the time of the alleged offence having been committed should be limited to the first two sermons.

The sentence appealed from related only to the first two sermons. The reason being, I presume, that there was not proof of the preaching and publishing of the third sermon in the Diocese of Bath and Wells. Upon the 31st of October, 1854, a commission of inquiry issued by direction of the Archbishop. The commissioners accordingly met, and notice of such meeting having been given to the Archdeacon, he attended thereat. In January, 1855, the commissioners reported to the Archbishop that there was a sufficient primâ facie ground for **[338]** instituting further proceedings against the Archdeacon. The Bishop of Bath and Wells was then applied to to sign letters of request to the Arches Court; but he again declined to do so. Articles against the Archdeacon were then prepared and deposited in the registry of the Diocesan Court of Wells; and also in the registry of the vicar-general of the Archbishop in London. The printed papers in this case contain the proceedings in this cause; I find it set forth at length:—"The commissioners having made their report to the Archbishop of Canterbury, and the Bishop of Bath and Wells having been again applied to, and asked to take proceedings upon this report by sending the case to the Court of Arches, and having declined to do so, articles were prepared and deposited both in London and in Wells, on the part of Mr. Ditcher, and the Archbishop was pressed to constitute a Court, and to hear the case under section 11 of 3 & 4 Vic. c. 86. The Archbishop declined to proceed further in the matter, upon which steps were taken in the Court of Queen's Bench to compel him to proceed. The following are the dates of the several steps taken." This is a matter which has been dwelt upon very much in the argument, therefore I have stated it in the words of the book itself. Now, the dates were these. The rule nisi was applied for and obtained on the 22nd of November, 1855. The rule was made absolute on the 24th of January, 1856; and peremptory on the 19th of April. The citation issued on the 5th of May from the Archbishop to the Archdeacon, summoning him to appear in London upon the 27th of May, 1856. The return to the rule was quashed **[339]** upon the 26th of May, application having been made to the Court of Queen's Bench, and that Court considering the return insufficient. An appearance in London was given to the citation upon the 27th of May, 1856. Upon the 5th of June, 1856, a requisition issued to the Archdeacon to appear at Bath, and this was served upon the Archdeacon on the 10th. Eventually a Court was formed by the Archbishop to sit at Bath. The notice or requisition to appear at Bath is in these terms:—"I, John Bird, by Divine Providence Lord Archbishop of Canterbury, Primate of all England and Metropolitan, in pursuance of a mandamus issued to me, and dated the 26th day of April, 1856, by Her Majesty's Court of Queen's Bench, do hereby require you, the Venerable George Anthony Denison, a clerk in holy orders of the United Church of England and Ireland, Archdeacon of the Archdeaconry of Taunton, and Vicar of the Vicarage of East Brent, both in the Diocese of Bath and Wells, and the Province of Canterbury, to appear before me either in person or by your agent duly appointed at the Guildhall, in the City of Bath, within the diocese aforesaid, at eleven o'clock in the forenoon of the 22nd day of July, 1856, then and there to make answer to certain articles filed in the registry of the diocese aforesaid by the Reverend John Ditcher, clerk and Vicar of the Vicarage of South Brent, in the said Diocese of Bath and Wells, the party complainant, and whereof a copy was served upon you on the 4th day of August, 1855. Given under my hand, this 5th day of June, 1856.—J. B. CANTUAR." The requisition issued on the 5th; it was served **[340]** upon the 10th of June; and on the 22nd of July the Court was opened at Bath, the Archbishop and his assessors forming the Court as required by the Act. Witnesses were examined upon the occasion, and

counsel were heard. A protest was given in on behalf of the Archdeacon, and that was argued and overruled. I think an application was made to hear that in the first instance, and it was argued and overruled by the Court. And upon the 12th of August, in the year 1856, the Archbishop pronounced the doctrines set forth by the Archdeacon to be contrary to the twenty-eighth and twenty-ninth articles of religion; and called upon him to retract upon pain of deprivation; time being however allowed him for that purpose until the 1st of October thence next ensuing. The Archdeacon not having made the required retraction, the Court met upon the 21st of October to deliver its sentence. But a statement in writing, and also a further protest having been offered on behalf of the Archdeacon, application was made to be further heard thereon, which was granted. But the Court not deeming the same to be satisfactory, pronounced a sentence of deprivation, from which sentence the present appeal was brought to this Court.

Application has also been made to this Court by the learned counsel for the Archdeacon to be heard on the protest in the first instance, before entering into the principal case. It appeared to the Court, from the statement of the learned counsel, that one part of the protest, if well founded in law, might possibly dispose of the whole case, and it allowed that point to be first argued.

Now, that portion of the protest which the Court **[341]** allowed, and which was assented to on all sides should be first argued, is to be found in the printed papers. I will read it, for it is quite necessary that I should do so. It is the fifth paragraph of the protest, and it is in these terms: "That the suit or proceeding (if any) now pending before his Grace the Archbishop of Canterbury was commenced or instituted by the service upon the said George Anthony Denison, on the 10th day of June, 1856, of a certain instrument in writing or citation under the hand of the said Archbishop, dated the 5th day of the said month, and calling upon the said George Anthony Denison to appear at the Guildhall, in the city of Bath, either in person or by his agent duly appointed at 11 o'clock in the forenoon of the 22d day of July, 1856, then and there to make answer to certain (pretended) articles therein alleged to have been filed in the registry of the Diocese of Bath and Wells, and of which (pretended) articles it is therein also alleged that a copy was served upon the said George Anthony Denison on the 4th of August, 1855; that the said pretended articles do not set forth any alleged offence, which was the subject of inquiry before the said commissioners, as having been committed by the said George Anthony Denison, within two years of such the commencement or institution of this suit, according to the provisions of the hereinbefore cited Act, and therefore the party accused cannot be called upon to make answer to the said articles." That was the ground of the protest, and it was founded upon the Act of Parliament, which has been referred to, the Church Discipline Act, and the 20th section I think of that Act, the 3 & 4 Vic. c. 86.

**[342]** The question, then, which was thus raised, and which the Court is called upon to decide, depends upon what is the true construction of the statute, the 3 & 4 Vic. and especially of the 20th section of that Act, as applicable to the dates and circumstances of this case. Now, by the 20th section of that Act, it is enacted, "that every suit or proceeding against any such clerk in holy orders for any offence against the laws ecclesiastical shall be commenced within two years after the commission of the offence in respect of which the suit or proceeding shall be instituted, and not afterwards." Then follows a proviso, which I think does not apply directly to the present case; but it is that part of the 20th section to which I have already referred, namely, that proceedings or suits are to be commenced within two years after the offence alleged, and not at any subsequent time, "not afterwards."

Now, then, the question is as to when this, whatever it is to be called, whether it is a proceeding or whether it is a suit, commenced against the Archdeacon—whether it was within the two years, or whether it was not; and what I have to consider is, what is the commencement of the suit or the proceeding? On behalf of Archdeacon Denison it is contended that the commencement of the suit or proceeding is referable to the service of the requisition or citation on the Archdeacon to appear before the Court at Bath, that being the only Court which, under the circumstances, had authority to adjudicate between the parties. To that requisition I have already referred. That, the Archdeacon contends, is the first time that he is called upon in any suit or proceeding binding upon him, and therefore that **[343]** the commencement is to be dated from that period. On the other hand, it is said, for Mr. Ditcher, that the com-

mencement of the suit or the proceeding, whichever it is to be called, was first, the issuing of the commission by the Archbishop; and if that was not the commencement of the proceeding or suit, then it must be considered that the suit commenced at the time of the filing of the articles in the Consistory Court at Wells, and also at the Vicar-General's Court in London; and if the mere filing of the articles was not the commencement of it, then it must be taken that the service upon the Archdeacon of the articles must be the commencement of the proceedings; because they contained a charge against him, they were served upon him, and therefore that time must be held to be the commencement of the suit or the proceedings in the cause.

It is between these two conflicting statements as to what is the commencement of the cause or proceeding that the Court is now called upon to decide. With respect to the issuing of the commission of inquiry, whether that is to be held as the commencement of the cause or proceeding, or whether the requisition or the citation to appear at Bath is to be held as the commencement, is a very important point in the case. I must remark, in the first instance, that there is a very wide difference indeed between the issuing of a commission to inquire, and a proceeding against a party by way of punishment. The object of the commission, in the first instance, is to inquire whether there are sufficient grounds to make it advisable that "further proceedings" as in one part of the statute **[344]** it is stated—in another, that "proceedings" should be instituted, or that "a suit" should be instituted against the party. Now the commissioners, though they have the power to inquire, to examine witnesses, and so on; and though they are to give notice to the party who is charged with the offence, in order that he may attend if he thinks proper, have no power to compel his attendance, and they have no power whatever to inflict any punishment upon him, whatever the evidence may be that is given against him in the course of the inquiry which they have pursued. Neither has the Bishop, nor the Archbishop, nor any other person, any authority to punish for any offence that may be proved upon the evidence that is produced before the commissioners of inquiry, unless by the consent of the party himself. If the party defendant thinks proper to say, "I submit to the report of the commissioners, and I am willing to take any punishment that the Archbishop or the Bishop may award," then the Archbishop or the Bishop may give sentence against him. But it is by consent only; they have no power whatever of themselves to do so. Then, upon their report all that can be done is to institute proceedings regularly against him, either in the Court of the Bishop himself, who is to sit there with certain assessors, or the Bishop may send the case, by letters of request, to the Court of Appeal of the province; and then the proceedings are regularly commenced, and regularly go on, as in any suit instituted against an offending party.

Then, as to the articles being filed in the registry of the Court below, that would be no sufficient **[345]** notice to the party. The serving of the articles upon him, which is required by the Act, is, to some extent, a notice given to him of the proceedings that are going on against him. But it is a very imperfect notice. He is not bound to take any steps whatever in consequence of it. He is not called upon, as in a citation in a cause to appear before any particular judge, or at any particular time or place. There is no citation of that sort. He need take no notice of it whatever, unless the parties think proper to take further steps. He is not bound to move merely because articles have been served upon him. He has no knowledge of where he is to appear, or before whom his case is to be adjudicated. It is wanting in all the requisites of a citation making the party the defendant in a suit. It is deficient in these respects, and, therefore, it cannot be said that that would be binding upon him, unless this service of the articles be followed up by a citation.

It is said in this case, that great hardship was imposed upon Mr. Ditcher, the prosecutor, in consequence of the delay of the Court, or the Archbishop, or whoever is to proceed in this matter, to adjudicate upon it; that it is a great hardship upon him that he should fail, merely because the proper steps have not been taken by the Archbishop. But suppose they have not—and suppose the Archbishop was to blame for not having proceeded with due celerity in this case—is it a reason why the Archdeacon should be punished, contrary to the tenor of the Act, which expressly provides that the suit or proceeding shall be commenced within two years; if, through the default of Mr. Ditcher himself, **[346]** or of any other person, no such proceedings are taken? If the Archdeacon is not convened before the proper court within the time required by the law—that is within two years—it is expressly provided that he shall

not be proceeded against afterwards; these are the terms used in that 20th section of the Act. And I apprehend, whosesoever fault it might be, if fault there was, that the cause was not carried on with due activity, the Archdeacon is not the person to suffer upon that account.

I think it is hardly necessary to go through this Act, which has been commented upon at considerable length by the learned counsel in the cause. But it may be as well just to observe from the recital of the Act, that its purview is this:—"Whereas the manner of proceeding for the correction of clerks requires amendment." It is as to "causes for the correction of clerks," that this statute is particularly directed. And then the Act provides this court of inquiry, in a later section, for the purpose of making inquiry as to the grounds of such charge or report; that is what the commissioners are to do. They are to inquire into the ground of such charges or reports, and to see whether there is any necessity for further proceedings. In one or two of the sections the term "further proceedings" is used. For instance, in the 4th section they are to inquire and to see whether "further proceedings" are to be instituted; and again, in the 6th, "any further proceedings." And after that, throughout the Act, the words are, for "instituting proceedings" after the inquiry; that is what they are to do. They are to inquire **[347]** whether there is ground for the scandal, and whether there are grounds for instituting proceedings, that is, for bringing a suit in point of fact—for it can be by a suit, and a suit only, that the party can be proceeded against and punished, unless he shall think proper, voluntarily, to consent to the punishment assigned by the Bishop or Archbishop upon the evidence which is given upon the inquiry. But beyond that he is not liable, and it appears to me, therefore, that these terms, that no suit or proceeding shall be instituted after two years, are confined to legal proceedings in the nature of a suit or proceeding. "No suit or proceeding," or "proceeding or suit," are terms which are to be reckoned precisely the same. There is no difference. Then I apprehend that the Act must mean the suit, and not the preliminary inquiry, whether there should be a suit or not. That is "in itself no suit or proceeding." Here, undoubtedly, is a suit, but not within the two years; and, consequently, as it appears to the Court, the charge brought against Archdeacon Denison does not come within the period required by the statute.

There have been some cases determined upon this point, several of which have been referred to by the learned counsel in the course of the argument. I think the first of those cases was one decided by Sir Herbert Jenner Fust, and is reported in the 4th vol., Notes of Cases, p. 304. The case to which I am adverting is that of *The Bishop of London* v. *Day*. The learned judge, in the course of his judgment upon that case, made some remarks as to the inconvenience of delay. He says, "But supposing there are reasons for the delay, it must be admitted **[348]** that great inconvenience results from such delay. The jurisdiction of the Court is limited to a period of two years, before the commencement of the proceedings: and it might happen that the report of the commissioners of inquiry would be applicable to a different state of things, where seven months intervened between the report and the commencement of the suit. The Bishop issued his notice on the 7th of August, 1844, and what offences may have been proved before the commissioners, independently of these before the Court, I have no means of ascertaining. It would appear that any offences committed after the 25th of September, 1842, might have formed the subject of inquiry before the Commissioners, whereas this Court can only inquire into offences committed after the 10th of May, 1843. This clearly shews the importance of allowing as little delay as possible to occur between the report of the commissioners, and commencement of proceedings in this Court." So that he clearly held that this Court could not proceed in regard to offences committed at a greater distance of time than two years, although the court of inquiry, from its sitting nearer to the time of those offences, might have inquired into them. If they had been inquired into, and it was found by the court of inquiry that they afforded grounds for further proceedings, or for instituting a suit against the clerk, the learned judge was of opinion that he could not take notice of those charges; though the commissioners of inquiry might do so, he could not do so, if more than two years had elapsed from the time. And this is a case in which the learned judge expressed himself very strongly and very clearly upon the subject.

**[349]** Then it is said that this can only apply to cases where the suit is brought by letters of request; and it is admitted that if the suit is brought by letters of

request (I do not know whether it was admitted merely for the purpose of argument, or whether it was admitted distinctly and absolutely), that that indeed constituted a new proceeding and a new suit; and, therefore, that the Court sitting in consequence of those letters of request, could not inquire into prior acts; but that if the Bishop or Archbishop who had granted the commission of inquiry had himself proceeded, and the further proceedings or suit had been before him, that then such proceedings might have included all the facts that were charged before the commissioners, and found before the commissioners; whether those facts were within the two years or not. But I really cannot see any difference between the two modes or further proceeding. If the one is a new suit; if that which is brought by letters of request is a new suit, why, surely the other must be a new suit likewise! How does the matter stand? When the commissioners have reported, it is competent to the Bishop either to proceed in his own court with certain assessors, or to sign letters of request. Whether he does the one thing or the other, either is a proceeding entirely free and distinct from the report of the commissioners of inquiry, whether there should be proceedings instituted or not. It seems to me, therefore, that the opinion of the learned judge as expressed here, is quite clear; and, also, that it would be the same whether the case were by letters of request or not.

There was another case of *Brooks* v. *Cresswell*, which was also before my predecessor in this chair. **[350]** The case is reported in 4 N. C., p. 432, and the learned judge said—"It has been also objected that a specific charge laid in the third article, relating to an occurrence in October, 1842, is out of time, being beyond the limit of two years prescribed by the Church Discipline Act, as the citation was not returned till the 7th of November, 1844; whereas, it was contended on the other side that the commencement of the proceedings was the taking out and service of the citation, which was served in August, 1844, and consequently within two years of the offence. This point might have been raised in the case of *Lincoln* v. *Day*. But in that case it was not necessary for the Court to determine the point, as it held the offence charged not to have been established. The Court, however, was then inclined to hold that the commencement of the proceeding dates from the return of the citation, and upon further consideration, the Court is now prepared to hold that the commencement of the proceedings is to be dated, not from the time the citation was extracted, but from the time of its service upon the party." Then he goes to the case of *Sherwood* v. *Ray*.

There is also another case, but that is not so important, because that was decided by myself; but it was in conformity with the decision of Sir Herbert Jenner Fust, and in fact it was founded very much upon his judgments, and upon what was considered to be the practice of the Court, and the doctrine of the Court upon this point. I refer to the case of the Bishop of Hereford against a person whose initial is T. I do not know what the name was; that is not important. It is reported in 2 Robertson. **[351]** Now, what fell from the Court upon that point is as follows:—"Hitherto, then, I do not consider that the objections raised would warrant me in dismissing the reverend gentlemen; but one more objection remains to be considered, and that the most important one; namely, the question of time. The offences are charged to have been committed between the months of March, 1850, and June, 1851, but the decree was not issued until the 20th of September, 1852; therefore the offences may all have been committed more than two years prior to the institution of this suit, since it is not stated that they were continued to June, 1851. Now, by the 20th section of the statute, it is enacted 'that every suit or proceeding shall be commenced within two years.'" I need not go through that section of the statute. Then I say:—"Here is a positive enactment which is strengthened by the following negative words, 'and not afterwards.' By this section, literally as it stands, it is clear that the person cited cannot be proceeded against for the offences charged, as they are not, as I have observed, alleged to have been committed within two years of the commencement of this suit. But it was said, that this section is not to be taken alone, it is to be construed with reference to other parts of the statute." Then I proceed to comment upon the several sections of the Act, and I state "that the term 'further proceeding' is used in other parts of this Act; and it is said that the suit in this court is not an original proceeding, but a continuation of the first proceeding, namely, of the commission of inquiry, which was instituted within the two years." So that in this case, as in **[352]** one of the cases which had been decided by Sir Herbert Jenner Fust, there had been this commission of inquiry, and the

question was whether it was to be considered as a continuation of that, or whether it was a new suit or proceeding. "I cannot adopt that view, though I allow that there is a want of distinctness in some sections in reference to the precise meaning of the words 'proceedings' and suit. The words of the 20th section, already cited, are plain. I cannot, then, attempt to explain any words that are distinct by words which are to some extent ambiguous. Even if a doubt could exist, as to the meaning of the 20th section, it would be my duty, as this is a criminal proceeding, to give the individual cited the benefit of that doubt; but the truth is, I have no doubt respecting the meaning of the Legislature; the 'proceedings' or the 'further proceedings,' when sent to this court, are to be 'heard and determined according to the law and practice' of this court," and so on.

This must, therefore, be considered as the doctrine of the Court, right or wrong, as to the course that has been pursued, and from which I am scarcely at liberty to depart, unless it should be made clearly to appear that there has been some great error committed upon the point. I say, I am not at liberty to depart from that doctrine, unless there has been such error clearly made out, or unless there has been some decision of a superior court, to which, of course, it would be the duty of this Court at once to bow, and to correct the error which it might have committed. But in this case I do not find that there is any decision by any superior court that at all militates against the doctrine here laid down. It is quite **[353]** true that the Archbishop and his learned assessors came to a different conclusion, and certainly I should bow with deference and respect to them; but I have been taught in this case that the Archbishop was only sitting upon the present occasion, not as an archbishop, but as and for the Bishop of Bath and Wells; and that it is to be considered an inferior court, and that from that inferior court the appeal lies to this court. I must therefore adhere to the doctrine that has been laid down by my learned predecessor, and which has been followed by myself, and the only conclusion to which I can come is this, that this suit or proceeding, or whatever it is to be termed, has not been brought within the time required by the statute, that more than two years have elapsed from the commission of the alleged offence; and it is, therefore, the duty of the court, I think, in this case, to pronounce for the appeal, to reverse the decision appealed from, and to dismiss the Archdeacon from all further observance of justice in this suit. I make no order as to costs.

# REPORTS of CASES DECIDED in the COURT of PROBATE and in the COURT for DIVORCE and MATRIMONIAL CAUSES. By M. C. MERTTINS SWABEY, D.C.L., Advocate in Doctors' Commons, and of Gray's Inn, Barrister-at-Law, and THOMAS HUTCHINSON TRISTRAM, D.C.L., Advocate in Doctors' Commons, and of the Inner Temple. Volume I. From Hilary Term 1858 to Hilary Vacation 1860. London, 1860.

[1] REPORTS OF CASES DECIDED IN THE COURT OF PROBATE AND IN THE COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

LATHAM AND DEE *v.* WOOLBERT, on the Admission of a Responsive Allegation. January 20 & 28, 1858.—Will.—Constraint.—Influence.—Incapacity.—The admission of a responsive allegation, pleading in the earlier part the personal and testamentary history of the testatrix, and in the later part, that the paper in question was procured by her husband at a time when, by reason of extreme illness, she had not testamentary capacity, was opposed.—Held, that the earlier part of the allegation, though in itself inadmissible as not affecting the issue, would, in combination with the averment of testamentary incapacity contained in the later part, be such evidence as a Judge could not properly withdraw from the consideration of a jury at a trial of the issue of testamentary competency, and must be admitted to proof accordingly.

[S. C. 27 L. J. P. 10; 6 W. R. 375.]

This was a cause of granting letters of administration with the will, bearing date 7th July, 1857, annexed, of Ann Caroline Latham, wife of Charles Thomas Latham, deceased, promoted by Latham and Dee, the executors therein named, against Thomas Dedrich Woolbert, one of the executors of a will of the deceased, bearing date the 10th June in the same year.

The will of July was propounded in a simple allegation, on which the two attesting witnesses and Dee were examined.

The allegation now before the Court was responsive to this, and pleaded that the deceased was the natural daughter of T. D. Woolbert; that she and her mother lived with Woolbert [2] till 1822, the deceased being then about sixteen years of age, when they went to reside with W. Whitaker Clulow, and that the deceased remained with him till his death; that Woolbert was in the habit of occasionally seeing her from 1822 till 1848, when he lost sight of her until May, 1857; that Clulow died in September, 1855, and left deceased personal property to the amount of between £8000 and £10,000, the interest to her separate use during her life, and, after her death,

subject to her appointment by will; that deceased intermarried in October, 1855, with C. T. Latham. Other articles pleaded various wills procured by Latham from his wife in his favour, and his unkind treatment of her after the first testamentary paper so obtained; that in May, 1857, deceased caused advertisements to be inserted in the "Times," which resulted in a renewed intercourse with T. D. Woolbert, her father, in the same month; the instructions, drafts, and execution of the will of June 10th; the weak state of health of deceased; her husband's discovery of the will of 10th June in favour of her father and his family; and the undue control and influence exercised by her husband; and more specially her state of body and mind on the 5th, 6th, 7th, and 8th of July, and her incapacity at that time for any testamentary act.

Dr. Addams, Q.C., and Dr. Twiss, Q.C., opposed the admission of the allegation. I. As to all the earlier articles. There could be no such thing as undue influence vitiating a will, especially undue marital influence, without mental incapacity in the person influenced. II. As to the whole allegation. That the earlier articles did not pretend to set up a case of incapacity; that the later articles, in fact, only pleaded a weakened state of body on the 5th, 6th, 7th, and 8th July; and that the allegation as a whole was no answer to the allegation propounding the will.

The Queen's Advocate (Sir J. D. Harding) and Dr. Robinson contrà.

Cur. adv. vult.

January 28.—*Sir C. Cresswell.* In this case I have been called upon to decide whether an allegation brought in by Dedrich Woolbert is admissible or not. On the 16th of November Latham **[3]** and Dee brought in an allegation propounding a will as the last will and testament of Ann Caroline Latham deceased, wife of Charles Thomas Latham, which was alleged in the ordinary form to have been prepared according to her instructions, and to have been duly executed by her on the 7th July, 1857, she being at the time capable of giving instructions and of executing her will, or of doing any other act requiring thought, judgment, and reflection. In answer to this an allegation, consisting of twenty-four articles, was brought in by Woolbert on the 9th December, and its admission opposed. The question was argued last week, when it appeared that the opposition was not to the form of any of the articles, but was general to the whole allegation as not giving any answer to the case made in support of the will. The earlier articles of the allegation contain the personal history of the deceased, Ann Caroline Latham, shewing that she was the natural daughter of Dedrich Woolbert; that in 1822 she and her mother went to live with a person named Clulow; that until 1848 she and her father occasionally met, and always on affectionate terms; but that from 1848 till 1857 they lost sight of each other; that in 1855 Mr. Clulow died, having made a will whereby he bequeathed property to a considerable amount to the deceased; that in October, 1855, she intermarried with Charles Thomas Latham, and that he procured her to make a will; and he afterwards treated her with great unkindness, which induced her in 1857 to endeavour to discover her father, which she succeeded in doing by means of an advertisement in the "Times" newspaper. Several articles then follow, alleging that she made a will, leaving to her father an annuity of £100, legacies to some other persons, and making her brother Frederick T. Woolbert residuary legatee; that she afterwards made another will and codicil under the coercion and undue influence of her husband in the month of June. Now all this has no direct bearing on the question whether the will propounded of the 7th of July was the will of Ann Caroline Latham, executed by her when in the possession of capacity to do so. It might be perfectly true that her husband prevailed upon her to make a will, and afterwards treated her with unkindness; that she afterwards discovered her father, and made a will, leaving legacies to him and others; that by the undue **[4]** influence of her husband she was induced to make another will and codicil in June; and yet it would not follow that she had not testamentary capacity to make another will in July, and that the will propounded by the husband was not a valid will; and if the allegation had gone no further, I should have considered that it was inadmissible. But the 21st article is directed to the will now in question. It is as follows:—"That the said deceased was, on the 5th July last, extremely ill and under the influence of delirium, brought on, in great measure, by the said C. T. Latham, having, contrary to the express directions of her medical attendant, supplied her with spirits and water; that on the following day (the 6th) the said deceased was worse than on the previous day; that she, on that day, suffered greatly from sickness and vomited blood and bile, had a discharge from the uterus, and also a discharge of blood from the bowels; that

she had also a nervous twitching of the hands, and was again under the influence of delirium, and in the evening of the said day was under the impression that there were devils in her room, when the said C. T. Latham had a candle brought into the room to endeavour to convince her to the contrary; that on the two following days (the 7th and 8th) the said deceased continued much in the same state as on the two previous days; that on the evening of the said 7th her medical attendant (who on his calling in the morning had been prevented seeing her by the said C. T. Latham sending word, contrary to the fact, that the deceased was asleep and could not be seen) was, in consequence of her having got worse, sent for, and on his seeing her found her quite unconscious and unable to answer questions put to her by him, the medical attendant, who, from her then state, expressed a wish that a physician should be called in, to which however the said C. T. Latham objected, on the ground that there was no necessity for it. And the party proponent further alleges and propounds, in contradiction to the allegation given in and admitted on the part of C. T. Latham and J. S. Dee, the other parties in this cause, that the said deceased, on the said 5th, 6th, 7th, and 8th days of July was incompetent to transact any matter of business requiring thought, judgment, and reflection." That therefore alleges, not that the deceased was induced to execute it by coercion **[5]** or under the undue influence of her husband, but that she was at the time incompetent to transact any matter of business requiring thought, judgment, and reflection. It appears that, according to the rules of pleading which prevailed in the Ecclesiastical Court, a bare denial of capacity would not be allowed,—it was necessary to allege some facts from which an inference to the effect of a positive denial might be drawn. Now this 21st article avers that the deceased was on the 5th July under the influence of delirium; that on the 6th she was worse in health, again delirious, and in the evening labouring under delusions; that on the 7th and 8th she was much the same; that on the morning of the 9th (the day on which the will was executed) her medical attendant was not allowed to see her, a false reason being assigned for his exclusion, and that in the evening he found her quite unconscious and quite unable to answer questions. It seems to me, that these facts bear directly on the question of the competency or incompetency of the deceased, at the time when the will was executed; and had they been given in evidence on an issue to try that question before a jury, the Judge could not with propriety have withdrawn them from their consideration. Having then evidence bearing directly on the question, the former part of the allegation is no longer immaterial, and the facts therein stated may with propriety be taken into consideration in combination with those contained in the 21st article. I say nothing as to the strength or weakness of the case made in opposition to the will; it seems to me that it is a case which ought to be admitted to proof and considered by the Court. In *Croft* v. *Croft*, 3 Hagg. 311, Dr. Lushington, on the subject of admitting or rejecting averments, says, "The better and more discreet line to be adopted is, if a serious doubt arise as to the ultimate effect of any averment in a plea, to allow it to stand and come before the Court in proof; for then the utmost extent of mischief is to occasion some additional expense, while wholly to exclude the averment might work absolute injustice." Acting upon that rule, which seems to be as applicable to a whole allegation as to a particular averment, I think I ought to admit this allegation to proof.

**[6]** IN THE GOODS OF WILLIAM THOMAS NORRIS (deceased), on Motion. January 28, 1858.—Administration.—Presumption of Death at Sea.—Advertisements in Newspapers dispensed with.—W. T. N., a settler in New Zealand, embarked 1st July, 1856, in a vessel bound for Sydney, on his way to England. The vessel never reached Sydney; and no intelligence, after inquiries had been instituted, having been obtained as to the vessel or any of those on board, she was supposed to have foundered at sea in some heavy gales which occurred at the time she was making the voyage in question.—Held, that the death of W. T. N. was to be presumed; and that advertisements in newspapers for persons supposed to be dead may be dispensed with, when their history is known and traced to within a short period of their being last heard of.

[S. C. 27 L. J. P. 1; 6 W. R. 261. Distinguished, *In the Goods of Atkinson*, 1873, Ir. R. 7 Eq. 219.]

This was an application for administration of the effects of W. T. Norris, who was supposed to have been lost at sea.

It was supported by three affidavits:—

1. By one made by his father, who deposed that the deceased, being a bachelor and intestate, was supposed to have perished at sea on or since 1st July, 1856; that in 1854 he settled in Canterbury settlement, New Zealand; that in December, 1855, by the death of an aunt, he became entitled to £20,000, and that in January, 1856, he (the deponent), by letter, apprised his son of that event, and suggested that he should return to England; that he had received from the deceased a letter in answer thereto, dated 13th May, 1856 (annexed to the affidavit), expressing his intention to return on settling his affairs, accompanied with a power of attorney authorising deponent to receive for and to transmit to him £3000 (part of the £20,000). That in November, 1856, a letter of credit for £3000, and a letter of advice, were dispatched by post to the deceased, both of which had been subsequently returned to this country by his agent in New Zealand. That according to a letter (annexed to the affidavit) received from his agent, he sailed from Nelson on 1st July, 1856, in a vessel called the "Wyvern" for Sydney, which was due there about the 1st August. That it had been ascertained, on inquiries instituted by several persons—amongst others, by an uncle of the deceased (the Bishop of Adelaide, in Australia)—that the [7] "Wyvern" had never arrived at Sydney; that there had been no tidings of the vessel, her cargo, or any of the crew or passengers; and that she was supposed to have foundered at sea in some heavy gales which occurred in the month of July, and from which other vessels making the same passage in the same month received considerable injury.

2. By an affidavit of the London correspondent of the deceased's bankers at Lyttleton, who deposed that he had received communications from the manager of the deceased's bank at Lyttleton, that he had sailed in the "Wyvern," which was supposed to have foundered at sea.

3. By an affidavit of T. R., clerk to the solicitors of the father, who deposed that he had ascertained by inquiry that the "Wyvern" belonged to Sydney; that its registered owner was a merchant of Melbourne; that he had not been able to discover at Lloyd's rooms that it was insured in this country or elsewhere, or that the owners had any agents in this country; that he had inspected files of newspapers published in New Zealand and Australia, and had discovered certain paragraphs in some of them (recited in the affidavit), to the effect that the "Wyvern" was supposed to have foundered; that upon inquiry at Lloyd's on the 24th December last he had learned that, up to that date, no information had been received of the missing vessel.

Dr. Phillimore, Q.C., moved the Court "to decree letters of administration of the personal estate and effects of the deceased, as dying a bachelor and intestate on or since the 1st July, 1856, to be committed and granted to W. N., the natural and lawful father of the said deceased." He founded his motion on the three affidavits. Before making applications of this nature, it had not been unusual to insert advertisements in newspapers for the person supposed to be dead; but under the circumstances of the present case, this course had been deemed unnecessary.

*Sir C. Cresswell.* Advertisements in newspapers are very well, if nothing has been heard of a person for some time. Here, as you trace the history of the deceased up to a certain time, and then lose sight of him, I think they may be dis-[8]-pensed with. There is no reasonable doubt that he died at the time supposed. Motion granted.

IN THE GOODS OF WILLIAM FRITH (deceased), on Motion. January 28, 1858.—Will.—Subscription of attesting Witness.—W. F. signed his will in the presence of two witnesses, A. and B. B. being unable to write, A., by his request, guided his hand when he subscribed the will.—Held, that the subscription of B. was valid.

[S. C. 27 L. J. P. 6; 4 Jur. (N. S.) 288; 6 W. R. 262.]

William Frith, late of Swansea, made a will on the 22nd of October, 1857, and died on the 26th of the same month. Having signed his name below the attestation clause, an affidavit of due execution was required in the Registry, from which affidavit it appeared that the hand of one of the attesting witnesses (who was unable to write) was, at his request, guided by his fellow-witness, when he subscribed the will.

As, since the passing of the Wills Act, no similar case had occurred in the Registry, the direction of the Court was required as to whether the will was sufficiently attested under 7 Wm. 4 and 1 Vict. c. 26, s. 9.

Dr. Robertson moved the Court to decree probate of the will, and cited *Harrison* v. *Elvin and Another* (2 Gale & Dav. 769) (S. C. 3 Q. B. 117), which was a case exactly

in point, and in which the Queen's Bench held "that the signature of a subscribing witness, not knowing how to write, and whose hand was guided, must be taken to be his signature."

*Sir C. Cresswell.* I am perfectly satisfied with the authority cited.

Motion granted.

IN THE GOODS OF JOHN JOSEPH MARTINDALE (deceased), on Motion. January 28, 1858.—Will, with Power of Appointment to Married Woman.—Renunciation of the Executor and Universal Legatee in Trust.—Administration (with Will annexed) to the Nominees of the Married Woman appointed by Deed.

[S. C. 27 L. J. P. 29; 4 Jur. (N. S.) 196; 6 W. R. 377.]

The deceased in this case died in June, 1857, leaving a will **[9]** bearing date the 6th March, 1855, of which James Weeks was constituted the sole executor and universal legatee in trust. The testator bequeathed the whole of his property, of the value of about £500, to the said James Weeks, in trust for such person or persons as Martha Brown, wife of James Brown, should, by any writing or writings under her hand, or by her last will, notwithstanding her coverture, appoint, and in default of such appointment, for her absolute, sole and separate use, free from all marital control. It appeared that James Weeks was unwilling to act under this will, and had by proxy renounced all his right to the probate of the said will, as also to letters of administration with the will annexed. Martha Brown, under power given to her in the will, had executed an indenture of appointment and assignment, by which she assigned all her estate and interest under the said will, and also the right of letters of administration with the will anuexed, to Ebenezer Mariner and Henry William Judge, upon trust, for the purposes therein mentioned, in order that Mariner and Judge might apply for letters of administration with the will annexed, and they by the said indenture accepted the trust therein mentioned.

Dr. Deane, Q.C., moved the Court to decree letters of administration (with the will annexed) of the goods, chattels and credits of the deceased, to be granted to Ebenezer Mariner and Henry William Judge, as nominees of the said Martha Brown. He submitted that, if the Court had any doubt as to the effect of the indenture as an exercise of the power given to Martha Brown by the will, it might think it a case falling under the 73rd section of the Probate Act. He was not aware of any case in its circumstances approaching the present.

*Sir C. Cresswell* inquired whether the original indenture of assignment was in the registry.

On being informed that there was only a copy in the registry, the learned Judge directed that the original should be brought in and compared with the copy in the registry, and on that being found correct, that the grant should go as prayed.

**[10]** IN THE GOODS OF LOUISA EDWARDS (deceased), on Motion. January 28, 1858.—Will drawn by Stranger in Blood, who was principally benefited.—Attesting Witnesses since dead.—Consent of Next of Kin.

[S. C. 4 Jur. (N. S.) 196; 6 W. R. 295.]

Louisa Edwards died a widow, on the 4th January in the present year, having made her will, wherein she named William Edmonds sole executor. The will was dated the 31st January, 1854, but was not, in fact, executed till the 11th April in that year. The property was not above £350.

It appeared, from the affidavit of Edmonds, who was also the writer of the will, and took the largest share of the property, that the testatrix intended to execute her will in January, 1854, by making three crosses or marks thereto, but that this was done in the presence of one witness only. Afterwards becoming aware that two witnesses were necessary, she on the 11th April, 1854, acknowledged the marks opposite to her name to be her marks, and that it was her will, in the presence of Richard Knight and King Marshall, who made their marks thereto as witnesses, in the presence of the testatrix and of each other. These attesting witnesses were since dead, and no other person was present at the execution of the will. As Edmonds was a stranger in blood, the consent of the next of kin to the probate going to him had been obtained.

Below the signature of the testatrix were the words—

Executor, WILLIAM EDMONDS.

CHARLES TUBB, ✕ my mark, 2nd Battalion Coldstream Guards;

the latter being the witness to the attempted execution of the will in January. Edmonds's appointment as executor was contained in the body of the will.

Dr. Deane, Q.C., moved the Court to decree probate to the executor therein named, omitting the words and mark above recited. The consent of the next of kin was in fact obtained, but no formal execution of such consent was yet prepared.

*Sir C. Cresswell.* The consent of the next of kin should be formally executed and brought into the registry; upon bringing it in the probate may go as prayed.

**[11]** IN THE GOODS OF ANDREW MAIN (deceased). January 28, 1858.—Administration.—Presumption of Death at Sea.—Payment of Policy by Underwriters.—A. M. sailed from Liverpool in the "Brevet," the 27th January, 1857, for Valparaiso. The voyage should have been made in ten weeks. Nothing had been heard of either the "Brevet" or crew since she left Liverpool. The "Brevet" was insured, and the underwriters had paid policy thereon, as upon a total loss. —Held, that the death of A. M. was to be presumed; that payment of policy by underwriters was strong evidence in favour of such presumption.

[S. C. 27 L. J. P. 5; 6 W. R. 261.]

A. Main, master and part owner of the ship "Brevet," of Liverpool, sailed in her from thence, on the 27th January, 1857, on a voyage to Valparaiso. The ship never arrived at her destination: since she left Liverpool she had never been seen, heard of, or spoken to, nor had any on board of her been seen or heard of.

She was supposed to have been totally lost, with all on board; the underwriters had paid, as upon a total loss, the amount for which the ship was insured.

The above facts were deposed to by F. D. Anderson, of Liverpool, merchant, and part owner of the "Brevet," and a member of the firm, who acted as ship's husband.

Dr. Phillimore, Q.C., stated that the voyage from Liverpool to Valparaiso, under ordinary circumstances, should have been made in ten weeks, and moved for a grant of administration of the effects of A. Main, as having died a bachelor and intestate in or since the month of July, 1857, to be decreed to E. W., his aunt, and one of his next of kin.

*Sir C. Cresswell* observed, that payment by the underwriters, of the amount for which the ship was insured, was very strong evidence in support of the motion.

Motion granted.

**[12]** PERRY *v.* F. H. DYKE, ESQ. (the Queen's Proctor). IN THE GOODS OF EDWARD R. JAQUES (deceased), on Motion. January 28, 1858.—Will.—Testamentary Incapacity.—Administration.—E. R. J. made a will, whilst of unsound mind, in favour of some charitable institution. The only party interested to support it being cited to propound it, or shew cause why it should not be treated as void, did not appear. On an affidavit of the medical attendant of the deceased as to his testamentary incapacity, administration was granted to one of his next of kin, as in an intestacy.

[S. C. 27 L. J. P. 7; 6 W. R. 275.]

Edward R. Jaques died January, 1857, leaving a holograph will, dated the 19th of May, 1825, in the following terms:—"I wish to leave all my money I am possessed of to the use of some charitable institution at my decease. Witness my hand, Edwd. R. Jaques."

A member of the Chancery Bar, who had been consulted on behalf of the next of kin of the deceased, was of opinion, that this bequest was not void for uncertainty, but was a good one in favour of charity, and that the particular mode of its application would be directed by the Queen's sign manual (*Morrice* v. *Bishop of Durham*, 9 Ves. 405).

The deceased being supposed to be of unsound mind when he made his will, W. Perry, one of his next of kin cited, in July last, the Queen's Proctor, as representing the Crown (who alone was interested to support it), either to propound it or to shew cause why administration of the effects of the deceased, as dying intestate, should not be granted to him.

The Queen's Proctor had not appeared to the citation, and had intimated that it was not his intention to do so.

W. M., surgeon, deposed on affidavit, that from September 1823, up to the death of the deceased, he had been acquainted with him, and, with the exception of certain

short intervals, had been his medical attendant; that in October, 1826, he had placed him in a lunatic asylum, where he remained until the following April: that from August, 1827, to his death he resided at Epping, a confirmed lunatic without intermission, under the deponent's constant care and supervision; and further, that during the whole of the period of the deponent's acquaintance with the deceased, he had been always consi-[13]-dered and treated by himself and others as a person of imbecile mind, and wholly incapable of making a will.

The original paper had, subsequently to the death of the deceased, been lost, but there was an affidavit accounting for its loss, to which a collated copy of the original was annexed.

Dr. Tristram, upon the affidavit of W. M., moved the Court "to decree letters of administration of the effects of the deceased as dying intestate, to be granted, under the usual security, to W. Perry the lawful cousin-german, and one of the next of kin of the said deceased." In support of the motion he cited *In the Goods of Jean E. L. Bourget*, deceased, 1 Curt. 591, in which case Sir H. Jenner had granted a similar application, being satisfied from the affidavits, and upon the face of the paper (which was in very incoherent terms), that the deceased was insane; but he directed the paper to be left in the registry, in order that anyone having an interest in it might propound it, should he think fit to do so. In the present case the copy, which had been collated with the original, would remain in the registry.

*Sir C. Cresswell.* On the authority of the case cited, I grant the motion.

IN THE GOODS OF JOHN JONES (deceased), on Motion. January 28, 1858.—Administration.—Next of Kin resident out of the United Kingdom.—20 & 21 Vict. c. 77, s. 73.—A. B. died a widower and intestate; his only son and the sole person entitled in distribution was resident in Australia; a legal representative being required immediately for the preservation of the property, administration for the use and benefit of the son was granted to his father-in-law under 73rd section of the Probate Act.

[S. C. 27 L. J. P. 17.]

This was an application for administration of the goods of the deceased under the 73rd section of 20 & 21 Vict. c. 77; the person who, if that section had not passed, would have been entitled to the grant, being resident out of the United Kingdom of Great Britain and Ireland.

The deceased, late of No. 29 Ponsonby Terrace, Vauxhall [14] Bridge Road, a carpenter, died on the 24th December, 1857, intestate and a widower, leaving Joseph Jones, his only child, and the sole person entitled to his personalty. Joseph Jones had been residing, since 1854, at Sydney, in Australia, and had no duly-constituted attorney or other agent in England. The deceased died possessed of certain furniture in his lodgings, some leasehold houses, and moneys in savings-banks, the whole supposed to be under the value of £600, but requiring the immediate management and protection of a legal personal representative of the deceased.

Joseph Jones, in 1854, married Elizabeth Riches, and the present application was made on behalf of her father, George Riches, for the use and benefit of his son-in-law, under the provisions of the section above referred to.

The application was supported by the affidavits of George Riches and William Clark, as to the facts above stated, and of George Hobbs, verifying collated copies—1, of the register of the marriage of George Riches in 1821; 2, of the baptism of his daughter Elizabeth; 3, of the marriage of John Jones and Mary Organ in 1830; 4, of the baptism of their son Joseph Jones; 5, of the burial of Mary Jones; 6, of the marriage of Joseph Jones and Elizabeth Riches.

Dr. Deane, Q.C., moved the Court "to decree letters of administration of all and singular the goods, chattels, and credits of John Jones to be granted to George Riches, for the use and benefit of Joseph Jones, the natural and lawful and only child, and only person entitled to the personal estate and effects of the deceased, now residing in Australia, and until he shall apply for the same, to be granted to himself, on his giving justifying security, and being assigned to exhibit an inventory of the goods, chattels, and credits, within one month from the date of the letters of administration."

*Sir C. Cresswell.* I think it may be done on the terms proposed as to sureties.

**[15]** IN THE GOODS OF FREDERICK BEDWELL (deceased), on Motion. January 28, 1858.—Transference of Jurisdiction.—Practice.—A Requisition to New South Wales, under seal of Prerogative Court of Canterbury, to swear an administrator. —Held, on consideration, that the Court of Probate can decree administration on the affidavits so sworn.

[S. C. 27 L. J. P. 8.]

On the 21st July, 1857, a requisition issued, under the seal of the Prerogative Court of Canterbury, for swearing Frederick Garling, administrator with the will annexed of the goods of Frederick Bedwell, late of Paterson River, in the colony of New South Wales (deceased).

The requisition was directed to "His Excellency the Governor of Sydney, in New South Wales, his Lieutenant-Governor, or other competent judge"; and on the 9th of November, 1857, Mr. Garling was sworn before Samuel Frederick Milford, a Judge of the Supreme Court of New South Wales. The requisition and other papers had only been returned to this country within a fortnight of date of the present application.

On application to the registry for letters of administration with the will annexed, a difficulty was felt as to whether the Court of Probate could act on the affidavit of the intended administrator, sworn under a requisition which had issued under seal of another Court, namely, the Prerogative Court of Canterbury, now extinct.

Dr. Deane, Q.C., moved the Judge to decree letters of administration, with the will annexed, of the goods of the deceased, under the seal of Her Majesty's Court of Probate.

*Sir C. Cresswell.* I am anxious to place no formal difficulties in the way of suitors, but I doubt whether I have the legal power to act in such a case, and must take time to consider the point. It is an important one, and I understand that there are many similar cases. Cur. adv. vult.

On a later day, in the goods of Sophia Henderson Ludlow, deceased (infra, p. 29), the learned Judge intimated that he had considered the matter and was prepared to act on affidavits so sworn.

**[16]** IN THE GOODS OF GEORGE FRECKLETON (deceased), on Motion. January 28, 1858.—Practice.—Probate Duty.—Probate was taken in the Prerogative Court of Canterbury to cover property, part of which was afterwards discovered to be without the province (in the diocese of Chester).—Semble: Such grant is valid as regards the property in Chester under 20 & 21 Vict. c. 17, s. 87, on condition of the same amount of duty being paid, as would have been paid before this Act came into operation, if a separate grant had been taken out in Chester.

[S. C. 27 L. J. Ex. 6; 4 Jur. (N. S.) 124; 6 W. R. 262.]

The deceased died at Cheltenham, in November, 1857, and on the 1st December his will was proved by his widow and sole executrix in the Prerogative Court of Canterbury. The probate was general in its terms, and not limited to property in the province of Canterbury. His personalty was sworn under £7000. It now appeared that only £5779 was within the province of Canterbury, and that the residue, viz. £540, being shares in the Liverpool Exchange, was without the province, and within the diocese of Chester; consequently, before the Act came into operation the Prerogative grant *quoad* the £540 would have been of no effect.

Dr. Deane, Q.C., moved the Court to confirm the probate heretofore granted under 20 & 21 Vict. c. 77, ss. 86, 87, 88. The revenue thereby would be no loser. The duty paid on the single grant already taken out was £120; whereas if two grants had been taken out, the duty on the whole property would have been only £111, viz. £100 on the £6000 within the province of Canterbury, and £11 on the £600 within the diocese of Chester.

*Sir C. Cresswell.* This case does not come within sec. 86, which applies to cases when the probate was void, on the ground of error as to *bona notabilia*. As it was a legal grant of probate, though not affecting the whole property, such a grant has by sec. 87 the same force and effect as if granted by the Court of Probate, and I am of opinion that it comes within that section. You don't want my assistance. The Act of the Legislature does for you what you ask me to **[17]** do. But inasmuch as if it had not been for the provision of this Act, probate must have been taken out in Chester, and duty must have been paid upon that grant, you must pay under sec.

87 as much duty as you would have had to pay if you had taken out probate before the Act came into operation.

IN THE GOODS OF HENRIETTA JOHNSON, Widow (deceased), on Motion. January 28, 1858.—Will.—Substituted Executor in Case of Death of one of the Original Executors.—A. made a will, and appointed B., C., D., and E. executors; and in case of the death of B., F. to be executor in his place. B., C., D., and E. proved the will. B. and C. died. F. applied to have a double probate granted to him. D. and E. opposing such grant.—Held that F. was entitled to the grant, and that the casualty was not restricted to the death of B. in A.'s lifetime.

[S. C. 27 L. J. Ex. 9; 6 W. R. 275.]

The deceased in this case died on the 24th January, 1856, having duly executed her will and codicil, and thereof appointed John Blake, William Tyler, Joseph Roche, and William Gates, executors; "and in case of the death of the said John Blake, then I nominate and appoint John Joseph Blake, of the city of Norwich, gentleman, to be an executor hereof in the place of the said John Blake."

It appeared from a duplicate paper, that it had originally stood, "in the case of the death of the said John Blake in my lifetime," but the latter words had been effectually erased from the will before its execution.

In March, 1856, the four executors above named proved the will and codicil in the Prerogative Court of Canterbury. John Blake and William Gates had died since that date; John Blake leaving a will in which his son, the said John Joseph Blake, was appointed executor, and of which he took probate in September, 1857.

From the affidavit of John Joseph Blake, it further appeared that the bulk of deceased's property was acquired under the will of Charles Mills, of which will John Blake was, at the time of his death, the sole surviving executor and trustee, and **[18]** the trusts of the will of Charles Mills, so far as they remain unperformed, had devolved upon John Joseph Blake as the representative of John Blake. That John Blake had, since 1831, acted as such trustee, and his son John Joseph Blake, having been his father's partner for twenty-five years, was intimately acquainted with the affairs both of the testatrix and Charles Mills, and that it was testatrix's intention that John Joseph Blake should succeed his father in the management of her affairs, whether the father's death might occur in the testatrix's lifetime or after her decease.

Dr. Addams, Q.C., moved the Court to decree a double probate of the said will and codicil, to be granted to the said John Joseph Blake, as the executor substituted in the will in the place of John Blake, deceased. On the face of it, this might seem to be a doubtful motion; but the case, *In the Goods of the Rev. Sir John Lighton, Bart.*, 1 Hagg. 235, was, he thought, sufficient to ground it. The marginal note to that case was in the following words:—"A testator having appointed two executors, and provided that on the death of either of them two others should be substituted; on the death of the original executor, who had proved the will, and on a proxy of consent from the other, probate will be granted to one of the substituted executors, it appearing to have been the testator's intention that the substitution should take place on the death of either of the original executors, whether happening in the testator's lifetime or afterwards." The only circumstance mentioned in that case, which might be supposed to distinguish it from the present, was the consent of the surviving original executor, who had not taken probate, but whose right thereto had been saved. Such consent could not well affect the right of the substituted executor, whatever that might be; nor did it appear from the report that Sir John Nicholl, in granting that motion, had relied on that particular circumstance.

Dr. Twiss, Q.C., contrà: The surviving original executors, for whom he appeared, had no interest in opposing this motion, but did not know how far they were justified in admitting Mr. John Joseph Blake's claim to probate. The distinction between this claim and *The Goods of Sir John Lighton* seem to **[19]** be, that in that case there was no one entitled to act under the original probate; but here there was an outstanding grant, and two executors capable and willing to act. He submitted that it would be contrary to the policy of a Court of Probate to make a double grant under such circumstances. In that case also, the Court was induced to look into certain circumstances and determine the meaning of the words in the will "in case of the death of either of them."

*Sir C. Cresswell.* In granting Dr. Addams's motion, I proceed entirely upon the

case cited, as to the construction of the will. I should be very loth to take any presumed policy of the Court of Probate as my guide. *In the Goods of Lighton* there were, in fact, two decisions, for there was a grant of the Irish Court in the first instance, and that was acted upon by the Judge of the Prerogative Court in this country. Here there are ample grounds to satisfy me as to the intention of the testatrix. Blake, the father, was trustee and executor of the person from whom she received a considerable amount of property in a complicated state; and John Joseph Blake, as his father's partner, was conversant with the whole business. These are very good reasons why the testatrix should have desired him to succeed his father as her executor, and I cannot consider such substitution as limited to the casualty of the father's decease in the lifetime of the testatrix. Motion granted.

NICHOLS AND FREEMAN *v.* BINNS. February 1, 1858.—Citing Heir-at-law.—Infant Co-heir.—61 and following Sections of 20 and 21 Vict. c. 77.—In a cause transferred from the Prerogative Court of Canterbury to the Court of Probate, before any allegation or declaration given in.—Held, that the provisions of the 61st and following sections of the Probate Act, as to citing heirs-at-law, applied—that the intent of the Act was to prevent double trials—and that the fact of one co-heir being an infant and child of a plaintiff was no ground for the Court refusing to allow such co-heir to be cited.

[S. C. 27 L. J. P. 14; 6 W. R. 276.]

This was a question arising on sections 61, 62, and 63 of the Probate Act, in a cause transferred from the Prerogative **[20]** Court of Canterbury to the Court of Probate. It was a business of proving in solemn form the last will of W. W. Parkinson, who died a lunatic, promoted by Nichols and Freeman, the executors under one of his testamentary papers dated the 15th of November, 1851.

Mary A. Binns, the niece of the deceased, and one of the surviving executors named in a will dated the 4th February, 1837, appeared in opposition thereto.

As the will of 1851 purported to dispose of real as well as personal property, the defendant's proctor had been summoned to attend before the Judge to shew cause why a citation to see proceedings should not issue against Charles J. Freeman, son of one of the plaintiffs, and Mary Ann Binns, wife of H. B. Binns, the defendant, co-heirs of the real estate of the deceased in the above cause.

Dr. Addams, Q.C., moved the Court, as the will in question purported to dispose of real as well as personal property, to make an order to authorize the plaintiffs to cite the co-heirs of the deceased. The provisions of sec. 61 directly applied to the case.

Mr. Denman, for the defendant: The Act does not necessitate the citation of the heir-at-law, but leaves it to the discretion of the Court; sec. 63 points out cases where it need not be done. The defendant might be prejudiced by citing the co-heir, who is an infant, and a son of one of the plaintiffs. By the citation he would have a right to become a party to the cause, and acquire a knowledge and avail himself of information which might be of importance to the defendant. It would be inconvenient for the defendant to be hampered with an infant co-defendant.

*Sir C. Cresswell*: I cannot see how any such prejudice or inconvenience could arise. You are not bound to join or concur with him in your defence. You may act independently of him. I don't think that you have shewn any sufficient ground for imposing on the other parties the necessity of another trial. One of the great objects of the Act was to prevent the possibility of a double trial on the same will, and this can only be accomplished by citing the heir-at-law. The 61st and 63rd **[21]** sections do not seem quite consistent; the former is more imperative in its terms than the latter.

Mr. Denman: The present case raises also a point of practice, viz. whether this was in the words of sec. 61, "a proceeding taken under this Act." Taken must mean commenced; whereas in this case an appearance was entered, and a contentious cause was in existence, before the Act came into operation. This was a pending suit transferred under sec. 84.

Rule 34 of the rules for contentious business, implies that the Judge may exercise a discretion as to citing the heir.

*Sir C. Cresswell.* I think, at this early stage of the cause, no answer or allegation in opposition to the will having been given in, but only an appearance and an asser-

tion of the will, that the plaintiffs are still in a position to call upon the heir-at-law to appear, if they think fit. The case seems to me to be clearly within the spirit of the Act. I do not think it would be a reasonable exercise of my discretion not to permit the citation on the heir-at-law to issue.

CARLESS *v.* THOMPSON. February 5, 1858.—A Defendant suing in formâ pauperis condemned in Costs.—W. T. obtained probate in common form of a paper professing to be the will of A. L. Such probate, at the suit of the next of kin of the deceased, was revoked, the Court holding that the paper in question was not the will of the deceased, and that W. T. had been guilty of fraud in obtaining probate of it, and in contesting the suit.—W. T., though suing in formâ pauperis, was condemned in the costs of the suit.

This was a suit transferred to this Court from the Prerogative Court under the 84th section of the Probate Act.

The defendant, W. Thompson, had cohabited for several years with Jane Lewis, the alleged testatrix in this case, and some months after her death, had obtained probate in common form of a paper professing to be her last will and testament, which bequeathed the whole of her property to himself.

A suit had been instituted by Mrs. Carless in the Prerogative Court with a view to obtain the revocation of such pro-**[22]**-bate, and, in lieu thereof, a grant of letters of administration of the effects of the deceased to be made to herself, as the sister and one of the next of kin of the deceased, on the ground that the will in question was a forgery.

Dr. Addams appeared for Mrs. Carless.

Dr. Swabey, counsel assigned, for W. Thompson, who had been admitted to sue in formâ pauperis.

*Sir C. Cresswell*, after reviewing the evidence in the case, came to the conclusion that the will had not been established, the impression on his mind being that the paper in question was not the will of the deceased, and that the defendant had been guilty of a gross fraud in obtaining probate of it originally, and in contesting the present suit. He therefore directed the probate to be revoked, and administration to be granted as prayed by Mrs. Carless.

Dr. Addams prayed the Court to condemn the defendant in the costs of the suit.

*Sir C. Cresswell* inquired whether, by the practice of the Prerogative Court, a person suing in formâ pauperis could be condemned in costs.

Dr. Addams replied, that on sufficient grounds shewn, it had been the practice of the Prerogative Court to do so.

*Sir C. Cresswell*, under the circumstances of the present case, condemned the defendant in the costs of the suit.

IN THE GOODS OF SUSANNA CLARKE (deceased), on Motion. February 15, 1858.—Will.—Execution by Mark.—Wrong Name.—A will purporting to be that of S. Clarke, and delivered by her as such for safe custody to one of her executors shortly before her death, was executed by mark, against which appeared the name S. Barrell.—Held, that there being no doubt as to the identity of the testatrix, her execution by mark was not vitiated by another person having written the wrong name against it.

[S. C. 27 L. J. P. 18; 4 Jur. (N. S.) 243; 6 W. R. 307.]

The testatrix executed a will in 1844, by mark. Against **[23]** her mark the name Susanna Barrell (her maiden name) was written instead of Susanna Clarke, her real name, and the one by which she was described in the commencement of the will and in the testimonium clause.

Shortly before her death, she delivered the will in a sealed envelope to F., one of the executors named therein, in whose custody it remained until after her death, telling him "that she wanted him to manage for her." F. deposed that both the attesting witnesses were dead, that the will was in the handwriting of Sidney, one of them; and that he believed the word "Barrell" to have been a clerical error of Sidney's.

Dr. Deane, Q.C.: The execution satisfies the Wills Act. (*In the Goods of Bryce*, 2 Curt. 325, and *In the Goods of Clarke*, ib. 329.)

*Sir C. Cresswell.* There is enough to shew that the will is really that of the

person whose it professes to be. Her mark, at the foot or end of it, is a sufficient execution, and that which someone else wrote against her mark cannot vitiate it.

IN THE GOODS OF THOMAS GULLAN (deceased), on Motion. February 15, 1858.—Will.—Practice.—Presumed Revocation.—T. G. duly executed a will on six or eight detached sheets of paper. At the time of execution he subscribed his name at the foot of each sheet in the presence of the attesting witnesses, who thereupon also subscribed in his presence each sheet. On his death two of the middle sheets of the will only were found amongst his papers, and there was no trace of the remaining sheets. On motion to decree letters of administration with these sheets, as the will annexed—Held, that the signatures at the end of the will, being the only ones that satisfied the Wills Act, having been destroyed, the will must be presumed to have been revoked.

[S. C. 27 L. J. P. 21; 4 Jur. (N. S.) 196; 6 W. R. 307.]

The deceased died in December, 1857, in his eighty-third year, leaving Lucy G., his widow, him surviving, but no other known relation. He left personal property to the amount of **[24]** £9000, and certain real estate; he had also a power under his brother's will to charge in favour of his widow certain property, devised to himself for life, with an annuity of £100 per annum.

In 1855 he executed a will (prepared by himself without professional advice) on six or eight detached sheets of paper, by signing his name at the foot of each sheet in the presence of two witnesses, who thereupon, in his presence, subscribed each of the said sheets.

After his death diligent search was made for his will, but only two of the above sheets, viz. the third and fourth, were found among his papers, and no information could be obtained as to the remaining sheets of this will, or as to any other testamentary papers of the deceased, from the two solicitors whom he had professionally consulted, or at his banker's or elsewhere.

The two sheets found were, in their beginning and ending, insensible; but in their body the testator exercised the power of appointment given to him under his brother's will in favour of his widow, and also made a disposition of part of his own property to his widow and to some other persons. His widow deposed that he had frequently told her that on his death she should have his property absolutely, as he had no relations: and that he had made a practice of not destroying any papers relating to business until a few weeks before his death, when a great change came over his mental faculties, and that he then destroyed very many of such papers.

Dr. Deane, Q.C., moved for administration (with the said two paper writings annexed as containing the will of the deceased) of the effects of the deceased to be granted to his widow. There was no case exactly in point, *Ewin* v. *Franklin*, Deane's Rep., p. 7, being one of imperfect execution, not of revocation, did not apply. Each of the sheets might be taken as a codicil.

*Sir C. Cresswell.* You would have been in a very different position, if no more than these two sheets had been executed. The signatures at the end of the last sheet were the only ones made in compliance with the statute. You cannot convert signatures not made in due compliance with the sta-**[25]**-tute into valid signatures. The only execution in compliance with the statute having been destroyed, I cannot grant the motion.

YOUNG *v.* OXLEY, IN THE GOODS OF WILLIAM OXLEY (deceased), on Motion. February 15, 1858.—Intestacy.—Administration Bond given to the Bishop of Chester.—Quære, whether the Obligation survives to the Judge of the Court of Probate?—An administration bond with sureties was given to the Consistory Court of Chester in 1854. In Jan. 1857 the Master of the Rolls directed the bond to be put in force in an action at law against the sureties. Before the requisite steps could be taken, the testamentary jurisdiction of the Court of Chester had ceased by virtue of the Probate Act. On motion to order the bond to be attended with, for the purpose of being put in suit at common law, the Court directed one of the registrars to assign it for that purpose; but quære as to its effect at common law.

[S. C. 27 L. J. P. 30; 6 W. R. 308.]

The deceased in this case died in April, 1853, intestate. In January, 1854, letters of administration were granted by the Consistory Court of Chester to his widow, Ann Oxley, she having entered into the usual administration bond to the Bishop of Chester with two sureties in the sum of £4000, for the due and faithful administration of the personal estate of the deceased.

The deceased was at the time of his death indebted to John Young, to the amount of £109. Young brought an action against the administratrix in the Queen's Bench, and obtained judgment in March, 1854, for £118, 4s. 2d., the amount of debt and costs. A suit in Chancery was subsequently instituted by Young against Ann Oxley, and an account was ordered to be taken, which shewed a balance of £1026, 3s. 2d. due from her as administratrix, and £126, 15s., together with interest thereon, due to John Young, and Ann Oxley was ordered to pay the balance of the £1026 into the bank. This not having been done, the Master of the Rolls, on the 12th January, 1857, directed proceedings by an action at law to be taken against Hughes and Brandwood (the sureties in the bond), or one of them, for the purpose of putting in force the administration **[26]** bond. The usual proceedings were taken in the Court of Chester, and a monition was decreed against Hughes and Brandwood to shew cause why the administration bond should not be attended with for the purpose of being put in suit at common law. Before the monition was returnable the Probate Act came into operation, and the testamentary jurisdiction of the Court of Chester ceased.

Dr. Phillimore, Q.C., moved the Court to order the bond to be attended with for the purpose of being put in suit at common law. This could not be said to be one of the bonds mentioned in the 81st, 82nd, and 83rd sections of the Probate Act, yet the Court had authority to deal with it as a matter testamentary in a suit transferred with all its incidents to the Court of Probate (sect. 84).

*Sir C. Cresswell.* Let the bond be brought into the registry. When that is done, all I can do for you will be to direct one of the registrars to assign the bond, so that it may be put in suit at common law, and the Court of common law may deal with the question of its validity or invalidity as it may think fit.

HAMER *v.* BOREHAM. February 15, 1858.—Pauper, Assignment of Counsel to.—A person suing in formâ pauperis, to whom counsel has been assigned by the Court, cannot appear by another counsel, until there has been a renunciation, or a new assignment of counsel, or he has been dispauperized.

[S. C. 27 L. J. P. 107.]

This was a suit which had been commenced in the Prerogative Court, and was transferred to this Court under the 84th section of the Probate Act.

The plaintiff was suing in formâ pauperis; an advocate and proctor had been assigned to him by the Judge in the Prerogative Court, and had appeared for him in the proceedings in that Court, and now, without communication with his advocate or proctor, he had instructed a barrister and solicitor to appear for him.

**[27]** Mr. Needham was about to make an application in this case. His client had been admitted to sue in formâ pauperis.

*Sir C. Cresswell* (interrupting him). Assuming there is no other objection to your motion, can a person suing in formâ pauperis, who has had counsel regularly assigned to him by the Court, argue the case by another counsel? I cannot hear you. The pauper should appear by the counsel who has been assigned to him.

Some renunciation, or a new assignment of counsel, or an act of dispauperizing should take place to entitle him to appear by another counsel.

IN THE GOODS OF JOHN ÉLWELL, Jun. (deceased), on Motion. February 24, 1858.—Diocesan Grant.—Bona notabilia without the Diocese.—20 & 21 Vict. c. 77, ss. 86, 87, 88.—Administration to the goods of A. was granted in the Consistory Court of Lichfield, in September, 1857. The property was sworn under, and the duty paid upon £9000. It was afterwards discovered that £3000 consols formed part of this amount. The Bank of England refused to register the letters of administration, which were certainly void under the old law. It was now sought to take the opinion or direction of the Court as to the effects of sects. 86, 87, 88 of the Probate Act on such a grant. No definite motion being made, the Court declined to give any opinion on the point.

John Elwell died in August, 1857, a widower and intestate, leaving an infant daughter. On 14th September, 1857, letters of administration were granted to the uncle of the infant by the Consistory Court of Lichfield, on which occasion the property was sworn under £9000, and £240 stamp duty was paid. It afterwards appeared that the deceased was possessed, at the time of his death, of £3000 consols, which sum was included in the total amount sworn to at Lichfield. The grant was therefore absolutely void under the old law; and the Bank of England had refused to register the letters of administration.

The 86th section of the Probate Act enacts, that "All grants [28] of probates and letters of administration, made before the commencement of this Act, which may be void or voidable by reason only that the Courts from which respectively the same were obtained, had not jurisdiction to make such grants, shall be as valid as if the same had been obtained from Courts entitled to make such grants."

The 87th section enacts, that "Legal grants of probates and administration made before the commencement of this Act, and grants of probates and administration made legal by this Act, shall have the same force and effect as if they had been granted under this Act"; with proviso for payment of further stamp-duty in certain cases.

The 88th section enacts, "Provided that where any probate or administration has been granted before the commencement of this Act, and the deceased had personal estate in England, not within the limits of the jurisdiction of the Court by which probate or administration was granted, or otherwise not within the operation of the grant, it shall be lawful for the Court of Probate to grant probate or administration only in respect of such personal estate not covered," etc.

It was now sought to take the direction of the Court on the effect of any or all of these sections on the administration granted as above stated.

Dr. Deane, Q.C., after stating the circumstances of the case, observed that it differed from *The Goods of Freckleton* (supra, p. 16), where the grant was good as far as it went, but did not extend far enough.

*Sir C. Cresswell*: I do not wish to retract the opinion I expressed in the case of *Freckleton*, but it was extra-judicial.

Dr. Deane: The view I take is that the grant is made good by the Act, and is out of the hands of the Court.

*Sir C. Cresswell*: The difference between the grant in this case is, that it is in terms confined to the diocese of Lichfield, the London as well as the Prerogative grants are general in their terms. Suppose this Court were to be induced to grant [29] an administration of goods within a particular district, would that give the administrator a right to goods elsewhere?

Dr. Deane was not asking for a grant, but for the opinion of the Court.

Dr. Phillimore, Q.C., was instructed on behalf of the Bank of England to say that they were ready to act on his Lordship's opinion.

*Sir C. Cresswell*: It will be time enough for me to come to a decision on the point, when you bring before the Court a definite motion which requires me so to do.

N.B. The prayer at the end of the paper was: "To decree that the said letters of administration are valid and extend to the whole of the personal estate of the deceased in England, or that the said letters of administration are valid and extend to so much of the personal estate of the deceased as was within the jurisdiction of the Consistory Court of Lichfield at the time of the death of the deceased; and that letters of administration of the personal estate and effects of the deceased, to which the aforesaid letters of administration do not extend, may be granted to the said Henry Elwell by Her Majesty's Court of Probate."

IN THE GOODS OF SOPHIA HENDERSON LUDLOW, Spinster (deceased). February 24, 1858.—Administration with Will annexed.—Residuary Clause.—Construction.—"Things."—In a will which contained specific bequests of several articles of plate, furniture, etc., the last specific bequest being that of £30.—Held, that a bequest to R. S. of "the residue of my things" would not entitle R. S. to a grant of administration as residuary legatee.

[S. C. 27 L. J. P. 7; 6 W. R. 409.]

This was a question as to granting administration with the will annexed, arising on the construction of the deceased's [30] will. The will was a holograph paper, dated September, 1842, and in page one, which contained bequests of £100 and of

several small articles to R. Ludlow, a brother of the testatrix, there were certain interlineations and erasures. In page two the testatrix specified some small articles to be left "to my niece, Mrs. Sutton"; then on the next line by itself and on the right-hand half of the page, "and to her son R. Sutton, £30." Then, after a blank space of nearly three inches, "and the residue of my things I give to my brother, James Ludlow." There was no attestation clause, and neither of the attesting witnesses could speak as to the condition of the will at the time of its execution. James Ludlow was the brother and only next of kin of the deceased.

Dr. Deane, Q.C., moved for administration with the will annexed to James Ludlow, as residuary legatee, and that the probate should include the alterations in page one and the words in page two, "and to her son Robert Sutton, £30." The word "things" in the residuary clause might be construed in reference to the next preceding bequest of "£30 to Robert Sutton," so as to include property of the same nature, and to give James Ludlow the general residue.

*Sir C. Cresswell.* It is very much guesswork in these cases. From a close inspection of the will the residuary clause, which would be last written, and which I am disposed to think was last written, is in a darker ink. That which is written on the erasures is also in a darker ink. It is very questionable whether the bequest to Robert Sutton was not introduced subsequently to the execution of the will. However, as there is nothing to shew that it was, it may stand. I cannot construe "the residue of my things" so as to carry the general residue. The word "things" here must be taken ejusdem generis with the things enumerated in the body of the will. Decree letters of administration, with the will annexed, to James Ludlow, as next of kin, but without the alteration in the first page.

**[31]** IN THE GOODS OF SAMUEL WILLIAM LEWIS (deceased), on Motion. February 27, 1858.—Will.—Custody of Testator.—Revocation.—A. made his will, being in extreme illness, on the 15th of December, and placed it in his mother's custody. At his request his mother gave it to him on the 21st. On the 22nd he died, and the will was found under the bolster of his bed, with the signatures and attestation clause torn off; the latter were nowhere to be found. A. had expressed no dissatisfaction with his said will.—On motion for probate of the paper to his widow as executrix—Held that the will was revoked.

[S. C. 27 L. J. P. 31; 4 Jur. (N. S.) 243.]

The deceased, in this case, died on the 22nd of December, 1857; on the 15th of the same month, being then in extreme illness, he requested his cousin, Robert Lewis, to prepare a will for him, which was accordingly done, and the will was duly executed; it was then, by the deceased's desire, delivered to his mother, Rebecca Lewis, who retained possession of it till the 21st of December, when, at the deceased's request, she redelivered it to him in the same state as it had been delivered to her after the execution. On the following day the deceased died, and whilst his body was being laid out, the will was discovered under the bolster of the bed upon which he was lying, but that part of it which had contained his signature and the attestation clause and signature of the subscribing witnesses was torn off and could not be found. The deceased, after executing his will, expressed his satisfaction at having done so to Robert Lewis, who continued in attendance upon him till his death. It did not appear that the deceased, in any way, mentioned the subject to any other person. Under these circumstances his widow, who was appointed executrix of the will, wished to take the opinion of the Court of Probate.

Dr. Waddilove moved the Court to decree probate of the paper to the widow as executrix therein named, but presumed that the Court would feel itself unable to do so.

*Sir C. Cresswell.* I must, of course, reject your motion. The widow is entitled to a grant of letters of administration of the goods of the deceased as dead intestate.

**[32]** IN THE GOODS OF WILLIAM BROWN (deceased), on Motion. February 27 and March 2, 1858.—Will—Revocation.—The destruction of a second will, itself revoking one of prior date, does not reinstate the first will, even though it may be in existence at the testator's death. Parol evidence admitted as to the contents of the second will.

[S. C. 27 L. J. P. 20; 4 Jur. (N. S.) 244. Applied, *In the Goods of Gardner*, p. 109, post; *Newton* v. *Newton*, 1861, 12 Ir. Ch. R. 132.]

William Brown died in February, 1857, leaving a widow and six children,—the youngest, a daughter, being still a minor. He was possessed of real property to the amount of £40,000, and of personality in value above £10,000. On the 6th of November, 1846, the deceased duly executed a will, disposing of his real and personal property, which was before the Court annexed to the affidavit of his widow.

On the 21st of July, 1855, the deceased executed another will, disposing of his real and personal estate, of a different tenor and with a different appointment of executors, thereby revoking the will of 1846, which, however, was found in his possession at his death, though not among his papers of moment and concern. The will of 1855, when executed, was delivered to the deceased, who said he should possibly leave it at his bankers; this he never did; and since his death diligent search had been made for it, but it not having been found, the presumption arose that it was destroyed by himself. Neither the instructions for, nor any draft of, the will of 1855 were in existence, having been destroyed by the deceased himself at the time of executing it; but the substance or contents of such will were deposed to by Robert Breckon, of Whitby, the confidential solicitor of the deceased, who had drawn and been an attesting witness to both of the said wills.

In consequence of doubt being felt as to whether the deceased died intestate, or whether the will of 1846 was operative as to the real estate, his eldest son and heir-at-law brought an action of ejectment, which was tried at Guildhall on the 15th of December, 1857, before Lord Campbell and a special jury, when a verdict was found for the plaintiff, subject to the opinion of the Queen's Bench on a special case,—the questions for the opinion of the Court being: First, was the will of July, 1855, proveable by parol for any purpose; if so, was the will **[33]** of November, 1846, revoked thereby? Secondly, if the will of November, 1846, was so revoked, did the deceased William Brown (the father) die intestate, or was the will of 1846 an operative will on the death of the said deceased?

The special case was argued in the Q.B. on the 26th of January in this year, when the full Court unanimously held:—1. That the will of 1855 was proveable by parol, and that the first will was revoked thereby. 2. That William Brown the father died intestate: and thereupon judgment was entered for the plaintiff, the heir-at-law.

On affidavits of the widow, of Mr. Breckon the solicitor, and of Robert Porritt, one of the executors named in the will of 1855,

Dr. Addams, Q.C., moved the Court to decree letters of administration of the deceased's effects, as dead intestate, to the widow of the deceased.

*Sir C. Cresswell* asked to be furnished with a copy of the judgment in that case before he disposed of the motion.

Cur. adv. vult.

March 2.—*Sir C. Cresswell.* This question arises under peculiar circumstances. The deceased made a will, and some years after he made another will, revoking the first; the second was not to be found after his death, and the ordinary presumption that he had destroyed it animo revocandi must, in the absence of any evidence to the contrary, prevail. The Court of Q.B. have come to the conclusion that parol evidence to prove the contents of the second will (all due search having been made for the instrument itself) might be received. By such evidence it is clearly proved, that a will was executed, by which the first was revoked. It is also clear that the destruction of this second will cannot reinstate the first (see the 22nd section of the Wills Act): I must decree administration of the goods of the deceased as dead intestate.

**[34]** DE CHATELAIN *v.* PONTIGNY, on Motion. February 27, 1858.—Administration pendente lite, under the 70th Section of the Probate Act, granted to the Defendant in the Suit, the Plaintiff not opposing.

[S. C. 27 L. J. 18; 6 W. R. 409.]

Mr. Denman: This was a testamentary suit, and the present application was under the 70th section of the Probate Act, that the Court would decree administration of the effects of the deceased pendente lite to the defendant in the cause. He understood that there was no opposition to this motion.

Dr. Phillimore, Q.C.: The parties for whom he appeared were not inclined to oppose this application, on the understanding that it would be no prejudice to them as regarded the main suit.

*Sir C. Cresswell*: In that case, the administration may go as prayed pendente lite;

otherwise I should have thought some person unconnected with the suit would have been a more proper person to have been appointed.

IN THE GOODS OF THOMAS CADYWOLD (deceased), on Motion. March 2, 1858.—Will.—Marriage and Birth of Child.—Revocation.—A., in 1828, made his will in contemplation of his intended marriage, providing for his intended wife, and for the children of such marriage, and making his intended wife executrix.—Held, that the marriage which ensued, together with the birth of a .child, operated as a total revocation of such a will.

[S. C. 27 L. J. P. 36; 6 W. R. 374.]

T. C. died in 1857, leaving a duly executed will, dated the 29th March, 1828, whereof he appointed Elizabeth Soundy, spinster (afterwards Elizabeth Cadywold), his intended wife, and two others, executors.

By his will he devised all his real estate to E. Soundy, his intended wife, for life, and after her death he directed his executors to sell the same, and bequeathed the money to arise from such sale to and amongst all and every his child or chil-[35]-ren by his said intended wife living at his decease or born in due time afterwards, and the residue of his personal estate he bequeathed to Elizabeth Soundy, his intended wife, for her own use absolutely.

Subsequently to the execution of this will deceased intermarried with Elizabeth Soundy, and died leaving his said wife and four children of the marriage him surviving. Mrs. Cadywold having been at first advised that the will was valid on the authority of *Kenebel* v. *Scrafton*, 2 East, 541, applied to the registry as executrix (the two other executors having renounced) for probate, and was there directed to make application to the Court.

Dr. Addams, Q.C.: By the old rule of the Ecclesiastical Courts marriage with the birth of a child operated only as a presumptive revocation of a will made before marriage. The presumption of revocation might be rebutted by evidence of intention, that the will should not be revoked; and in deciding the question of intention, the fact of provision having been made for the intended wife and children or otherwise would have been taken into consideration. Thus, in *Fox* v. *Marston*, 1 Curt. 494, Sir H. Jenner admitted an allegation pleading parol evidence to rebut the presumption of revocation; but in the same case, on the question of devise (*Marston* v. *Doe dem. Fox*, 8 Ad. & El. 14), the Court of Ex. Ch. decided that the revocation of a will made before marriage took place in consequence of a rule or principle of law quite independent of any question of intention of the party himself; and this decision was followed by the Judicial Committee in the case of *Israel* v. *Rodon*, on appeal from the Court of Ordinary in Jamaica, 2 Moo. P. C. C. 51. He was instructed to move for probate of this paper; but such being the law, he apprehended it could not be granted.

*Sir C. Cresswell.* It seems at first sight rather startling to say that a will like the present, executed in contemplation of marriage, and providing for the wife and children of the marriage, should be revoked by such marriage and the birth of a child; but on the cases you have cited, there is no doubt that the law so stands, and I must reject the motion for probate.

[36] IN THE GOODS OF JOHN PERCIVAL WILLMOTT (deceased), on Motion. March 5, 1858. Will.—Memorandum.—Codicil.—A. executed his will in February, and a codicil on the same paper in December; below the signature to the will, and before the commencement of the codicil, appeared a memorandum, which, from the evidence of the solicitor who prepared the will, had been written on the paper before the execution of the will.—Held, that the memorandum, being no part of the will as originally executed, was not entitled to probate by reason of the duly-executed codicil of subsequent date, such codicil referring merely to the will.

[S. C. 27 L. J. P. 30; 6 W. R. 409.]

The deceased executed his will on the 3rd February, 1854, on a sheet of letter-paper, of which the will occupied the first and part of the second page; below the subscriptions of the testator and attesting witnesses, the following words were written: "I have made no bequest to my daughter Mrs. Kay, because I provided for her in my lifetime. I request those who will have my plate to allow my wife the use of the same during her life."

On the 13th December, 1854, the deceased executed a codicil to his will on the third page of the same sheet of letter-paper; the codicil had no reference to or bearing on the above-recited words, which were below the signature to the will. The same witnesses attested the codicil and the will, but they could not remember whether the words in question were or were not on the paper at the time of the execution of either the will or codicil. From the affidavit of the solicitor who prepared the will, it appeared that the words were written before the paper was forwarded to the testator to be executed, below the place where the testator was intended to sign his name, and that such words were never meant to form part of the will, but merely to serve as an explanation and memorandum.

Dr. Swabey submitted that the words in question clearly formed no part of the will at the time it was executed, and that the codicil, though written on the same sheet of paper, yet referring merely to the will, could not give effect to that which was originally no part of the will; he moved the Court to decree probate of the will and codicil to the executors, without the memorandum at the foot of the will.

**[37]** *Sir C. Cresswell.* I can only take the solicitor's affidavit as evidence of the time when the words were in fact written: I can pay no attention to his evidence of intention; that would be admitting parol evidence to affect a written instrument; but, on the face of the papers, I think you are entitled to probate as prayed, without the words at the bottom of the second page.

ROBINS AND PAXTON *v.* DOLPHIN. January 28, February 1 and 8, and March 5, 1858. —Revocation of Will.—English Marriage.—Scotch Divorce.—Bonâ-fide Domicil. —A., a domiciled Englishman, married B., an Englishwoman, in England. Differences having arisen between them, a separation by mutual agreement took place. A. having subsequently to their separation gone to Scotland, but without any apparent intention of making that country his permanent residence, committed adultery there. The Lords of the Court of Council and Session, when he had been resident in Scotland for nearly six months, at the suit of B., his wife, made a decree dissolving their marriage by reason of his adultery. B. subsequently in due form married a domiciled Frenchman, and died resident in France. Shortly before her death, she made at Paris a holograph will, valid according to the law of France, revoking all previous wills.—Held, that A., by his residence in Scotland, did not acquire a Scotch domicil, so as to distinguish this case from *Lolley's case* (Russ. & R. C. C. 237) and *Conway* v. *Beasley* (3 Hagg. Ecc. Rep. 639), and that the English marriage of A. and B. was not dissolved by the Scotch decree of divorce. That a Scotch sentence of divorce, purporting to dissolve a marriage, if not good for the purpose for which it was intended, could not have the effect of a divorce à mensâ et thoro, so as to enable B. to acquire a domicil independent of that of A., her husband. That B.'s domicil being at the time of her death English, the will she executed at Paris not having been executed according to the law of the country of her domicil (England), was inoperative to revoke a previous will and codicil made by her in pursuance of a power and in conformity to 7 Wm. IV. & 1 Vict. c. 26.

[S. C. 27 L. J. P. 24; 4 Jur. (N. S.) 267; 6 W. R. 457.]

This was a question as to the admission of an allegation responsive to one propounding the last will and testament and a codicil, respectively bearing date the 11th of April, 1854, of Mary Ann Dolphin, the wife of Vernon Dolphin, made in pursuance **[38]** of a power reserved to her by an indenture made subsequently to her marriage with her said husband, bearing date the 15th of November, 1839: these testamentary papers were propounded by Robins and Paxton, the executors therein named.

The allegation was brought in by Mr. Dolphin, the alleged husband of the testatrix. It pleaded:

The marriage on the 16th of July, 1822, of Vernon Dolphin and Mary Ann, otherwise Marie Eustelle de Pontes, wife of Amédée Theodore Davisies de Pontes, falsely called Mary Ann Dolphin, wife of Vernon Dolphin, then Mary Ann Payne, spinster, in the parish church of St. George, Hanover Square, Middlesex.

An indenture, dated the 1st of April, 1823, between Vernon Dolphin and Mary Ann, then his wife, formerly Mary Ann Payne, and certain other parties, being a settlement executed in pursuance of certain articles of agreement of the 15th July, 1822.

The cohabitation of the parties till a separation was mutually agreed upon in November, 1839, and their living separate thereafter, but continuing man and wife till some time in the year 1854, when a divorce was obtained by the said Mary Ann Dolphin.

A deed or declaration of trust of certain properties of the 15th of November, 1839, under which Mary Ann Dolphin had a power of appointment, notwithstanding coverture, by deed or by will, and in default of such appointment in trust for Vernon Dolphin, his executors, etc.

The seventh article was in the following words: "That the party deceased in this cause having sometime in the beginning of the year 1854 discovered that the said Vernon Dolphin was then living in adultery, and was then resident and domiciled in Scotland, and that he had been so resident and domiciled in and near Edinburgh from the month of February, 1854, she proceeded to Edinburgh, and on the 17th of June in that year instituted an action of divorce before the Lords of the Court of Council and Session in Scotland against her then husband, the said Vernon Dolphin, on the ground of adultery; and thereupon such proceedings were taken and proofs adduced, that the said Court, by their decree, dated the 20th of July, 1854, found the said Vernon Dolphin guilty of adultery, and therefore divorced and separated him from the said Mary Ann **[39]** Payne or Dolphin, her society, followship, and company in all time to come, and declared that he had forfeited all the rights and privileges of a lawful husband; and that the said Mary Ann Payne or Dolphin was entitled to live single or marry any free man as if she had never been married to the said Vernon Dolphin, or as if he were naturally dead. And the party proponent expressly alleges and propounds that by such decree the said Mary Ann Payne or Dolphin became and was from and after the said 20th of July, 1854, absolutely divorced from the bond of matrimony with the said Vernon Dolphin, and free to marry any other man."

The remaining articles, among other things, pleaded: The lawful marriage of Mary Ann Payne, on the 8th of October, 1854, after proclamation in the church of St. Mary, in Edinburgh, according to the rites and ceremonials of the church of Scotland, with Amédée Theodore Davisies de Pontes.

The proclamation in France when a marriage is contracted between a native subject of France and a foreigner out of that country, which is necessary by the French law to the validity of such a marriage in that country.

That De Pontes was a native of Paris, and at the time of such marriage domiciled at La Rochelle.

The deceased's adoption of the Romish faith and change of name on her reception into that church in 1855.

That after the marriage and proclamation as aforesaid, General de Pontes and the deceased cohabited as man and wife, and eventually took up their permanent residence at Paris, where they continued to live together (never again visiting either Scotland or England) until a short time before the deceased's death, when General de Pontes, placed his wife in a convent in Paris, wherein she died.

That a will was in fact made by the deceased on the 3rd of April, 1856, at the solicitation of General de Pontes, in which he was named the universal legatee.

That the deceased did subsequently write with her own hand a paper in the words following:—"I revoke all foregoing wills made by me up to this date, 23rd June, 1856, Paris": and set and subscribed her then names of Marie Eustelle Davisies de Pontes thereto, and placed the same in an envelope, which she indorsed and signed as follows:—"Last will **[40]** which I have made this day, the 23rd June, 1856, Marie Eustelle Davisies de Pontes."

That by reason of the premises the deceased was on the 23rd of June, 1856, and at her death, lawfully domiciled in France.

That by the law of France, then and still in force, such a holograph will is good and valid to all intents and purposes.

The 25th and 26th articles pleaded and set out a bill filed in the High Court of Chancery by General de Pontes, setting up a deed conferring upon him substantially the same benefit as the will and codicil propounded.

Thus it appeared that Mr. Dolphin was interested in maintaining the French domicil of the deceased, which depended on the effect of the Scotch sentence of divorce, as he would be entitled under the deed of 1839 to the property over which

she had a disposing power in the event of her having died by virtue of the instrument of June, 1856, in effect, intestate; while the executors of the will of 1854 would maintain the invalidity of the divorce; that the deceased had died the wife of Mr. Dolphin; that her domicil would be presumed to have continued the same as her husband's (English); and that the instrument of June, 1856, not having been executed according to the English law, was inoperative as a will.

Dr. Addams Q.C., and Dr. Spinks, for the plaintiffs: This allegation should be either rejected in toto, or, if admissible, should be reformed. I. It it submitted that it should be rejected in toto. The question before the Court is the title of the will and codicil of the 11th of April, 1854, to probate. For the defendant, it will be contended that they were effectually revoked by the instrument of the 23rd of June, 1856, and are therefore not entitled to probate. The grounds, upon which the validity of this latter instrument is rested, are, that the deceased, at the time of its execution and of her death, was a domiciled Frenchwoman; that, as such, it was competent to her to make a will in conformity to the law of France; and that this instrument (being holograph) is by such law valid as a will. Admitting its validity, if made by a domiciled Frenchwoman, it is contended for the plaintiffs, that the domicil of the deceased, at the time of its execution and of her death, was English and not French. This, then, **[41]** is the first question upon which issue is joined, viz. whether the deceased's domicil was English or French. To establish that her domicil was French, it will be contended for the defendant, that her marriage with Mr. Dolphin, which was an English marriage, was dissolved by the Scotch sentence of divorce, dated the 20th of July, 1854, so as to entitle her to marry again; and that, having been in due form married to General de Pontes, she became his lawful wife, and as such acquired his domicil, which was French. In point of fact, the real question intended to be raised by this allegation is, the effect of a Scotch sentence of divorce on an English marriage, the parties to which were at the time of such sentence domiciled in England. But it is submitted, that the invalidity of such a sentence on an English marriage was so definitively settled in *Lolley's case*, Russ. & R.C.C. 237 (the principle of which decision was recognized in *Warrender* v. *Warrender*, 2 Cl. & Fin. 540: see especially Lord Lyndhurst's remarks: "That if he conceived the judgment about to be adopted in that case were understood as affecting that delivered in *Lolley's case*, he should feel it his duty to object to so dangerous and precipitous a course, and should recommend, before pronouncing final judgment, the principles of the law to be reviewed, and the opinions of the Common Law Judges to be obtained on the whole case." Ib. 558; and again in *Geils* v. *Geils*, Macq. H. L. Cas. 255, see Lord St. Leonards's remarks, ib. 263): that this Court will not feel itself now at liberty to allow the same question to be raised again. Nor will the present case come within the scope of the remarks of Dr. Lushington in *Conway* v. *Beazley*, 3 Hagg. 639, as at the date of the sentence of divorce, though Mr. Dolphin had resided in Scotland for the time required by the Scotch Courts to found their jurisdiction, viz. forty days, there is nothing in the allegation to shew, but the contrary, that he was a bonâ fide domiciled Scotchman. But, assuming for argument, that the deceased, when she executed the instrument of June, 1856, was a domiciled Frenchwoman, and that it is valid as her will, two further incidental points may still be raised by way of objection to the admission of this allegation. The will and codicil of 1854 were executed by her when domiciled in **[42]** England according to the English law. By sec. 20 of 7 Wm. IV. & 1 Vic. c. 26, a subsequent will, to revoke a prior one, should be executed in the manner required by that statute. It is submitted, as a question for the consideration of the Court, whether the instrument of June, 1856, which was not executed according to the provisions of that statute (there being no attesting witnesses to it), is a good revocation of the prior will and codicil.

Again: The will and codicil of 1854 were made in pursuance of a power contained in the deed of the 15th of November, 1839. By that power the deceased was authorized to dispose of, or deal with, certain property by a will or codicil executed by her in the presence of two attesting witnesses. She would be entitled to revoke, by a will similarly executed, any previous will made in pursuance of that power (see *Tatnall* v. *Hankey*, 2 Moo. P. C. C. 342); but here an attempt is made to deal with the property, and to revoke a duly attested will by a will not duly attested. This is not a good revocation under the power.

But, II., it is submitted, that this allegation, if not altogether admissible, should

be reformed. The recital of the bill in Chancery is wholly irrelevant, and the real question at issue might be stated in much more concise terms.

Dr. Deane, Q.C., and Dr. Twiss, Q.C., for the defendant: I. The Scotch Court had power to dissolve an English marriage under the particular circumstances of the present case. Upon principle it must have had this power. It would be absurd to say that a husband and wife, though married in England, if separated by a competent Court out of England, are not legally separated (*Connelly* v. *Connelly*, 2 Rob. Ecc. Rep. 258); if a sentence of separation decreed by a competent Court is effectual, so also must be a sentence of divorce à vinculo, when pronounced by a competent Court. The Scotch Court in this case was clearly competent to make the decree in question. It acquired jurisdiction by reason of Mr. Dolphin's residence in Scotland, which was a bonâ fide residence, and one not resorted to, as that in *Lolley's case*, for the purpose of evading the English law. It cannot be treated as a colourable residence. See Lord Truro's remarks in *Geils* v. *Geils*, 1 Macq. H. L. Cas. 275. Lord **[43]** Eldon, in *Tovey* v *Lindsay*, 1 Dow. 117, does not appear to have considered the question decided in *Lolley's case* as concluded. When referring to it (ib. 136), he pointed out the extreme importance of the questions raised in the case then appealed, and it was remitted to the Scotch Courts, that the House of Lords might have the benefit of the deliberate judgment of those Courts upon them; but the death of one of the parties put an end to the suit. (See also *Edmondstone's case*, Fergusson's Reports of Decisions in Actions of Divorce, 403.) What would be the position of the wife, if she were not allowed to pursue her husband in the Scotch Courts? She could not cite him in the Ecclesiastical Courts in this country, as he was out of their jurisdiction; she could only proceed against him in those Courts (the Courts in Scotland) to whose jurisdiction he was alone amenable. But, II. The decree of the Scotch Courts, if not good to dissolve an English marriage, is good to repel the presumption of law, that the domicil of the husband and wife are the same. It is good, we contend, to decide that the wife may have a separate domicil from her husband: *Williams* v. *Dormer*, 2 Rob. Ecc. Rep. 508. [*Sir C. Cresswell*: What force would the Ecclesiastical Courts have given to this sentence, supposing it not to be efficacious for the purpose for which it was originally intended? Is there any case, where a Scotch sentence of divorce, professing to be à vinculo, has been held by competent authority as good for a separation à mensâ et thoro, in answer to a suit in England for restitution of conjugal rights?] *Connelly* v. *Connelly*, 2 Rob. Ecc. Rep. 201, is the nearest case to that put by your Lordship, but is not exactly in point. And, III., as to the last objection raised by Dr. Spinks, that the instrument of June, 1856, is not a good revocation under the power, it is submitted that it is not competent to the Court of Probate, any more than it was to the Prerogative Court, to deal with that question. It has jurisdiction to declare whether the instrument is testamentary or not, but not to inquire into the due execution of the power: *Barnes* v. *Vincent*, 5 Moo. P. C. C. 201. It was clearly the intention of the deceased to revoke all previous wills by the instrument of June, 1856, and to die wholly intestate, and that instrument is entitled to probate. See *Hughes* v. *Turner*, 4 Hagg. Ecc. Rep. 52, and *Brenchley* v. *Still and Others*, 2 Rob. Ecc. Rep. 164. Cur. adv. vult.

**[44]** *Sir C. Cresswell.* In this case I was to consider the admissibility of the allegation, which was opposed by Dr. Addams, on the ground that the question, which really arose, had been concluded by the decisions of other Courts. I understood from Dr. Deane, that he could reform the 7th article so as perhaps to put the question in a better form for his client. At present it merely proceeds on a recital, that Mrs. Dolphin having discovered her husband domiciled in Edinburgh, and living there in adultery, went to the place in question, and there procured a divorce. I can take no notice of an allegation in that form, as presenting any case of a real domicil in Scotland, and I shall therefore direct the allegation to be reformed in that particular, so as to allow the Court to see what is set up as a Scotch domicil. I shall do that the more, in order that I may be put in a position to judge how far the case is affected by what was said by Dr. Lushington in the case of *Conway* v. *Beazley* upon foreign domicils, and the effect which a permanent domicil in Scotland might have in a foreign Court.

With regard to the articles, which recite a great part of a bill in Equity, it seems to me that I ought to reject them wholly. The question to be decided by the Court is one arising out of the facts which occurred before the death of the party, and I do

not see how that question could be affected or elucidated by anything that may have been done since her death by General de Pontes. I think, therefore, that those articles are irrelevant, and ought to be rejected. The seventh article I wish to be reformed, in order that I may see how far you can carry the Scotch domicil, and that I may see whether the question is concluded by the decision of Dr. Lushington.

The allegation having been reformed, its admission, as reformed, was opposed.

March 5.—*Sir C. Cresswell* (without hearing counsel) said: This case was argued before me on the admissibility of an allegation brought in by the proctor of Mr. Dolphin. The circumstances of the case are peculiar. In 1822, Mr. Dolphin, an Englishman, domiciled in England, married an English lady in England, and they afterwards lived together at his house **[45]** in Gloucestershire. In 1839, differences having arisen between them, they agreed on a separation, and afterwards lived apart.

At that time a settlement was executed, whereby certain property was secured to Mrs. Dolphin for life, with power of appointment by deed or will. In April, 1854, Mrs. Dolphin, then living in England, executed a will as required by 1 Vict. c. 26, of which Robins and Paxton were appointed executors. In the same year Mr. Dolphin went to Edinburgh, and in the same year Mrs. Dolphin also went there, and instituted against him an action for divorce before the Lords of the Court of Council and Session on the ground of adultery; and on the 20th of July a decree was pronounced, dissolving the marriage, and declaring her to be at liberty to marry again, as if he were dead; and on the 8th of October, 1854, she married, in Edinburgh, Amédée Theodore Davisies de Pontes, a Frenchman, domiciled in France; and they were afterwards remarried in France, and all necessary steps were taken to render such marriage a valid one according to the law of France. Mrs. Dolphin, having accompanied De Pontes to France, continued to live with him there as his wife, until a short time before her death, when she was placed by him in a convent in Paris, where she died. When there, Mrs. Dolphin, by the name of De Pontes, wrote and signed a paper, intended to be a will, in these words: "I revoke all foregoing wills made by me up to this date, 23rd June, 1856, Paris"; and this was alleged to be by the law of France a valid will. Mrs. Dolphin died soon afterwards, and the executors named in the will of 1854 having propounded it, the proctor of Mr. Dolphin brought in an allegation, pleading the several matters above mentioned. This was opposed on the ground that the facts alleged afforded no answer to the claim of the executors to have probate of the will of 1854, for that the Scotch Court had no power to dissolve a marriage solemnised in England, between English people domiciled in England, and consequently Mrs. Dolphin, although resident in fact in France with De Pontes, remained domiciled in England, and the document executed by her in the convent in Paris, not being attested as required by the stat. 1 Vict. c. 26, could not have any effect upon the **[46]** will executed in 1854, and the cases of *Rex* v. *Lolley*, Russ. & Ryan, 237, and *Conway* v. *Beazley*, 3 Hagg. Ecc. Rep. 639, were cited. The allegation in its then state was very vague as to the nature and duration of Mr. Dolphin's residence in Scotland before the suit for divorce was instituted, and I requested that it might be reformed, so as to enable me to judge how far the case was similar in circumstances to that of *Conway* v. *Beazley*. That has been done, and the allegation as to that matter now stands thus:

"That in the month of February, 1854, but on what particular day the party proponent is unable to set forth, the said Vernon Dolphin, the then husband of the party deceased in this cause, left England and went to Scotland; that on the 23rd of February, 1854, he arrived at Edinburgh, and from such time until the 25th of the said month he resided at the Waterloo Hotel, in Edinburgh aforesaid, when he left the said hotel, and from such time, until the 3rd of April following, he resided at a cottage, called South Cottage, which he had hired as a residence at Wardie, near Edinburgh, and that on the 3rd day of April he returned to the Waterloo Hotel, where he resided until the 9th of the said month, when he left the said hotel, and went to England for a few days, and returned to Scotland, and resided again at Edinburgh and Stirling, in Scotland, until the 6th day of June following, when he again returned and took up his said abode at the said hotel, and there remained until the 19th of the said month; that the said Vernon Dolphin had by such residence and in intention, as well as in fact, become a domiciled Scotchman; that the party deceased in this cause, having ascertained that the said Vernon Dolphin was living in adultery during the said time in Scotland, on the 17th of the said month of June

a summons was personally served on the said Vernon Dolphin at her instance, and an action for divorce before the Lords of the Court of Council and Session in Scotland was instituted against the said Vernon Dolphin on the ground of adultery; that on the 19th day of the said month of June the said Vernon Dolphin again went to England, but returned afterwards to Scotland, and there was resident for some days in the month of July, 1854; that on the 20th day of the said month of July the said Lords of the Court of Council and **[47]** Session in Scotland, by their decree, found the said Vernon Dolphin guilty of adultery, and therefore divorced and separated him from the said Mary Ann Payne or Dolphin, her fellowship and company in all time to come, and declared that he had forfeited all the rights and privileges of a lawful husband, and that the said Mary Ann Payne or Dolphin was entitled to live single or marry any free man, as if she had never been married to the said Vernon Dolphin, or as if he were naturally dead, etc.; and that by the law of England she became in like manner divorced, or, at all events, she became from the said date of the said decree divorced and separated from bed, board, and mutual cohabitation, until they, the said Vernon Dolphin and Mary Ann Payne or Dolphin, became reconciled to each other, and that at the time of the death of the said deceased in this cause, as hereinafter more particularly pleaded, they, the said Vernon Dolphin and the said deceased were not and never had been reconciled to each other, and consequently never lived together as husband and wife."

Now, the allegation does not state that Mr. Dolphin had given up his house and establishment in England, nor that he had left it without the intention of returning, nor that he had gone to Scotland with the intention of remaining there. It appears to me, therefore, that the case in this respect is governed by *Lolley's case*, and *Conway* v. *Beazley*, and that the marriage was not dissolved. But it was contended, secondly, that admitting that the Scotch Court had not power to dissolve the marriage, yet the sentence would have the effect of a divorce à mensâ et thoro, and that the domicil of the wife could no longer be presumed to be that of the husband, for which *Williams* v. *Dormer* 2 Rob. Ecc. Rep. 505, was cited for an authority. But the sentence of the Scotch Court was no otherwise a sentence of separation from bed, board, and mutual cohabitation, than by dissolving the marriage. As a dissolution of the marriage, it cannot be recognized in this Court, and therefore, I think, could not destroy the legal presumption, that the domicil of the husband is the domicil of the wife. It follows then that the revoking instrument, not having been executed by Mrs. Dolphin in conformity with the law of her domicil, is inoperative, the will remains unrevoked, and the allegation, if admitted, would afford no answer to the **[48]** claim of the executors to have probate of that will. It must therefore be rejected.

Dr. Deane, Q.C., asked the learned Judge's permission to appeal, this being an interlocutory decree (see 20 & 21 Vict. c. 77, s. 38), which was granted.

HADDON *v.* FLADGATE (on the Admission of Defendant's Allegation). February 24 and March 5.—Will.—Wife.—Husband.—Separation by Consent.—Separate Property.—A. and B. married in 1811; in 1817 they verbally agreed to separate, and not to interfere with each other, and divided their then furniture and effects. They never again cohabited, and the wife supported herself by her own industry, and acquired property, which she disposed of by will in 1856. Probate of this will was opposed by the husband, who asserted his marital right to his wife's property.—Held, that under the circumstances, the property had been acquired to the wife's sole and separate use, and that the jus disponendi would therefore attach to such property.

[S. C. 27 L. J. P. 21; 6 W. R. 456. Distinguished, *In the Goods of Pepper*, 1874, 31 L. T. 274. Referred to, *In the Goods of Sharp*, 1878, 3 P. D. 81.]

This was a question arising on the will of a married woman under peculiar circumstances. Haddon, the plaintiff, had been sworn administrator to the effects of Martha Haddon, deceased, as her lawful husband, and it was not denied that he was her husband: but an allegation was given propounding a will of the deceased by Fladgate, one of the executors therein named, the admission of which allegation was opposed. It pleaded that from the marriage of the parties in 1811, William Haddon had uniformly treated his wife with great unkindness, which resulted, in the year 1817, in a mutual agreement to separate, to divide their furniture and effects equally, and not to interfere with any property or money which either might acquire subsequently

thereto; and that Martha Haddon agreed thenceforth to maintain herself, and never to apply to William Haddon to support her or liquidate any debts which she might contract, and that in consideration thereof William Haddon agreed to permit the deceased to **[49]** enjoy her own earnings and property for her sole and separate use; that their effects and furniture were accordingly divided. William Haddon allowed deceased to have and enjoy her share thereof to her separate use; that since then deceased had entirely maintained herself by her trade of dressmaking, and had never applied to William Haddon for assistance.

It further pleaded her various residences till her death; that these had never been concealed from William Haddon, who was aware that she was engaged in trade as a feme sole, and had saved a considerable sum of money; and that he had never in any way interfered with the deceased, but constantly down to the time of her death treated and considered such her earnings as her own, and as money set apart to her separate use, in pursuance of his aforesaid agreement. It also pleaded declarations of William Haddon in accordance with these statements, and that he had been married in fact to Ruth Bates during the lifetime of the testatrix.

That by reason of the premises, the property acquired as aforesaid by the said Martha Haddon by means of her separate trade became and was her separate property, and as such might be devised and bequeathed by the said Martha Haddon, the deceased, by her last will and testament, notwithstanding the alleged marital right of the said William Haddon. And lastly, it pleaded the factum of the will, dated the 30th of October, 1856.

Dr. Deane, Q.C., and Mr. Godfrey, for the plaintiff.

To entitle the will of a feme covert to probate, it must either, 1st, have been assented to by her husband after her death (*Maas* v. *Sheffield*, 1 Rob. Ecc. Rep. 364); or, 2ndly, it must dispose of property over which she had a right of disposition by virtue of a power for that purpose given to her; or, 3rdly, it must dispose of property held by her to her separate use. In this allegation it is not asserted that the husband has in any way assented to the will made by his wife since her death, or that it was made in exercise of a power, and the facts pleaded are insufficient to raise a case of her being entitled to hold the property acquired by her subsequent to this separation to her separate use. To establish this last position, the circumstances of the separate trading of the wife, or of the **[50]** husband and wife living separately (by agreement), are not sufficient (*Lamphir* v. *Creed*, 8 Ves. 599), but there should be satisfactory evidence of a clear distinct act of the husband, by which he totally divested himself of the property, and constituted himself as trustee of it for the wife (*M'Lean* v. *Longland*, 5 Ves. 71, and *Walter* v. *Hodge*, 2 Swanst. 92). The allegation does not state the nature of the property claimed to be disposed of by the will. Part of it may be leasehold. The agreement alleged to have been entered into by the husband was a parol agreement. But by sec. 7 of the Statute of Frauds a declaration of trust as to leasehold property by parol is not binding. It must be in writing, and therefore the agreement, if binding upon the husband as to chattels personal, is not binding as to leaseholds.

Dr. Spinks and Mr. Ellis for the defendant.

That a feme covert may by will dispose of property held by her to her separate use is settled law (*Hearle* v. *Greenbank*, 1 Ves. Sen. 303; *Fettiplace* v. *George*, 1 Ves. Jun. 44; *Tappenden* v. *Walsh*, 1 Phill. 353), as admitted by the counsel for the plaintiff. The circumstances of the present case, the separation for nearly forty years with the husband's consent, the permission to the wife to trade as a feme sole, the fact that her husband never intermeddled with her property, and treated it as hers, and the express agreement alleged to have been entered into at the time when the separation was resolved upon, are amply sufficient to establish the position that we contend for, viz. that the property in question was held by the wife to her sole and separate use. In *Braham* v. *Burchell*, 3 Add. 263, Sir J. Nicholl intimated "that he had strong doubts, whether a will made by a married woman a dozen years after a final separation from her husband (through no fault of hers), disposing of the fruits of her industry acquired during the separation, could be treated as a nullity." See also *Cecil* v. *Juxon*, 1 Atk. 278; *Rich* v. *Cockell*, 9 Ves. 380. The present case in its circumstances is much stronger than that of *Mews* v. *Mews*, 15 Beav. 529, and the position we contend for is supported by *Bletson* v. *Sawyer*, 1 Vernon, 244, and *Slanning* v. *Style*, 3 Peere Williams, 337.

But even should the right of the wife to dispose by will of **[51]** this property be questionable, the Court is still bound to grant probate (*Braham* v. *Burchell*, 3 Add. 264), and leave it to a Court of Equity (within whose peculiar province it is) to decide whether the property was or was not held by her to her separate use. If probate be refused, the defendant will not be able to bring that question before a Court of Equity, as those Courts take no notice of instruments in their nature testamentary, until probate shall have been granted to them. *Rich* v. *Cockell*, 9 Ves. 380.

It is therefore laid down in *Barnes* v. *Vincent*, 4 N. of Cas. Suppt. 25 ; S. C. 5 Moo. P. C. C. 200, that the safest and most convenient course in such cases is to grant probate.

Dr. Deane, Q.C., in reply: If probate is to be granted to this will on the ground last contended for by the counsel for the defendant, a will made by any feme covert is entitled to probate. [By the Court: Is not the position put by the learned counsel on the other side, that upon a primâ facie case being made out of a wife's right to dispose of her property by will, probate should be granted, and that that case must not be scanned very nicely?] To deal with the cases cited for the defendant: In *Tappenden* v. *Walsh* and *Fettiplace* v. *George* the property disposed of by the wife had been expressly given for her separate use. The remarks of Sir J. Nicholl in *Braham* v. *Burchell* were obiter dicta. As to *Cecil* v. *Juxon*, see the remarks of Mr. Jacob in 2 Bright on Husband and Wife, p. 299. In *Slanning* v. *Styles* the wife's savings from the butter, etc., had been treated by her husband as pin-money. And in *Mews* v. *Mews* it is clearly laid down, that to constitute property acquired by the wife, as acquired for her separate use, there should be some irrevocable act of the husband, and that the fact that it has been treated by him as such for a certain time is not sufficient. He submitted that the Court would not be satisfied either from the facts alleged, or upon the authorities cited, that the husband could be held in this case to have deprived himself of his marital rights.

*Sir C. Cresswell*: After a separation of forty years I shall be anxious to find authorities in favour of treating the **[52]** testatrix as a feme sole, but I must take time to look at the cases cited. Cur. adv. vult.

*Sir C. Cresswell.* This was a question whether an allegation should be admitted propounding the will of Mrs. Haddon, a married woman, who had been living separate from her husband. The allegation states that the husband and wife separated many years ago, and sets up an agreement then entered into between the husband and wife to separate; to divide their furniture and effects; that the wife should work for herself and maintain and take care of herself; that the husband should not be liable for her debts; and in consideration thereof, that she should keep for her own use whatever property she obtained. It was contended, that this allegation ought not to be brought in, that there was no sufficient agreement of the property having been settled to her separate use, and that she had no power to treat it as so settled. On the other hand it was said that according to the authorities in the Court of Chancery the husband under such an agreement would become a trustee for his wife. The case principally relied upon in opposition to the admission of the allegation was *Lamphir* v. *Creed*, 8 Ves. 599. That was a case where Mrs. Creed, a married woman, trading without the interference of her husband, who was a soldier and residing in a different part of the country, advanced money for the purchase of a share in a lottery ticket upon an agreement with Lamphir, who was to purchase it for her, that half of the money advanced by her should be considered as a loan to him, and that they should jointly share in the adventure. That was very different in its circumstances from the present case. It is not stated that the husband in that case had agreed that the wife should trade as a feme sole, and have property to her separate use, and his absence from her, not wilfully, but as a soldier under the service of the Crown, did not raise such a presumption. The Master of the Rolls treated the purchase of the lottery ticket as made with the husband's own money. There are many authorities to support the right of the wife in the present case: *Cecil* v. *Juxon*, 1 Att. See also *Rich* v. *Cockell*, 9 Ves. 369, where Lord Eldon treats it as settled law, that the husband may under circumstances similar to those in the present case become a trustee for the wife.

**[53]** I think that the property earned by Mrs. Haddon, since her separation from her husband, did become her separate property, and if so, all the rights incident to separate property, amongst which is the right of bequeathing it, attached. I must admit this allegation, with the exception of the article pleading the husband's bigamy, which can have no bearing on the case.

IN THE GOODS OF ELIZABETH HOW (deceased), on Motion. March 12, 1858.—Will. —Married Woman.—Presumed Death of Husband.—A. arrived at Albany, in the State of New York, from England, in April, 1850, and from that date, though inquiries had been made, he had never been heard of. His wife died in England in February, 1857, leaving a will dated January, 1857.—Probate granted to the executor as of the will of a widow.

[S. C. 27 L. J. P. 37; 4 Jur. (N. S.) 366; 6 W. R. 53.]

In this case Elizabeth How died on the 20th February, 1857, leaving a will bearing date the 25th of January in the same year. It appeared that her husband left England for the United States, North America, in February, 1850; he was known to have arrived at New York on the 6th of April following, to have quitted the ship on the 8th of April, and to have gone by steamboat to Albany, in the State of New York, on the 9th of April; since which time nothing had been heard of him. His wife had caused inquiries to be made for him in the United States, in Australia, at the Cape of Good Hope, and elsewhere, and had caused advertisements for him to be inserted in the "Albany Evening Journal" and the "New York Herald" in the year 1856. Since Mrs. How's death, George Barter, the executor named in her will, had continued these inquiries, and had advertised for him in a Melbourne paper, but without hearing any tidings of him. Applications for probate had been delayed till the present date, because the disposition of the property in the will was made contingent in the following words, "If my husband Edmund How does not return in twelve months after my decease."

On an affidavit of Mr. Barter to the above facts,

Dr. Deane, Q.C., moved the Court to decree probate to the **[54]** executor of the will of Elizabeth How, as having died a widow. He submitted that the lapse of seven years since Edmund How had been heard of would warrant the Court in granting probate in that form.

*Sir C. Cresswell.* I think your are entitled to have your motion granted. Seven years have fully elapsed since the husband was heard of, which is a fair ground for presuming that a person is dead, but not for presuming that he died at the beginning or at the end of the seven years.(*a*) Here there is ground for supposing that this person died some time ago. If he had remained in Albany he would probably have been known there; but not having been known, it is probable that he died very soon after his arrival there. You may fairly assume that he was dead before the date of his wife's death.

IN THE GOODS OF MATTHEW GENT (deceased), on Motion. March 19, 1858.—Administration Bond.—Amount.—Sureties.—20 & 21 Vict. c. 77, ss. 81, 82.—A. died intestate, leaving his mother solely entitled in distribution, property under £3000, and debts £45. The Court granted administration on the mother entering into a bond in the amount of £100 with sureties.

[S. C. 27 L. J. P. 37; 4 Jur. (N. S.) 341; 6 W. R. 460.]

Matthew Gent died in December 1857, a bachelor and intestate, leaving his mother him surviving, the only person entitled to his personal estate. His personal property would be sworn under £3000. Mrs. Gent proposed to take out administration, but she, being a foreigner, and having no relations in England, had a difficulty in finding sureties for the administration bond. His debts did not exceed £45.

Dr. Addams, Q.C., moved the Court under the 81st and 82nd sections of the Probate Act to decree administration to Mrs. Gent, on her giving a bond with sureties to the sum of £100, or without sureties to the amount of £6000. The 82nd section directed that the administration bond should be in double the **[55]** amount under which the estate is sworn, unless the Court should direct the sum to be reduced; and the 81st section left it to the option of the Court to require sureties.

*Sir C. Cresswell.* The most convenient course will be for Mrs. Gent to enter into a bond in the smaller amount with sureties for double the amount of the debts said to be due, namely £100.

PATTEN v. POULTON AND OTHERS. March 8 and 13, 1858.—Will not forthcoming at Testatrix's Death.—Presumption of Revocation rebutted.—The presumption of fact, that a will, known to have been in the testatrix's custody, and not forth-

(*a*) *Nepean* v. *Doe d. Knight*, 2 Mee. & W. 894.

coming at her death, was destroyed by her animo revocandi, is a primâ facie presumption only, and may be rebutted by probable circumstances, among which declarations of unchanged affection and intention have much weight. It is not necessary for the parties seeking probate, having proved the factum of the original instrument and given sufficient secondary evidence of its contents, to shew how the original instrument was in fact destroyed or lost.

[S. C. 27 L. J. P. 41 ; 4 Jur. (N. S.) 341 ; 6 W. R. 458.]

This was a cause of proving the last will of Julia Clarenza, as contained in the draft thereof, promoted by James Patten, the executor therein named, against R. L. Poulton and Edward Poulton, the two brothers and next of kin of the deceased, and others entitled in distribution in case she died intestate.

The deceased, formerly Julia Poulton, spinster, contracted a de facto marriage at Gretna Green in 1806 with John Pechè, Esq., late a lieutenant-general in the Honourable East India Company's service, of which marriage were born two sons and a daughter,—of whom the two sons are now surviving, one being in Germany, and the other at the Cape of Good Hope ; the daughter had married in Germany and had died since her mother's decease. It turned out that Mr. Pechè, at the time of such pretended marriage, had a lawful wife living, and on discovering this Julia Poulton separated from him, and afterwards intermarried with Count Clarenza, a Sicilian nobleman, who died in 1822, and the countess, during her after-residence in England, went by the name of Mrs. Clarenza.

**[56]** General Pechè died in 1823, having made the three children above mentioned, who bore his name, his residuary legatees.

The deceased was stated to have entertained during life the warmest affection for and interest in her three children, and to have denied herself every comfort in order to forward their fortunes ; and letters from her to each of them, carried down to within a few weeks of her death, were brought in in support of this statement.

In September, 1837, being then resident at Blackheath, she gave instructions in a letter to James Patten, who had long acted as her solicitor and confidential adviser, to draw a will in favour of her said three children. On the 10th of October in the same year a will was executed by the deceased, dividing all her property between her three children equally, and appointing Mr. Patten executor. It was attested by two clerks in Mr. Patten's office ; the draft, filled up after execution in the handwriting of one of the clerks to correspond with the will, was retained by Mr. Patten ; the will itself was made over to the deceased's custody. The deceased died at Dawlish, on the 5th of September, 1846, having previously moved from Blackheath to Torquay, and from Torquay to Dawlish, and the will was not forthcoming.

The allegation propounding the draft expressly stated that the will was not destroyed by the deceased during her lifetime animo revocandi ; that, if destroyed by her at all, it was through inadvertence and mistake, and that she died believing it to be in existence, and that it would be an operative will. It further pleaded that her brother, R. Lewis Poulton, who was living next door to her at the time of her death, had, by his own admission, burnt or otherwise destroyed some of the deceased's papers after her death as of no importance, though whether or not the said will was then destroyed was not known.

Mr. Patten, on being informed by R. L. Poulton of Mrs. Clarenza's death, and that no will could be found, expressed his astonishment thereat ; various negotiations and attempts at compromise took place between the parties severally interested under the will, or in case of an intestacy, but, owing to the smallness of the property—under £1000—and to the number of persons interested, and to their being dispersed in **[57]** various parts of the world, nothing definite was done till June 1857, when the Judge of the Prerogative Court of Canterbury was moved to decree limited probate of the said draft to James Patten on certain proxies of consent from some of the next of kin, others entitled in distribution having been cited but not appearing, which motion the Judge of the Prerogative Court was pleased to reject ; whereupon Mr. Patten propounded the draft in an allegation on which four witnesses—Mary Ann Kipps, Adolphus Bach, James Allberry, and James Patten—were examined.

Mrs. Kipps had become intimately acquainted with the deceased while residing at Blackheath. She spoke to the deceased's anxiety and affection for her children, and said that, shortly before the deceased left Blackheath to go into Devonshire, she called on the witness, and said : "My dear, I am going to London to see Mr. Patten,

to settle all my affairs." On her return from London, she said: "Now I have settled all my affairs quite to my mind, and now I shall leave happy." And in February, 1844, this witness received a letter from the deceased, from Dawlish, in which she wrote: "My mind seems now at ease that the £600 is now secure in the bank for my children in case of sudden death."

Mr. Bach had known the deceased since 1830, was the agent of the deceased's children, and spoke in the strongest terms of her affection for them, and of the extreme improbability of her doing any act that would be contrary to their interests.

Mr. Allberry, clerk to Mr. Patten, spoke to the handwriting of the attesting witnesses (since deceased) to an affidavit made by them in 1847, respecting the factum of the will and the draft.

Mr. Patten spoke to the instruction for the will and all the circumstances of the factum of it, and to his retaining the draft filled up, as above stated, after execution of the will; that he corresponded with deceased till shortly before her death, and never received any intimation from her of having destroyed the will.

The cause came on for hearing on this allegation and evidence, as the next of kin had given in no allegation, and did not interrogate the witnesses.

Dr. Addams, Q.C., in support of the will: The primâ facie **[58]** presumption, that a testamentary paper, traced to the possession of the testatrix, and not forthcoming after her death, had been destroyed by her animo revocandi, was in this case conclusively rebutted by the circumstances—her entire devotion to her children, and the fact that they being illegitimate would take nothing in case of intestacy. The matter had stood over for an inconvenient length of time; if that were thought to be adverse to the application for probate, it must be remembered that the next of kin might have applied for letters of administration, and so brought the matter to an issue.

Dr. Twiss, Q.C., for the next of kin: The only point proved, namely, undiminished maternal affection, is not sufficient to rebut the primâ facie presumption of revocation. The burden of proof is on the party seeking probate under such circumstances. He cited *Welsh* v. *Phillips*, 1 Moo. P. C. C. 299; *Wargent* v. *Hollens*, 4 Hagg. Ecc. Rep. 249.

By the Court: Have not the Courts been in the habit of admitting declarations of diminished or undiminished attachment to the parties benefited—on the one hand, to strengthen the primâ facie presumption; on the other, to rebut it?

Dr. Twiss: I am not aware of any case, where such declarations alone have been held sufficient to rebut the presumption.

By the Court: Do you contend, that where a will, having been in the testator's custody, is not forthcoming, the presumption can only be rebutted by proving some mode by which it might actually be destroyed? Can the Court not take into consideration several probabilities, not perhaps fortifying each other, but each suggesting a more or less probable account of the matter? As here you have—first, the statements as to continued affection; secondly, the probability of the paper having been destroyed by mistake; thirdly, of its having been lost in the changes of residence.

Dr. Twiss: There is no statement or allusion on her part to testacy or intestacy.

**[59]** By the Court: But she knew that the children could take nothing under an intestacy, and she stated some time before her death that she was satisfied in the thought that her small property would go to them.

Dr. Addams: *Davis* v. *Davis* (2 Add. 226) was a case which turned on probabilities and undiminished attachment, and Sir John Nicholl there said, "The presumption may be repelled, nor does it require evidence amounting to positive certainty, but only such as reasonably produces moral conviction."

By the Court: So that in such cases the maxim, Stabitur præsumptio donec probetur in contrarium, does not, in its strictness, hold good. Cur. adv. vult.

March 13.—*Sir C. Cresswell.* This is a cause of propounding the will of Julia Clarenza, deceased, promoted by James Patten, the executor therein named, against R. L. Poulton, her eldest brother and others, next of kin. Several witnesses were examined on Patten's allegation; the next of kin did not bring in any allegation or administer any interrogatories. The following facts are proved: Julia Clarenza, formerly Poulton, in 1806 married John Pechè, and by him had three children, two sons and a daughter; she then discovered that before the marriage Pechè was married to another woman, who was still living, and thereupon immediately separated from him, and never cohabited with him again. She afterwards married Count Clarenza, who died in 1822, and by him had no issue. John Pechè died in 1823, having made

a will in favour of his three children above-mentioned, his property being sworn under £3000. Julia Clarenza was always devotedly attached to her children, who grew up under her care. The daughter married an Austrian, one son entered the Austrian army, and the other settled at the Cape, and she maintained a correspondence with them during the whole of her life, always manifesting the strongest affection for them, and anxiety for their prosperity. After Count Clarenza's death she lived at Blackheath, in Kent, and when there, often spoke to a lady with whom she was intimate, of her anxiety about them, and **[60]** of her intention to settle her affairs, so that they might enjoy the small property of which she had to dispose. In 1837 she was about to remove to Torquay, and then gave instructions in her own handwriting to Mr. Patten, a solicitor, for the preparation of a will. He prepared one according to those instructions, and, at her request, consented to act as executor. The will was executed on the 10th of October, 1857, and at the same time the attestation clause and the names of the attesting witnesses were copied on to the draft, which Mr. Patten retained, the will being given to the deceased. She afterwards told a Mrs. Kipps, an intimate friend resident at Blackheath, that she had settled her affairs; and in 1844, writing to the same lady, said, "My mind seems now at ease, that the £600 is now secure in the bank for my children in case of sudden death." In October, 1837, the deceased removed to Torquay, and remained there for some time occupying part of the house in which her brother R. L. Poulton resided. She afterwards removed to Dawlish, and there occupied part of a small cottage till her death, which happened in September, 1846. Her brother thereupon went to Dawlish and searched for a will without success; when so doing he burnt some papers, which appeared to him unimportant, and it was not imputed that he had intentionally destroyed a will. The delay that has occurred in propounding the will having been accounted for, I make no observation respecting it. The case, then, stands thus: the executor has proved the due execution of a will, and that the original cannot be found, and he has given satisfactory secondary evidence of the contents. But, on the other hand, it is said that, as the will was in the keeping of the deceased, and at her death could not be found, it must be presumed that she destroyed it animo revocandi. This has sometimes been called a presumption of law; but I think that Sir J. Nicholl, in *Colvin* v. *Fraser* (2 Hagg. 325), and Park, B., in *Welsh* v. *Phillips* (1 Moo. P. C. C. 302), more correctly designate it a presumption of fact, and there can be no doubt, that evidence of a will being left in the keeping of the party who made it, and that it cannot be found at his death, is sufficient, in the absence of circumstances tending to a contrary conclusion, to warrant an opinion that the maker of the will destroyed it. But it is **[61]** a presumption that prevails only in the absence of circumstances to rebut it, and is, therefore, commonly called a primâ facie presumption. It may be fortified or it may be rebutted by many circumstances. Those commonly relied on are declarations either of goodwill towards the parties benefited by the will, and of an adherence to the will as made, or, on the contrary, of dissatisfaction and change of mind respecting them. In *Saunders* v. *Saunders* (6 N. C. 522) Sir H. Jenner Fust said, "The strongest proof of adherence to the will, and of the improbability of its destruction, arises from the contents of the will itself." In the present case I find no extraneous circumstances to fortify and support the primâ facie presumption; the lady changed her residence twice after the will was made, and she does not appear to have had any place for the deposit and safe custody of pape s of importance: the probability of the will being lost by accident is not therefore excluded. Again, her brother destroyed some papers, the particular nature of which is not ascertained. It is not suggested that he wilfully destroyed a will, nor is it probable that he could destroy the will in question, which would be of considerable bulk, without some examination; but the possibility of its being so destroyed is not excluded. On the other hand there are many circumstances tending to negative the presumption: the constant undeviating affection manifested by the deceased for her children—that the will was made under the influence of that feeling as expressed at the time and afterwards—that she never expressed a desire to benefit by her will any other person, and above all, the fact that she perfectly well knew that her children were illegitimate (although not by any fault of hers), and that consequently, if she died intestate, they would receive no part of her property, but the whole would be divided amongst others. Here then, as in *Saunders* v. *Saunders*, it may be said, that the contents of the will itself shew the improbability of its destruction. These

circumstances combined render it so improbable that the deceased would wilfully destroy a will made in favour of her children, that I cannot, from the mere circumstances of its not being found, presume that she did so. The will then having been duly executed, the contents of it having been duly proved by secondary evidence, and it not being established that the deceased revoked [62] that will, the Court must give effect to it by pronouncing for its force and validity, and by decreeing probate of the draft.

Dr. Twiss applied for costs out of the estate.

*Sir C. Cresswell.* I have considered the question of costs, and shall make no order as to them.

IN THE GOODS OF MARY SHAW, Spinster (deceased), on Motion. March 19, 1858.—Will.—Codicils.—Presumptive Revocation.—A. made her will in March, 1854, and a codicil in June, 1854, one of the legatees under the will having died since its execution. In May, 1856, she executed another codicil, among other things appointing one of the parties benefited under the codicil of 1854 to be executor, in the room of one appointed in the will. At her death, in December, 1857, the will and second codicil were found in a tin box at the Bank of England, in which she kept her papers; but the first codicil, of which the testatrix took possession immediately after its execution, was nowhere to be found.—On motion for probate of the draft of the first codicil, with the consent of the residuary legatees—Held, That the primâ facie presumption of revocation was strengthened rather than rebutted by the circumstances.—Probate of the draft refused.

This deceased died on the 13th December, 1857, leaving a will, dated the 13th of March, 1854, in which H. K. Smithers, James Ford, and Alexander Christie, were appointed executors and trustees, Miss Lucy Chambers and Miss H. M. Smith, residuary legatees.

On the 26th of June, 1854, the deceased executed a codicil, which at her death was not forthcoming, but the draft of it was in existence. This codicil disposed of £500, and the reversion of another sum of £500, which by the will had been bequeathed to James Christie, who died in Upper Canada in April, 1854. George and Charlotte Christie, and their children, were the persons benefited under the first codicil.

On the 27th of May, 1856, the deceased executed another codicil, by which she revoked the appointment of Alexander Christie, one of the executors in her will, and appointed George Christie, who was benefited by the first codicil, executor of her [63] will and codicils thereto, and trustee with Smithers and Ford of the trusts thereby created. This second codicil revoked certain pecuniary legacies contained in the will and bequeathed others.

Mr. Smithers, one of the executors and trustees, was the intimate friend of the deceased, and consulted by her on all business matters, and drew and wrote the will and both codicils. The first codicil was executed at Mr. Smithers's house, and was taken away by the testatrix, who kept papers of consequence in a tin box deposited at the Bank of England, in which, after her death, the will and codicil of 1856 were found, but the first codicil was not forthcoming, either there or in any repositories at her residence. Advertisements had been inserted offering a reward for it, but without producing any information.

Dr. Deane, Q.C., moved the Court to grant probate of the draft of the codicil of 1854, limited until the original codicil, or a more authentic copy, should be brought into the registry. The consent of the residuary legatees, who would be prejudiced by the draft forming part of the probate, had been obtained to the present motion.

*Sir C. Cresswell.* Has it been usual to be satisfied with consent in such cases? It is in evidence that the deceased had a place for the deposit of papers of importance; the codicil in question was in her possession, and must have found its way there. I should have great difficulty in saying that the presumption of revocation is rebutted; in point of fact, the presumption is fortified by the circumstance of the will and second codicil being found where she usually placed papers of importance, and the first codicil not being there. The deceased must have had access to that place, and should have known that it was not there. The party relies on the circumstances of the deceased having spoken of her will and codicils; but the second codicil is a very long one—in it she alludes frequently to the will, but never to the former codicil. I must reject this motion.

**[64]** IN THE GOODS OF SARAH HANNAH ROBERTS, Spinster (deceased), on Motion. March 26, 1858.—Administration.—20 & 21 Vict. c. 77, s. 73.—A. died intestate, leaving an aged uncle and aunt, the only persons entitled in distribution; at their desire administration was granted for their use and benefit to their son on the sureties justifying.

[S. C. 6 W. R. 460. Followed, *In the Estate of Davis*, [1906] P. 330.]

Sarah Hannah Roberts died on the 5th of January, 1858, intestate, a spinster, without parent, brother, or sister, leaving William Roberts, her lawful uncle by the father's side, and his wife Hannah Roberts, her lawful aunt by the mother's side, the only next of kin, and solely entitled in distribution. Mr. and Mrs. Roberts, being of very advanced age, were unwilling to take upon themselves the burden of administration, and were desirous that letters of administration should be granted to their son for their use and benefit. On an affidavit from Mr. and Mrs. Roberts,

Dr. Phillimore, Q.C., moved the Court accordingly. He submitted that this was a case in which the Court would be inclined to exercise the discretion given to it by 20 & 21 Vict. c. 77, s. 73.

*Sir C. Cresswell.* I grant this motion; but the sureties must justify.

IN THE GOODS OF MARY BURRELL, Spinster (deceased), on Motion. March 26, 1858.—Administration.—20 & 21 Vict. c. 77, s. 73.—A. died intestate, leaving her only sister solely entitled in distribution, a lunatic, and without any committee of her estate or person. Administration for the use and benefit of the sister during her lunacy granted to the stepmother, who was co-executor and co-trustee with the deceased of the father's will, and beneficially interested under it. Surviving cousins not cited.

[S. C. 6 W. R. 465.]

The deceased in this case died in November, 1857, a spinster, without a parent, and intestate, leaving Frances Burrell, **[65]** spinster, her sister, her only next of kin and solely entitled in distribution; the personal property was about £2000. Frances Burrell, aged about fifty-two years, had been for many years a lunatic, and confined in a private lunatic asylum, without prospect of recovery, but no committee of her person or estate had been appointed. Mr. Burrell, the father of the two sisters, by his will bequeathed his estate and effects, in moieties, to his wife Sarah Burrell, the stepmother of Mary and Frances, and to his daughter Mary, and appointed them trustees and executrixes; they proved this will in November, 1853. Mr. Burrell in his said will declared "that he made this provision for his said wife and daughter in the full and implicit confidence that they would thereout maintain and provide for his daughter Frances Burrell during her life, yet so nevertheless that the same provision should not be a charge upon or in any manner affect the disposition thereinbefore made." Mary Burrell and Sarah Burrell had, since Mr. Burrell's death, provided for the lunatic, whose only next of kin at her sister's death were several cousins, with whom her father and sister had had very little communication.

On the affidavit of Sarah Burrell, of the nurse and of the medical attendant at the lunatic asylum, and on a copy of Mr. Burrell's will,

Dr. Phillimore, Q.C., moved that the Court for letters of administration of the effects of Mary Burrell to be granted to Sarah Burrell, for the use and benefit of the said Frances Burrell during her lunacy. This case would come under the 73rd section of the Probate Act, and there was some authority for it in cases under the old jurisdiction. (*In the Goods of Mary Keane*, 1 Hagg. Ecc. Rep. 692; *In the Goods of Agnes Blagrave*, 2 Hagg. Ecc. Rep. 83.)

*Sir C. Cresswell*: What was done as to the sureties in those cases? I am told that the usual course in similar cases is for the sureties to justify, in which the motion may be granted as prayed.

**[66]** IN THE GOODS OF ROBERT COOPER (deceased), on Motion. March 19, 1858.—20 & 21 Vict. c. 87, s. 88.—Probate of the will of R. C. had been granted by the Peculiar Court of W. to his executor R. S. C. who was now abroad, and supposed to be in Australia. R. C. at the time of his death had assets out of the jurisdiction of the Peculiar of W.—A motion to grant letters of administration with the will annexed under section 88 of the Probate Act to the residuary

legatee of R. C. refused.—Semble, that on the Court being satisfied that the executor of R. C. was in a distant country, it would grant administration to his residuary legatee.

[S. C. 6 W. R. 459.]

Robert Cooper, late of Bilston, in the county of Stafford, died in April, 1826, leaving a will in which Ann Cooper, R. Thompson, and his son R. S. Cooper, were named executors, the first two being residuary legatees in trust.

In January, 1827, Ann Cooper proved his will in the Royal Peculiar of Wolverhampton, power being reserved of granting probate to Richard S. Cooper, R. Thompson having renounced probate.

In 1841 Ann Cooper, who had subsequently married, died, and probate of the will was granted by the same Court to R. S. Cooper, who left the kingdom in August last, and was still abroad.

At the time of the death of the testator, E. F., who was then resident out of the jurisdiction of the Peculiar of Wolverhampton, was indebted to him in the sum of £132, 4s.

E. F. subsequently became insolvent, and made an assignment of his property to trustees for the benefit of his creditors, who were now prepared to pay to the estate of the deceased £72, 14s. 2d. by way of a dividend on the above debt.

Dr. Addams, Q.C.: At the time of the testator's death, E. F. being resident out of the jurisdiction of the Peculiar of Wolverhampton, his debt would not pass under the probate of the Court of that Peculiar. No probate had been taken out of the Diocesan or Prerogative Court. He moved the Court, under the 88th section of the Probate Act, to decree administration (with the will annexed) of the effects of the [67] deceased, limited to the purpose of receiving and administering the said dividend, to J. R. Cooper, the son of the deceased, and one of the residuary legatees named in his will.

*Sir C. Cresswell*: The 88th section would be precisely in point for granting a new probate to the executor limited to the property out of the jurisdiction of the Court which made the original grant. But this is not what you are asking for. You want an administration with the will annexed to be granted, not to the executor, who is abroad, and who proved the will, but to one of the residuary legatees.

Dr. Addams: The motion, perhaps, might be granted under 38 Geo. III. c. 87, and sec. 74 of the Probate Act.

*Sir C. Cresswell*: The 74th section is applicable to cases where letters of administration have been granted, and the provisions of 38 Geo. III. c. 87, to which it refers, are limited by the form of affidavit there prescribed, which is to the effect, that the applicant is a creditor of the deceased's estate, and is desirous of exhibiting a bill in Equity. That Act does not apply to this particular case, but only to a case where the person making the application is desirous of exhibiting a bill in Equity. The powers of that Act are extended by section 74 of the Probate Act, but only to cases where letters of administration have been granted. But here probate and not letters of administration have been granted. It does not appear where the executor is; he may be close at hand; you had better find him out, and get him to take or renounce the grant, or perhaps if it can be shewn that he has gone to a distant country, as, for example, India or Australia, there might be no difficulty in granting the motion.

Dr. Addams: From a letter, it appears that the executor is supposed to be in Australia.

*Sir C. Cresswell*: I should like to have an affidavit of that fact, and then probably I should grant the application.

[68] IN THE GOODS OF JOHN PETER RIPLEY (deceased) on Motion. March 19 and 26, 1858.—Will.—Copy.—Evidence of Execution.—A. being resident in India, sent in 1850 to England, in a letter to his solicitor, a copy of a will which he stated he had made there. In February 1857 he transmitted in the same way a copy of a codicil stated to have been made at Delhi. A. lost his life in May, 1857, in the mutiny at Delhi, and the will and codicil were not forthcoming.—On motion for probate of the will and codicil as contained in the copies sent to England—Held, that there being no proof of the execution of the original will and codicil except the statement of the deceased himself, made after their execution, the copies were not entitled to probate.

[S. C. 4 Jur. (N. S.) 342; 6 W. R. 460. Referred to, *Quick* v. *Quick*, 1864, 3 Sw. and Tr. 448. Approved, *Sugden* v. *Lord St. Leonards*, 1876, L. R. 1 P. D. 227; *Atkinson* v. *Morris*, [1897] P. 48.]

This was a question of proving the will and codicil of the deceased, who was killed in May, 1857, being then the colonel commanding the 54th Bengal N. I., as contained in copies sent by post to his brother, W. R. Ripley, of Lincoln's Inn Fields. Mr. W. R. Ripley's affidavit, on which the motion was founded, established the following facts: he had always acted as Colonel Ripley's legal adviser, and in the year 1850 he received by post from India a copy of a will dated the 2nd of March, 1850, with an attestation clause, but no copies of the signature either of the testator or of the subscribing witnesses. On the same paper was a letter from Colonel Ripley to his brother, referring to the will, desiring him, if he was not satisfied with it, to send him the draft of one properly expressed, and at all events to destroy a former will then in Mr. W. R. Ripley's custody. Mr. W. R. Ripley accordingly destroyed the old will, but did not send out any new draft, being satisfied with the one of which he had just received the copy. In April, 1857, Mr. W. R. Ripley received in the same manner the copy of a codicil headed, "Codicil No. 1 to my will written at Delhi, 18th February, 1857." The copy of the codicil bore the signature J. P. Ripley, Lieutenant-Colonel, Bengal army. Witnesses: H. C. Henderson, Lieutenant, 54th Regiment N. I.; Ernest Edwards, Lieutenant, 54th Regiment N. I. The letter accompanying this codicil referred to the will of 1850, the copy of which Colonel Ripley presumed his brother still retained.

It seemed probable that Colonel Ripley, after he was wounded, had time to make over his papers of importance to a **[69]** native servant, and that the will and codicil would be amongst them. One of his sons in India had made every exertion to recover them, but without success. Lieutenant Edwards was killed at the same time with Colonel Ripley; Lieutenant Henderson was supposed to be alive.

Dr. Deane, Q.C., moved the Court to decree probate of the will and codicil as contained in the copies transmitted by Colonel Ripley to his brother, to the executors therein named.

*Sir C. Cresswell*: There is abundant proof of the contents of the will and codicil, but I have a great difficulty as regards the proof of execution of these papers. The only proof before me is the statement and assertion of the deceased himself. Is there any precedent for granting probate of papers, where there was no other proof of the execution of them?

Dr. Deane: I have not been able to find any exact precedent; but where, as in the codicil now before the Court, a testamentary paper purported to bear the names of two subscribed witnesses and the attestation clause was defective, the Prerogative Court did not always insist upon affidavits from such witnesses if they were at a great distance, in India for instance.

By the Court: But in such cases the original instruments were produced. Here I have before me mere copies, and nothing besides the deceased's own statement that the originals were executed. I do not see where it would stop if I am to grant probate of these: the motion must stand over.

March 26.—*Sir. C. Cresswell.* This was an application for probate of a supposed will and codicil (the alleged testator having been murdered at Delhi) as contained in what were said to be copies of the will and codicil sent over to this country. It seemed to me at the time when the application was made, that I could not grant it upon principle, there being no proof of the factum of the original will and codicil except the decla-**[70]**-rations of the supposed testator, made after their execution, that he had made such a will and codicil. But as the circumstances of the case caused me to feel rather disposed to grant probate of the instruments, if I could do so with propriety, I was anxious to have an opportunity of seeing whether any instance could be found, in which the Prerogative Court had granted probate under similar circumstances. No instance could be found; but in the case of *Doe d. Shallcross* v. *Palmer*, 16 Q. B. 747, a Common Law Court refused to receive in evidence the declaration of a testator, made after the execution of his will, that an interlineation in it was made before execution. If a declaration made after execution as an interlineation could not be received, à fortiori a declaration as to the actual making of a will could not be received. There being no other evidence as to the factum of the will, I am bound to refuse probate of the copy. I must reject the motion.

**[71]** EX PARTE ARMITAGE. January 23, 1858.—Divorce.—Practice.—Action of Crim. Con.—Adulterer.—Co-Respondent.—A. having, in an action of crim. con., recovered damages against B., applied for leave to present a petition for the dissolution of his marriage without making B. a co-respondent to such petition.—Held, that the circumstances of A. having recovered damages against B. did not constitute such special ground, within the meaning of 20 & 21 Vict. c. 85, s. 28, as to justify the Court to grant the application.

[S. C. 4 Jur. (N. S.) 56; 6 W. R. 222.]

This was an application made under the 28th sect. of 20 & 21 Vict. c. 85, which provides that "upon any such petition presented by a husband" (for the dissolution of marriage on the ground of his wife's adultery), "the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless on special ground, to be allowed by the Court, he shall be excused from so doing."

Mr. Pullein, on behalf of a husband, applied for leave to present such a petition without making the alleged adulterer a co-respondent, on the special ground that the husband had already recovered damages and costs against him in an action of crim. con.

*The Judge Ordinary.* I cannot grant you any authority to present a petition without doing what the statute re-**[72]**quires unless upon special grounds shewn. You have not shewn any special grounds in this case, and I must therefore reject your application.

SAUNDERS *v.* SAUNDERS. February 8, 1858.—Wife.—Divorce à mensâ et thoro.—Application to reduce permanent Alimony.—A. obtained a sentence of divorce à mensâ et thoro, in 1847, by reason of her husband's cruelty. £300 per annum was taken by consent as permanent alimony. Upon her father's death, A. having received an accession of income (to the extent of £144 per annum, as admitted by herself), her husband applied for a reduction of alimony.—Held, that no case was made out by the husband for a reduction of alimony. His income did not appear, and non constat that £300 would not have been originally allotted by the Court, even if A. had then been in possession of £144 per annum.

[S. C. 6 W. R. 328.]

This was an application to the Court for a reduction of permanent alimony. The marriage took place in 1825. In 1847, Mrs. Saunders obtained a sentence of divorce à mensâ et thoro in the Consistory Court of London (1 Rob. Ecc. Rep. 555), by reason of her husband's cruelty. Permanent alimony was taken by consent of both proctors at £300 per annum. There were four children of the marriage, sons, now making their own way in the world, and who, as alleged by Mr. Saunders, had been educated at his sole expense, whilst Mrs Saunders asserted that she had expended considerable sums and had incurred a debt of £750 in respect of the youngest son's education, and for the advancement of the others.

Mrs. Saunders's father died in December, 1855. Some time after this event Mr. Saunders, conceiving that his wife had in consequence of her father's death become possessed of an independent income, allowed the payment of alimony to fall in arrear.

Monitions to enforce payment were served on Mr. Saunders in the spring of last year, and on the 2nd of July the Judge of the Consistory Court of London ordered immediate payment of two quarters' alimony, due up to the 18th of March, 1857. **[73]** Mr. Saunders then brought in an allegation, pleading Mrs. Saunders's separate income to be £500, £400, or at least £300 per annum; and in an additional article to the allegation asserted that she had other independent income under the testamentary disposition of a deceased relative.

Mrs. Saunders's personal answers to the allegation admitted an income of £144 per annum, under her father's estate, with the possibility of some increase to it. Mr. Saunders was examined on the allegation, but his evidence was little more than hearsay.

Dr. Phillimore, Q.C., and Dr. Spinks, in support of Mr. Saunders's application.

Dr. Addams, Q.C., and Dr. Robertson, contrà, for Mrs. Saunders.

*The Judge Ordinary.* I am of opinion that no sufficient case is made out to induce me to order a reduction of alimony. A husband separated from his wife for cruelty does not present himself under very favourable circumstances to the Court. It does not appear that, latterly at least, the sum decreed by the Consistory Court of London was paid, except by compulsory proceedings in that Court. I have no means of know-

ing upon what computation the alimony was originally settled, or what the husband's income now is. The original alimony was taken by consent, and it is not likely under such circumstances that a husband would act very liberally towards a wife. There are no facts before me to shew that this alimony would be unreasonable according to the husband's present income, taking into consideration the income which the wife admits she now receives from her father's estate. I must reject this application with costs.

ROWBOTHAM *v.* ROWBOTHAM. February 17, 1858.—Petition for Dissolution of Marriage.—Service of Citation.—Practice.—On motion to allow substitutional service on the father of a husband proceeded against for adultery and bigamy, it appearing most pro-[74]-bable that the husband was in New York, the Judge Ordinary refused to dispense with personal service.—Quære. Whether the Judge Ordinary has power to dispense with personal service in a suit for dissolution of marriage?

[S. C. 27 L. J. P. 33; 6 W. R. 328.]

This was a motion to dispense with personal service of a citation, and to allow a substitutional service under 20 & 21 Vict. c. 85, s. 42, and rule 10 of the Court for Divorce and Matrimonial Causes. The suit was instituted by the wife for a dissolution of marriage by reason of the husband's adultery and bigamy. The parties were married in November, 1849, and the delinquency, which formed the ground of the petition, was stated to have occurred in March, 1856. From the affidavits of the wife and her brothers, to whom Mr. Rowbotham had written since that date, it was most probable that he was in New York, and had gone from England to that city in the year 1856. Mr. Rowbotham's father admitted to one of the brothers, that he could send a letter which would reach his son, but seemed unwilling to communicate his direct address, even if he knew it.

Mr. Macqueen moved the Court to permit a substitutional service on the father of Mr. Rowbotham, allowing him ample time to communicate with his son, and then, if no appearance were given, to proceed with the cause. On the practice of the House of Lords in such cases, he cited *Mrs. Battersby's case*, session 1840 (Macqueen's "Practice of the House of Lords," p. 667), where the husband having been convicted of bigamy and transported, substitutional service on the attorney, who had been employed to defend him at the Old Bailey, was permitted; and the House did not suspend its proceedings, but the bill went on in its usual course.

*The Judge Ordinary*: What would have been the fate of a bill if directions had been given to serve a party abroad with notice of the second reading, and the result of such direction could not be known till after the end of the session? The answer to that question may throw light on *Mrs. Battersby's case*; there too the conviction of bigamy may have been considered as affecting the husband with notice that his conduct was impugned.

[75] Mr. Macqueen: In *Captain Wyndham's case*, session 1855 (3 Macq. H. L. Cas. 43), the petitioner was allowed, under such circumstances, to continue his bill in the next session of Parliament.

*The Judge Ordinary.* The main question is, whether you have shewn a practical impossibility of serving the husband. Upon looking at the Act I feel some doubt,—however, the rule 10 is in general terms,—whether, sitting as Judge Ordinary, I have power to dispense with personal service in proceedings for dissolution of marriage; and if I have the power, I am of opinion that some further steps should be taken, than appear to have been taken on these affidavits. I feel great difficulty about it. I should be glad to render all parties due assistance. But there is strong evidence that the husband is in New York, and some effort might be made to discover him. If I were at once to say that service on the father is good service, it might lead in a majority of cases to dispensing altogether with personal service. I should recommend a copy of the citation to be sent out to New York, with directions to endeavour to discover his residence there and to serve it upon him. An affidavit should be made before a person competent to administer oaths in America of the service of the citation or stating that he cannot be found in New York. An alteration must be made in the form of citation, as given in the rules and forms, for that is clearly only applicable to service in England, as it commands an appearance within eight days of the service. In the citation to be sent out, I should advise the appearance to be commanded within six weeks after the service.

CURTIS *v.* CURTIS, on Motion. February 24, 1858.—Petition for Judicial Separation.—Custody of Children under Sect. 35 of Divorce Act.—Interim Order.

[S. C. 27 L. J. P. 16; 6 W. R. 409. Referred to, *Kelly* v. *Kelly*, 1870, L. R. 2 P. & D. 61.]

This was a question arising out of a suit for judicial separation, brought by Mrs. Curtis against her husband for cruelty, as to the custody of the children pendente lite, under sect. 35 of 20 & 21 Vict. c. 85.

It appeared that the marriage of the parties to the suit took **[76]** place in June, 1846,—and that of the marriage there had been five children born, of whom three were surviving, of the respective ages of nine, eight, and five years. Mr. and Mrs. Curtis resided in London some time after their marriage, and the affidavit of the wife in support of the present motion set forth certain acts of violence on the part of Mr. Curtis to the children and herself. It was stated that in the autumn of 1850 Mr. Curtis had been put under restraint as a lunatic, and that when such restraint became no longer necessary he was desirous of going to Australia, on which point differences arose between himself and his wife, and threats on his part were sworn to of going to Australia with the children, leaving Mrs. Curtis to shift for herself. Ultimately they went together to New York in February, 1852; in the course of which year the husband was again placed under restraint as a lunatic. The father of Mrs. Curtis went over to New York and brought her and the children back to England, and from that time till 1857 it was stated that the husband had deserted, or at least never returned to the wife, or in any way contributed to her maintenance or to that of the children. In July, 1857, he found Mrs. Curtis living with her father in Ireland. Mrs. Curtis, wishing to avoid him, escaped with her children, and had since been living under an assumed name. In February, 1858, the husband again found Mrs. Curtis living with her sister at Hornsey, and attempted, as she asserted, to take from her by force the youngest child. The elder children were, at the date of the present application, under the care of an old governess of the family, and at the expense of Mrs. Curtis's father.

Under these circumstances,

Mr. Forsyth, Q.C., moved the Court to make an order that while the suit was pending, and till some final order should be made, the children should be protected from the father's violence, and that he should be restrained from removing them from the mother's custody.

Mr. Curtis appeared in person in opposition to this motion, and explained according to his own view the specific acts of violence towards the children alleged by Mrs. Curtis; said that his being under restraint was merely the temporary effect of **[77]** brain fever, and contended that on Mrs. Curtis's own affidavit there was no such conduct on his part as could justify his being deprived of his common law right to the custody of the children; he concluded by praying the Court to make an interim order, that Mrs. Curtis be restrained from exercising her unlawful custody of the children, be ordered to bring them into Court and deliver them over to the custody of himself as their father and lawful guardian.

*The Judge Ordinary.* All that I can now do is to make an interim order, which can have no bearing whatever on the merits of the case as between the principal parties, which I do not wish in any degree to enter upon and prejudice now. For the present purpose the two elder children seem to be in very proper custody with the lady in whose care they now are, and on the understanding that Mrs. Curtis's father remains responsible for their expense, I desire that they should continue in that custody till further orders; the youngest child, five years of age, must remain with the mother. In both cases the father is to have reasonable access, and no change of their residence is to be made without giving the father notice.

EX PARTE MULLINEUX. February 27, 1858.—Desertion.—Protection Order.—Specific Property.—A protection order under sec. 21 of the Divorce Act should be in general terms, the Court having no power to decide what title the wife may have to specific property.

[S. C. 27 L. J. P. 19; 6 W. R. 356.]

This was an application on behalf of Mary Mullineux under the 21st section of the Divorce Act, for an order to protect her property.

From her affidavit it appeared that she was married in August, 1836, to James Mullineux; that she lived and cohabited with him at Market Drayton for nearly a

year and six months; that in February, 1838, he deserted her without any reasonable cause; that from that time she had no intelligence of her husband till August, 1848, when she received a **[78]** letter from him, dated "Pittsburgh, Pennsylvania, 18th June, 1848"; that in January, 1854, he unexpectedly came into her house and stopped there a short time; that he then went to the house of his father at Market Drayton, where he remained about a fortnight, making almost daily calls upon her, but not cohabiting; that he then suddenly left the neighbourhood, and that the last tidings she had received of him were contained in a letter he had written to her, dated "Liverpool, 10th February, 1854," in which he stated his intention of forthwith sailing for America; that since the desertion of her husband she had maintained herself by her own industry, and had thereby and otherwise acquired certain property, consisting of—[here the description of various houses in the applicant's possession or occupation were set forth, and other property earned and acquired, see form 13.]

Dr. Addams, Q.C., moved the Court for an order of protection under the 21st section of the Divorce Act, as to the specified property, against the husband, his creditors, and all persons claiming under him.

*The Judge Ordinary.* On this affidavit Mrs. Mullineux is certainly entitled to an order for the protection of her property, but my order cannot specify the particular property to which it is to extend. I have no power to decide the title to any property. The order must be in general terms, leaving untouched all questions as to right to this or that particular property.

EVANS *v.* EVANS, on Motion. February 27, 1858.—Petition for Dissolution of Marriage.—Practice.—Style of Court.—Answer to Petition.—A petition for dissolution of marriage should be addressed "To the Court for Divorce and Matrimonial Causes."—Where the petition on the face of it sets up a sufficient case it should be met by a responsive plea, and cannot be dismissed by the Court on an affidavit of facts, which might be a sufficient plea in bar.

[S. C. 27 L. J. P. 31; 6 W. R. 356.]

**[79]** In this case Mr. Evans had presented a petition for dissolution of marriage by reason of Mrs. Evans's adultery, addressed "To the Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes."

The facts, which this petition set forth, were the same as those on which Mr. Evans had founded a suit for divorce à mensâ et thoro in the Arches Court of Canterbury, which had terminated in June, 1857, by the learned Dean of the Arches pronouncing that Mr. Evans had failed in proof of the libel given in by him, and dismissing Mrs. Evans from the suit. This, of course, did not appear on the face of Mr. Evans's petition to the Court for Divorce and Matrimonial Causes.

The Queen's Advocate (Sir J. D. Harding): In this case I appear for the respondent, the wife proceeded against; the petition given in by Mr. Evans is addressed, following the form, No. 3: "To the Judge Ordinary of the Court for Divorce and Matrimonial Causes." I do not feel certain on the point, but presume an answer may be correctly addressed in the same way. I also hold in my hand a motion, supported on Mrs. Evans's affidavit, that your Lordship would be pleased to dismiss this petition on the ground that it is res judicata by a Court of competent authority; but I apprehend that, as nothing to that effect appears on the face of the petition, we must answer that petition, and are not yet in a position to ask that it should be rejected.

*The Judge Ordinary.* I am not at all sure that the petition is rightly addressed; the forms were not intended to be literally followed, but merely to serve as general examples, and the full Court alone has the power to hear petitions for dissolution. The better course will be that the petitioner should have leave to amend his petition, and address it "To the Court for Divorce and Matrimonial Causes." As to the second point you mentioned, I am clearly of opinion that you are not, under the circumstances, at liberty to ask the Court to dismiss the petition. You must give in a responsive plea.

**[80]** PYNE *v.* PYNE, on Motion. March 8, 1858.—Petition for Dissolution of Marriage at Suit of Wife.—Practice.—A petition for dissolution of marriage by reason of the husband's adultery and desertion, directed to be amended by a distinct averment of the fact of desertion; some statement of circumstances in such a petition may be necessary, but evidence should not be pleaded.

This was a petition for dissolution of marriage on the part of the wife, by reason of the husband's adultery and desertion.

On an affidavit of the personal service of the citation, and on an affidavit that up to the 4th of March no appearance or answer on behalf of Mr. Pyne had been entered in the registry;

Dr. Phillimore, Q.C., moved the Court, under the 21st rule, to direct the manner in which the cause should be tried.

*The Judge Ordinary.* Before I make any order in this case, if I am competent to do so, I wish to direct your attention to the form of the petition. It prays for a dissolution of marriage at the suit of the wife; adultery alone therefore will not be sufficient. The petition goes into a long statement of circumstances, from which I presume it is intended to set up a case of desertion as well as adultery; but I can find no distinct averment of the desertion. In such a case it may be right to state some circumstances, though care should be taken not to plead evidence. I should advise the petition to be withdrawn and amended. Every such petition should contain a distinct averment of the grounds on which it depends.

WRIGHT *v.* WRIGHT, on Motion. March 8, 1858.—Amended Petition.—Practice.—Notice of application for leave to amend should be given to the other party, or the petition may be withdrawn and served de novo.

[S. C. 27 L. J. P. 32; 6 W. R. 507.]

Dr. Deane, Q.C., moved for leave to amend the petition for dissolution at the suit of the wife.

**[81]** *The Judge Ordinary*: You must give notice of your application to the other side.

Dr. Deane, Q.C.: With your Lordship's permission we propose to withdraw the petition, and serve it again on the respondent.

*The Judge Ordinary*: You are at liberty to do that.

HAYWARD *v.* HAYWARD, on the Admission of the Plaintiff's Responsive Allegation. March 2 and 19, 1858.—Suit for Restitution of Conjugal Rights.—Insanity of Wife.—The wife libelled for restitution of conjugal rights. The husband alleged the wife's insanity and a morbid hatred towards himself, which rendered cohabitation unsafe. The wife's responsive allegation allowing that she had been insane, but asserting her recovery and denying the facts on which the husband relied to shew continuance of insanity, admitted to proof.

[S. C. 28 L. J. P. 9; 6 W. R. 639. Referred to, *Russell* v. *Russell*, [1895] P. 330. Affirmed, [1897] A. C. 395. See further p. 333, post.]

This was a suit for restitution of conjugal rights, brought by Christi Annette Hayward, wife of Edward Hayward, against her husband. The suit was commenced in February, 1857, in the Arches Court of Canterbury. The libel was in the usual form, pleading the marriage of the parties in August, 1838, and charging Mr. Hayward's refusal to cohabit since November, 1856.

The allegation brought in on behalf of Mr. Hayward stated, that in the course of the year 1854 Mrs. Hayward entertained a groundless aversion and hatred to her husband, and used such threats, and sometimes actual violence towards him, that he was obliged to sleep in a separate room, the door of which, for his personal security, he kept locked; that in the spring of 1855 the aversion to her husband assumed a decidedly morbid character, and was accompanied by delusions in other respects, in consequence of which she was, on the 15th of April, 1855, placed in a lunatic asylum at Ticehurst; that during her stay there the leading feature of her insanity continued to be the same causeless hatred of her husband; that **[82]** in December, 1855, her mind having become gradually tranquillized, she had leave of absence from the asylum for two months; and on the 17th of February, 1856, she was discharged therefrom, restored to her natural state of mind, by the authority of her husband; that thereupon she was received into Mr. Hayward's house, where she lived till September, 1856; but that shortly after such final discharge Mrs. Hayward renewed her violent and frantic conduct towards her servants, her only child, and especially her husband; that she got possession of a carving-knife and a dagger, and made totally unfounded charges of her husband's cruelty towards herself; that in September, 1856, Mr. Hayward, under the advice of Dr. Conolly and of his own medical attendant, placed her at a private house in Southborough in the county of Kent, from which she escaped

in the month of November, and on the 20th of November presented herself at Mr. Hayward's then residence at Hastings, where she conducted herself with such violence that Mr. Hayward told her that it was impossible, with any reasonable regard to his personal security, that they could continue to live in the same house; whereupon, on the day following, Mrs. Hayward came up to town, and has since been living in apartments, where she had been and still was, and from time to time would be supplied by Mr. Hayward with adequate means, relatively to Mr. Hayward's income, of supporting herself.

The admission of this allegation was opposed; but on the 19th of November, 1857, after hearing counsel thereon, the learned Dean of the Arches was pleased to admit the same.

The responsive allegation on behalf of Mrs. Hayward, which formed the present subject for the consideration of the Court, denied the causeless aversion towards her husband set forth in his allegation; stated that Mr. Hayward had slept in a separate room since 1844, assigning the state of his health as his reason for so doing. It asserted that the alleged lunacy of Mrs. Hayward had its origin in the ill-treatment and violence of her husband; that especially, in consequence of an altercation which took place between them in March, 1854, she became so irritated and excited that Mr. Hayward procured the certificate under which she was confined at Ticehurst. It denied that after she was discharged in February, 1856, she **[83]** conducted herself in a violent, frantic manner; alleging that the carving-knife was a common kitchen-knife, which she had for the purpose of opening a deal box; and the dagger, a Russian sword, which had been given her as a curiosity. It stated that on her escaping from the house at Southborough, where she alleged she had been illegally confined, she upbraided her husband for his conduct towards her, and that, on his persisting in refusing to allow her to remain in his house, she went to London. The allegation went into the question of maintenance since she had been lodging in London apart from her husband—a part of the case of no importance for the present purpose,—and concluded by asserting that Mrs. Hayward, since the month of November, 1856, up to the present time, had been, and had conducted herself as a sane person, and had been in the habit of paying and receiving visits, and seeing her friends on the footing of any visitor in society.

Dr. Addams, Q.C., and Mr. Cooper opposed the admission of this responsive allegation.

Dr. Phillimore, Q.C., and Dr. Waddilove, contrâ, contended that this allegation was admissible as in part traversing and in part explaining the averments of the allegation admitted on behalf of Mr. Hayward.

Ultimately counsel agreed to take into consideration an offer of the husband to settle on the wife for her life a sum to be fixed by the arbitration of some members of the Bar, on condition that Mrs. Hayward should provide a trustee who should indemnify Mr. Hayward against his wife's debts. This attempt at an arrangement, however, failed, and on the 19th of March—

March 19.—*The Judge Ordinary.* As to the question, whether this allegation should be admitted, the case seems to stand thus. The wife sues for restitution of conjugal rights. The husband, by his allegation, says that she has unhappily become insane, and has taken a violent dislike to him personally; that that dislike has assumed a morbid character, and that in fact she has been and is subject to insane delusions, and has been for **[84]** a time necessarily confined in a lunatic asylum; that since her discharge therefrom she has conducted herself in a frantic and violent manner towards him, so that it is unsafe for him, having regard to his own personal security, to live with her. The wife, in reply, says that she was let out of confinement by her husband's own sanction, and that after her discharge he turned her out of his house, and that she was obliged to go to London, and live in lodgings there. There is a controversy whether, since her discharge from confinement, she again manifested symptoms of insanity, by concealing a dagger or a knife, intending therewith to do violence to her husband? The parties then are in this curious position. If this lady at the time alleged concealed a dagger or a knife, intending to do violence to her husband, being insane, and she turns out to be insane, I find no authority for holding that that is an answer to a claim for restitution of conjugal rights. A husband is not entitled to turn a lunatic wife out of doors. He may be rather bound to place her in proper custody, under proper care, but he is not entitled to turn her out of his house. He is less than ever

justified in putting her away, if she has the misfortune to be insane. On the other hand, she insists she is not insane and if her assertion can be established, she would be responsible for those acts of violence, and her husband would be justified in refusing to receive her, or in using force to restrain her. That would be an answer to an application to the husband to receive her. But I must assume, that Mrs. Hayward denies those facts, which would be an answer to this application. I think there are one or two precedents, which authorize the admission of this allegation. The allegation of Mrs. Hayward must therefore be admitted to proof.

**[85]** HAYWARD *v.* HAYWARD, on Allotment of Alimony pendente lite. March 13 and 19, 1858.—Husband and Wife.—Alimony pendente lite.—A husband may deduct from income derived from real property the expense of ordinary current repairs, but not of extraordinary and permanent improvements, which ought to be charged on the fund of the income. The husband is liable for reasonable expenses incurred by his wife till the decree for alimony is made. Where several months had elapsed from the return of the citation, and £50 had been paid on account by order of the Court, an alimony pendente lite of £120 per annum was decreed, payable from the date of the decree.

[S. C. 27 L. J. P. 19; 6 W. R. 638.]

This was a question of alimony pendente lite, arising in a suit brought by Mrs. Hayward for the restitution of conjugal rights.

Mr. Hayward, in his answers to the allegation of faculties, admitted that he had received from his father, in 1846, £1600, which he had laid out in the purchase of a freehold property; that, under his father's will in 1853, he became possessed of real property, which he sold for £2400, and of £16,000 personalty, of which he laid out £11,485 in the purchase of real property; that since his father's death he had lived as the rate of £1700 per annum, principally at his wife's instigation, thereby absorbing the remainder of the capital he received under his father's will. He admitted an income of £615 from real property, from which he claimed to deduct £150 for necessary repairs and outgoings; that he was possessed of paintings to the value of about £400; of plate, linen, and furniture to about £550; of diamonds to the value of £740; of hops, horses, and farm stock to about £1070. But he stated that his wife's expenses and debts contracted by her since November, 1856, were very considerable, amounting, so far as has already come to his knowledge, to more than £300.

On the 5th of December, 1857, the Dean of the Arches decreed £25 on account of alimony, and on the 9th of March the Judge Ordinary decreed a similar sum. The citation in this cause was returned on the 13th of February, 1857.

Dr. Philimore, Q.C., and Dr. Waddilove, for Mrs. Hayward, **[86]** cited, as to the principle on which alimony pendente lite is given, *Hawkes* v. *Hawkes*, 1 Hagg. Ecc. Rep. 526. As to the proportion usually adopted, *Frankfort* v. *Frankfort*, 4 Notes of Cases. As to the time for which it is generally payable, *Hammerton* v. *Hammerton*, 1 Hagg. Ecc. Rep. 23. As to what the husband's answer ought to contain, *Harris* v. *Harris*, 1 Hagg. Ecc. Rep. 351, in which case it was held that the value of all marketable securities and whatever might be converted into money, must be included in the calculation of the husband's income. In the same case Sir John Nicholl directed the alimony to commence from the return of the citation, and that the amount of all debts which the wife had incurred since that time, and which had been discharged by the husband should be first deducted.

Dr. Addams, Q.C., and Mr. Cooper, for Mr. Hayward, admitted the general principles laid down on the other side, though they varied when applied to particular cases. Occasionally, when the wife did not examine witnesses on her allegation of faculties, but was dissatisfied with the husband's answers, she had brought in an affidavit. It was, however, allowed on the other side that this was irregular. The question was, What is the real amount of Mr. Hayward's income? The expense of upholding property was a proper deduction from income; taking the husband's answers most strongly against himself, his income could not be more than £400, and he had himself and daughter to support.

*The Judge Ordinary*: Current repairs from year to year, I think, you would be entitled to deduct from annual income. Extraordinary improvements must fall on the

total fund of income. On the whole, this is a question of facts, and I must carefully examine those facts to enable me to form my judgment upon them.

Cur. adv. vult.

March 19.—*The Judge Ordinary* gave judgment: This is a question of alimony which was argued before me the other day, and I have endeavoured to make out the accounts of the husband's property, so as to do justice between the parties. The husband, in his answers, admits having received under his father's [87] will £16,000 in money and £2400, the proceeds of the sale of real property. He says he expended in the purchase of real property £11,485, which would leave a balance of £6915, which he says he spent in the course of four years, living in an extravagant manner at his wife's instance. He may have spent it, but there must be some misapprehension as to his having spent it all at her instance, for she was away from him a considerable part of those four years. However, there is no denial that he has spent the money, and that it is gone. I cannot grant alimony on the presumption that he has it; so it must be deducted. He further admits the ownership of real property producing an income of £615; but he claims to charge it with £150 annually for repairs and improvements. That is too much; some portion of such an outlay must be put down to permanent improvements, and which are not necessary from year to year. Probably £500 may be taken as the fair annual value of this property. I reckon his hops and farm stock at a value of £1050; furniture, etc., at £1200. The learned counsel for Mr. Hayward very candidly stated, that he did not object to a charge of four per cent. on that part of the property, which is unproductive. Four per cent. on these unproductive portions of the property will give another £100 per annum, and bring the total income up to £600, of which I shall allot one-fifth, £120, as fair alimony pendente lite. Alimony is generally due from the return of the citation; but here I feel some difficulty as to this part of the case. It is said that the wife has contracted debts to a considerable amount for which the husband is responsible. The husband is not protected from liability for his wife's debts incurred before the decree for alimony is made. Some allowance ought, therefore, to be made on that score out of alimony. A great deal of discussion has taken place about the amount of debts contracted by the lady, but I cannot take that circumstance into consideration, because the husband is at law liable only for a reasonable amount, considering the lady's position. And if she should have contracted extravagant debts, I cannot assume that juries would find verdicts against the husband for extravagant amounts. It may be that by his own conduct in paying debts of a similar description before, he had sanctioned a larger credit than would be otherwise given to her. If so, [88] he must suffer for his own imprudence, but I cannot take the large amount of her debts into consideration in dealing with this subject. I must assume that he is only liable for a reasonable sum for her support. But as he has already paid £50 in this suit on account of alimony pendente lite, I think it will satisfy the justice of the case if I make the payment of the £120 to commence from the present date (the date of the decree), and not from the date of the citation.

EX PARTE ALDRIDGE. March 19, 1858.—Protection for Wife's Earnings.—Desertion.—Quære, whether, under the words of 20 & 21 Vict. c. 85, sec. 21, a woman resident within the city of London can obtain an order for protection of her property.—The absence of a husband in his ordinary occupation as mariner does not constitute desertion; and the Court cannot take into consideration an actual desertion in past years, which has been terminated by a return to cohabitation.

[S. C. 6 W. R. 507.]

This was an application for protection of the wife's earnings under section 21 of the Divorce Act, which enacts that "A wife deserted by her husband may at any time after such desertion apply to a police magistrate, if resident within the metropolitan district, or, if resident in the country, to justices in petty sessions, or in either case to the Court, for an order to protect any money or property she may acquire by her own lawful industry, etc., provided always that every such order, if made by a police magistrate or justices at petty sessions, shall, within ten days after the making thereof, be entered with the registrar of the County Court within whose jurisdiction the wife is resident."

Dr. Addams, Q.C., apprehended there might be a difficulty in the Court making

the order prayed by Mrs. Aldridge. She was resident within the city of London, and the terms of the 21st section seemed inapplicable to residents within the city.

*The Judge Ordinary*: It is certain that parties living within the city have not the remedy intended by the Act to its [89] full extent, as there are no police magistrates and no County Courts in the city of London; but those provisions of the sections do not affect this Court: at the same time I am aware, that there is considerable doubt as to the validity of the order, if I were to make it. But I have a further difficulty in this case; it appears that the husband has gone to Australia as a sailor: if he has gone merely as a sailor, in such capacity, how can you treat that as a case of desertion?

Dr. Addams: It appears from Mrs. Aldridge's affidavit, that from 1845 to 1856 her husband deserted her; that he returned in 1857, and then cohabited with her for a time, but has now gone away again without making any provision for her.

*The Judge Ordinary.* The former desertion was entirely put an end to by the return to cohabitation. I cannot connect the present absence with the former. Revival of condoned cruelty by a slight act of cruelty goes on the principle that, taken altogether, the husband's conduct shews such an animus as renders it unsafe for the wife to live with him; but desertion under this section is quite a different matter. I should like to be satisfied in what capacity the husband has gone to Australia, whether as a seafaring man or otherwise. The first consequence of an order made now might be that some creditor of the husband would contest its validity. If, however, I were satisfied that it was a case of desertion, although I have doubts as to my jurisdiction, I would make the order, and leave the Common Law Court to settle any question that might be raised as to its validity. The application had better stand over; possibly the difficulty as to the wording of the section may be removed before long.

[90] DEANE *v.* DEANE. March 19, 1858.—Judicial Separation.—Practice under 20 & 21 Vict. c. 85.—The affidavit of the petitioner required by section 41 will not be taken as evidence at the hearing, but the parties must produce sufficient evidence to prove the petition independently of such affidavit. The Court is bound by the rules of evidence as observed at common law, section 48.—Semble: the fact of an appearance having been given to the citation, no further steps in the suit having been taken by the defendant, will not be considered at the hearing as any proof of identity.

[S. C. 28 L. J. P. 23; 4 Jur. (N. S.) 268. Referred to, *Redfern* v. *Redfern*, [1891] P. 149.]

This was a suit for a judicial separation, promoted by Mrs. Deane against her husband by reason of his adultery. The suit commenced in the Court of Arches, and a citation was personally served on the husband in the Camp at Aldershot, on the 14th of October, 1857. He at first appeared by a proctor, but had taken no steps since Mrs. Deane's petition was in the form in use in the present Court, and this was the first case in which the Court pronounced a decree on vivâ voce evidence.

The marriage took place in December, 1835, and there were several children born, of whom eight were now alive. Mr. Deane had latterly joined the Berkshire militia, and went by the appellation of Captain Deane. The adultery charge was alleged to have been committed in the course of 1857, at Oxford, with a Mrs. Turner, with whom Captain Deane became acquainted in consequence of joining in some amateur theatricals.

Dr. Phillimore, Q.C., and Dr. Spinks, for Mrs. Deane.

Dr. Phillimore wished, before calling witnesses, to ask the opinion of the Court whether the affidavit of the petitioner verifying the petition could be used as evidence at the hearing; whether the 41st and 46th sections of the Divorce Act, taken together, did not by implication repeal, at least in part, the 3rd and 4th sections of 14 & 15 Vict. c. 99 (Lord Brougham's Evidence Act).

*The Judge Ordinary*: The affidavit of the petitioner under section 41 is a preliminary step merely—it gives the security of [91] the oath of the party that the proceeding is bonâ fide. No person is allowed to commence a proceeding without pledging on oath to the truth of the facts (within his or her knowledge) upon which the proceeding is founded; but I have considered the point you mention, and am of opinion that I am not at liberty to take any notice at the hearing of the affidavit of the party so given. The 48th section of the Divorce Act is precise in its directions, that "the rules of

evidence observed in the Superior Courts of common law at Westminster shall be applicable to and observed in the trial of all questions of fact in this Court." This confines me within the limits of 14 & 15 Vict. c. 99, and you must deal with this case as if there were no evidence at present before the Court.[1]

Elizabeth Sainsbury was then called: Was cousin of the petitioner, formerly Anne Sandars, and present at her marriage in 1835 to a gentleman of the name of Arthur Deane, at St. Mary's, Reading; the usual entries were made in the register; had visited them since, when living together as man and wife.

Richard Grant, clerk to Mr. Hanson, a fruit merchant in the city of London: The copy of the marriage certificate of Arthur Deane, now produced, has been collated by me with the original at St. Mary, Reading, and is a true copy. In the summer of 1856 I remember a gentleman by the name of Captain Deane calling at Mr. Hanson's warehouse on several occasions; saw him several times in Mr. Hanson's counting-house: next saw Captain Deane at Oxford on the 15th or 16th of September, 1857; a friend pointed out Captain Deane as we were walking down the Corn Market: followed him and saw him go into Mrs. Cooke's, No. 12 Gloucester Green; recognized him as the same person who went by the name of Captain Deane at Mr. Hanson's in 1856; next saw him at Aldershot later in 1857, when I served the citation on Captain Deane; could tell the exact day by reference to memorandum of expenses; it was the 14th of October. Captain Deane said, "Oh, very well," or some such remark.

**[92]** Samuel Hanson, a fruit merchant in the city, had known Arthur Deane all his life; was intimate with his mother and grandfather; knew his wife since their marriage, and had stayed with them at Lawrence Waltham; saw Arthur Deane several times in the summer of 1856 at his counting-house on matters of business; understood he was then in the Berkshire militia; no other Captain or Mr. Deane called on him at that time; had no communication with Arthur Deane by letters or otherwise in 1857. The letter now produced I swear to be in his handwriting; it is dated 12 Gloucester Green, Oxford, 31st of August, 1857, and is written to Mrs. Deane.

*The Judge Ordinary* asked for the letter and read it, observing that if the letter is used at all, the other party is entitled to have the whole before the Court. I will look through it and see whether it makes in any way in his favour. I see he speaks of a desire to quit the militia.

William Peachy, master of the Ship Inn at Oxford: A gentleman came to my house about January, 1857, who called himself Captain Deane; he engaged a bedroom and had the use of the sitting-room.

*The Judge Ordinary*: This is merely de bene esse in case you afterwards identify this person as being the party in the suit.

Examination continued: He was accompanied by a female he called his wife; they remained about three days and occupied the same bed; he said they were going to perform at the Star Hotel in some theatrical representations; I went there and saw them.

Here Mrs. Deane was produced to the witness, who said she was not the person who accompanied Captain Deane to the Ship in 1857.

Eliza Cox, servant to last witness, confirmed his evidence.

Louisa Cook: I live at 11 Gloucester Green, Oxford; am a laundress and let lodgings. In July, 1857, I remember a Captain Deane bringing as a lodger to my house a person called Mrs. Turner. Captain Deane, so he called himself, lodged next door. He was constantly with Mrs. Turner. Mrs. Turner generally breakfasted in bed, but one evening she said she would not do so the next morning, and I met Captain Deane coming out of the bedroom about 10 A.M. Captain Deane often spoke of his wife, and said she was at Reading. **[93]** Another gentleman, a Mr. Belmont, was lodging at No. 12 at the same time.

Emily Warland, servant to the last witness, swore to having seen the persons calling themselves Captain Deane and Mrs. Turner in bed together.

Dr. Phillimore, Q.C., submitted that the evidence given had sufficiently proved

---

[1] The attention of the Court was not on this occasion called to the 43rd section of the Divorce Act, which gives the Court power to order the attendance of the petitioner, and to examine or permit him to be examined or cross-examined on oath at the hearing of the petition.—(Editor's Note.)

the marriage, the adultery of the husband, the identity and diversity of the parties, namely, that the man who cohabited at Oxford with Mrs. Turner was the husband of Mrs. Deane the petitioner, and that Mrs. Turner was not the wife of Captain Deane.

*The Judge Ordinary*: There is no proof of the identity of the defendant with the person who was at the Ship Hotel in January, or that Deane who acted at the Star Hotel was the defendant. The only proof of identity at Oxford is offered by Grant, who saw him go into Mrs. Cooke's, and identifies that person as the Captain Deane who had called at Mr. Hanson's in 1856 on several occasions, and there is reasonable evidence that the person Grant then saw was the defendant. One or two of the links in the chain of evidence are very fine; but there is his own handwriting that he was in fact staying at the adjoining house, No. 12 Gloucester Green, in the autumn of 1857. I can give no weight to the fact that he appeared to the citation: as a set-off against that, Mrs. Deane has had the benefit of her witnesses not being cross-examined; I think the case is proved, but there is nothing to spare. I must pronounce for the judicial separation.

Dr. Phillimore applied for permanent alimony. Mr. Deane had an income of £164, and there are eight children, none of whom are with the husband.

*The Judge Ordinary*: I shall decree a moiety of that income under the circumstances—say £80 per annum to Mrs. Deane.

**[94]** HOPE *v.* HOPE. March 2 and April 16, 1858.—Suit for Restitution of Conjugal Rights.—Previous Suit for Divorce.—Par Delictum.—A wife brought a suit for divorce against her husband by reason of his adultery; the husband recriminated the wife's adultery; and the suit was dismissed on the ground that both parties were proved to have been guilty of adultery. The wife subsequently instituted a suit for restitution of conjugal rights. The husband brought in an allegation pleading in bar of her suit the previous suit and sentence.—Held that the wife by reason of her adultery (though the husband had also been guilty of adultery) could not sustain a suit for the restitution of conjugal rights.

[S. C. 27 L. J. P. 43; 4 Jur. (N. S) 515; 6 W. R. 585. Explained *Wilson*, v. *Glossop*, 1887, 19 Q. B. D. 382. Followed, *Brooking-Phillips* v. *Brooking-Phillips*, [1913] P. 80. Referred to, *Everett* v. *Everett*, [1919] P. 316.]

This was a suit for restitution of conjugal rights, commenced in the Consistory Court of London, and promoted by Mrs. Emilie Mélanie Mathilde Hope against her husband, Adrian John Hope, Esquire.

In 1853 a suit for divorce had been instituted in the same Court by Mrs. Hope against her husband by reason of his adultery; Mr. Hope recriminated his wife's adultery; and the Court dismissed both parties from that suit, as being in pari delicto, by reason of each of them having been guilty of adultery.

The present suit was brought by Mrs. Hope, as was stated by her counsel, from absolute necessity, with a view to obtain a maintenance from her husband.

The cause was very fully argued before the learned Judge of the Consistory Court of London, in Michaelmas Term, 1857, who reserved his decision; but before he had an opportunity of delivering it, by 20 & 21 Vict. c. 85, the jurisdiction of the Consistory Court in matters matrimonial was abolished; and by virtue of the same Act the present suit was transferred to this Court.

The case was now re-argued before the Judge Ordinary.

Dr. Twiss, Q.C., and Dr. Spinks, for Mrs. Hope: The real question raised in this suit is, whether the sentence pronounced in the previous suit for divorce, dismissing both parties therefrom, is a bar to a suit for the restitution of conjugal rights. The Court, in deciding this question, will be guided by the principles which obtained in the Ecclesiastical **[95]** Courts (20 & 21 Vict. c. 85, s. 22). We cannot cite any case decided in those Courts precisely in point. But when upon a question of matrimonial law no decision could be found in the records of the Ecclesiastical Courts, the Canon law is the source whence they derive their principles. (*Proctor* v. *Proctor*, 2 Cons. Reps. p. 300. See also *Dalrymple* v. *Dalrymple*, ib. p. 67.) The Canon law, which it is submitted should rule this case, does not allow parties who have entered into the social status of married parties to withdraw from cohabitation without the sentence of a legal tribunal to this effect. The law recognizes no intermediate state between a cohabitation and a formal separation: *Proctor* v. *Proctor*, ib. p. 299. A competent Court has refused to decree a formal separation between these parties; the law therefore

imposes upon them the duty of cohabitation. The fact of Mrs. Hope having been pronounced guilty of adultery will not relieve her husband from this duty, as he was declared by the same sentence to be in pari delicto. The Canon law in such a case, there being a par delictum, would apply the doctrine of compensation. "Paria crimina, compensatione mutuâ delentur." This well-known doctrine of the Canonists is discussed in two passages in the Canon law. Decr. Greg. IX., 5 tit. 16, vi. & vii. The Canonists have continually in their mouths the doctrine of compensatio criminis. [The Judge Ordinary: A curious doctrine this,—a singular kind of subtraction,—to subtract crime from crime, and there remains nothing but innocence.] This doctrine is also discussed in Sanchez, De Matrimonio, B. x., De Divortiis, Disput. 6; also in Ayliffe's Parergon, title Divorce, p. 226. [The Judge Ordinary: Ayliffe puts it as a proceeding in pœnam, that a husband for a punishment shall be obliged to receive back his adulterous wife. But if both are guilty, why should one only be punished?] The husband is only bound to take his wife home. Mrs. Hope brings this suit as the sole means by which she can compel her husband to support her. [The Judge Ordinary: Have you any such doctrine as the restitution of limited conjugal rights?] This Court does not pretend to enforce the duty of matrimonial intercourse, only that of matrimonial cohabitation: *Forster* v. *Forster*, 1 Cons. Rep. 154; *Orme* v. *Orme*, 2 Add. **[96]** 382. In the case of *Denniss* v. *Denniss*, 3 Hagg. Eccl. Rep. 353, note, where a suit brought by a husband against his wife for divorce by reason of her incestuous adultery was dismissed on the ground of his having connived at her incest, the Court observed, "That it would not necessarily follow, that in a suit for restitution of conjugal rights, the Court would compel the husband to return to an incestuous bed." But there is a broad distinction between adultery which is incestuous, and adultery which is not incestuous, and the exception here adverted to in the case of incestuous adultery goes to establish the rule that we are contending for. What were the antecedent duties of these parties? 1st, Cohabitation; 2nd, the duty of the husband properly to maintain his wife. In the previous suit for divorce, he sought to be discharged from the duty of cohabitation. His prayer was refused. The antecedent duty reverts. Oughton, in his Ordo Judiciorum, a work of great authority in the Ecclesiastical Courts, vol. 1, tit. 216, lays it down, that a party proceeding for restitution of conjugal rights, though guilty of adultery, is entitled to succeed, provided compensatio criminis be established.

Dr. Phillimore, Q.C. (for Mr. Hope), was not disposed to dissent from the general propositions laid down on the other side. Mr. Hope, however, was not the person who brought the present question before the Court, but Mrs. Hope.

The legal proposition has never yet been judicially solved, whether either of two parties, who have been declared equally guilty in a Court of Matrimonial Jurisdiction, can appear again, and call upon the Court to exercise its power in respect of their matrimonial relations. It is not denied that no wife in Mrs. Hope's position has ever brought a suit for restitution of conjugal rights, but it has been argued, on principle and on analogy drawn from decided cases, that she is entitled to her prayer. The proposition laid down, on the other side, as to the Canon law, is not true to its full extent. The Canon law is the basis on which the matrimonial law of Europe is founded, but an alteration took place at the Reformation, and the Canon law has only been held binding so far as it has been adopted by the law and the usage of this country. Hence **[97]** the term, the "King's Ecclesiastical law." As to the particular Canon law cited there is valid reason for not importing it into the Queen's Ecclesiastical law. In the case relied upon, *Proctor* v. *Proctor*, taken altogether and not in part, it may be seen how much of the Canon law was imported, and how much rejected. The Canon law applied to parties so situated its own discipline, and in that way avoided the chance of debts and spurious offspring; but that part of the law was never received in England. It would be introducing that which stands at variance with English, and almost Protestant life. The Canon law compelled the husband to take back his wife, but when? after a course of spiritual discipline; Sanchez has a chapter on this very subject. The Canon law could enforce *debitum conjugale* by spiritual censure. In this respect our law falls short.

There are precedents in our Ecclesiastical decisions indirectly in our favour: 1st, in *Denniss* v. *Denniss* it is intimated that a party dismissed from a suit for divorce on the ground of connivance might be dismissed from a suit for restitution of conjugal rights brought by the other party. And in *Moore* v. *Moore*, 3 Moo. P. C. C. 84, it is laid

down that a plea insufficient in support of a suit for divorce may be sufficient as a bar to a suit for restitution.

In the absence of direct precedents in our Ecclesiastical Courts we do not even find a tradition of such a law prevailing. Is there anything like authority at Common law? The point has at least been incidentally considered in questions of maintenance: *Govier* v. *Hancock*, 6 T. R. 603; *Rex* v. *Flinton*, 1 B. & A. 227.

Dr. Deane, Q.C., on the same side.

Cited, *Manby* v. *Scott*, 1 Siderfin, 104; S. C. 2 Smith's Leading Cases, 250.

This point is raised for the first time by Mrs. Hope; the object of the suit is to compel the husband to take the wife back again. [The Judge Ordinary: How would the matter stand as to contracts? He is not now liable for the debts; if he takes her back again, would mesne debts attach? If she succeeded in a decree for restitution, it would import that she had been improperly excluded; would not debts attach?] Dr. Deane: **[98]** She might come back and bring an adulterer with her. What remedy would the husband have? he is barred by his previous adultery. When there is a sentence of dismissal, the Court Christian in effect says, "Each party is deprived of our assistance, they are outlaws." Again, many acts which are not sufficient to obtain a remedy are sufficient in bar;—a husband could not obtain divorce on the confession of the wife alone, but could the Court compel restitution when the wife had confessed? Oughton is an authority on practice, but not on law. Mr. Hope now is not liable for his wife's debts, Co. Litt. 32a. What authority has the Court of Matrimonial Jurisdiction to alter the responsibilities of husband and wife?

Dr. Twiss, Q.C., in reply. Cur. adv. vult.

April 16.—*The Judge Ordinary.* This suit was commenced in the Consistory Court of London by Mrs. Hope against her husband for restitution of conjugal rights. The libel pleaded the marriage, the birth of three children, and the refusal of the husband at and after a certain time to permit the wife to live and cohabit with him.

The defendant on the 6th of June, 1857, brought in an allegation, pleading (amongst other things) fourthly, that the complainant voluntarily quitted his house; and fifthly, as follows:—"In further contradiction to what is untruly pleaded as aforesaid in the fourth article of the said libel, the party proponent alleges and propounds, that the said Emilie Mélanie Mathilde Hope, shortly after she had so voluntarily as aforesaid quitted the house of her said husband, to wit, on or about the month of September, 1853, instituted in this Court a suit for divorce against the said Adrian John Hope, by reason of alleged cruelty and adultery; that after such the institution of the said suit, it came to the knowledge of the said Adrian John Hope, that the said Emilie Mélanie Mathilde Hope had formed in the year 1846, and had subsequently carried on, an adulterous connection with Count Olympe Aguado, who during such period principally resided, and does still principally reside, at No. 18 Place Vendôme in the city of Paris; that accordingly such the adultery of the said Emilie Mélanie Mathilde Hope, with the said Count **[99]** Aguado, was pleaded in the same suit in an allegation on behalf of the said Adrian John Hope; that the said suit proceeded in due course, and was concluded on or about the 19th day of July, 1855, when the following decree was duly made therein. The Judge having read the proofs, and heard advocates and proctors on both sides thereon, by his interlocutory decree, having the force and effect of a definitive sentence, in writing pronounced, decreed, and declared that Emilie Mélanie Mathilde Hope, wife of Adrian John Hope, had failed in proof of so much of the libel admitted in this cause as charged the said Adrian John Hope with cruelty, but had sufficiently proved so much of the said libel as charged the said Adrian John Hope with adultery, and that the said Adrian John Hope had been guilty of adultery as therein pleaded; and he further pronounced, that the said Adrian John Hope had also sufficiently proved the allegation given in by Bathurst, and that the said Emilie Mélanie Mathilde Hope had been guilty of adultery as therein pleaded, and therefore dismissed as well the said Adrian John Hope as also the said Emilie Mélanie Mathilde Hope from this suit, and all further observances of justice therein. In verification of what is hereinbefore alleged, the party proponent craves leave to refer to the acts and records of this Court. And this was and is true, and the party proponent alleges and propounds as before." That allegation stood for admission; then Mrs. Hope brought in an allegation of faculties for alimony, and Mr. Hope was assigned to answer; but he prayed to be heard on petition to shew why he ought not to be called upon to assign alimony.

She answered. The matter was argued and stood for judgment, when the authority of the Consistory Court was abolished, and all suits then pending were transferred to this Court; and I much regret that the parties and the public cannot now enjoy the advantage of having this question determined by the very learned person who for so many years presided in the Consistory Court with so much benefit to the suitors and honour to himself. In this Court the learned advocates agreed to abstain from all discussion on technical points, and to argue the main question only, viz. whether a wife, having been guilty of adultery, the husband also being guilty, can claim restitution of conjugal rights? **[100]** It was admitted on both sides, that the records of the Ecclesiastical Courts of this country furnish no case exactly in point, so that, being left without any former precedent for my governance, I am compelled now to establish one, availing myself of such assistance as can be derived from the dicta bearing on the subject, which have from time to time fallen from learned judges presiding in our Courts, whether spiritual or temporal. The argument for Mrs. Hope was simply this, that cohabitation is a duty resulting from marriage, and that neither party can lawfully withdraw from cohabitation without the judgment of a Court, which in this case the husband not only had not obtained, but having asked the proper tribunal to release him from that duty, his prayer was rejected; and secondly, that the guilt of each being the same, their mutual delinquencies were thereby compensated, and both were restored to their original position as innocent parties. The first proposition is hardly to be sustained, for an innocent husband may withdraw from cohabitation with a guilty wife without being subject to any legal proceeding for so doing, and if the wife were to sue for restitution of conjugal rights, her suit would fail on proof of her guilt. But the question remains whether the guilt of the wife is to be considered as abolished by that of the husband, so as to restore her to the condition of an innocent person with reference to her conjugal rights. The authority mainly relied on in support of that proposition was *Proctor* v. *Proctor*, 2 Hagg. Cons. Rep. 292, not as a decision on the point now under consideration, but for certain expressions of Lord Stowell as to the extent to which the Canon law is to be considered as binding in questions of marriage, and its rights and duties, for undoubtedly in the Canon law authority may be found for saying, that where both husband and wife are guilty of adultery, the husband cannot refuse to receive his adulterous wife. In 2 Cons. Rep., page 300, that eminent person thus speaks of the Canon law: "Upon the first point, the binding authority of the Canon law in causes matrimonial depending in these Courts, I look without success for any principle on which I can hold that they can release themselves by any power of their own from a submission to that authority. The release, if proper, must come from a higher authority than they possess. It **[101]** is notorious that this country at the Reformation adopted almost the whole of the law of matrimony together with all its doctrines of indissolubility, of contracts per verba de præsenti et per verba de futuro, of separations à mensâ et thoro, and many others; the whole of our matrimonial law is in matter and form constructed upon it; some Canons of our own may have varied it, and a higher authority, that of the Legislature, has swept away some important parts of it; but the doctrine of indissolubility remains in full force. The very practice of the Legislature in granting by special Acts particular divorces in particular cases affirms the indissolubility as existing in the general law, and to be maintained in their dispensations of justice." This latter proposition, viz. that marriages are indissoluble, was the important one for the decision of the case then before the Court. The husband sued for a divorce on the ground of adultery. The wife recriminated. The adultery of the wife before the suit was proved. The husband also was proved to have been guilty, but not until after the commencement of the suit, and the question to be decided was, whether under such circumstances he could have a divorce. The learned Judge held, that the marriage was by our law, following the Canon law, indissoluble; that the infidelity of the husband was therefore par delictum with that of the wife, and that consequently he would not have a legal separation. That was the only point determined in *Proctor* v. *Proctor*, and is obviously far short of an authority for the decision of that now before the Court. But Lord Stowell in the course of his judgment says, of the Canon law as affecting the case of mutual guilt, "It provides against the mischiefs to which a husband might be exposed by such a wife living apart, by its known doctrine, that all separations merely voluntary are totally illegal, not to be either tolerated or presumed. It acknowledges no inter-

mediate state between a cohabitation and a formal separation. It therefore presumes, when it withholds its divorce of separation, that the parties return to cohabitation; all matters return to their former course, but with increased vigour; the husband and wife live again on their former footing, and there is no anticipation of separate debts, or of the probability of a spurious offspring. That such is the doctrine of **[102]** the Canon law is most certain; the authorities are numerous and precise to that effect." His Lordship then cited several passages to that effect, which are printed in a note to Dr. Haggard's Report of the Judgment. In some it is said that "paria crimina mutuâ compensatione delentur"; in others, "mutuâ compensatione ambo adulteria abolentur," and that the husband may be compelled to take his wife back. If indeed whatever is found in the Canon law on this subject is to be accepted as an authority binding the Courts of this country, the passages cited would shew that the wife in this case is entitled to a decree in her favour. But in the case of *Reg.* v. *Millis*, 10 Cl. & Fin., Lord Chief Justice Tindal, in giving the answers of the Judges to the question proposed by the House of Lords, thus describes the effect to be given to the Canon law of Europe: "That the Canon law of Europe does not and never did, as a body of laws, form part of the law of England, has been long settled and established law. Lord Hale defines the extent to which it is limited very accurately; the rule, he says, by which they proceed is the Canon law, but not in its full latitude, but only so far as it stands uncorrected either by contrary Acts of Parliament, or the Common Law and custom of England; for there are divers canons made in ancient times, and Decretals of Popes, that were never admitted here in England," The Lord Chief Justice then quotes the following passage from *Cawdrie's case*, 5 Co. Rep. 1: "As in temporal causes the King by the mouth of the Judges in his Courts of Justice doth judge and determine the same by the temporal laws of England, so in causes Ecclesiastical and Spiritual, as, namely (amongst others enumerated), rights of matrimony, the same are to be determined by Ecclesiastical Judges according to the Ecclesiastical law of this realm." He afterwards adds, "So albeit the kings of England derived their Ecclesiastical laws from others, yet so many as were proved, approved, and allowed here by and with a general consent are aptly and rightly called the King's Ecclesiastical Laws of England." The Canon law of Europe therefore binds the Courts in England, not simply because it is the Canon law, but because it has been approved and allowed here; to that extent, and to that extent only, is this Court bound to give effect to it. And not-**[103]**-withstanding the general expressions on this subject ascribed to Lord Stowell in *Dalrymple* v. *Dalrymple*, and *Proctor* v. *Proctor*, I infer from another passage in the latter case, that he would have entertained at least grave doubts as to the propriety of giving effect to the Canon law in its full latitude, had the question now raised been brought before him for his decision, for in 2 Hagg. Cons. Rep. 302, he says: "Taking this (viz. that the adultery of the husband was a bar to his suit for divorce on account of the adultery of the wife), as I think I am compelled to do, as the rule of the law binding upon the judgments of this Court, I cannot blind myself to the fact, that the modern course of life and manners does not furnish those corrections of the mischiefs that may follow, which the Canon law had anticipated in connection with its rule. There is no return to cohabitation, nor any means to be resorted to for the purpose of compelling it." This passage leaves me in some doubt, whether his Lordship meant to say, that the law of this country does not furnish the means of compelling a return to cohabitation, or that the usage of society would prevent either party from taking advantage of those means. But whatever be the real meaning of the passage, what is there to shew that the state of things described by him has arisen from the modern course of life and manners, and did not always exist in this country? for I have not discovered—and, what is more important, the industry of the learned counsel engaged in this case has failed to discover—any decision or dictum of any Judge, authorizing the opinion that under such circumstances as exist in the present case a decree for restitution of conjugal rights could at any time have been obtained. There is in Oughton's Ordo Judiciorum a statement that such would be the case; under his tit. 216, De causis quæ impediunt restitutionem obsequiorum conjugalium in causâ matrimoniali, he says, "Probatio quod post contractum vel citra solemnizatum matrimonium ac recessum mulieris a viro (vel e contra) vir vel uxor commiserit adulterium sufficit ad impediendum restitutionem in causâ matrimoniali. In hoc tamen casu, si actor replicaverit et probaverit compensationem, vel scientiam, condonationem, vel remis-

sionem criminis, obtinebit actor restitutionem petitam." In *Mortimer* v. *Mortimer*, 2 Hagg. Cons. Rep. 317, Lord **[104]** Stowell mentioned Oughton as an authority of no mean consideration in matters of practice in that Court; from which limited praise I infer, that equal attention has not been paid to his statements of the law in other respects, unless he refers to some other authority. In the passage quoted, he puts compensatio criminum, connivance and condonation, on the same footing. By connivance in this and other passages, I take it that the party is supposed so to connive as to give a willing consent to the act, although not an accessory before the fact; in such a case it is consistent with reason to say, that the party so consenting shall not be allowed to take advantage of the guilt contracted by doing the act consented to. So as to condonation, it is reasonable to say, that an offence which has been blotted out by forgiveness shall not afterwards be made the subject-matter of accusation. But the same observation is not strictly applicable to a case of compensation by mutual guilt. Both break the sacred obligation into which they have entered; neither instigates or consents to; neither pardons the offence of the other; and although it may not be competent to either to obtain the assistance of a Court to punish the offence committed, it by no means follows, as a reasonable consequence, that each shall be bound to treat the other as an innocent party. There is a passage in Lord Stowell's judgment in *Beeby* v. *Beeby*, 1 Hagg. Eccl. Rep. 789, which seems at variance with Oughton's doctrine even as regards the effect of condonation. The husband there sued for a divorce on the ground of adultery; the wife pleaded in bar the adultery of the husband. It was argued, but not pleaded, that the evidence proved condonation of his guilt. Lord Stowell, at p. 797, deals with this point as if it had been pleaded. He says: "But what is the effect of condonation? In general it is a good plea in bar, it is not fit that a man should sue for a debt which he has released; but here the plea in bar is compensatio, and condonation is not in bar of the action, but a counter-plea. Here the wife does not pray relief, but prays to be dismissed. It does not follow that the same act which will bar the remedy will operate on the other side; and unless it is a universal law, that whatever is a plea in bar, and disables a party from bringing a suit, likewise destroys the defence, the present **[105]** attempt cannot avail the husband. A man, it is true, who has forgiven adultery cannot bring a suit, but when he complains of his wife, will her forgiveness of his previous misconduct make him a proper person to receive the sentence of the Court? Does her act bind the Court? If both are equally guilty, will her condonation make him rectus in curiâ, and enable him to procure a sentence?" The decision, however, did not proceed on that ground, for Lord Stowell considered that condonation was not proved. If the opinion which, from that passage, Lord Stowell may be presumed to have entertained be sound, it would apply to this case also. Can a wife, guilty of adultery, say that she is recta in curiâ because her husband also is guilty? Does his act bind the Court, and enable her to procure a sentence? Here the whole matter appears on the plea, and the case must be considered as if the husband had pleaded the adultery of the wife, and his adultery had been alleged by way of counter-plea. A question similar to that which I am now called upon to decide was involved in the case of *Naylor* v. *Naylor*, of which a note was read by Dr. Lushington in giving judgment in *Astley* v. *Astley*, 1 Hagg. Eccl. Rep. 714. It was tried by Dr. Bettesworth in the Consistory Court in 1777. The wife sued for restitution; the husband pleaded her adultery in bar: the wife recriminated. Whether by counter-plea, or whether the point was raised in the evidence only (as in *Beeby* v. *Beeby*), does not appear. The learned Judge decided that the guilt of the wife was fully proved, but that the charge against the husband was not proved. He had, therefore, no opportunity of deciding the question now raised; he said, indeed, "that according to the law of the Ecclesiastical Court, if the guilt of the husband were proved, it would prevent his obtaining his prayer," which, I presume, was for a divorce; but he does not go on to say that the wife would therefore have obtained a decree for restitution. To adopt the language of Lord Stowell in *Beeby* v. *Beeby*, if both were equally guilty, that might not make her a proper person to receive the sentence of the Court, and Dr. Bettesworth does not say that it would; but the force of the argument, founded on Lord Stowell's observations, in *Beeby* v. *Beeby*, is certainly diminished by the opinion expressed by Dr. Lushington in *Anichini* v. *Anichini*, 2 Curt. 210. That **[106]** was a suit by the wife for restitution; the husband pleaded her adultery in bar, and prayed a sentence of separation; she recriminated; he rejoined condonation.

Dr. Lushington, in giving judgment, stated that although Lord Stowell had not in *Beeby* v. *Beeby* decided the point, he inferred that his opinion was that a husband who had committed adultery could not, notwithstanding condonation, afterwards obtain a divorce à mensâ et thoro on account of the adultery of the wife, and from that he, Dr. Lushington, dissented; and in the case then before the Court, which disclosed gross adultery on the part of the wife, and a single act of adultery by the husband long before fully condoned, he decreed a separation according to the prayer of the husband. The learned Judge does not say what would have been his decision, had the evidence of condonation failed. But undoubtedly there is another passage in this judgment, from which, if considered by itself, and without reference to the facts of the case then before the Court, it may be inferred that in that event he would not have felt justified in refusing to decree restitution. "I know no authority," he says, "which states that whatever be the guilt of both parties, if the Court does not pronounce for a separation, they are not according to the law of this country bound to live together, and I think such a principle would be dangerous to society and to public morals." But during the argument in this case, it was forcibly contended by the counsel for the defendant, that if an adulterous wife could claim the assistance of this Court to enforce restitution of conjugal rights by reason of the husband's equal guilt, a principle much more dangerous to society and to public morals would be established; for the husband's violation of the marriage vow remaining uncondoned (for a suit for a restitution is said not to be a condonation) will be a perpetual bar to any proceeding against the wife for repetitions of her offence, however numerous and shameless, and committed under his own roof; and the wife would be equally without remedy for the misconduct of the husband. With that observation I agree, and cannot but think that, as far as public morals and the interests of society are concerned, it would be better to act upon the suggestion, not to say the opinion, thrown out by Lord Stowell in *Beeby* v. *Beeby*, that [107] a party guilty of a breach of the marriage vow should not have the assistance of the Court to enforce any marital right. In the case of *Kirby* v. *Kirby* (reported in a note to *Anichini* v. *Anichini*, 2 Curt. 215) the wife sued for restitution; the husband pleaded the adultery of the wife, and prayed a divorce. She offered an allegation denying her guilt, and recriminating, and also prayed a divorce. The admission of the allegation was opposed; Sir W. Wynne admitted the allegation, and after some preliminary observations said, "If both prove adultery, it is not necessary to say now what would be the consequence; perhaps the Court might say it would give no sentence." In that case neither party succeeded in proving adultery, but the wife would not revert to her original prayer, and both parties were dismissed. After some research bestowed on this question, the dictum of Sir W. Wynne; the principle suggested, rather than enunciated by Lord Stowell in *Beeby* v. *Beeby*; his intimation in *Proctor* v. *Proctor* that in such a case as the present no means could be resorted to for the purpose of compelling cohabitation, and the passage cited from Dr. Lushington's judgment in *Anichini* v. *Anichini*, are all the lights that I have been enabled to obtain from the reports of the Ecclesiastical Courts. But there are two decisions of the Court of Queen's Bench which it is important to consider. The first of them, *Govier* v. *Hancock*, occurred in 1790, and is reported in 6 T. R. 613. It was an action of assumpsit for the board and lodging of the defendant's wife. It appeared in evidence that the defendant having committed adultery with a woman named Beazeley, whom he had brought home, treated his wife with great cruelty, and finally turned her out-of-doors; then the wife committed adultery; after which she offered to return home, but her husband would not receive her, and this action was brought for her board and lodging subsequent to that time. It was held that the action could not be maintained, and the Court said, "That in this case, if the wife had instituted a suit in the Ecclesiastical Court against the husband for restitution of conjugal rights, they would not have assisted her." And a similar opinion was expressed by the same Court in 1830, in *Rex* v. *Flinton*, 1 B. & Ad. 227, which was an appeal against a conviction of a husband for refusing to maintain [108] his wife. It appeared that the wife committed adultery, which was not then known to the husband; she and her husband afterwards quarrelled and separated, and then he committed adultery. The wife sued in the Ecclesiastical Court for a divorce on the ground of the husband's adultery, and claimed alimony; he recriminated. The guilt of both was proved, and the suit was dismissed. The husband then refused to maintain his wife, and was

convicted under 5 Geo. IV. c. 83, s. 3. Bayley, J., asked, "How can it be said that he is liable to maintain her, if he can neither be sued for maintenance found her, nor for restitution of conjugal rights?" And the whole Court concurred in quashing the conviction. This then is the result of my investigation of this question. I find in a decretal of Gregory IX., an assertion that an adulterous wife was entitled to be received by her husband, if he also had been guilty of a similar offence, and this is mentioned as the law by several canonists: Lancellottus; Sanchez, De Matrimonio; and Ayliffe (in his Parergon). I do not find any instance in which the law so laid down has been adopted and acted upon as part of the Ecclesiastical law of this land. I find a dictum of Sir W. Wynne that, under such circumstances, a suit for restitution would probably be dismissed, and there is ground for inferring that such was the opinion of Lord Stowell. The Court of Queen's Bench, in two cases occurring after an interval of thirty-five years, expressly declared that such was the law prevailing in the Ecclesiastical Court. In my humble judgment, that rule is sound in principle, and calculated to prove beneficial in its operation. I have therefore come to the conclusion, that the suit for restitution in this case cannot be sustained, and that the husband must be dismissed.

**[109]** IN THE GOODS OF HERBERT CALTHORPE GARDNER, Esq. (deceased), on Motion. April 16, 1858.—Will.—Probate as contained in an Affidavit.—A. made his will in 1855. In May, 1857, when the Indian Mutiny broke out, he escaped from Delhi, leaving his will, among other property, behind him; he died at Kussowlee in June, 1857. On the affidavit of one of the attesting witnesses as to due execution, and of the same witness and of his widow as to the contents, probate was granted to the widow, as sole executrix.

[S. C. 27 L. J. P. 55. Applied, *In the Goods of Clift*, 1873, 29 L. T. 249.]

The deceased in this case, a captain in the 38th Bengal Light Infantry, made his will at Cawnpore, in the East Indies, in May or June, 1855. The deceased, his wife, and their two only children, were in Delhi in May, 1857, when the mutiny broke out; they escaped from that city, leaving all their property behind them, among which was the deceased's writing-case, in which his will was deposited. Captain Gardner died at Kussowlee on the 28th of June, 1857, leaving his widow and two only children, the only persons entitled in distribution in case of an intestacy.

The joint affidavit of Mrs. Gardner and of Lieut. Hawes, one of the attesting witnesses, established the due execution of the will in 1855, and its contents, namely, leaving all his property to his wife, and making her sole executrix. Mrs. Gardner spoke to having frequently read it over, and to having seen it in her husband's desk as lately as February, 1857, and to her assurance that it had not been revoked or destroyed by her husband prior to their leaving Delhi, and that since the **[110]** recapture of Delhi nothing had been heard of the will. The property amounted to about £1000.

Dr. Phillimore, Q.C., moved the Court "to decree probate of the will as contained in the affidavit to be granted to the widow, the sole executrix named therein, limited until the original will or a more authentic copy thereof shall be brought into and left in the registry of the Court." He submitted there was before the Court sufficient proof of the execution and contents of the original will, and cited *Trevelyan* v. *Trevelyan*, 1 Phill. 153.

*Sir C. Cresswell.* The case of *Brown* v. *Brown* lately decided in the Court of Queen's Bench, and on which I have already acted,[1] went beyond the present case. There parol evidence was held sufficient to prove the contents of a will, and thereby revoke a will of earlier date, which was in existence at the testator's death. I grant the motion.

IN THE GOODS OF JENNY WATSON, Spinster (deceased), on Motion. April 20, 1858.—Administration (with Will annexed).—Specific Legatee.—An application for grant of administration (with the will annexed) to the sole legatee, on an affidavit that the testatrix died possessed of no other property than that specifically described in the will.—Held, that no reason was shewn for not citing the next of

[1] *In the Goods of William Brown*, supra, p. 32.

kin; that they must be cited; or that administration might be taken, limited to the property specified in the will.

[Not applied, *In the Goods of Watts*, 1860, p. 538, post. Distinguished, *In the Goods of Miles*, 1890, 59 L. J. P. 59; 62 L. T. 607. Followed, *In the Goods of Baldwin*, [1903] P. 61.]

This was a question as to the right to the administration (with the will annexed) of the goods of the deceased.

The will was as follows: "I, Jenny Watson, of 20 Wilton Terrace, near the Old Kent Road, declare this to be my last will and testament. I give and bequeath to Amelia Sarah Lyon . . . my wearing apparel, and all my effects of every kind at my present dwelling, and also the amount now stand-**[111]**-ing in my name in the Savings Bank in Bloomfield Street, Moorfields. As witness my hand . . ." Thus there was no appointment of executor or residuary legatee. It appeared on affidavit that all the property which the deceased died possessed of was that specified in the will, amounting in the whole to about £28. A. S. Lyon was a feme covert. The practice of the registry would hold the next of kin entitled in such a case.

Dr. Wambey moved the Court to decree administration (with the will annexed) to Mrs. Lyon, as the sole legatee. Under the circumstances of the property, as it appeared in Mrs. Lyon's affidavit, she was in effect, though not in terms, universal legatee. As to passing over the next of kin, the leaning of the Court of Probate had been to follow the interest. (*West and Smith* v. *Willby*, 3 Phill. 381.) And if the residuary legatee, who had no statutable right, was, by the practice of the Registry, allowed to exclude the next of kin from the representation on the established principle that the right to the administration should follow the right of the property, à fortiori would the universal legatee be entitled to the preference.

*Sir C. Cresswell.* But in this case there is no residuary clause, and I cannot even take Mrs. Lyon to be universal legatee. To entitle you to the motion, some reason should have been given for not inviting the next of kin to come forward. You must either cite the next of kin, or you may take administration limited to the property disposed of by the will.

IN THE GOODS OF JAMES CARR (deceased), on Motion. April 16, 1858.—Revocation. —Lost Letters of Administration.—Practice.—Upon the revocation of letters of administration, which have been lost, an undertaking will be required from the person to whom they were granted, that, if found, he will bring them into the Registry, and that they will not be acted upon.

Letters of administration to the effects of the deceased hav-**[112]**-ing been granted to Mr. Reynolds, Solicitor to the Treasury, on the suggestion (since discovered to have been erroneous) that the deceased had died intestate, without leaving any person entitled in distribution, application was now made to the Court to revoke the same, and to grant administration to A., as the lawful next of kin of the deceased.

The Queen's Advocate (Sir J. D. Harding) stated, that from the affidavit of Mr. Reynolds it appeared that the letters of administration originally granted could not be found.

*Sir C. Cresswell.* I think it right your motion should be granted. But ought not the Court to have some security from Mr. Reynolds that, if the letters of administration be found hereafter, he will bring them into the Registry? Mr. Reynolds should give an undertaking to bring them in, and that they shall not be acted upon in the event of their being found.

IN THE GOODS OF ELIZABETH MERRITT (deceased). April 16-20, 1858.—Execution of a Power by Will.—General Revocatory Clause in a later Will.—7 Will. IV. & 1 Vict. c. 26, s. 27.—E. H., a married woman, in 1846, duly made a will in execution of a general power of appointment, disposing of certain stock, and appointing executors thereof. In 1855 she made another will, without the consent of her husband, disposing of certain other property under her marriage settlement, and of other articles; it did not refer to the general power, under which the will of 1846 was made, nor to the stock thereby appointed; but it contained a general revocatory clause, and named a different executor.—Held, that the 27th section of the Wills Act was intended to enlarge the dispositive power of testators, and has no bearing on questions of revocation;—That the

revocatory clause in the will of 1855, being in general terms, and containing no reference to the general power in execution of which the will of 1846 was made, or to the property thereby appointed, did not operate to revoke that will.

[S. C. 29 L. J. P. 155; 4 Jur. (N. S.) 1192. Discussed, *In the Goods of Eustace*, 1874, L. R. 3 P. & D. 185. Considered, *Sotheran* v. *Denning*, 1881, 20 Ch. D. 99. Not followed, *In re Kingdon*, *Wilkins* v. *Pryer*, 1856, 32 Ch. D. 610. Disapproved, *Cadell* v. *Wilcocks*, [1898] P. 21.]

E. Harding, by her will, bequeathed £650, 3 per cent. **[113]** Consols, to trustees upon trust to pay the dividends thereof to her daughter, Elizabeth Merritt (the deceased in this case), during her life for her separate use, and after her decease she directed the same to remain upon such trusts as the said E. Merritt should by her last will appoint; and, in default of appointment she directed the trustees to apply the stock and dividends in such manner and such proportions as they might consider most for the benefit of any child or children of the said Elizabeth Merritt, as might be living at the time of her death.

In August, 1846, the deceased made and executed a will, and thereby, after referring to the power given to her by her mother's will, she directed that the trustees should after her death, in case her husband survived her, pay the dividends of the said stock to him for the term of his natural life, and that after his death they should stand possessed of the said stock in such manner as directed by her mother's will; she appointed executors of this will, which disposed of no other property than as above mentioned.

Besides this property under her mother's will, the deceased had a separate life income under the will of her brother, but no power to deal with by that will; and under her marriage settlement she had power to dispose of £1400 Consols thereby settled by will amongst her children; and also, with the consent in writing of the trustees of her marriage settlement, to revoke by deed the trusts of such settlement, and appoint new ones.

On the 13th of February, 1855, her husband being then in Australia, the deceased made a will in the following terms:—

"This is the last will and testament of me, Elizabeth Merritt.

"I give and bequeath unto my eldest son, William Harding Merritt, all my plate and plated articles, and I appoint Thos. Newton my sole executor of this my will, for the purposes herein mentioned. And I direct my executor to pay all my just debts, notes of hand, bonds, or any and every other security for any moneys which I may have received out of my own settlement of £1400, which was taken out of the Basingstoke Bank by Charles Bailey, Esq., solicitor. And I hereby revoke any settlement of such £1400 I may **[114]** have heretofore made; and it is also my will and desire that the sum of £105, out of the aforesaid settlement of £1400, be paid to the trustees or directors of St. Anne's School at Brixton, in the county of Surrey, for the education of my youngest son, Walter Merritt, as soon as his age will admit of his being therein received after my decease; and further, that the sum of £6 per annum be paid unto Patience Merritt, during the term of her natural life, out of the interest arising from the residue of the £1400; and that at my decease the remainder of principal and interest be paid unto my husband, W. Merritt, in case he shall survive me, if otherwise, such moneys to be then divided, share and share alike, among and between my surviving children. All my household furniture, trinkets, ornaments, and wearing apparel, I give and bequeath unto and for the use of my dear family of children; and I revoke all former wills by me at any time heretofore made. In witness whereof I have to this my last will and testament, contained in this sheet of paper, set my hand and seal, this 13th day of February, 1855. ELIZABETH MERRITT."

This will was written on one of the printed forms of wills bought at stationers' shops, and there was no authority from her husband to authorise her to make such will.

The deceased died in February, 1855, leaving her husband and the said William Harding Merritt and six other children her surviving. Shortly after, the trustees of her marriage settlement, with which the will of 1855 purported to deal, filed a Bill in Chancery against E. Newton, the executor, and W. Merritt and his children, for an administration of the funds of that settlement, and the Master of the Rolls decided, that that will did not affect the trusts of the settlement, and decreed the

trusts to be specifically performed, and that the trust fund then in Court was distributable as in default of appointment.

On the 15th of February, 1856, a Special Grant of Administration was made by the Prerogative Court of Canterbury to the said W. Merritt, of the goods, etc., of the deceased, except any property which by the will of her said mother, or by her marriage settlement, she (the deceased) had power to dispose of, and had disposed of by the above-mentioned wills; the **[115]** suit in Chancery as to the operation of the second will on the trusts of the marriage settlement being then pending. The trustees of the £650 stock had paid that sum into the Court of Chancery under the Trustee Relief Act. The executors named in the deceased's will of 1846 renounced probate thereof, and the present application was made by W. Merritt, the husband, for a further grant of letters of administration (with the will of 1846 annexed). It came before the Court on the 11th of March, on an ex parte motion. The Court, on hearing the statement of facts, desired the point to be argued, whether the general revocatory clause of the will of 1855 operated as a revocation of the execution of the power by the will of 1846. An appearance was subsequently given on behalf of Wm. H. Merritt, the son of the deceased, who with her other children took an interest, in default of appointment, in the £650 3 per cent. Consols.

Dr. Addams, Q.C., renewed the motion on behalf of William Merritt, for administration with the will of 1846 annexed. He admitted: 1st. That all questions of revocation were questions of intention; that the will of 1855 contained no reference to the appointment of the £650 by the will of 1846; and that, upon the facts above stated, it could not be assumed that there was any intention on the part of the deceased to revoke that will. 2nd. That, if by the general revocatory clause in the second will, the deceased intended to have revoked the first will, there would then arise a question of dependent relative revocation. The first will was in favour of the deceased's husband. It might possibly be, that she intended to revoke the first, upon the supposition that her husband would benefit under the second. But the disposition in his favour contained in the second will being clearly inoperative, the revocatory clause would be inoperative to revoke the first will.

Dr. Deane, Q.C., contrà: By section[1] 27 of 1 Vict. c. 26, the bequest of personal property in general terms includes per-**[116]**-sonal property over which the testator may have a general power of appointment, unless a contrary intention shall appear by the will. The deceased had a general power of appointment over the property disposed of by the will of 1846. If by this section she might execute this general power in general terms without referring to the power, she might revoke it in the same manner.

The revocatory terms are general: "I revoke all former wills by me at any time made"; and there is nothing on the face of this will shewing an intention that it should not operate upon the will of 1846. [Sir C. Cresswell: Is there anything upon the face of the will shewing an intention to dispose of this property?] There is; she revokes all former wills by her at any time made, and she had made no other will, save that of 1846, to which this clause could apply. (*Evans* v. *Evans*, 23 Beav. 1.) [Sir C. Cresswell: I doubt whether the revocatory clause acquires any strength from the Wills Act, to which you refer. The power was to dispose of the stock by will. Were the revocatory words intended to operate as an execution of this power? If the paper of 1855 operates, the deceased has declined to execute the power. The object of the Legislature in this section was to give effect to the disposition of property.] To revoke all former wills was equivalent to a different disposition of property from that of the will of 1846. The question of intention seems only to be collected from the words of the instruments themselves. [Sir C. Cresswell: I should like to know how you would have argued, before the Wills Act, such a case, and then to hear whether you think there has been any alteration in consequence of that Act; namely, 1st, a will purporting to be in execution of a power; 2nd, a will dealing

[1] The words of the section are:—"And in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

with totally different property, not referring to the power, but containing a general revocatory clause.] The rule under the old law required express reference to the property comprised in the power. [Sir C. Cresswell: Just so. There are some authorities in Williams on Executors in point. If I **[117]** mistake not, they go to this;—that a general clause, revoking all former wills, was not sufficient to manifest an intention to revoke a will made in execution of a power. The onus of shewing that such was the intention,—ultra the words,—was on the other side. Are you relieved from that burden by the Wills Act?] On the section of the Wills Act alone rests my argument.

Dr. Addams, in reply: The Wills Act does not interfere with the regular province of the Court of Probate to arrive at the intention of the testator. In construction you cannot go beyond the four corners of the paper, but not so in determining the title to probate. The statute does not apply to the present case.

*Sir C. Cresswell*: The argument against you is, that the statute has given a technical effect to certain words to be found in the will. As at present advised, I quite agree with you; but as the question has been raised on the statute, let it stand over. Cur. adv. vult.

April 20.—*Sir C. Cresswell.* I have looked at the statute in consequence of Dr. Deane's ingenious argument that, inasmuch as since the Wills Act a bequest in general terms will operate upon property over which there is a general power of appointment, so a revocation in general terms will operate to revoke a will made in execution of a general power, although it contains no reference to that will. I cannot agree to this; there are two sets of clauses in the Wills Act:—the first, dealing with modes of revocation of testamentary papers; the second, with modes of disposition of property. The first set do not affect this case, which therefore follows the old rule, and the will of 1846, in execution of the power over the £650 stock, remains unrevoked.

I decree letters of administration with will annexed, as prayed.

**[118]** ENOBIN AND OTHERS *v.* WYLIE. April 16 and 20, 1858.—Will.—Domicil.—Probate.—Court of Construction.—A., a natural-born British subject, died domiciled in Russia, having acquired large property, both real and personal, in that country; he was also possessed of a considerable sum in the English funds. He left a will made in Russia, whilst he was domiciled there, in the Russian language and form, appointing Russian subjects executors, which will was duly authenticated in the Russian Courts. It purported to dispose of "all his movable and immovable property." There were no words distinctly excluding any part of his property from its operation, nor was there any allusion to, nor any words distinctly describing, the money in the English funds.—Held, that the executors, being clothed with the authority of the competent Court of the testator's domicil, were entitled to probate as regards the money in the English funds.—Semble, where the Court of Probate has any doubt on a point of construction, it will so decide as will best enable the parties concerned to have recourse to the tribunals whose more special duty it is to put a construction on testamentary papers.

[See in Chancery, 1 De G. F. & J. 410; reversed, 10 H. L. C. 1; 11 E. R. 924, (with note.)]

The testator, Sir James Wylie, Bart., had been long domiciled in Russia, and had amassed a large fortune in that country, in both real and personal property. He left also between £60,000 and £70,000 in the English funds. The present question was as to probate of his will, dated the 12th of February, 1852, drawn in the Russian language, and executed in the Russian form, appointing three Russian subjects executors, and which was authenticated in a competent Russian Court in the course of 1854, the testator having died in February of that year.

The will purported to dispose "of all his moveable and immoveable property honestly acquired by himself." It directed all buildings and lands to be sold, "the money proceeds of the above, as also the whole of his capital which should remain after his death in ready money, and in bank billets belonging to him," to be divided into ten parts, eight of which were to be applied to the establishment of some public or charitable benefit, under the direction of the Emperor. "Any other disposal made previous to this one, concerning his movable and immovable property, by whatever papers and acts such might be found, or by whomsoever produced, **[119]** should be

considered as of no effect, null and void. . . . And as all his movable and immovable property was his own, and honestly acquired by himself, so nobody had a right to interfere with his dispositions, and contest the same under any pretence whatever; and likewise no one had a right to interfere with or contest the dispositions and proceedings of his executors." "As executors to this his testament, he named . . ." There was also a codicil and list of legacies in small amounts, which was refused authentication as not being duly attested.

After the death of Sir James Wylie in 1854, during which year Russia and Great Britain were in a state of war, Mr. Walter Wylie, his brother, in ignorance of the existence of the will, obtained letters of administration from the Prerogative Court of Canterbury as in case of an intestacy. Anne Wylie, as a party interested in the estate, filed a bill in Chancery against the administrator for the purpose of the estate being administered in that Court.

In June, 1855, a decree was made by Wood, V.C., directing an inquiry into the circumstances of the testator's domicil, property, etc., and the sum in the English funds to be transferred to the name of the Accountant-General. The chief clerk reported that Sir James Wylie had died a domiciled Russian, and had left a will in the Russian language, which had been proved in that country, but that such will had reference only to property in Russia. Notice of these proceedings was subsequently served upon the executors in Russia, and they now applied to the Court of Probate to revoke the letters of administration granted to James Wylie, and to grant probate of the Russian will, in order to give them a locus standi in a Court of Equity, which would ultimately have to decide on the true construction of the will.

This application was opposed on behalf of Mr. Walter Wylie.

As regards the Russian law, the counsel for the next of kin relied on the opinion of two Russian advocates given on an A. B. case. A counter opinion on affidavit was produced on behalf of the executors. It also appeared on affidavit, that the usual stock receipts of investments in the English funds, which had been sent to the testator in St. Petersburg from time to time, were found, after his death, in the same box which contained **[120]** the billets of the Commercial Bank of the Empire, which belonged to him.

Dr. Addams, Q.C., and Dr. Spinks, for the next of kin: Upon this case two considerations arise:—1st. Does this will dispose of that part of the testator's property which was invested in the English funds? We contend that it does not. 2nd. By what law is that to be determined? By the law of Russia or England?

I. It is submitted that, although the will was made in Russia by a domiciled Russian, it is not incumbent on the Court to resort to the law of Russia for the determination of the question of construction now raised. The law of the place of the domicil of the testator does not afford the universal rule for construing wills. "It does so in many cases, and when you want to get at the interpretation of particular expressions, which are ambiguous, or of different significations in different countries" (4 Burge's Commentaries on Col. Law, 590). But this is not the case here. This will, on the face of it, does not affect to dispose of the testator's property in the English funds. In the outset it purports to dispose "of all his movable and immovable property"; but the dispositions in the body of it can only be taken to refer to his property in Russia. If a man at the top of his will says, "I dispose of two of my estates," and then proceeds to dispose of one only, the other would not pass under the will. From the character of the deceased, from the nature of his intercourse with his relations, and from his letters, in which he always speaks of them with kindness, it is most improbable that he could have intended to have excluded them from his property.

But, II. If, from any ambiguity in the terms of the will, it were incumbent on the Court to resort to the Russian law for the rule of construction, the evidence of the Russian lawyers is in favour of the construction we contend for. [Sir C. Cresswell: The opinions you have brought in are not upon oath. I apprehend I am taken to know nothing of the law of Russia, and can only treat it as a fact, to be proved, as any other fact.] [The Queen's Advocate: The will was not laid before their counsel.] The reason why the will was not laid **[121]** before counsel, and that we are unable to produce an opinion on oath, was, that the names of the late and present Emperors of Russia being mentioned in it, and the present Emperor taking an interest under it, no Russian advocate could be found to give an opinion, which might be adverse to the Emperor.

III. Letters of administration having been already granted to the next of kin, the Court will not revoke them unless they are clearly wrong.

The Queen's Advocate (Sir J. D. Harding), Dr. Phillimore, Q.C., and Mr. E. Karslake, for the executors.

I. The testator being domiciled in Russia, and the will being made there, it must be construed according to the Russian law (see Story on the Conflict of Laws, s. 498a; 2 Williams on Executors, 980; *Trotter* v. *Trotter*, 4 Bligh (N. S.), 502; *Harrison and Others* v. *Nixon*, 9 Peters, 503 and 504). II. What is the true interpretation according to the law of Russia is matter of evidence, and must be proved. (*Yates* v. *Thompson*, 3 Cl. & Fin., 545; *Trotter* v. *Trotter*, 4 Bligh (N. S.), 502.) The opinion on the A. B. case, not being on oath, is inadmissible. The counter opinion we have brought in is conclusive as to the interpretation of the will. III. It has been contended, that the grant of administration having been made, will not be revoked, unless it is clearly shewn to have been a bad grant. But it was made by mistake. The English Court was taken by surprise; and the mistake ought now to be rectified. IV. The question, as regards the next of kin, is in reality one of form merely. For if probate be granted to the executors, the question as to the construction of the will will be reserved for the Court of Chancery, without prejudice to anyone, and the next of kin, though the grant of administration may have been revoked, will still have a locus standi in the suit in that Court. Whereas if probate be refused, the decision, as regards the executors, will be final. They cannot obtain the opinion of the Court of Chancery on the interpretation of the will without probate: and if their present application be rejected, they will be debarred from having that question decided by the legitimate Court of construction.

**[122]** Dr. Addams, Q.C., in reply.

*Sir C. Cresswell.* When I consider that the contest respecting this large sum of money will, in all probability, not rest here, but will be the subject of appeal, and as I have no doubt as to my opinion, I think I ought to give it at once, so that the parties may take the opinion of the Court of Appeal without unnecessary delay. I must also bear in mind another consideration, namely, that, if I grant probate, it in no way binds the Court of Chancery in the construction it may put upon this will, but merely gives the executors that without which they cannot appear in that Court at all. I think it is necessary for the executors to obtain probate before they can get a locus standi in the Court of Chancery. That Court has a sum of money to deal with, which is in the hands of the Accountant-General. The executors, as Russian executors, are not recognized in that Court; they cannot act upon the Russian probate in reference to this property, but they must have an English probate, otherwise the Vice-Chancellor would not entertain their suit. The Vice-Chancellor would not have sent the parties here, unless he had been of that opinion. I cannot think that any prejudice will arise to the next of kin by granting probate, or that any undue weight will be given to my opinion by the learned Judge before whom the cause may come. Now as to the point to be determined; it is said that I must determine it by the Russian law, inasmuch as it is a will made in Russia, by a domiciled Russian, in the Russian tongue, and altogether in accordance with the Russian law and form. I assent to this; I have accordingly endeavoured from the materials before me to ascertain what the rule of the Russian law, applicable to such circumstances, is, but without coming to any satisfactory conclusion. By the advocates examined on behalf of the executors, I find something like a rule of law stated, that the general expression, "all real and personal estate," includes everything wherever situated. Whilst those who have given opinions on this point on behalf of the next of kin, reason on the meaning of particular words used in the will, from which I conclude that they intend to state, that by the law of Russia you should endeavour to find out, as best you can, the meaning of the **[123]** testator, and should then give effect to his meaning. Again, the advocates examined on behalf of the executors, say that the deceased cannot be considered to have died partially intestate, for that the general expressions used in the will include all movables and immovables, and pass everything not distinctly excluded, and that this imposes the onus probandi on the other side, to shew that anything is distinctly excluded from the operations of those general expressions. On turning, however, to the opinions on the other side, I find that they pass by altogether the effect of the first general expressions, "all movable and immovable property," and rely upon the description,

which follows, of certain sorts of property, to be adverted to presently; they do not refer to any rule of law, but confine themselves to the meaning of the particular words. If I look to the will itself, I find that it begins, "I, the undersigned, etc. . . . make this my will, by which, in case of my death, I dispose of all my movable and immovable property, honestly acquired by myself, in the following manner." It then directs real property to be sold, and that "the money proceeds of all the above, as also the whole of my capital which shall remain after my death, in ready money and in bank billets belonging to me." This last expression may mean, "such part of my capital"; or, perhaps, a more probable construction would be, "all my capital which I say exists in ready money or bank billets." In a further part of the will, "any other disposal made previous to this one, concerning my movable and immovable property, by whatever papers and acts such might be found, or by whomsoever produced, shall be considered as of no effect, null and void," etc. Now supposing that there had been found a will of earlier date, disposing of British funds, would not that have been revoked by such a will as the present? I certainly am reluctant to have this Court turned into a Court of construction, but it is forced upon me for the day, and I am glad to think that the force and effect of my so acting will not be very great. No doubt the executors will go to a Court of Equity, and that Court will deem itself in possession of the fund as a trustee for those really entitled to it, and will give an independent construction to the will, and by that construction, and not by mine, the question **[124]** will be determined. I have no doubt that Mr. Karslake is right as to the course matters may take in Chancery, and that, though the next of kin may be deprived of the character of administrator, yet that they will be able in substance to continue the suit there as next of kin. As the effect of granting probate will be to give the executors an opportunity of litigating the question in that Court, which they would be deprived of, if I were to refuse it, I shall grant the probate prayed for. I agree with the construction put on the will by the Queen's Advocate, and think the executors in Russia are entitled to probate with respect to the property in the English funds. I revoke the administration, and decree probate to the executors. It is quite a case, however, for costs out of the estate.

FARLAR v. FARLAR. April 21, 1858.—Next of Kin.—Executor.—Plea.—Costs.—Practice.—The next of kin may generally put an executor on the proof of a will and cross-examine the witnesses without making himself liable for costs; but if he pleads or takes any further step, he does so at his own risk. When a plea contains irrelevant matter it should be objected to.

[S. C. 27 L. J. P. 103.]

This was a business of proving the will of John Farlar, promoted by his widow, the sole executrix named therein, against William Farlar, his only brother and next of kin. The declaration simply stated the factum and due execution of the will.

To this William Farlar pleaded:—1. That he was the brother and heir-at-law of the deceased. 2. The age of the deceased at his death, and that he and his brother had always lived on friendly and brotherly terms, and had corresponded with each other, the address of the said William Farlar being well known to the plaintiff. 3. That deceased suffered from a serious illness which led to his death, and for six months previous thereto never left his fireside, nor entered into conversation with any one. 4. That the illness was concealed by the plaintiff from the defendant. 5. That the plaintiff never informed the defendant of the deceased's death till after the **[125]** funeral had taken place. 6. That the defendant had good reason to assert that the will was obtained by undue influence, while the deceased was incapable, through illness, of making his will. 7. That the will was drawn up and witnessed by a non-professional person, who knew that deceased had constantly refused to make a will. 8. That the words appointing the executrix were inserted after the execution of the will. 9. That the deceased died on the 11th of October, and that the will was dated the 3rd of the same month.

The plaintiff replied, denying the truth or relevancy of great part of the plea, negativing undue influence or incapacity, and asserting that the appointment of executrix formed part of the will prior to its execution.

The defendant, who had conducted his own cause, did not appear at the hearing.

Dr. Swabey, for the plaintiff, having examined the attesting witnesses, submitted that they sufficiently proved execution and capacity, and asked for costs against the

next of kin. The rule of the Prerogative Court had been, that the next of kin were, generally speaking, entitled to put the executors on proof of a will, and to cross-examine the witnesses, without being liable to costs, but if they went beyond this, they did so at their own peril. In the present case the defendant had not even attempted to support by evidence his plea, part of which had necessitated a reply.

*Sir C. Cresswell.* The plea should have been objected to. Great part of it has nothing to do with the issue. I think you are entitled to your costs from the date of giving in the plea.

IN THE GOODS OF REBECCA SMITH, Widow (deceased), on Motion. April 26 and 28, 1858.—Married Woman.—Separate Estate.—Husband Trustee.—Jus Disponendi.—A. from time to time gave his wife sums of money, part of which accumulated as stock in his name; he received the dividends and paid **[126]** them to her, and in every way treated the stock as her separate property. The wife during coverture, with the husband's consent, made a will, whereof she appointed an executrix, survived him a few hours and died without republishing the will.—Held, that the testatrix had acquired a separate estate of which the husband had considered himself trustee for her, and to which the jus disponendi attached; and that her executrix was entitled to a limited probate.

[S. C. 27 L. J. P. 39; 4 Jur. (N. S) 1193. Referred to, *Noble* v. *Phelps*, 1871, L. R. 2 P. & D. 283. Approved, *Noble* v. *Willock*, 1873, L. R. 8 Ch. 797; affirmed, L. R. 7 H. L. 580.]

This was the case of a will made by the deceased during coverture, with the consent of her husband; there was no settlement on her marriage, nor any instrument under which she had power to make a will during coverture. The deceased died on the 19th of January, 1858, about thirty-six hours after her husband, without having republished her will, which bore date the 4th of January, 1858. The affidavit of a daughter, who was named executrix in the will, proved that the husband of the deceased had been from time to time in the habit of presenting her with sums of money, part of which had accumulated, and was invested in her husband's name in the New Three per Cent. Stock; that he received the dividends and handed them to his wife; and that, if she had need of any of the capital, he was in the habit of giving her cash for it at the current price.

From a memorandum-book in the husband's handwriting it appeared that he clearly treated the stock so accumulated as his wife's separate property; and in his will, dated July, 1857, and proved in the Court of Probate, was the following passage:—"And whereas there is now standing in my name in the New Three per Cent. Bank Annuities, the sum of £1100 stock, which in equity belongs to and is the sole property of my said dear wife; now I do hereby declare the same to be the sole property of my said wife, and direct my executors hereinafter named to transfer or pay the same to my said dear wife or her assigns, to and for her own absolute use, benefit, or disposal, and so far as may be necessary or I can do, I hereby give and bequeath the same to her."

The deceased's will was written by the husband at the wife's dictation, and there was no doubt of his entire consent to it.

**[127]** Dr. Phillimore, Q.C., moved the Court to decree probate of the will of the deceased. Unless the case fell within the scope of those which decided that a married woman might dispose by will of her separate property, a difficulty might arise from the fact of there having been no republication after the husband's death.

Cur. adv. vult.

*Sir C. Cresswell.* I find the passage in Roper, vol. i. 170, referred to by Dr. Phillimore, and adopted by Mr. Justice Williams, is to the effect, that the assent of the husband to his wife's will, is merely a waiver of his rights as her administrator, and that if he predecease his wife, her will, so far as it depends on his consent, is void against her next of kin. There are other rather nice distinctions drawn, where a married woman makes a will or appointment under a power, but those in no way affect the present case. There is a third class of cases, within which I think the present case falls, where the wife has been considered as possessed of a separate estate to which the jus disponendi attaches (*Fettiplace* v. *Gorges*, 1 Ves. jun. 44). I consider that the husband made himself a trustee of the stock in question for his wife. The executrix may take a probate limited to such property.

IN THE GOODS OF LOUISA GOODYAR (deceased), on Motion. April 28, 1858.—A General Bequest followed by Specific Bequests.—Universal Legatees in Trust.—A. B. left in the hands of trustees, "all the property she might be possessed of at her death," etc., followed by an enumeration of properties, which however did not include the whole of her property.—Held, that the specific enumeration did not restrain the general terms preceding it, and that the trustees were entitled to administration with the will annexed as universal legatees in trust.

[S. C. 5 Jur. (N. S.) 1243.]

The deceased duly executed a will in May, 1851, in the following words:—"I, Louisa Goodyar, do herein will in the [128] hands of trustees the Rev. C. P.; J. M., Esq.; and the Rev. A. G. M., all the property I may be possessed of at my death, namely, such moneys as shall remain of the legacy of my uncle W. S., and also the legacy of W. G. P., being two thousand five hundred pounds, as well as any other property or sums of money I should have become entitled to, had I been living at such time as the residuary legatees named in the will of the late W. G. P. are paid off. All these sums to be by the above-named trustees invested in the highest interest they can with safety obtain." The will then proceeded to dispose of the interest and capital as therein mentioned, but there was no other mention of the residue, nor any appointment of executors. One of the trustees predeceased the testatrix, who died in January, 1858.

The bulk, but not the whole of deceased's property at her death was comprised in the items enumerated in the will. The question was, whether the surviving trustees were by the terms of the will entitled to administration with the will annexed, as universal legatees in trust, or whether the specifications following the word "namely," restricted the operation of the general words, "all the property I may be possessed of."

Dr. Deane, Q.C., moved the Court to "decree letters of administration with the will annexed to the surviving trustees as universal legatees in trust." He relied on the case of *Fisher* v. *Hepburn*, 14 Beav. 626. There the clause in question was, "And as to all the rest, residue and remainder of my estate and effects, whatsoever and wheresoever, canal shares, linen, plate, china, and furniture, I give, devise, and bequeath the same to my said wife, for her own use and benefit." The Master of the Rolls had no hesitation in reading it as a general residuary bequest, without giving any opinion as to its operation on real estate. His Honour continued: "The case of *Parker* v. *Marchant* has been relied on in reference to the circumstance, that the general words precede the enumeration; but, as was observed by Sir W. Grant, in *Cambridge* v. *Rous*, the latter are not words of restriction; they are rather words of enlargement. The object was to [129] exclude nothing. Such an enumeration under a videlicet, a much more restrictive expression, has been held only a defective enumerative, not a restriction to the specific articles. This is only a common residuary bequest."

*Sir C. Cresswell.* The grant may go as prayed. Motion granted.

SHAWE AND DICKENS *v.* MARSHALL AND OTHERS. April 28 and May 6, 1858.—Legatee.—Interveners.—Costs.—Practice.—A., B., and C., three legatees named in a codicil, sought probate of it in solemn form against the executors named in the will. Subsequently to their having propounded the codicil, D., another legatee, intervened. The executors by their replication, which was given in after D. had intervened, admitted part of the alleged codicil, including the legacy to D.—Held, that D. was not entitled to have his costs out of the estate.

This was a question as to the right of an intervener to costs arising in a cause of proving in solemn form of law a codicil to the last will and testament of Elizabeth Atherton, late of Clifton, in the county of Gloucester, spinster, deceased, promoted by William Shawe and William Dickens, the executors named in the said will, against Mary C. Marshall, widow, Mary A. Bulger and Lucy Mackin, spinsters, legatees named in the said codicil, who were all represented by the same counsel and proctor, and also against Bertram Atherton, another legatee named in the said codicil, but who appeared by a different counsel and proctor.

The will, about which there was no dispute, was dated the 26th of August, 1856.

The codicil, which was duly attested, was in the following terms:—

"I give and bequeath to the under-mentioned persons the following sums in addition to those already mentioned in my will:—

**[130]** "March 9th, 1857.

"Free of Legacy Duty.—To my cousin, Bertram Atherton, Esq., £2000. To my cousin, Lucy Makin, £2000. To Mary Ann Bulger, residing with me, £1000. To Mrs. M. C. Marshall, £1000. Henrietta, Elizabeth, Mary, daughters of Mrs. Marshall, widow of the late Incumbent of Christ Church, each £500. To Misses Elizabeth and Caroline Justice, each £50. To Mary Portens, £500. To Mrs. Abigail Portens, £500. To my cook, Ann Sims, £50. To my housemaid, Mary Ann Edwards, £100. To my coachman, Charles Frew, £100.

"ELIZABETH ATHERTON (L.S.)."

The plaintiffs in their declaration propounded the will only, but to their affidavit of scripts, filed with the declaration, the said codicil was annexed, and described therein as a pretended codicil to the said will.

The first three named defendants in their plea admitted the due execution of the will. They further pleaded, that the testatrix had made the said codicil to her said last will, bearing date the 10th day of March, 1857; and that the said testatrix by her said codicil bequeathed certain legacies to the said M. C. Marshall, M. A. Bulger, and L. Makin and others. And after pleading the due execution of the said codicil, they alleged that the words "free of legacy duty," written under the third line of the said codicil, and the words and figures,—"Henrietta, Elizabeth, Mary, daughters of Mrs. Marshall, widow of the late incumbent of Christ Church, each £500. To Misses Elizabeth and Caroline Justice, each £50. To Mary Ab. Portens, £500. To Mrs. Abigail Portens, £100,"—written on the eighth and three following lines of the said codicil, were written and inserted in the said codicil after the execution thereof; and that the figures "£50" written in the said codicil, after the name "Mary Ann Edwards," were struck through; and the figures "£100" were written after the same; and the initial letters "E. A." were written thereunder after the execution of the said codicil; and that such alterations were not executed as is required by law.

The plaintiffs replied, admitting the plea of the defendant so far as it related to the codicil, except they alleged that the figures "£1000," written on the eighth line of the said codicil **[131]** after the words "To Mrs. M. C. Marshall," were not written, and formed no part of the said codicil on the said 10th day of March, 1857; and that the figures "1000" were inserted after the execution of the said codicil.

Previous to the filing of the replication Mr. Atherton intervened, but he did not put in any plea.

The only question for the decision of the Court, as settled by the Judge at chambers, was, whether a certain legacy of £1000 to Mrs. Marshall was inserted before or after the execution of the codicil.

Dr. Deane, Q.C., appeared for the executors.

Dr. Phillimore, Q.C., and Dr. Spinks, for Mrs. Marshall, M. A. Bulger, and Lucy Makin.

Dr. Twiss, Q.C., for Mr. Atherton.

The Court decreed probate of the said codicil, including the said legacy of £1000 to Mrs. Marshall, and gave to the first three named defendants their costs out of the estate.

Dr. Twiss, Q.C., on behalf of Mr. Atherton, applied for his costs. The plaintiffs at the commencement of these proceedings, by their declaration and affidavit of scripts, ignored the codicil. Mr. Atherton was then entitled to appear to protect his interests; and although by the replication the issue had been subsequently narrowed, this should not affect his right to costs, as he had intervened before it was delivered.

Cur. adv. vult.

*Sir C. Cresswell.* I have endeavoured to ascertain what was the practice of the Prerogative Court with regard to allowing to interveners costs out of the estate. I have come to the conclusion, that by the practice that prevailed in that Court, under the circumstances of the present case I cannot allow more than one set of costs to the defendants. Mr. Atherton, as an intervener, cannot have his costs out of the estate.

**[132]** IN THE GOODS OF RACHEL BAYNE, Spinster (deceased), on Motion. May 18, 1858.—Chain of Executorship.—Will of feme covert.—Practice.—A limited probate taken out of the will of a feme covert will not continue the chain of

representation under the general probate of the will of the original testator, but the Court will make a supplemental grant limited to the property which the feme covert had as executrix.

[S. C. 6 W. R. 815. Applied, *In the Goods of Martin*, 1862, 3 Sw. & Tr. 1.]

Rachel Bayne died in 1799, a spinster, leaving a will dated October, 1798, whereof she appointed Sir Robert Pocklington and Mr. Oliver Cromwell executors, and Martin R. Pocklington residuary legatee. In October, 1799, the will was proved by both executors in the Prerogative Court of Canterbury. Sir Robert Pocklington survived Mr. Oliver Cromwell, and died on the 21st of September, 1840, having made his will, and thereof appointed his wife, Catherine F. Pocklington, sole executrix. In December, 1840, she proved the will in the Prerogative Court of Canterbury, and subsequently intermarried with Sir Henry E. Austen, whom she survived, and died on the 27th of December, 1856, a widow, having during her coverture with Sir H. E. Austen, in virtue of a power reserved to her by her marriage settlement, made a will, and thereof appointed the said Martin R. Pocklington and her brother Edward Blagrave executors. On the 23rd of March, 1857, a limited probate of the said will was granted by the Prerogative Court of Canterbury to the said Martin R. Pocklington, Edward Blagrave having renounced his right to probate. The Bank of England, under advice of counsel, declined to transfer certain moneys into the name of Mr. Martin R. Pocklington as the personal representative of Rachel Bayne, on the ground that the chain of executorship was broken by reason of Lady Austen having made her will during coverture, and a limited probate thereof only having been granted to the said Mr. Pocklington.

Dr. Phillimore, Q.C., submitted that the Bank of England had been rightly advised, and that it was necessary to have recourse to the Court to continue the representation to the original testatrix.

**[133]** By the Court: As a feme covert Lady Austen might have made a will of that which she had as executrix?

Dr. Phillimore: Yes; but the difficulty is in carrying on, with the limited probate of her will made under the power, the representation which commenced under the general probate of the will of the original testatrix. In *Barr* v. *Carter*, 2 Cox C. C. 429, the will had been executed in pursuance of a power given by settlement, but the probate was in the usual general form, and it was on that ground that the Master of the Rolls considered the executrix of that will as a general representative. In *Birkett* v. *Vandercom*, 3 Hagg. Ecc. Rep. 750, the representation was continued under a limited form.

*Sir C. Cresswell.* The limited probate cannot give power to deal with the estate of the original testatrix. You may take a supplemental grant. That will be the most correct mode of proceeding. It will be a supplemental grant of probate, limited to the property which Lady Austen had as executrix.

IN THE GOODS OF CHARLES AUGUSTUS FITZROY, Knight (deceased), on Motion. May 18, 1858.—Execution of Power of Appointment by Will.—Subsequent Marriage.—Revocation.—7 Wm. IV. & 1 Vict. c. 26, s. 18.—A. under his marriage settlement had, in the event of his surviving B. (his wife), a power of appointing by deed or will amongst his children certain trust moneys, and in default of such appointment the moneys were to be equally divided amongst them. A. survived B., and by a will executed in 1847, he, being then a widower (amongst other things) directed the then unappointed portion of such moneys to be equally divided amongst his sons (a portion of such moneys having been previously assigned to his only daughter on her marriage). A., in 1855, contracted a second marriage, and died in 1858 without having executed any other will, or any further appointment of the trust moneys.—**[134]** Held, that the will of 1847, so far as it was an execution of the power of appointment, was not revoked by A.'s second marriage, though the same persons would take under the settlement in default of appointment, as would have taken in case of an intestacy under the Statute of Distributions.

[S. C. 6 W. R. 863. Followed, *In the Goods of Russell*, 1890, 15 P. D. 114.]

The deceased died on the 16th of February, 1858. By an indenture of settlement, bearing date the 9th of March, 1820, and made on his marriage with Lady Mary Lennox, the sum of £17,500 (subject to a deduction of the sum of £2300, as in the

indenture mentioned) was assigned to the trustees of the settlement upon trust to pay the interest thereof to Sir C. A. Fitzroy for life; and after his decease to Lady Mary Lennox for her life; and after the decease of the survivor of them to stand possessed of the trust-moneys and the interest thereof, in trust for such one or more exclusively of the other or others of the children of the marriage, as Sir C. A. Fitzroy and Lady Mary Lennox should, during their joint lives, by deed jointly direct or appoint; and in default of such appointment, or so far as the same should not extend, as Sir C. A. Fitzroy, in case of his surviving Lady Mary Lennox, should by deed or will appoint; and in default of such appointment, upon trust for the children of the marriage in equal shares. There were three sons of the marriage, one of whom died in September, 1855, a bachelor, and a daughter, now the wife of the Hon. Keith Stewart. Lady Mary Fitzroy died in September, 1847, leaving her husband her surviving. Sir Charles and Lady Mary Fitzroy, by indenture bearing date the 9th of August, 1841, assigned the sum of £2000, part of the fund comprised in the above indenture of settlement, for the benefit of their daughter Mary Caroline, wife of the Hon. Keith Stewart. But no further joint appointment was made of the said trust-fund. By his will, dated the 18th of December, 1847, Sir C. A. Fitzroy disposed of various articles of household furniture, personal ornaments, etc., but the last clause was as follows:—"The funded property confided to trustees under my marriage-settlement in 1820 is, I believe, left at my disposal (as the survivor), so far as appropriating the shares to each of my children; but of this fund the sum of £2000 was settled at her marriage upon my daughter Mary. The remainder I wish to be divided among my sons, as also **[135]** any other sums of money that I may die possessed of." No executor was named in the will. Sir C. A. Fitzroy, in December, 1855, married Margaret Gordon Hawkey, widow. On the deceased's death the above was the only testamentary paper to be found.

Dr. Addams, Q.C.: The will is a good execution of the power of appointment of the trust-fund, and if so, would, as far as regards that part of it, fall under the exception in the 18th section of the Wills Act, and remain unrevoked by the marriage of 1855. By the indenture of August the 9th, 1841, Mrs. Keith Stewart has no interest in the fund in the hands of the trustees, except in the £2000 assigned on her own marriage. He moved the Court to decree letters of administration, with the will annexed, to Lady Fitzroy.

*Sir C. Cresswell.* You say, in fact, that, that the trust-moneys, in default of such appointment, would not pass under the Statute of Distributions, but under the settlement. Suppose there was no will—that Sir Charles had put the will in the fire—the same persons would take in the one case under the settlement, in the other under the intestacy. The question is, whether the exception in the 18th section of the Wills Act applies, the children, in the event of an intestacy, taking under the settlement, and not under the Statute of Distributions, though they are the same parties that would take, and take in the same proportions as if the trust-moneys had passed under the statute. I am inclined to think that the exception in this section does apply, and that the will, so far as it disposes of the trust-moneys, is not revoked; and I decree letters of administration, with the will annexed, to the widow.

IN THE GOODS OF BIAGIO MANFREDI (deceased), on Motion. May 18, 1858.—Will in the Registry of the Court.—Practice.—The Court will not allow a will in its custody to be taken out of its jurisdiction on any alleged necessity for the furtherance of justice. **[136]** It must presume that other Courts, when satisfied that the original document is withheld by a competent authority, will admit secondary evidence.

[S. C. 6 W. R. 792.]

Dr. Deane, Q.C., moved the Court to allow the original will of the testator to be delivered out of the registry of the Court under the following circumstances:—The will bore date 1842; the deceased died in January, 1845, having been for thirty years domiciled in England. His only property in this country consisted of several pictures and other articles, less in value than £100, but he left considerable property in Bologna. The will and codicil were proved in the Prerogative Court of Canterbury, the property being sworn under £200. The nephews of the deceased had commenced an action against the executor, in the Courts of Bologna. In the first instance, and on appeal, the Courts of Bologna held that they had no jurisdiction. On further

appeal to the Court of Rota, at Rome, that Court decided that the Courts of Bologna had jurisdiction, and directed them to proceed in the suit. It was apprehended that the executor would be at a disadvantage in that suit, unless he could produce the original testamentary papers of the deceased. He moved the Court to order the original will to be sent to Bologna, in such manner and on such terms as it should be pleased to direct.

By the Court: An application of a similar kind was made last term to send a will to Australia.* I then distinctly said I would comply with nothing of the sort.

Dr. Deane: I rather assumed that your Lordship would reject this motion; but if so, we would wish to have some **[137]** document which we might transmit, shewing that the application has been made and refused.

*Sir C. Cresswell.* Perhaps a certified copy of the entry in the Court books would satisfy the authorities at Bologna. Wills in the custody of the Court are open to inspection with a view to prove handwriting. The attesting witnesses are the proper medium of proof of execution of the will. I cannot assume that any Court would allow a suitor to be prejudiced, where the absence of an original document is accounted for by the refusal of a competent Court to part with it.

**[138]** IN THE GOODS OF MARTHA PEACH, Spinster (deceased), on Motion. June 26, 1858.—Execution.—Testamentary Paper.—Dispositive Words following Testator's Signature.—A. produced to B. a sheet of paper, having on the first side a formal heading and ending of a codicil, and asked B. to write a codicil for her. B., not having finished the dispositive part when he reached the formal ending, turned over the page and continued the sentence and other dispositive clauses on the second side. The signatures of A. and of the attesting witnesses following the formal ending were on the first page. On motion for probate, counsel suggesting that the writing on the second side might be considered as an interlineation, the

---

* *In the Goods of Mary Ann Holl* (deceased), on Motion. April 28, 1858.—In this case, a question as regarded land in New South Wales was said to be pending in the Court at Sydney under the will and codicil of Mary Ann Holl, which had been made in this country, and were proved and deposited in the Prerogative Court of Canterbury in September, 1849. A commission from the Supreme Court of Sydney to examine witnesses in this country was in the course of execution, and the original will and codicil had been attended with before that commission by a clerk from the principal registry. But it was stated in an affidavit made by the solicitor for the devisees named in the codicil, that at the trial that Court might require the production of the original will and codicil, and might refuse to receive secondary evidence of them.

Dr. Addams, Q.C., moved the Court to direct, "that the original will and codicil of M. A. Holl (deceased) should be delivered out of the registry, upon leaving a certified copy of them, in order that they might be produced at the trial at Sydney, or that the same should be transmitted to the Judge, Registrar, or other official of the Supreme Court, with such directions as the Court should think expedient to insure the safe return of them to the Registry."

*Sir C. Cresswell* totally rejected the motion, observing that he could have no security whatever for the return of the will and codicil from New South Wales; that the regular course in this country was to require the production of original documents, but when a satisfactory reason for their non-production was given to receive secondary evidence of their contents. When the Court had refused to allow the will and codicil to go out of its custody, the Court at Sydney would, he must presume, admit secondary evidence. He had no doubt it would act on the same principle as that followed by the Court of Exchequer in *Alison* v. *Furnival*, 1 Cr. M. & R. 277. In that case an action had been brought on an agreement deposited with a notary in France, and the Court of Exchequer ruled, that as there was sufficient evidence of an established usage in France not to allow the removal of documents so deposited without an order of a French Court, secondary evidence of the contents of the instrument was admissible. If the execution of the will and codicil were proved under the Commission, and an examined copy of them were sent out to Australia, he had no doubt the Court there would dispense with the production of the originals.

Motion rejected.

Court refused to decide such a question on motion, but left the parties to propound the paper, if they thought fit.

[S. C. 6 W. R. 865.]

In this case the deceased had made and duly executed her will in 1847; in 1855, owing to the death of certain legatees under the will, she wished to alter it, and, as appeared from the affidavit of John Francis, a friend and neighbour of the deceased, she, with that view, produced to him the form of a codicil; namely, on the first side of a sheet of paper a formal heading, "This is a codicil to the last will and testament of me, , bearing date ," followed by a considerable blank space; and towards the bottom of the same side of the sheet of paper a formal conclusion, "In all other respects I confirm my said will, and direct this to be taken as part thereof. In witness whereof, I have hereto set my hand, etc." The attestation clause and the signatures of the testatrix and subscribed witnesses alongside of it, occupied the remainder of the first side of the paper. Francis, from the testatrix's dictation, and using the terms of her will, where he thought them applicable, proceeded to write the dispositive part of the codicil, which he commenced immediately after the formal heading, and continued to the words "in all other respects," when, not having space to finish the dispositive part, he turned over the page and continued the sentence broken off on the first side at the top of the second side of the paper, as follows:—"is to say, I give the share of that one who shall first so die to my nephew **[139]** Charles Sharman, and the share or shares of the other or others so dying to my nephews other than the said Charles Sharman, in equal shares. I give all the residue of my property and effects whatsoever and wheresoever to my said sisters, or such of them as shall be living at my decease, in equal shares, if more than one; and in case my said sisters shall all die in my lifetime, I give such residue to my nieces in equal shares; and I appoint my said three sisters executrixes of this my will. In witness whereof I have set my hand. I request that all legacies be paid free of duty." This extended about halfway down the second side; the paper was then duly executed at the bottom of the first side.

Dr. Swabey moved the Court to decree probate of the whole codicil; he submitted that, with the full information as to the facts afforded by the affidavit of Francis, who wrote the paper, the Court might consider that part of the codicil on the second side, which in the ordinary sequence of the paper followed the testatrix's signature (Wills Act Amendment Act, 15 & 16 Vict. c. 24), as an interlineation immediately preceding the testimonium clause on the first side, and, as such, proved to have been there before the execution of the paper, and so entitled to probate.

*Sir C. Cresswell.* I think you have mentioned the only ground on which that part of the paper can be sustained; but you will observe that though the writing on the second side commences in the middle of a sentence, which must be referred to the preceding part on the first side to make sense, yet it continues with a distinct residuary clause, an appointment of executors, and a short testimonium clause. I suppose that part which is written on the second page, and not signed, would not have satisfied 1 Vict. c. 26. This is far too important a question to be disposed of on motion. I must refuse the present motion, and if the parties wish to carry the matter further, they must propound the paper.

**[140]** IN THE GOODS OF JAMES TERRIBLE (deceased), on Motion. May 31 and June 26, 1858.—Revocation of Will by Marriage.—Memorandum.—Revival by Codicil. —James T. made a will, giving a life-interest in his property to his wife Sarah. She died, and he subsequently married Martha B. On the day before his death he told an attendant that he wished the name of his former wife Sarah to be erased in his will, and the name of Martha (his present wife) to be substituted for it, and requested her to write a memorandum on his will to carry out his wishes. The attendant thereupon wrote a memorandum upon the will, which was executed according to the provisions of the Wills Act. The memorandum did not in direct terms refer to the will.—Held, that the memorandum operated as a codicil to the will, so as to revive the will.

[S. C. 6 W. R. 816.]

James Terrible died on the 4th of January, 1858. He executed a will on the 11th of June, 1852, whereby he bequeathed (among other things) his real, and the residue of his personal property to his then wife Sarah for her life, and after her death he gave

one moiety thereof to her children by a former husband, and the other moiety to his adopted daughter, Mary Lamb, wife of Thomas Lamb, and he appointed his wife Sarah and the said Mary Lamb executrixes of his will. His wife Sarah died in November, 1852, and the deceased afterwards married Martha Brewer, whom he left him surviving.

On the morning of the 3rd of January, 1858 (being the day before his death), the deceased being ill and in bed, sent for his will, and, on the same being brought to him, told Sarah Durrant, the nurse who was attending upon him, that he wanted his other wife's name erased, and his wife Martha's put in, and directed her to write a memorandum upon his will to that effect, in order to give effect to his wishes.

Sarah Durrant thereupon, immediately under the names of the attesting witnesses to the will, wrote these words:—"I give and bequeath to my wife Martha Terrible, my wife Sarah Terrible being void by death"; and read the same to the deceased, who expressed his entire approval thereof, and thereupon made his mark at the foot of this memorandum, in the presence of three persons, who duly subscribed the same as attesting witnesses.

**[141]** Dr. Tristram moved the Court "to grant probate of this paper writing, as containing the will and codicil of the deceased to Mary Lamb (wife of Thomas Lamb), as the surviving executrix named in the will." He submitted, that though the will had been revoked by the marriage of the deceased subsequent to its execution, the memorandum of the 3rd of January, 1858, was sufficient under the 22nd section of the Wills Act to revive it. The memorandum was clearly entitled to probate, On the face of it, it was not a substantive will, but a codicil to some will; and from its being written on the same sheet of paper, as also from its contents, it could be a codicil to no other will than that of June the 11th, 1852. Its identification as a codicil to that will was sufficient to revive the will. *Neate* v. *Pickard* (2 N. C. 406).

*Sir C. Cresswell.* It is not necessary for me to decide on this motion, whether the effect of the memorandum is to substitute the deceased's widow Martha Terrible as executrix in the place of his former wife Sarah. I will grant probate as prayed.

IN THE GOODS OF ELISHA PECK (deceased), on Motion. May 31 and June 26, 1858.—Creditor.—Appointment of Guardian.—Insolvent Estate.—Administration.—A creditor appointed guardian to minors (the only children of E. P.), who had no known relations, for the purpose of taking out administration to the estate of E. P., who had died intestate and insolvent.

[S. C. 27 L. J. P. 106; 6 W. R. 793. Followed, *Coombs* v. *Coombs*, 1866, L. R. 1 P. & D. 290.]

Elisha Peck died on the 5th of June, 1857, intestate and insolvent, a widower, leaving three children, all minors, the eldest being of the age of thirteen years.

The deceased left personal effects under the value of £100, and debts to the amount of £180. His principal creditors were F. Newman, to whom he owed £150, and J. Woodford, to whom he was indebted in the sum of £15.

The minors had no natural guardian, as the deceased was illegitimate, and there were no known relations of their mother. On the death of the deceased, J. Kinger, a brother **[142]** of the natural father of the deceased, took possession of his dwelling-house and effects, and promised to assist the said J. Woodford, as one of the creditors, in becoming administrator; but he subsequently prevented the eldest minor from signing a paper electing J. Woodford guardian, and had refused to administer himself, or to allow anyone else to do so. He had disposed of a considerable portion of the effects of the deceased, without paying any of his debts. It was the general desire of the creditors that administration should be granted to F. Newman.

The above facts were deposed to in a joint affidavit made by F. Newman and J. Woodford.

Dr. Tristram moved the Court, under sect. 73 of the Probate Act, "to grant administration of the effects of the deceased to F. Newman, on his exhibiting an inventory of the effects, and giving justifying security." F. Newman would undertake to distribute the property of the deceased rateably amongst the creditors.

*Sir C. Cresswell*: I have an objection to granting your motion under the 73rd section of the Probate Act. I think, before granting it, the minors, or someone in the character of their guardian, should be cited. The better course would be for the Court to appoint a guardian to them, and you can then cite him. I incline to think that Mr. Kinger would be the most proper person to be appointed their guardian for that purpose. Let the motion stand over.

June 26.—Dr. Tristram now moved the Court to "appoint F. Newman as guardian to the minors, for the purpose of his taking upon himself letters of administration of the personal estate of the deceased for the benefit of the minors, and until one of them should attain the age of twenty-one years, and to decree letters of administration to be granted to him accordingly." The Court had on a previous day intimated that Kinger would be a proper person to be appointed guardian, but there were strong objections to his appointment. His conduct in respect to the estate, as detailed in the affidavit, had been most improper. His appointment might enable him **[143]** to defeat the very object of the present application, which was to secure the property for the creditors. [By the Court: It would have been more satisfactory if other creditors had joined in the affidavit.] The estate of the deceased is under £100, his debts amount to £180, and he appeared for two creditors, whose united claim amounted to £165. Kinger, not being by law related to the minors, had no special claim to be their guardian.

*Sir C. Cresswell.* Under the circumstances of the case, I will appoint F. Newman guardian to the minors, for the purpose of taking out administration.

COOPER AND SPARKS *v.* MOSS AND MOSS. June 26, 1858.—20 & 21 Vict. c. 77, s. 38.—Place of Trial.—Practice.—Application on behalf of the plaintiffs to direct a cause to be tried at the coming assizes at Derby, refused. There is no similarity between the position of a plaintiff here and his common law right to lay the venue where he pleases. A testamentary suit is at large, and ought to be tried before the Judge in the Court of Probate, though he has a discretionary power to send an issue to be tried before a Judge of Assize.

[S. C. 8 W. R. 866.]

Dr. Robertson applied to the Court to direct this cause to be tried at the coming assizes at Derby. He relied on the affidavits of the plaintiffs, the executors named in the testamentary paper in dispute, which set forth the residence of the testator and other parties concerned for forty years in Derby; that the bulk of their witnesses were in Derby, or close by; that great expense would result from bringing them to London; and that the real estate disposed of by the will was in the county of Derby, and a few miles off, in Staffordshire.

Dr. Phillimore, Q.C., contrà: The opposition to this will is founded chiefly on the undue influence alleged to have been exercised on the mind of the testator by a dissenting minister of considerable reputation in Derby. The cause has created **[144]** much discussion in Derby, and it is therefore not desirable that it should be tried there. As to the expense, if a day can be fixed to try the case in this Court, it cannot be much increased by the witnesses coming to London.

*Sir C. Cresswell.* The party making this application is not in the situation of a plaintiff at common law, who would have had a right to lay his venue in Derbyshire. The cause properly belongs to this Court, and should be tried here. Special powers are, however, given to the Court to exercise a discretion in this respect, and to direct the issues joined to be tried either before a Judge of Assize in any county, or at the sittings for the trial of causes at London or Middlesex (20 & 21 Vict. c. 77, s. 38). Without saying anything to the prejudice of Derby, as the cause arose there, and probably has been the occasion of a good deal of discussion and feeling on the spot, I do not think it would be a discreet exercise of my power to send it for trial there. There is no other assize town near to Derby where it could be conveniently sent for trial. It must therefore remain in London, and some day certain can be fixed in due course for its trial in this Court.

Application refused.

IN THE GOODS OF JOSEPH RAINE (deceased), on Motion. June 26 and July 19, 1858.—Joint Will.—Application for Probate.—A. and B., partners in a farming business, and joint tenants in certain freeholds, executed a will containing various devises and bequests, to take effect after the decease of both of them. On the death of A., B. surviving, application for probate as of the will of A. was made by the executor therein named.—Held, that probate could not be granted of such an instrument, till after the death of both the parties.

[S. C. 6 W. R. 816. Disapproved, *In the Goods of Miskelly*, 1869, Ir. R. 4 Eq. 62; 18 W. R. 218; *In the Estate of Heys*: *Walker* v. *Gaskill*, [1914] P. 192.]

This was a question of granting probate of a testamentary paper made in the following terms:—

"In the name of God, amen. We, Joseph and Charles Raine, farmers, of Holwick, in the parish of Romaldkirk, in the county of York, do hereby make and ordain this our [145] last will and testament in manner and form following, that is to say—

"1. We give and bequeath to our nephew, Charles Raine, the sum of £5, to be paid to him at the expiration of twelve calendar months after both our decease: and also the like sum of £5 to our sister Jane Raine, to be by our executor hereinafter named paid to her twelve calendar months after both our decease.

"2. We give and bequeath to James Raine, our nephew, all our personal property, or the residue thereof, whatsoever and wheresoever, consisting of goods, chattels, farming-stock and crop, husbandry and dairy utensils, joiners' tools, money and credits to the said James Raine, to take possession of the same immediately after both our decease.

"3. We give and devise to James Raine, our nephew aforesaid, our dwelling-house, situated at Middleton Town Head, with all the appurtenances thereto belonging or appertaining, now occupied by Ralph Atkinson; we also give and devise to our nephew, James Raine aforesaid, our allotment, if not sold during our lifetime, situate on Middleton outer pasture. He, the said James Raine, to take possession of the said house and allotment immediately after both our decease, and to have, hold, and enjoy the the same, him and his heirs, executors, administrators, and assigns for ever; and we hereby nominate, appoint, and ordain James Raine, our nephew aforesaid, sole executor of this our last will and testament.

"In witness whereof we hereby set our hands and seals this 14th day of April, 1855.

"Signed, sealed, and declared in the presence of us, and we in the presence of each other, by the testators, Charles and Joseph Raine, as their last will and testament. } WILLIAM HOULDEN. PHILIP RAINE.

"JOSEPH RAINE, his × sign (L.S.)
"CHARLES RAINE. (L.S.)"

Joseph Raine died on the 24th of August, 1856. The deceased and his brother were in partnership as farmers, and joint tenants of certain freeholds. The only property of which Joseph Raine was possessed, not included in the partnership, [146] was worth about £10. An affidavit of Charles Raine, the surviving brother, set forth all the circumstances of drawing the will and its execution.

Dr. Wambey moved the Court "to decree probate of the will of the said Joseph Raine, deceased, to be granted to James Raine, the executor therein named." *Hodson* v. *Blackburn and Blackburn*, 1 Add. 274, was an authority against mutual wills. But *In the Goods of Sir Josias Henry Stracey and Diana Stracey his wife*, 1 Deane 6, Sir John Dodson had distinguished between joint and mutual wills, and granted probate of an instrument very similar in terms to the present one. Cur. adv. vult.

July 13.—*Sir C. Cresswell.* This was an application for probate of a very singular instrument. Two persons profess to make their will, and neither gives anything without the other; and the instrument is to have no effect till after the death of both. It is distinguished from the cases referred to: it is not a mutual will, which purports to leave to the survivor of one or more parties the property of the other; nor is it such an instrument as that *In the Goods of Stracey*, calling itself a joint will, where the husband and wife disposed of separate properties, over which they had respectively powers of appointment. I cannot grant probate of this paper during the life of either.

IN THE GOODS OF JANE ELIZABETH CRAUSE (deceased), on Motion. June 26 and July 13, 1858.—Administration.—Husband and Wife deceased.—Husband's next of Kin.—Where the husband has survived the wife and died intestate, without administering to her estate, his next of kin must constitute themselves his legal personal representatives, before they have any claim to administer to the wife's estate.

[Referred to, *Partington* v. *Attorney-General*, 1869, L. R. 4 H. L. 115. Applied, *In the Goods of Ferguson*, 1881, 7 L. R. Ir. 176.]

The deceased in this case married Major Jackson Crause in 1830; there was one child of the marriage, who died in [147] the lifetime of both the parents. Jane

Elizabeth Crause died in November, 1836, being then entitled to a fifth share of a sum of Consols, expectant upon the death of her mother, Ann Green. Major Jackson Crause left England in 1839, and, as appeared from the affidavit of his father, Mr. Charles Crause, had not been heard of since 1841. Ann Green, the mother of Jane E. Crause, died in 1854, when the sum of Consols became divisible.

Dr. Twiss, Q.C., moved the Court to "decree letters of administration to the personal effects of Jane E. Crause to Mr. Charles Crause, as the father and next of kin of Major Jackson Crause." It had been suggested in the Registry that the father should first take out administration to the son, and then, as his representative, administer to the estate of the deceased.

But in *Fielder and Fielder* v. *Hanger*, 3 Hagg. Ecc. Rep. 770, Sir John Nicholl said: "On principle, however, that the grant ought to follow the interest, and that the whole interest is vested in the husband's representatives, I shall decree this grant. I should have done the same if the husband had not taken out administration, unless it could be shewn that he had no interest, but that the property belonged to the wife's next of kin. And it will be understood in the Registry that this is to be the rule for the future, unless special cause to the contrary be shewn."

*Sir C. Cresswell*: I am informed that it never has been the practice to make such a grant directly, as you are now asking it, and it is rather a grave question as regards the revenue and the Chancellor of the Exchequer. Cur. adv. vult.

July 13.—*Sir C. Cresswell.* I have looked at the case cited, but that bears on the beneficial interest of the representatives of the husband or the wife, and does not meet the difficulty of the present case, which is, that the father of the husband, till he has legally constituted himself his personal representative, can have no claim whatever to the personal estate of the wife. I must uphold the practice as stated in the Registry, and refuse this motion.

Motion refused.

**[148]** BELBIN *v.* SKEATS. June 8, 1858.—Will.—Proof of Execution.—Examination of one of the Attesting Witnesses sufficient.—To prove the execution of a will in the Court of Probate, it is not necessary to examine both the attesting witnesses.

[S. C. 27 L. J. P. 56.]

Probate in common form had been granted by the Prerogative Court of Canterbury of a paper professing to be the last will of Moses Hebbard, deceased, and dated the 1st day of July, 1856, to Horatio Ward and Robert Skeats, the executors named therein.

The present suit was instituted by the plaintiff (Jane Belbin), the executrix of a will of the deceased of prior date, with a view to obtain revocation of such probate.

Dr. Phillimore, Q.C., and Mr. Denman, for the plaintiff.

Dr. Deane, Q.C., and Mr. Coleridge, for the defendant.

Both the attesting witnesses to the will of July the 1st, 1856, viz. J. Phillips and John Ward, were examined on behalf of the defendant to prove its due execution. John Ward was a witness hostile to the case set up by the defendant.

Dr. Deane, Q.C. (to the jury): The evidence given by John Ward on his cross-examination was no doubt prejudicial to the case of the defendant, one of his own witnesses; but he was not his witness by choice; the defendant was compelled to produce him, as one of the attesting witnesses to the will to prove its due execution.

*Sir C. Cresswell*: I think not.

Dr. Deane: By the practice of the Prerogative Court, both the attesting witnesses to a will were required to be produced by the party seeking to prove its execution.

*Sir C. Cresswell.* The question does not arise here, but **[149]** whenever it does arise, I shall most unhesitatingly rule that it is not necessary to call both the attesting witnesses to prove the execution of a will. This is purely a question of evidence, and by 20 & 21 Vict. c. 77, s. 33, the rules of evidence observed in the Courts of Common Law are to be observed in this Court in the trial of all questions of fact. It must be governed, therefore, not by the practice of the Prerogative Court, but by the rules of evidence observed in the Courts of Common Law. In those Courts the execution of a will may be proved by calling one only of the attesting witnesses. In *Wright* v. *Doe dem. Tatham*, 1 Ad. & Ellis, 3, which was an action of ejectment brought by the

heir-at-law against a devisee claiming under a will made prior to the passing of the Wills Act, the Exchequer Chamber held that to prove the execution of a will it was sufficient to call one only of the subscribing witnesses, if he could speak to the observance of all that was required by the statute. The authority of that case has never been disputed.

PALMER *v.* MACLEAR AND M'GRATH. June 8, 1858.—Proof of Will in Solemn Form.—Several Defendants.—Counsel.—Evidence.—Practice.—Where an executor propounds a will in solemn form, and there are several defendants whose case on the pleadings is substantially the same, the Court will hear counsel only for one defendant.—The opposite counsel cannot inspect letters which a witness has with him during examination, though they relate to the cause, without putting them, if required by the other side, in evidence.

This was a case of proving in solemn form of law the will and codicil, dated respectively the 29th day of August, and the 13th day of October, 1854, of Sir George M'Grath of Plymouth, Knight, K.C.C., etc., M.D., deceased, promoted by Mary Elizabeth Palmer, one of the executors named in the said will, against Mary Maclear, the sister and sole next of kin of the deceased.

**[150]** The will and codicil were propounded in a declaration in the usual form.

To this Mrs. Maclear pleaded: 1st. That the deceased, at the respective dates of the execution of the will and codicil, was of unsound mind. 2nd. That their execution had been procured by undue influence.

After the issue had been delivered, the heir-at-law of the deceased (John C. M'Grath) was cited, and the declaration was delivered to him. He put in pleas similar in effect to those given in by Mrs. Maclear, and in addition thereto denied the due execution of both the will and codicil.

The Queen's Advocate (Sir J. D. Harding) and Mr. Skinner, Q.C., appeared for the plaintiff.

Mr. Collier, Q.C., and Dr. Phillimore, Q.C., for the next of kin.

Dr. Deane, Q.C., for the heir-at-law.

*Sir C. Cresswell*: There are two defendants in this case. A question arises, whether they are entitled to be heard separately by counsel.

Dr. Deane, Q.C., appeared for the heir-at-law. He went a little further in his pleadings than the next of kin. There was one point raised by the heir-at-law, which was not raised by the next of kin, viz. as to the due execution of the will and codicil.

*Sir C. Cresswell*: The case is substantially the same on the pleadings on behalf of both defendants. I shall hear counsel only for one defendant. That is the rule, which has been established by the Court of Queen's Bench.

W. L., the drawer of the will and codicil, was then examined on behalf of the plaintiff. This witness, during his examination, held in his hand notes which he had made from his day-book to refresh his memory, together with certain letters, which had reference to the subject of inquiry.

**[151]** Mr. Collier (to the witness): Are you referring to the notes which you say you made to refresh your memory, or to some other papers? Hand me those papers.

*Sir C. Cresswell*: You may look at the notes made by the witness to refresh his memory; but you cannot look at the letters without putting them in evidence, if required by the plaintiff.

HARVEY *v.* ALLEN. June 9 and 26, 1858.—Proving Will in Solemn Form.—Compromise.—Jurisdiction of Court of Probate.—In a cause of proving a will and codicil in solemn form, promoted by the executor against the legal personal representative of the sole next of kin of the deceased, a compromise having been agreed to, by which a verdict establishing the will and codicil was to be taken by consent for the plaintiff, and the defendant was to receive £2000 out of the estate—Held, that the Judge of the Court of Probate had jurisdiction to make the terms of the compromise a rule of Court, and to enforce it as such. Probate of the will and codicil was decreed to the plaintiff, as executor, the terms of the compromise being embodied in the decree.

This was a cause of granting letters of administration, with the will and codicil, bearing date respectively the 21st day of July, 1855, annexed, of Mary Carter, late of Brook Terrace, Old Kent Road, in the county of Surrey, deceased, promoted by

William Godfrey Harvey, a legatee therein named (the executor appointed in the said will having renounced probate of the said will and codicil), against Ann Allen, wife of John Lucas Allen, the legal personal representative of the sole next of kin of the deceased.

During the hearing of the cause before Sir C. Cresswell and a special jury, a compromise was agreed to by the counsel on both sides, and the following memorandum, containing the terms of the compromise, was subsequently signed by the plaintiff and the defendant: "Amount of property, £7700. Verdict for the plaintiff establishing the will. Plaintiff **[152]** undertaking to pay the defendant upon receipt of the money the sum of £2000. Each party to pay their own costs."

Dr. Deane, Q.C., moved the Court to decree letters of administration, with the said will and codicil annexed, to the plaintiff, in conformity with the compromise agreed to.

There had been some difficulty in carrying out the compromise. The plaintiff (Mr. Harvey) would not take under the will a sufficient sum to pay the defendant's £2000. This difficulty had been got over; for since the jury were discharged two of the plaintiff's children, who were of age and were legatees under the will, had become parties to the compromise, and had agreed to make their respective shares chargeable in equal proportions for the above sum.

Mr. Collier, Q.C., contra: Both parties are anxious to carry out the compromise. He objected, however, to the grant of administration passing to Harvey, by which he would be put in possession of the whole of the deceased's property, and the defendant would have no security for ever getting the £2000 agreed to be paid to her. If the plaintiff declined to give her security, the Court has power to grant the defendant administration under sect. 73 of the Probate Act; or administration pendente lite under sect. 70. [By the Court: I don't see how I can duly exercise such power in the present case.] Until judgment is signed, the lis will be pendens. [Sir C. Cresswell: I don't see how that can be; but I don't say that I am deprived of all authority in the matter.] The jury were discharged, subject to this: that if the parties did not agree, another jury would be summoned to try the case.

*Sir C. Cresswell.* There is another ground upon which I might interfere. By the 37th section of the Probate Act, when I try questions before a jury in this Court, I have the same powers, jurisdiction, and authority as belong to a judge sitting at Nisi Prius. Let the terms be embodied in the order I make. The Court can then enforce them as an order, or rather as a rule of Court, just as an order is made by a judge **[153]** at Nisi Prius, which the Court will enforce. The better way would be, that I should decree a grant of administration, with the will and codicil annexed, to the plaintiff; that the decree should recite what has been done, viz. that by consent the jury were discharged; that by consent administration, with the will and codicil annexed, had been decreed; that the plaintiff is to pay the £2000 to the defendant out of the first moneys which he receives under the will. Each party to pay their own costs.

Decree accordingly.

HARRIS *v.* BERRALL. July 22 and 24, 1858.—Will.—Revocation.—Insanity.—Onus Probandi.—A., having duly executed her will, subsequently became insane. Shortly before her death, it was discovered that the will had been mutilated by her; but it was proved to have been in her custody for a short time subsequent as well as prior to her insanity. Held, that there being satisfactory evidence of the due execution of the will, the onus of shewing that it had been mutilated by the testatrix when of sound mind was upon the party alleging its revocation.

[S. C. 7 W. R. 19. Followed, *Sprigge* v. *Sprigge*, 1868, L. R. 1 P. & D. 609; *Benson* v. *Benson*, 1870, L. R. 2 P. & D. 176. Distinguished, *Allan* v. *Morrison*, [1900] A. C. 610.]

This was a question as to the revocation of the will of Eliza Berrall, who died in February, 1857. The plaintiff, Mrs. Harris, had applied for a grant of administration to the effects of the deceased, alleging that she had died intestate, and that she was her sole next of kin, and the only person entitled in distribution to her personal estate.

The defendant entered a caveat against the grant, and propounded for probate a paper in the handwriting of the deceased, purporting to be her last will, and which had been found amongst her papers in January, 1857 (the month before her death),

with the bottom of the third page, where the deceased and the attesting witnesses were supposed to have signed their names, cut off.

The alleged will was dated the 8th of April, 1851. The deceased, as admitted by the plaintiff, became of unsound **[154]** mind on the 11th of September, 1852, and so continued up to the time of her death, in February, 1857.

In July, 1853, she was found, by a commission of inquiry, of unsound mind from the 11th of September, 1852. Mrs. Harris, the plaintiff, was then appointed committee of her person, and thereupon took into her custody the box in which the will was subsequently found.

It appeared, by the evidence, that from the 11th September, 1852 (the date of the deceased's insanity), up to July, 1853, or at anyrate during some part of that interval, the will was in the deceased's custody, but that from July, 1853, up to the date of her death she had no access to it.

Dr. Deane, Q.C., Dr. Tristram, and Mr. Quain appeared for the plaintiff.

The Queen's Advocate (Sir J. D. Harding), Dr. Spinks, and Mr. Ayrton, for the defendant.

Dr. Deane, for the plaintiff, submitted that the onus of shewing that the deceased had torn the will during the time she was insane, and had access to it (viz. between the 11th of September, 1852, and July, 1853) lay upon the defendant; that it did not appear, upon the balance of the evidence, that it had been mutilated during that interval, and that, if that were so, the presumption would be that the will was torn prior to the commencement of her insanity.

*Sir C. Cresswell* on this part of this case observed: I am satisfied that this will was duly executed. Upon the evidence I think it remained in a perfect state until the deceased became insane, and that it was torn by her during her insanity.

But if there had been no evidence to fix one time or another for its mutilation, I still think that it would have been entitled to probate. By 1 Vict. c. 26, every will is required to be executed as therein prescribed. If it is once proved that a will has been duly executed, I hold that it is entitled to probate, unless it is also shewn that it has been revoked by one of the several modes pointed out by that statute; and **[155]** I am of opinion that the burden of shewing that it has been so revoked lies upon the party who sets up the revocation.

One of the modes of revocation pointed out by the statute is tearing with an intention to revoke; but an insane person cannot be said to have any intention. The will in this case was in the custody of the deceased at the time she was of unsound as well as of sound mind. Shortly before her death it was discovered to have been torn by her. The burden of shewing that it was not done after she became insane, but at a time when she was of sound mind, is cast upon the plaintiff, who sets up the revocation of the instrument.

Probate granted.

ELMS *v.* ELMS. July 21 and 26, 1858.—Will.—Revocation.—Intention.—Act to carry into effect.—A., having previously expressed his intention to make a new will, and leave all his property to the principal legatee in the existing will, sent for the will and tore it almost in two, but was stopped by the exclamations of persons in the room as to the danger of destroying the existing will before making another. A. let the will fall on the ground, but in a few minutes picked it up and refused to burn it; it was replaced in his drawers upstairs, and a few days afterwards, being about to sail for India, he burnt certain papers, but not the will, to which his attention was at that time drawn; he afterwards shewed a paper, which he called his will, to the principal legatee. He sailed for India, still expressing his intention of making a new will; after his death the torn will was found in the house in Wales in which he had been staying.—Held, that in order to revoke a will by tearing, it is not necessary to rend the will into more pieces than it originally consisted of; but that it is sufficient if the testator intended the tearing actually done of itself to work a revocation, without any further act;—That there being satisfactory evidence that the paper had been duly executed, and no evidence to prove that, by partial tearing, the testator had carried into effect the original intention he had had to revoke the instrument, it was entitled to probate.

[S. C. 27 L. J. P. 96.]

**[156]** This was a question as to the intention and fact of revocation of the will of Lieut. Jacob.

The case was argued by the Queen's Advocate (Sir J. D. Harding), Dr. Spinks, and Mr. J. D. Welsby for the legatee.

Dr. Phillimore, Q.C., and Mr. Coleridge for the next of kin.

The facts are fully and minutely stated in the evidence of witnesses, as recited in the judgment. As regards the instrument in question being found by Cox in his drawer after Lieut. Jacob's death, it was suggested that the testator, being a man of intemperate habits, had left the will in the pocket of Cox's mackintosh, which he wore when he took leave of Miss Elms, and shewed her what he called his will; and that Cox, after Lieut. Jacob had left London for Southampton and India, carried it back with him in the mackintosh to Wales without being aware that it was there.

Cur. adv. vult.

July 26.—*Sir C. Cresswell.* This was a question as to whether Lieut. Jacob, late of the Madras Native Infantry, left a will or died intestate. It was admitted on both sides, and on the record, that the deceased in 1856 made a will, which was duly executed as required by 1 Vict. c. 26. But it was alleged by the defendants that he afterwards revoked that will, and that it never was revived. At the hearing of the case there was some discussion as to the party upon whom the onus probandi was cast. On that subject the remarks of Lord Brougham in *Waring* v. *Waring*, 6 Moore, P. C. 355, are well worthy of attention: he there says: "The burden of proof often shifts about in the progress of the cause accordingly as the successive steps of the inquiry, by leading to inferences decisive until rebutted, cast on one or the other party the necessity of protecting himself from the consequences of such inferences; nor can anything be less profitable as a guide to our ultimate judgment than the assertion, which all parties are so ready to put forward in their behalf severally, that in the question under consideration the proof is on the opposite side."

Adopting that view of the subject, I will proceed to consider the whole of the evidence in this case, and endeavour to **[157]** ascertain whether the will, which Lieutenant Jacob made in 1856, was afterwards revoked by him or not. The will, as brought into the registry, was written on five sheets of paper, which were attached together by tape at the upper left-hand corner; it appeared to have been folded up in the ordinary form of a brief; it appeared also to have been half-opened, so that the sheets, when attached, were doubled only with the top and bottom edges brought together, and that all the sheets had been torn at the same time from the edge very nearly through, so that only a small portion of each sheet, where it was doubled, held the two parts together; but no one of them was entirely torn through, so as to divide it into two portions. The manner in which it was reduced to that state was not left to conjecture or presumption. Positive evidence was given. It was torn by the deceased, not by accident or mistake, but by design, and the question is, whether he intended to revoke it by so tearing it. The statute 1 Vict. c. 26, s. 20, amongst other modes of revoking wills, mentions "tearing by the testator with the intention of revoking the same." Now, by tearing, I do not understand the Legislature to have meant that the testator must rend the will into more pieces than it originally consisted of; and therefore, although no one sheet of paper was completely divided, I think the tearing might be sufficient to revoke, if done with that intention. But, in order to make it effectual, he must have intended to revoke by so tearing it; by which I mean, that he must have intended that which he actually did of itself to have that effect without more. In one sense it may be said that he tore the will with the intention to revoke it, for no doubt he had that intention when he began to tear, and as soon as he had torn it a quarter of an inch he had torn it with intention to revoke; but he did not intend to revoke it by that tearing only, he intended to tear further.

And this brings me to the same question that was considered in *Doe* v. *Perks*, 2 B. & A. 489. When he ceased tearing, had he done all that he contemplated doing for the purpose of revoking? If he had, the revocation was complete, and he could not recall his act; he could only recall the will by some of the means prescribed by the 22nd section of the Wills Act, which he certainly did not adopt. But in order to decide **[158]** that this will, which was duly made, was afterwards revoked, I ought to be satisfied that the testator did all that the statute makes necessary to work a revocation, viz. that he tore it, meaning by that act without more to revoke it. And here I must refer to some of the evidence given in the cause.

According to Mr. Cox (who was acquainted with the deceased at Caernarvon, and in whose house the deceased was from time to time staying), it appears they were in London together in October, 1856, when the deceased told Cox that he had ordered his solicitor, Mr. Few, to obtain the will from Major Watson, in whose custody it was. Subsequently, in the same month, the deceased received a letter from the post office at Caernarvon, containing the will. He was then staying at Cox's house. He desired Cox to read the will, and to take care of it for him; Cox accordingly put it in a drawer, and he says it was then in a perfect state. "In May, 1857," Cox says, "we arranged to come up to London together; he told me to put the will in his portmanteau; he told me he was going to make a new will, and that he wished to leave all his money to Miss Elms, and that he should instruct Mr. Few to make one." It appears, however, that circumstances prevented the new will from being then made, and Cox brought back the existing will to Caernarvon, where they returned on the following day. Cox continued: "In June, 1857, the deceased received orders to go to India. I again came up to London with him. Nothing was then said about the will. We stayed two or three days in London, and then returned to Caernarvon. The deceased said he came up to make some arrangements about going out to India. I remember the 14th of August. The deceased had been drinking almost a pint of brandy that morning. He was on the sofa. He asked me to go up and fetch his will out of his portmanteau. I did so. As soon as he had it in his hand he ripped it, tore it; as soon as I saw what he was doing, I said, 'Stop, don't do that'—(he did stop); 'if you do so, Miss Elms won't take a penny of your money unless you make another will; and as it is, she will get the greatest part of it.' He said, 'Oh, I shall make another will when we are up in London; I wish her to have it all.' I said, 'If you wish to destroy the will, you had better burn it.' 'No,' he **[159]** said, 'you burn it.' I said, 'No, I could not do it.' I then asked if he wished to burn the will. He said, 'No, I shan't.' I then said, 'I'll take it upstairs.' I did so; he knew that I took it upstairs." In answer to some questions which I put, the same witness said, "When he tore it, he either gave it me, or I picked it up off the floor; I can't speak positively; I thought he picked it up; he was on the sofa; he did let it fall out of his hand on the floor; the will was in his hand when I said, 'Stop, don't do that'; it was on the instant. I said it would be time enough to destroy that when he had made another; it was all done at one tear." He further said: "Mrs. Cowlishaw was in the room at the time; the deceased left my house on the 16th of August—on a Sunday; I went with him to London; we got there on the 17th, and again stayed at the Cross Keys; on the 18th we went to Horsham; the deceased said he went to Horsham to bid Miss Elms good-bye; he saw her; he borrowed my mackintosh; I returned to London with him that day; he told me he had seen her; he seemed very much distressed; he never went out of the Cross Keys till Wednesday evening, when he started for Southampton; I don't know of his having the will with him when he went to Horsham. In September, 1857, I found the will in my drawer; I received a letter from Mr. Few to ask if the deceased had left any papers behind with me; he had burned all the other papers he wished to destroy the day before we last started for London; when we came to the will I said, 'Here's the will, Jacob'; he said, 'I shall make another will when I go to London'; I put the will in the drawer in his room. When Mr. Few wrote to me I went to find the will, and it was in the drawer in our room; I forwarded it to Mr. Few; I do not know how it came in the drawer where I found it." On cross-examination the witness gave the same account. He added: "When I came back from Horsham with Lieutenant Jacob, I reminded him that he should make another will; he said, 'I shall, but I have not time now; if I am taken ill on board ship I shall be sure to make my will; I should speak to the captain.'" Mrs. Cowlishaw, a married sister of Cox, who was staying in his house on the 14th of August, **[160]** says: "I remember being in the kitchen in company with Lieutenant Jacob and Mr. Cox; my husband was in an adjoining parlour; Lieutenant Jacob said to Cox, 'Cox, fetch my will down'; Cox brought it and gave it to Mr. Jacob; Jacob was lying on the sofa at full length; he took the will and appeared as if he would tear it then; he did begin to tear it, and I said, 'Stop'; he tore it a little more; I said, 'Pray, do stay.' Cox also said, 'Don't mutilate it like that, Mr. Jacob; Miss Elms won't get a penny of your money'; he was going to tear it still further, when I said, 'Pray, don't,' and he ceased; he let it fall on the floor; he was still at full length on the sofa; in a few minutes he rose, picked it up, and

said, 'I will take it to Cowlishaw, then, to read; he will like to read it.' He then went into the parlour, and took the will with him." Mr. James Cowlishaw, the husband of the last witness, said: "I was staying at Cox's in August, 1857. I knew Mr. Jacob there; he frequently spoke to me about his will; he said he intended to destroy that will and make another, and leave the whole of his property to Miss Elms; that he intended Major Watson's daughter not to have the £1000 he had left her. He said he should not leave his brother and sisters anything. On the 14th of August I was sitting in the parlour; reading; my wife and Mr. Cox were in the kitchen. Mr. Jacob came into the parlour, followed by Cox; he said to me, 'Cowlishaw, there is my will; read it.' I did so far that I could ascertain to whom he had left his money; he had left a legacy of £1000 to the little girl, and the whole of the rest to Miss Elms. I handed it back to him; he said, 'I mean to destroy this, and make another in favour of Miss Elms.' Myself and Mr. Cox said, 'If you leave it in this mutilated state, there will be a bother about it.' Mr. Cox suggested to put it in the fire in the back kitchen. Jacob asked me to do so. I said, 'No, it is a serious matter: I can't interfere.' Lieutenant Jacob refused to burn it, and Cox said, 'Well, Jacob, if you won't destroy it, I'll take it upstairs again.' He did so. Jacob had been drinking that morning brandy; he was not drunk, he knew what he was doing." Miss Elms deposed: "I remember his coming down on the 18th of August before he went to **[161]** India. I saw him; he said he was going to sail; he produced a paper from the pocket of the coat he had on; he said it was his will.' He partly opened it, and showed part of the writing; I think I saw my name, but am not sure I did not see his signature; he said it was a will made in my favour, and wished me to keep it. I refused. I did not observe whether it was torn; he opened it very partially." (On the will being shown to the witness), "It is the same colour as the paper I saw; it was doubled up; I thought it was a journal when he produced it." The act of dropping or casting it on the floor was no doubt relied on in consequence of the dictum of Best, J., in *Doe* v. *Perks*; but the learned judge must not be supposed to have ascribed to the act of throwing the torn will on the floor any other operation than that of shewing that he had done all that he intended to do. But there his hand had been arrested, and if I am to place implicit reliance on Mrs. Cowlishaw's evidence in this case, the testator was about to tear further, when she stopped him; the appearance of the paper confirms that. He had torn the will so nearly through, that one cannot but conjecture that he meant to effect a severance of the parts; but that remained unaccomplished, and I find nothing in the case upon which I can assume any other state of facts than that which Mrs. Cowlishaw describes. Her memory may be imperfect; but assuming it to be so, what other evidence have I before me? By what testimony has any other state of things been established? The brother's evidence is not quite so full, but it leads to the same conclusion.

I do not place reliance on what passed afterwards—viz. that when he burnt other papers, he preserved the will, and that he showed it to Miss Elms as his will. If it had appeared that he knew that the will once torn with intention to revoke was thereby revoked, the preservation and subsequent exhibition of it to Miss Elms would have tended to shew that he knew it had not been revoked, or in other words, that his hand had been arrested in time, and that he had never completely revoked; but he very probably supposed that, as long as no parts of the will had been destroyed, it would still be valid, although torn with intention to revoke, and therefore the preservation of it is too equivocal an act to be relied on **[162]** in forming my judgment upon this very nice question. But, putting that out of consideration, upon the whole of this evidence, dealing with it, as if I were a juryman, I say that I am satisfied, that the instrument brought into the registry was duly executed by the deceased Lieutenant Jacob as his last will and testament, and I am not satisfied that it was revoked by him. I must, therefore, pronounce for the will, and grant probate of it.

**[163]** (Before the *Judge Ordinary.*)

TOMKINS *v.* TOMKINS. April 17, 1858.—Alimony pendente lite.—Suit for Judicial Separation.—Appearance given by Husband.—No Appearance by Husband.—Practice.—Where the husband has appeared to the wife's citation in a suit for judicial separation, the Court will entertain an application for alimony pendente lite. Secus, where no appearance has been given by the husband.

This was a suit for a judicial separation by reason of cruelty, promoted by Mrs. Tomkins against her husband, who had appeared in the suit. Mrs. Tomkins had given in a petition for alimony, and Mr. Tomkins's answers on oath had been taken. (See Rules 25 and 26, Form 12.)

Dr. Swabey, for Mrs. Tomkins, moved the Court to allot alimony pendente lite.

Dr. Spinks for the husband.

*The Judge Ordinary.* The difficulty I had with regard to a similar application made lately in the case of *Deane* v. *Deane*, was, that the husband had not appeared, and I am satisfied that by the 25th rule it was intended, that where the **[164]** husband has not appeared, the Court should be precluded from entertaining an application for alimony pendente lite.

It was considered, that where the husband does not appear, there need be no delay in carrying through the wife's suit, and consequently that there would be no necessity for alimony, pendente lite. Here, however, the husband having appeared, I have no difficulty in granting the application. Taking his net income at £300, I allot alimony pendente lite at the rate of £60 per annum.

(Before the *Judge Ordinary.*)

LEIGH *v.* LEIGH. April 20, 1858.—Suit for divorce à mensâ et thoro.—Decree for Costs in the Chancery Court of York.—Transference of Jurisdiction.—20 & 21 Vict. c. 85, s. 3.—Where a decree for costs, made in 1854 against the husband, was still outstanding in the Chancery Court of York, the Judge Ordinary, on motion, directed the papers to be transferred to the registry, and the cause to be entered on the books of the Court, so as to enable it to enforce payment.

This was originally a suit instituted in the Chancery Court of York by Betsy Leigh, wife of John Leigh, against her husband for divorce by reason of adultery. Sentence was given in her favour in July, 1854, and the defendant was condemned in costs. In November, 1855, the proctor for the wife alleged his costs to be taxed at £451, 9s. 10d., and prayed a monition for payment; and in January, 1856, the defendant not appearing, the certificate was continued, and the costs not having been paid, the same certificate was continued up to the time of the transfer of the matrimonial jurisdiction to this Court.

Dr. Phillimore, Q.C., moved the Court "to allow the cause to be entered on the books of the Court, in order that it might be continued against the defendant." The wife did **[165]** not wish to throw her husband into prison, but still it was desirable not to lose the hold on him which the decree for costs gave. He submitted that, under the 3rd section of the Divorce Act, the Court had full power to grant this motion.

*The Judge Ordinary.* If the papers are transferred to this registry, the cause may be entered on the books of the Court.

(Before the *Judge Ordinary.*)

TOURLE *v.* TOURLE AND ANOTHER. April 22, 1858.—Petition for Dissolution.—Answer.—Affidavit in Verification.—Rule 15.—Each plea should be an answer, per se, to the whole of the matter to which it is pleaded. All matter in an answer beyond a simple denial must be verified by affidavit, which however need not be in absolute terms. The affidavit of the petitioner may speak "to the best of his knowledge and belief," as well as to matters absolutely within his personal cognizance.

[S. C. 27 L. J. P. 52; 6 W. R. 544.]

This was a question of practice arising in a suit for dissolution of marriage at the petition of the husband, by reason of the wife's adultery.

The petition charged the adultery on the 1st of September, 1856, and on other days between that day and the 19th of February, 1858.

The respondent answered:—1. Denying the adultery as charged. 2. That Mr. Tourle deserted her without any reasonable cause on the 4th of September, 1857. 3. Condonation. 4. Connivance.

The respondent's affidavit filed with this answer, according to rule 15, verified only the second plea.

The petitioner replied to this answer, objecting to the second plea as irrelevant,

and bad in law; and to the third and fourth pleas as not verified by affidavit in conformity with rule 15.

The respondent denied this replication.

**[166]** Mr. Kingdon, in support of the replication: The objection to the third and fourth pleas is, that, though they introduce new matter beyond a simple denial, they are not verified by the respondent's affidavit, as required by rule 15. The second plea is bad in law, as it professes to be an answer to the whole of the charges laid in the petition, whereas it is an answer only to part. The adultery charged extends from September, 1856, to February, 1858; the plea is, desertion since September, 1857, which may be a very proper answer to the adultery charged from that time till February, 1858, but leaves quite untouched that period of the charge which extends from September, 1856, to the date of desertion.

Dr. Phillimore, Q.C. (Dr. Spinks with him), contrà: It is true the desertion, as laid, does not extend to the whole period during which adultery is charged, but that part of the plea as to condonation must be taken as referring to the dates given in the petition; and as the evidence may turn out, the condonation may or may not cover the whole case. As to the defect imputed to the respondent's affidavit, that it fails to verify the third and fourth pleas, it does not seem reasonable to expect a woman to swear to condonation or connivance on the part of her husband, as she would thereby, by implication, be charging herself with adultery.

*The Judge Ordinary.* According to the system wished to be introduced, each plea should be perfect in itself, and per se an answer to the matter to which it is pleaded. If requisite, each plea may be limited as to time and other particulars. In this case the proper form of the second plea would be, that, as to the adultery charged in the petition since a certain date, the petitioner had deserted his wife without reasonable cause. As to the affidavit in support of the third and fourth pleas, I cannot see that the respondent would be worse off by making the affidavit as to condonation, than by proving the plea. But the affidavit need not be in absolute terms. She may very well swear that the adultery, if any, was condoned. I am very far from desiring to press technical points, but it is a very wholesome rule that one plea shall not be construed by another. The second plea **[167]** must be amended and the third and fourth verified by affidavit.

Mr. Kingdon asked leave to file an affidavit supplemental to the one already filed by the petitioner verifying the petition. As originally filed, it only spoke to the marriage and cohabitation, which were thought to be the only matters strictly within the petitioner's cognizance; but it was now understood, that it was usual to verify the statements to the best of petitioner's knowledge and belief.

The Court assented to this.

(Before the *Judge Ordinary.*)

FORSTER *v.* FORSTER AND EVANS. April 28, 1858.—Affidavit in Verification of Petition.—Sect. 41 of Divorce Act, and 2nd & 3rd Rules.—Practice.—The affidavit required to be filed in verification of a petition should not go into a detailed statement of the history of the parties. The Court may have no power to order an affidavit to be removed from the file of the Court, but on a question of taxation of costs, the costs of such an affidavit would not be allowed against the other party.

This was a suit for judicial separation, promoted by Mr. Forster against his wife by reason of adultery and cruelty. The petition charged the adultery to have been committed between the 6th and 15th days of September, 1851, and during the years 1855-56-57, and the months of January, February, and March, in the present year. The cruelty was charged from the month of September, 1856, to the 13th of February in the present year. The petitioner's affidavit, filed in verification of this petition, entered into a detailed statement of the acquaintance and intimacy between the parties, and of his own conduct, and of that of his wife's, extending over a period of several years.

**[168]** Dr. Swabey, on behalf of Mrs. Forster, objected to such an affidavit being allowed to remain on the file of the Court. The 41st section of the Divorce Act, and the second and third of the rules, required every petition to be accompanied by an affidavit of the petitioner's verifying the facts stated in the petition, of which he or she has personal cognizance; but he submitted that the present affidavit, extending

over twenty-six pages, and going into many details of matters of which no mention was made in the petition, was not such an affidavit as the above section and rules intended, and prayed the Court to direct large parts of it to be taken off the file of the Court.

*The Judge Ordinary.* I certainly think the affidavit goes into a detailed statement of the history of these parties, which was never intended by the rule you have referred to. But what harm does it do you? I don't know that I can order an affidavit to be taken off the file, but if it comes to a question of costs, such an affidavit would certainly not be allowed to be taxed as against your party.

(Before the *Judge Ordinary* and a Common Jury.)

TOMKINS *v.* TOMKINS. May 4 and 6, 1858.—Husband.—Wife.—Cruelty.—Judicial Separation.—Function of Jury.—When a question of cruelty comes before a jury as a ground for judicial separation, the jury are to determine, not only whether the acts complained of were done, but whether they constitute legal cruelty.—Bodily injury, reasonable apprehension thereof, or injury to health are the general tests of legal cruelty.

[Referred to, *Russell* v. *Russell*, [1897] A. C. 405.]

This was a petition for a judicial separation, preferred by Louisa Tomkins against her husband by reason of his cruelty.

Her petition charged acts of personal violence and blows, **[169]** constituting cruelty, from the year 1851 down to the 13th of January, 1858, when the petitioner left her husband, and shortly after instituted the present suit.

The answer of the husband admitted the marriage, cohabitation, and birth of children, but denied the truth of all the other averments in the petition, and prayed the Court to decree Louisa Tomkins to return to cohabitation, and treat the respondent with conjugal affection.

Mr. O'Malley, Q.C., and Dr. Swabey, for the petitioner.

Serjeant Shee, Dr. Spinks, and Mr. Russell, for the respondent.

Mr. O'Malley requested the Court to state what issue the jury would have to try. He apprehended that in a case of this nature it would be for them to find whether such and such blows had been struck or acts done, and for the Court to determine whether such blows or acts constituted legal cruelty.

[By the Court: I rather apprehend, that in such a case as this I shall be bound to direct the jury what acts constitute legal cruelty, and they will have to find whether the acts done are cruelty or not. There may be, and are cases under the Divorce Act, where an issue may be directed to a particular matter of fact; but here the fact or facts are the whole matter. It seems to me analogous to an issue directed to be tried by a Court of Equity; such a Court, dealing with the rights of different parties under a will, sends an issue devisavit vel non; the jury find not merely whether the testator signed his name on a sheet of paper, but whether the whole transaction is the legal expression of the intention of a competent testator—whether it is the testator's will or not. So here, I imagine, the issue is cruelty or no cruelty; and I must inform the jury what cruelty is.]

The case of the petitioner was supported by her own evidence, by that of servants who had lived with the parties at various times, and by that of Mr. Barry, a farmer and **[170]** grower of potatoes, who had employed Mr. Tomkins for many years as his salesman in Farringdon Market, and had on several occasions remonstrated with Mr. Tomkins on his ill-treatment of his wife. Mr. Tomkins was examined for the defence, and admitted in fact blows and ill-treatment, provoked frequently, it was said, by Mrs. Tomkins's neglect of business and irritating manner and remarks, and insufficient, as was contended, to constitute legal cruelty.

*The Judge Ordinary*, in summing up to the jury, remarked: This is the first time that a jury have been called upon to decide questions of this kind, which the Legislature have now thought fit to submit to them. Hitherto the judges, who have had the sole determination of such questions, used to take the papers home and read them there, and if the first perusal unavoidably excited feelings of indignation on one side or the other, they had ample time for a calm re-consideration, and for forming their decision on a strict balance of the evidence. I am one of those who, after long experience, am convinced that questions of fact are best decided by a jury; but in questions of this particular nature, as a jury are obliged to decide at once, and have no such opportunity

for re-consideration, it is incumbent on them to be on their guard, and not to allow themselves to be carried away by feelings of partiality, which may have been excited. I point this out in order to claim your calm and cautious deliberation in dealing, as you will have to do, when deliberating on your verdict, with a mixed question of fact and law. It will also be my duty to endeavour to point out what the law on such questions is, as now for the first time juries have to deal with these matters. Lord Stowell's judgment in *Evans* v. *Evans* (1 Consist. R.) is the great authority on questions of legal cruelty. That very eminent judge, whom I may in some sense consider as a predecessor of my own, remarks on the mischiefs which would ensue from giving the sanction of law to the separation of man and wife too easily, or on the mere disinclination of one or both of the parties to live together. "When people," he continues, "understand that they must live together, except for a very few reasons known to the law, they learn to soften by mutual accommo-**[171]**-dation that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes." Lord Stowell refused to give any strict definition of cruelty. The causes which warrant separation "must be grave and weighty, and such as shew an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged, for the duties of self-preservation must take place before the duties of marriage. . . . What merely wounds the mental feelings is in few cases to be admitted, where it is not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offences in the marriage state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties, for it may exist on one side as well as on the other, the suffering party must bear in some degree the consequences of an injudicious connection, must subdue by decent resistance or by prudent conciliation; and if this cannot be done, both must suffer in silence. . . . In the older cases of this sort, which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the Court has proceeded to a separation. The Court has never been driven off this ground; it has always been jealous of the inconvenience of departing from it, and I have heard no one case cited in which the Court has granted a divorce without proof given of a reasonable apprehension of bodily hurt. I say an apprehension, because assuredly the Court is not to wait till the hurt is actually done; but the apprehension must be reasonable—it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind." Danger of life, limb, or health has continued in substance the rule upon which the Courts have acted; the phrase has sometimes been **[172]** varied. Sir John Nicholl has used the expression, "injury to person or to health"; which I am inclined to take in conjunction with Lord Stowell's expression, for there might be a great deal of suffering and brutal usage without coming strictly within the terms of the latter. There must however be bodily hurt—not trifling or temporary pain; or a reasonable apprehension of bodily hurt. It will be for you, on a consideration of the evidence you have heard, to determine whether the husband has so treated his wife and so manifested his feelings towards her as to have inflicted bodily injury, to have caused reasonable apprehension of bodily suffering, or to have injured health. It is for her to make out the affirmative of what she alleges.

The jury, after a short deliberation, returned a verdict for the plaintiff, and on the 6th of May the Judge Ordinary pronounced a decree of judicial separation, with costs, against the husband.

Counsel for the wife then moved for leave to examine witnesses on her petition for alimony, under Rules 27, 29, before permanent alimony was decreed, as she considered her husband's income was understated in his sworn answers.

*The Judge Ordinary*, considering that under the practice of the Ecclesiastical Courts an application for increase of permanent alimony on proof of an increase in the husband's income would have been entertained, granted the motion; and permanent alimony was ultimately decreed, after hearing counsel on the affidavits produced by both parties.

In the case of *Deane* v. *Deane*, above referred to, the Judge Ordinary, after decreeing a judicial separation, made an order for permanent alimony. See p. 93.

[173] (Before the Full Court—*Lord Campbell, C.J., Pollock, C.B.*, and the *Judge Ordinary.*)

EVANS *v.* EVANS AND ROBINSON. May 10, 1858.—Previous Suit in Ecclesiastical Court dismissed.—Jurisdiction of Divorce Court.—A. brought a suit against his wife by reason of adultery, in the Arches Court; at the hearing, the late learned Dean of the Arches pronounced that the husband had failed to prove the charge made, and dismissed the wife.—Held, that the previous sentence was no bar to a petition for dissolution of marriage brought by the same husband against the same wife on the same alleged facts of adultery.

[S. C. 27 L. J. P. 57.]

This was a suit for dissolution of marriage, brought by Mr. Evans against his wife, by reason of her adultery. The question now raised was, whether Mr. Evans was estopped from bringing such a suit in this Court by reason of his having instituted a suit for divorce à mensâ et thoro against his wife on the same charges of adultery in the Court of Arches, which resulted, in the summer of 1857, in the late learned Dean of the Arches declaring that Mr. Evans had failed in proof of his libel, and dismissing Mrs. Evans from further observance of justice therein. From that sentence an appeal to the Judicial Committee of Privy Council had been instituted.

The Queen's Advocate (Sir J. D. Harding) and Dr. Deane, Q.C., for Mrs. Evans: The husband is estopped from proceeding in this Court; for, first, the same cause between the same parties was heard and adjudicated upon in the only Court of competent jurisdiction at the time existing; and secondly, an appeal from that sentence is now pending before the Judicial Committee.

*Lord Campbell, C.J.* We are clearly of opinion that there is no estoppel; the former suit in the Ecclesiastical Court was for a different object, namely, for a divorce à mensâ et thoro; here the petition is for dissolution of marriage, and before a tribunal armed with much larger powers than **[174]** the Ecclesiastical Courts had, and following the same rules of evidence as obtain at common law. In the same way the appeal to the Judicial Committee cannot have the effect of depriving the husband of the different remedy which he is here seeking. Lis alibi pendens must be lis ad idem.

(Before the Full Court—*Lord Campbell, C.J., Pollock, C.B.*, and the *Judge Ordinary.*)

NORRIS *v.* NORRIS AND GYLES. May 10 and 11, 1858.—Dissolution of Marriage.—Co-Respondent.—Costs under 34th Section.—Marriage Settlements.—When the co-respondent has appeared to the citation, but has given in no answer to the petition, he cannot be heard even on the question of costs. The Court has no power to deal with a marriage-settlement, under sect. 45 of the Divorce Act.

[S. C. 27 L. J. P. 72; 6 W. R. 640. Explained *Mitchell* v. *Mitchell*, [1891] P. 208. See *Loraine* v. *Loraine*, [1912] P. 90.]

This was a suit for dissolution of marriage, brought by the husband, a solicitor at Tenbury, by reason of his wife's adultery with Mr. Gyles, who had been curate of the parish of Tenbury since 1854. The marriage took place in 1847. In February, 1857, Mrs. Norris was advised to go to the Isle of Wight for change of air. Her husband accompanied her there, and left her in the house of Lady Holmes, a relative of her own. On the 24th of March she stated that she had received a letter from her husband, desiring her to come directly to him. She accordingly left the Isle of Wight, but never returned there or rejoined her husband. In the end of the year she was traced to lodgings in Lambeth, where she and Mr. Gyles were living together, and passing by the name of Mr. and Mrs. Grant. There was also evidence of their having passed three nights in December at an hotel near Paternoster Row, under the same name.

The co-respondent had appeared to the citation, but had not put in any answer to the petition.

Dr. Twiss, Q.C., and Mr. W. H. Cooke, for the petitioner.

**[175]** In the course of the proceedings the marriage-settlement was put in and proved, with a view to any order the Court might make, under sect. 45 of the Divorce Act.

Mr. H. T. Cole, for the co-respondent, cross-examined the witnesses produced to prove the petition, and was proceeding to address the Court.

By the Court: For whom do you appear?

Mr. Cole: Mr. Gyles has been made co-respondent in this case and given an appearance, and I submit that I have now a right to be heard for him.

By the Court: An appearance is nothing, unless you have answered. You were summoned to appear in the Court, and you were at liberty to put in an answer; but not having done so, and not having denied the allegations of the petition, you cannot now be heard on the case. It may be unimportant in this actual case whether you are heard or not, but the principle is of consequence. It seems to us that a person has no right to be heard, not having put in his answer; it would be most inconvenient, if it were so. It might have the effect of changing the whole aspect of the case at the hearing, without giving any notice to the petitioner.

Mr. Cole submitted that the Court would at least hear him on the question of costs, to which his client might be liable under the 34th section of the Divorce Act.

*Lord Campbell, C.J.*: We have not yet arrived at that stage of the cause. In this case the petitioner is entitled to the remedy he prays, viz. a dissolution of his marriage. The marriage is proved and subsequent cohabitation; there is no ground for suspecting collusion, and the adultery is clearly proved. With regard to the marriage-settlement, it is proper that we should take time to consider and frame our judgment according to what is fit to be done.

Dr. Twiss applied for costs against the co-respondent under the 34th section.

**[176]** Mr. Cole requested to be heard on the question of costs.

*Lord Campbell, C.J.*: At present we have a very strong opinion that you have no right to be heard even as to costs. We think it quite a case in which costs should be given against the co-respondent, and that you have no right now to be heard; if we see any reason to alter this opinion, you shall have notice of it.

May 11.—*Lord Campbell, C.J.* We are confirmed in our opinion that the co-respondent, having put in no answer, cannot be heard on the question of costs. As regards marriage-settlements, we think we have no power to deal with them in any way.

(Before the Full Court—*Lord Campbell, C.J.*, *Pollock, C.B.*, and the *Judge Ordinary.*)

TOURLE *v.* TOURLE AND RENSHAW. May 12 and 13, 1858.—Dissolution of Marriage.—Form of Record.—20 & 21 Vict. c. 85, s. 38, Rules 22 and 23.—Issues for Jury—Costs.—Co-Respondent.—On a petition for dissolution of marriage, when a record is drawn up in order that the case may be tried before a jury, only the issues stated on the record are to be proved at the trial before jury by either party.—The co-respondent, if he has put in no answer to the petition, is no party to the issue to be tried by the jury.—The co-respondent having put in no answer, is not entitled to be heard on the question of costs.—The co-respondent condemned in the costs of the suit.

This was a suit for dissolution of marriage, brought by the husband against the wife by reason of her adultery. The marriage took place in December, 1850. The record as settled for the jury (see sect. 38 of Divorce Act and 22nd Rule) was as follows:—"In Her Majesty's Court for Divorce and Matrimonial Causes, the 5th day of May, 1858.—John Joseph **[177]** Tourle against Eleanor Ann Tourle and R. W. Renshaw.—John Joseph Tourle did, in his petition presented in this cause, allege that on the 1st day of September, 1856, and on other days between that day and the 19th day of February, 1858, the said Eleanor Ann Tourle at divers places committed adultery with R. W. Renshaw; and Eleanor Ann Tourle did in answer thereto deny that she committed adultery with R. W. Renshaw as set forth in the said petition; and as to the alleged acts of adultery, if any, on or since the 4th day of September, 1857, did affirm that the said John Joseph Tourle deserted her without any reasonable cause on the said day. And she did therein also affirm that the said John Joseph Tourle had condoned the adultery of her the said Eleanor Ann Tourle, and had connived at the same. Whereupon the said John Joseph Tourle joined issue upon the matters alleged in the answer of the said Eleanor Ann Tourle. Therefore let a jury come."

Mr. Slade, Q.C., Mr. Coleridge, and Mr. Kingdon, for the petitioner.

Dr. Phillimore, Q.C., Dr. Spinks, and Mr. C. Pollock, for the respondent.

Dr. Deane, Q.C., and Serjeant Ballantine, for the co-respondent.

Mr. Slade proposed to prove the marriage, but was interrupted by Lord Campbell, C.J., who said that nothing was to be proved but the issues raised.

*The Judge Ordinary*: This record differs from the record of the whole proceedings in the Court of Divorce. The Act of Parliament provides that when parties have put on record all the statements they think necessary, then, if it be determined to refer any questions of fact to a jury, a further record is to be drawn up by one of the registrars of the Court, containing the questions for the jury to decide.

*Lord Campbell, C.J.*: The proceeding before the Court and jury assumes the marriage.

**[178]** Ultimately a certified copy of the marriage register was put in to fix the date.

Dr. Deane, for the co-respondent, who had put in an appearance but no answer, presumed that after the opinion pronounced by the Court in *Norris* v. *Norris and Gyles*, they would not hear him.

*Lord Campbell*: Certainly not; the issues for the jury to try are adultery and the various pleas of the respondent.

*The Judge Ordinary*: Mr. Renshaw is no party to this issue.

The Jury found a verdict for the petitioner on all the issues, and the Court declared the marriage to be dissolved.

Mr. Slade, Q.C., prayed for costs against Mr. Renshaw, the co-respondent.

Dr. Deane, Q.C., for the co-respondent, wished to be heard against the application, but he had put in no plea.

By the Court: We have considered this question, and we think that the co-respondent, not having pleaded, cannot be heard. We condemn Mr. Renshaw in costs of the petition.

(Before the Full Court—*Lord Campbell, C.J.*, *Pollock, C.B.*, and the *Judge Ordinary.*)

PYNE *v.* PYNE. May 12 and 13, 1858.—Dissolution of Marriage.—Adultery and Desertion.—Evidence.—Wife not a competent Witness to prove Desertion.—14 & 15 Vict. c. 99, s. 4.—In a suit instituted by the wife for the dissolution of her marriage by reason of her husband's adultery coupled with wilful desertion, the wife is not a competent witness to prove the desertion.

[S. C. 27 L. J. P. 54; 6 W. R. 507.]

This was a suit promoted by Mrs. Pyne against her hus-**[179]**band, for the dissolution of their marriage by reason of his adultery coupled with wilful desertion.

No appearance had been entered on the part of the husband.

Dr. Phillimore, Q.C. (Mr. H. Lloyd with him), proposed to examine Mrs. Pyne to prove the desertion. It was not competent for her to give evidence as to the adultery, but he submitted that she was an admissible witness to prove the desertion.

*The Judge Ordinary*: If you look at the Act 14 & 15 Vict. c. 99, s. 4, you will see that it entirely excludes the wife from giving evidence in support of this petition. It expressly excludes parties "to any proceedings instituted in consequence of adultery" from being witnesses in such proceeding. This is a proceeding instituted in consequence of adultery. It could not have been instituted but for the husband's adultery.

(Before the *Judge Ordinary.*)

ROBINSON *v.* ROBINSON AND LANE. May 29, 1858.—Mode of Trial in Court for Divorce.—A. had obtained a sentence of divorce à mensâ et thoro from his wife, in the Consistory Court of London; he now brought a petition for dissolution of marriage.—On the consent of the respondent and co-respondent, the Judge directed the petition to be heard before the full Court on oral evidence without a jury.

In this case a petition had been filed for dissolution of marriage by Mr. Robinson against his wife by reason of her adultery. Answers had been filed both by the respondent and co-respondent.

Dr. Addams, Q.C., for the petitioner, said that Mr. Robinson had proceeded against his wife in the Consistory Court of London, and had obtained a sentence of divorce à mensâ et **[180]** thoro. He had now to take the directions of the Court as to the mode in which the present petition should be heard. Having been of counsel

for Mr. Robinson in the previous suit in the Consistory Court, he thought the cause was not of such a character as that the Court would be much assisted by a jury.

Dr. Phillimore, Q.C., for the respondent, and Dr. Deane, Q.C., for the co-respondent, stated that their respective clients did not demand a jury.

*The Judge Ordinary.* In that case it will be heard by oral evidence before the full Court.

(Before the *Judge Ordinary.*)

LING *v.* LING AND CROKER. June 2, 1858.—Evidence.—Petition for Dissolution of Marriage.—Previous Divorce and Crim. Con. Action.—Proof by Affidavit.—Practice.—A. had obtained a divorce à mensâ et thoro, and recovered damages in a crim. con. action.—The Judge Ordinary, on the consent of the other parties, directed A.'s petition for dissolution to be heard on affidavit.

[S. C. 27 L. J. P. 58; 6 W. R. 736. Referred to, *Gayer* v. *Gayer*, [1917] P. 71.]

This was a suit for dissolution of marriage at the suit of the husband. He had obtained a sentence of divorce à mensâ et thoro in the Ecclesiastical Court, and a verdict for £1000 damages and costs in an action for crim. con., in which latter proceeding an application for a new trial on the part of the defendant had been refused by the Common Pleas. The co-respondent had appeared in this suit, and set forth in his answer to the petition the fact that the £1000 damages and costs had been paid by him.

Dr. Phillimore, Q.C., moved the Court to direct that this petition should be heard on affidavit. He understood that in the case of *Armitage* v. *Armitage and M'Donald* the Court **[181]** had, under similar circumstances, granted a similar application.

Dr. Deane, Q.C., on behalf of the co-respondent, assented.

Dr. Middleton, on behalf of Mrs. Ling, assented, and stated that she had no intention to put in any answer to the petition.

*The Judge Ordinary.* I very well remember the circumstances of this case, as I heard the argument in the Common Pleas for a new trial, and it would be very undesirable to parade all the facts again. Motion granted.

[In *Armitage* v. *Armitage and M'Donald*, May 6, on a similar application, the Judge Ordinary observed: I think that may be so; but amongst other affidavits an examined copy of the record and judgment in the Common Pleas should be before the Court. I do not mean, however, by this to dispense with affidavits as to the facts. I was thinking of the Judge's notes; but we are to act on the rules of evidence that prevail in Westminster Hall, and I do not think we could take the Judge's notes as evidence.]

(Before the *Judge Ordinary.*)

POTTS *v.* POTTS AND ANOTHER. June 26, 1858.—Mode of Trial.—Petition for Dissolution of Marriage.—Previous Divorce and Crim. Con. Action.—Nominal Damages.—Practice.—A. had obtained a divorce à mensâ et thoro, and had recovered in a crim. con. action a verdict for nominal damages.—The Court refused to allow the case to be heard on affidavit, and directed it to be heard on oral evidence.

[S. C. 27 L. J. P. 59; 6 W. R. 860.]

Mr. S. Jacobs applied that the husband's petition in this case, which was for the dissolution of his marriage by reason of his wife's adultery, might be heard on affidavit. A divorce **[182]** à mensâ et thoro had been obtained in the Ecclesiastical Court of Durham, and a verdict for nominal damages had been given in a crim. con. action.

*The Judge Ordinary.* Where nominal damages have been given, I think the petition should be heard on oral evidence.

(Before the *Judge Ordinary.*)

TOMKIN *v.* TOMKIN AND ANOTHER. June 2, 1858.—Co-Respondent.—Suit for Dissolution.—Previous Divorce à mensâ et thoro, and Damages recovered in Crim. Con. Action.—20 & 21 Vict. c. 85, s. 28.—A. had obtained a sentence of divorce à mensâ et thoro in the Ecclesiastical Court by reason of his wife's adultery, and had recovered damages in an undefended action for crim. con. from B., the alleged adulterer, who was now at the Cape of Good Hope. A. was allowed to proceed with his petition for dissolution, without making B. a co-respondent.

[S. C. 27 L. J. P. 54. Referred to, *Rayment* v. *Rayment*, [1910] P. 277.]

This was a suit for dissolution of marriage by reason of the wife's adultery.

Dr. Addams, Q.C., moved the Court to dispense with service of citation and petition on the alleged adulterer. Mr. Tomkin had succeeded in obtaining a sentence of divorce à mensâ et thoro in the Consistory Court of London in May, 1857. He had also recovered £1000 damages and costs in an undefended action for crim. con. The alleged adulterer was an officer in Her Majesty's service, and was now at the Cape of Good Hope with his regiment. Under these circumstances he asked the Court either to dispense with the service of citation and petition, or to direct it to be served on his attorney.

*The Judge Ordinary.* The probable object, at least in part, of obliging a petitioner, as a general rule (sect. 28, **[183]** Divorce Act), to make the alleged adulterer a co-respondent, was that the latter might have an opportunity of appearing and vindicating himself. As in the present case the alleged adulterer has been sued already, and did not take the opportunity then afforded him of endeavouring to clear himself, I think there is no need now to make him a co-respondent.

(Before the *Judge Ordinary.*)

HOOK *v.* HOOK. June 26, 1858.—Co-Respondent dispensed with.—Wife living in a Brothel.—An application to proceed in a suit for dissolution, without making a co-respondent, granted, on the ground that the wife was living in a brothel.—Quære, whether the wife can object to such an application?

[S. C. 27 L. J. P. 61; 6 W. R. 868.]

Dr. Spinks, for the husband petitioning, applied for leave to proceed without making a co respondent (sect. 28, Divorce Act), on the ground that the wife was living in a brothel.

Mr. Pollock, contrà.

*The Judge Ordinary.* I think very sufficient reason has been shewn why the husband should make no co-respondent. Assuming that he had some ground of suspicion, or even knowledge, as against two or three persons, he might not have sufficient evidence to prove the case against them, and so might fail in his suit.

I am not sure that the wife has any right to come and object to such an application made on the part of the husband.

Application granted.

(Before the *Judge Ordinary* and a Common Jury.)

PEACOCK *v.* PEACOCK. June 7 and 8, 1858.—Petition for Judicial Separation.—Adultery.—Condonation.—Condonation is forgiveness of a conjugal offence with full knowledge **[184]** of the facts, and in each particular case it is a question to be decided by the jury.

[S. C. 27 L. J. P. 71; 6 W. R. 866. Discussed, *Bernstein* v. *Bernstein*, [1893] P. 292.]

This was a petition for judicial separation brought by the wife against the husband by reason of his adultery. The issues before the jury were, first, the adultery charged by the petitioner; secondly, connivance at such adultery pleaded by the respondent; thirdly, condonation of such adultery pleaded by the respondent; and fourthly, a countercharge of adultery made by the respondent against the petitioner.

Dr. Swabey, Mr. H. Hawkins, and Mr. Phear, for the petitioner.

Dr. Phillimore, Q.C., and Mr. Cole, for the respondent.

The only question of importance, which the case presented, was that of condonation. The adultery had been committed, during Mrs. Peacock's absence from home, with a servant-girl, who left the service in the family-way and subsequently gave birth to a child. Shortly afterwards, in March, 1857, Mrs. Peacock's father heard a report that Mr. Peacock was the father of the child, and informed his daughter; upon which she left her husband's house, but returned to it after a few days on his reiterated assertions of his innocence, repeated after she had said to him, "If it is so, tell the truth and I will forgive you." In September of that year she was convinced beyond all doubt of the fact of Mr. Peacock's guilt, and immediately left his house, and shortly afterwards instituted this suit.

*The Judge Ordinary*, in summing up, after explaining to the jury that condonation signified forgiveness of a conjugal offence with full knowledge of all its particulars, said: "I am of opinion that condonation is a question of fact to be decided by the

jury, and I take this early opportunity of stating it, that my opinion as to the law on that point may be known, and the question decided on appeal if it is thought fit.

The jury, after a deliberation of some hours, found a ver-**[185]**-dict on the first issue in the affirmative; and on the second, third, and fourth, in the negative.

On the 8th of June the Judge Ordinary decreed the judicial separation as prayed by the petitioner, and condemned the husband in costs, intimating that he entirely agreed with the verdict the jury had given as to there having been no condonation.

(Before the Full Court—*Cockburn, C.J.*, *Wightman, J.*, and the *Judge Ordinary.*)

WARD *v.* WARD. June 14 and 16, 1858.—Dissolution of Marriage.—Desertion.—Practice.—Where, on the evidence in support of an undefended petition for dissolution of marriage by reason of the husband's adultery, cruelty, and desertion, a doubt arose as to whether the parties had not voluntarily separated, the Court ordered the case to be adjourned under the 44th section of the Divorce Act to have further evidence produced.—To constitute desertion, the acts relied on must have been done against the will of the person setting up desertion; evidence of separation only tends to prove desertion.

[S. C. 27 L. J. P. 63; 6 W. R. 866. Approved, *Harriman* v. *Harriman*, [1909] P. 146. Referred to, *Eastbourne Guardians* v. *Croydon Guardians*, [1910] 2 K. B. 23.]

This was a petition for dissolution of marriage, brought by the wife against the husband by reason of his adultery, desertion, and cruelty. The petition was unopposed.

Mr. Kennedy, and Mr. O. B. C. Harrison, for the petitioner, examined witnesses to prove the alleged charges. One of the witnesses said that she remembered Mr. Ward saying, that he and his wife had been before the police-magistrate, and had both been bound over to keep the peace.

*Cockburn, C.J.*: This evidence raises a doubt as to the desertion. If disagreements and quarrels took place, and both parties were bound over to keep the peace, can you treat a subsequent separation as desertion? Suppose an arrangement had been made, by the advice of the police-magistrate, **[186]** to separate by mutual consent. Though the husband may have left her, yet if there were a corresponding animus on the part of the wife, if she were a party to his leaving and consented to it, that would not constitute desertion. The act of desertion must be done against the will of the wife.

*The Judge Ordinary*: You must not assume that evidence of separation proves desertion, it only tends to it; the fact of living with another woman does not necessarily prove that a husband has deserted his wife.

*Cockburn, C.J.*: Upon this evidence so much doubt is thrown upon the case, that it must be cleared up, and the best way is to know exactly what took place before the magistrate. We adjourn the case under the 44th section of the Divorce Act; there can be no difficulty in shewing what really took place at the police-court.

On Wednesday, the 10th, the clerk to the magistrates at the Southwark Police-court produced the bail-book and the magistrate's book, in which the cases before him were shortly entered. By these it appeared that Ward had been bound over to keep the peace towards his wife, but there was no entry as against her. The mistress of the house, where Ward and his wife had last lived together, deposed to his violent temper, drunken habits, and acts of repeated violence towards his wife, owing to which she (the witness) had induced Mrs. Ward to apply to the magistrate for protection. After that, however, Ward left his wife; "He left her," said the witness, "without a shilling; she was quite agreeable, because of his ill-usage; she was a quiet, hard-working woman."

*Cockburn, C.J.*: Mrs. Ward is clearly entitled to a dissolution of marriage on the ground of adultery and cruelty, even if there were any doubt about the desertion.

**[187]** (Before the Full Court—*Cockburn, C.J.*, *Wightman, J.*, and the *Judge Ordinary.*)

LING *v.* LING AND CROKER. June 14, 1858.—Divorce à mensâ et thoro.—Damages and Costs in Crim. Con. Action.—Petition for Dissolution.—Proof by Affidavit.—Co-Respondent.—Costs.—Where the co-respondent had, in a previous action for crim. con., been condemned in damages and costs, and the husband had obtained a divorce à mensâ et thoro, the Court refused to make any order as to costs in an undefended petition for a dissolution of marriage, which was heard on affidavit.

[S. C. 27 L. J. P. 58; 6 W. R. 736. Distinguished, *Evans* v. *Evans*, p. 328, post.]

This was a suit for dissolution of marriage promoted by the husband against his

wife by reason of her adultery. He had obtained a sentence of divorce à mensâ et thoro in the Ecclesiastical Court, and a verdict for £1000 damages and costs against the co-respondent in an action for crim. con. The co-respondent had appeared in this suit, and set forth in his answer to the petition the fact that £1000 damages and costs had been paid by him. The wife gave in no answer, and the case was, by the direction of the Judge Ordinary, heard on affidavit.

The Court decreed a dissolution of the marriage between the parties.

The only question that now arose was as to the costs of the present proceeding.

Dr. Phillimore, Q.C., for the petitioner, applied for costs against the co-respondent.

Dr. Deane, Q.C., contrà: By the old law three proceedings might be taken in a case of adultery, and in only one of those, namely, in the crim. con. action, could the paramour be compelled to pay costs. In the present case, the co-respondent has paid all the costs to which he would have been subject under the old law. There is nothing in the Act or rules to induce the Court to saddle him with two sets of costs.

[188] *Wightman, J.* If the whole matter had arisen under the present state of the law, the action for crim. con. would have been merged.

*Cockburn, C.J.* At all events the proceeding for damages would have been one and the same, and he would only have had to pay one set of costs. We purpose to lay down no rule applicable as a precedent in cases which may present some varying circumstances; but looking at all the circumstances of the present case—that Croker has been condemned in damages and costs; that if it had not been for ex post facto legislation the husband would have gone under the old system for a bill in Parliament, and the co-respondent would have been liable for no further costs—we think it will be fair to make no order as to costs.

Costs refused.

(Before the Full Court—*Cockburn, C.J., Wightman, J.*, and the *Judge Ordinary.*)

TEAGLE *v.* TEAGLE AND NOTTINGHAM. June 14, 1858.—Petition for Dissolution.—Costs refused against Co-Respondent.—Costs refused against the co-respondent, there being no proof before the Court that he was aware that the respondent was a married woman, or of any of the circumstances under which the cohabitation with the husband was broken off.

[S. C. 27 L. J. P. 55; 6 W. R. 736.]

In this case there was no doubt about the adultery, and costs were asked for against the co-respondent.

The evidence shewed that the marriage took place in December, 1840, that Mrs. Teagle left her husband in November, 1851, and had for the last four or five years been living with the co-respondent as his wife, and had had two children born since she left her husband, who, as well as herself, passed by the name of the co-respondent —Nottingham. There was no evidence of the circumstances under which Nottingham had become connected with the wife.

[189] *The Judge Ordinary.* It is considered with the evidence that, when the connection commenced, Nottingham did not know that the respondent was a married woman.

*Cockburn, C.J.* The case is left so bare of circumstances that it does not appear that Nottingham was aware that the respondent was a married woman. Moreover, when you want costs against the co-respondent, you must give the Court more insight into the circumstances of the disruption of the cohabitation under the marriage.

Costs refused.

(Before the Full Court,—*Cockburn, C.J., Wightman, J.*, and the *Judge Ordinary.*)

BADCOCK v. BADCOCK AND CHAMBERLAIN. June 14, 1858.—Petition for Dissolution. — Co-Respondent condemned in Costs. — Costs given against the co-respondent, who knew that the respondent was a married woman, though the husband's conduct towards his wife was remiss.

[S. C. 27 L. J. P. 51; 6 W. R. 737.]

In this case the adultery was fully proved. The respondent's sister, who was examined as a witness to prove it, said of the petitioner, "He never made a home for my sister as he should have done, and they were mostly quarrelling, no doubt in part about the man Chamberlain."

*Cockburn, C.J.* The adultery is clearly made out. Chamberlain knew very well

that the respondent was a married woman. I am inclined to agree with the view that the witness took, that there was some remissness on the part of the husband: still that is no excuse for Chamberlain. He ought to pay the costs.

Co-respondent condemned in costs.

**[190]** (Before the Full Court,—*Cockburn, C.J., Wightman, J.*, and the *Judge Ordinary.*)

ROBOTHAM v. ROBOTHAM. June 16, 1858.—Dissolution of Marriage at Suit of Wife.—Order on Husband to secure Sum of Money to Wife.—Custody of Children.—20 & 21 Vict. c. 85, ss. 32, 35.—Where the husband is out of its jurisdiction, the only power which the Court has, in case of dissolution of marriage, to make provision for the wife, is to make an order on the husband to secure a sum of money to her.—Quære. Whether under the 35th sect., as regards custody of children, the Court should act on the rules hitherto acted upon in the Court of Chancery, or use a wider discretion?—Where the husband, by reason of whose misconduct the marriage was dissolved, was living in America, and the children remained in the custody of the mother in this country, the Court refused to make any order as to their custody; for any such order must have been final, and the circumstances and relative positions of the parties might be materially altered in the lapse of years.

[S. C. 27 L. J. P. 61; 6 W. R. 735.]

This was a petition for dissolution of marriage, brought by the wife by reason of the husband's adultery and bigamy. The petition was not opposed.

Dr. Phillimore, Q.C., and Mr. Macqueen, for the petitioner, examined witnesses in support of the petition.—It appeared that the respondent was at the date of these proceedings living in New York, and a brother of the petitioner produced a letter, written to him by the respondent before he left England, in which he acknowledged the fault he had committed, spoke in terms of strong affection for his wife and children, and said that he would do anything to facilitate his wife becoming possessed of a sum of money that stood in their joint names in a savings bank. The learned counsel asked the Court to make an order under the 32nd section of the Divorce Act to put the wife in possession of this sum, about £34. They also prayed the Court, under the 35th section of the Act, to make an order assigning the custody of the children to Mrs. Robotham.

**[191]** *The Judge Ordinary.* This latter point involves a question of much importance,—whether this Court is to assume a jurisdiction larger than that which has been exercised by the Court of Chancery, or whether the Court is to apply the rules on which the Court of Chancery has hitherto acted? The words of the Act are very large: "The Court may, from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree as it may deem just and proper with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of such suit," etc. But the Court of Chancery has always exercised very sparingly its jurisdiction in interfering with the common law rights of the father, even after the marriage has been dissolved by Act of Parliament.

As to the sum of money in the savings bank, all we can do, looking at the words of the 32nd section, is to make an order on the husband; you may then apply to the Judge Ordinary for an attachment, and if you can bring him here I may be able to deal with him.

*Cockburn, C.J.* There can be no doubt that the petitioner is entitled to the dissolution of marriage which she prays.

Beyond the sentence of dissolution, however, the Court is asked to do two things:—First, to make an order on the husband to secure to the wife a sum of money which stands in the names of both of them in a savings bank. From the husband's letter, which has been read, he appears to be a consenting party to that, and we have no hesitation in making the order, so far as the Act gives us power. We make the order on the husband; but he is beyond the jurisdiction, and it may not be of much use to you. We are, in the second place, asked to order that the custody of the children shall remain with the mother. We certainly have no hesitation in thinking that, under the present state of circumstances, the children ought to remain with the

mother; they have been abandoned and left unprotected by the father, and have been maintained by her. At the same time the father, from the letter we have heard read, appears to entertain considerable affection for them; it would be too much to say that the father, although repentant and contrite, [192] should be excluded from all intercourse with his children. Again, circumstances may change; the mother may remarry; and it may not be desirable that the stepfather should have the control of them; the father may return, in altered circumstance, and be able and willing to maintain and educate them.

By the terms of the Act of Parliament, our order must be final; we have no power to modify it; therefore, without saying that cases may not arise—they probably will—in which we should feel ourselves called on to exercise the power conferred by the Act, we are of opinion we ought to make no order in the present case. The father is in America; if he should seek to wrest the children from the hands of the mother, he could only do so by application to some Court; and we think that no Court would hand them over to a father guilty of bigamy and adultery.

(Before the *Judge Ordinary.*)

CURTIS v. CURTIS. May 18, 19, 20, 21, 22, and June 21, 1858.—Judicial Separation. — Cruelty. — Condonation. — Acts of Violence. — Threats. — Custody of Children.—Condonation will not be pressed against a wife where a probable motive of continuing cohabitation after certain acts of violence was the fear of being deprived of her children, and of leaving them in the sole control of a harsh and excitable father.—All condonation is conditional; and, assuming certain acts of personal violence to have been condoned by continued cohabitation, the Court held that subsequent harsh and degrading treatment, short of personal violence, would cause a reasonable apprehension of further violence, and revive the former acts.—Whatever may be the cause or motive of the husband's misconduct, the wife is entitled to the protection of the Court if cohabitation is rendered unsafe, unless she is herself greatly to blame.—Semble: If the evidence establish a plain case of condonation, the Court will take notice of it although not pleaded.—On decreeing judicial separation, the Court having no power under the 35th section of the Divorce Act to vary an order made as to the custody of children, and there being no fund out of which their maintenance [193] could be secured, made an order that the children should remain in the mother's custody for three months, so that the parties might avail themselves of the ampler power of the Court of Chancery.

[S. C. 27 L. J. P. 73. Affirmed, 1859, 28 L. J. P. 55. Followed, *Kelly* v. *Kelly*, 1870, L. R. 2 P. & D. 61.]

This was a suit for separation by reason of cruelty, brought by Mrs. Curtis against her husband. The facts are sufficiently stated in the judgment.

Mr. Forsyth, Q.C., and Mr. Mundell, for the petitioner.

Mr. Curtis conducted his cause in person.

The principal witnesses examined were,—the petitioner, Mr. and Mrs. Flood (the petitioner's father and mother), the respondent's mother, and the respondent himself, who made his own statement on oath, besides addressing the Court on the evidence.

Cur. adv. vult.

June 21.—*The Judge Ordinary.* This was a petition presented to the Court by Frances Henrietta Curtis, praying a judicial separation from her husband, John George Cockburn Curtis, on the ground of cruelty. The respondent denied the facts alleged in the petition.

The marriage between the parties was solemnized in 1846, and they had issue four children, of whom three are still living, now of the respective ages nine, eight, and five years. Before the case could be heard the petitioner applied for an interim order as to the custody of the children. I directed that the two elder children should remain at a school where they had been previously placed by the mother, and that the youngest should remain in her custody, the father having reasonable access to all of them, till the petition was disposed of.

The case, in statement and evidence, occupied the attention of the Court on the 18th and four following days of last month, and I have since bestowed upon it much anxious consideration, on account of the great importance of the subject generally, and the peculiar circumstances disclosed in this individual case. Some of the most

learned judges who have ever presided in the Ecclesiastical Courts have declined attempting to give a strict legal definition of cruelty; but in several **[194]** cases the rules by which a Court should be governed in deciding on such a question have been stated, and the leading cases on the subject are collected in the judgment of the Dean of the Arches in the case of *Westmeath* v. *Westmeath*, 2 Hagg. Ecc. Rep. Sup. 70. "In the case of *Evans* v. *Evans*, Lord Stowell said:—What is cruelty? In the present case it is hardly necessary to define it, because the facts here complained of are such as to fall within the most restricted definition of cruelty; I shall therefore decline laying down a direct definition. The causes must be grave and weighty, and such as shew an absolute impossibility that the duties of the married life can be discharged; in a state of personal danger no duties can be discharged, for the duties of self-preservation must take place before the duties of marriage. Further on he says:—Proof must be given of a reasonable apprehension of bodily hurt. I say an apprehension, because assuredly the Court is not to wait till the hurt is actually done; but the apprehension must be reasonable, not arising merely from diseased sensibility of mind." "So in *Harris* v. *Harris*, There must be something that renders cohabitation unsafe, or is likely to be attended with injury to the person, or to the health of the party. Words of violence may warrant the Court to interpose and prevent the actual mischief; but when such violence of language is accompanied with blows, it is a more aggravated case." "Again, in *Waring* v. *Waring*, The usual principles require that such complaints should be supported by proofs of violence and ill-treatment, endangering, or at least threatening the life, or person, or health of the complainant." The same doctrine is held in the case of *Holden* v. *Holden*: "The Court has to decide whether the conduct of the husband amounts to that sævitia which authorizes a separation. On this point the Court has had frequent occasion to observe that everything is, in legal construction, sævitia which tends to bodily harm, and in that manner renders cohabitation unsafe. Whenever there is a tendency only to bodily mischief, it is a peril from which the wife must be protected. It is not necessary to inquire from what motive such treatment proceeds; it may be from turbulent passion, or sometimes from causes which are not inconsistent with **[195]** affection. If bitter waters are flowing it is not necessary to inquire from what source they spring. If the passions of the husband are so much out of his own control, as that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what provocation such violence originated. Secondly, the law does not require that there should be many acts; for if one act should be of that description which would induce the Court to think that it is likely to occur again, and to occur with real suffering, there is no rule that should restrain it from considering that to be fully sufficient to authorize its interference. Thirdly, it is not necessary that the conduct of the wife should be entirely without blame, for the reason which would justify the imputation of blame to the wife would not justify the ferocity of the husband.

"These then are the principles by which these Courts have been governed; and according to which it is my duty to decide. There must be ill-treatment and personal injury, or the reasonable apprehension of personal injury. What must be the extent of the injury, or what will reasonably excite the apprehension, will depend upon the circumstances of each case; so likewise what may aggravate the character of ill-treatment must be deduced from various considerations,—in some degree from the station of the parties, in some degree from the condition of the person suffering at the time of the infliction. The complexion of individual acts may be heightened, nay, the acts may almost change their very essence, by the accompaniments: not only particular stations and situations, and the feelings almost necessarily arising out of them, but even acquired feelings may be entitled to some attention. In *Evans* v. *Evans*, Lord Stowell's remarks establish that what wounds, not the natural, but the acquired feelings will not absolutely be excluded by the Court when they are stated merely as a matter of aggravation; à fortiori, then, feelings which naturally belong to a wife or a mother of every station constitute a part of the consideration."

The first question to be determined, then, is, whether the respondent is proved to have been guilty of acts constituting cruelty, judging of the question by those rules. In order to do that it is necessary to examine with care the evidence **[196]** given in the cause, and to make allowance for the exaggerations which may be expected in the accounts given by parties whose feelings are much interested and excited, more especially when they are deposing to transactions which occurred several years ago.

The necessity for caution, if not suspicion, on such occasions, was pointed out by Lord Stowell in *Oliver* v. *Oliver*, 1 Consist. Rep., and in *D'Aguilar* v. *D'Aguilar*, 1 Hagg. 782. It appeared in evidence that the marriage of these parties took place in 1846, not with the approbation, but with the reluctant consent of the lady's parents, who considered that his station in society was beneath hers; and I fear that to this feeling and the want of cordiality between the husband and the parents of the bride a good deal of what followed may be ascribed. On the eve of the marriage, when the parties met to execute a settlement which had been prepared, differences arose, and an unfriendly discussion lasted from ten at night till two in the morning. And here we have at once an instance of the imperfection of memory as to those transactions in which parties are engaged under excited feelings. Several alterations were during the discussion made in the setttlement. Mr. Flood, the petitioner's father, stated in his evidence before this Court that they were made at the instance of his intended son-in-law, who had refused to execute the deed until they were made; in this he was directly contradicted by his own solicitor and the clerk of Mr. Curtis's solicitor, who attended on that occasion; and the nature of the alterations induces me to think that their statement is correct. Soon after the marriage, viz. in July, 1845, the parties went to reside in lodgings in the house of Mrs. Carberry, 16 Charing Cross, and remained there till the spring of 1849; and there two children were born,—Frances, on the 10th of April, 1847, and Mary, on the 31st of July, 1848. The petitioner, in her affidavit filed with her petition, deposed that during their residence at Charing Cross her husband treated her with cruelty, and assaulted, beat, and used personal violence towards her. Being cross-examined by him before this Court, she stated that the assault and beating mentioned in the petition was pushing her out of a room; and before she would swear to the affidavit, she inquired whether that was assaulting and beating, and she was told correctly that it **[197]** amounted in law to an assault and battery, but she should have been told at the same time that the Court would probably be misled by such a description of it. When examined before the Court other matters were stated as instances of cruelty, *e.g.* that he would not allow his first child to be baptized,—a refusal which he ascribed to his opinion that infant baptism was wrong, and, however erroneous his view of this subject, his conduct cannot be deemed an instance of cruelty; that when the child was dying he would not have medical advice, which was not true, but when it came to be sifted amounted to no more than this, that having consulted one physician of eminence, who said that nothing could be done for the child, he declined having another. To these another witness, Mary Gully, added two other charges of cruelty,—one, that when the child above mentioned died, she made some tea for Mrs. Curtis, which her husband would not give to her because he was then praying with her; the other, that after the birth of the first child Mrs. Curtis was suffering severely from a bad breast, and he would not allow her medical advice. The former is simply ridiculous as the foundation of a charge of cruelty; the latter must have been stated by mistake, for Mrs. Curtis never mentioned it at all, and until after her first child was born she was always, when she wished it, attended by Dr. Tweedale, an intimate friend of her husband. But Mrs. Curtis deposed also to another transaction of a very different character, viz. that during an angry argument on some religious or political subject her husband spat in her face. This disgusting insult has been frequently treated, and very properly so, as an act of cruelty; but Mr. Curtis's denial was as positive as his wife's assertion; and as she never mentioned it at the time, nor indeed until the present proceedings were about to be commenced, I cannot but hope that something of a less aggravated character took place, which contemplated by her now at this distance of time, and with the imagination excited by other grievances, leads her to suppose that he really then insulted her as she has sworn. But whatever may be the true state of the facts, what was said by the Judge of the Consistory Court in *Westmeath* v. *Westmeath*, 2 Hagg. Suppl. 52, is applicable to this part of the case:—"A natural test of injuries of this kind, is the sense in which **[198]** they are received: if they are not resented as injuries at the time, a state of things intervenes which either detracts from the weight of particular evidence when brought forward at a subsequent period, or may introduce quite another view of the relative situation of the parties."

It is needless then to pursue this part of the inquiry further; for if the act was committed as alleged, the continued cohabitation of the parties afterwards, as proved before me, would induce me to decline acting upon it now as a ground for decreeing a judicial separation.

But to pursue the history of this unhappy couple. In March, 1849, they removed from Charing Cross to Mr. Flood's house in Alpha Road, and remained there till November in the same year, living during all that time in perfect harmony. After that they took apartments in Blenheim Terrace, Regent's Park; there their dissensions were renewed and increased. Mr. Curtis objected to his wife's going to parties even at her father's house; he imagined that he was considered and treated by her family as an inferior, and she admitted that at her father's house, "engineering rubbish" was often talked of (Mr. Curtis being by profession a civil engineer), although she said it was not done offensively; and on one occasion, when irritated by a dispute, she told him that the only compensation he could make to her for having induced her to marry him was to die. He became jealous and accused her of infidelity, for which there was no foundation whatever, and called her by opprobrious names, and she, in return, provoked by such treatment, in some discussion about the children said, that perchance they were not his, but had each a different father, whereupon he beat her, or, as he said, "boxed her ears." In November, 1850, Mr. Curtis had a severe attack of brain fever, became delirious, and was placed under constraint for some weeks; after that he talked of going to Australia, and wished his wife to accompany him; and on her refusal, according to her account, which was confirmed by other testimony, became very violent, and on more than one occasion beat her with his closed fist.

Upon this part of the case it is hardly necessary to observe, that if Mr. Curtis found that he did not succeed in his profession in England, and wished to remove with his family to Au-**[199]**-stralia in hopes of improving his condition, he had a perfect right to do so, and no imputation on his conduct would arise out of such a resolution; but if he sought to put an end to his wife's objections, and to obtain her acquiescence in his views by violence, by threats and blows, he did that which is utterly inexcusable, and which shewed him to be unfit to claim the society of his wife. Mr. Curtis's own account of these alleged acts is this:—"I may briefly state that I did not beat and assault Mrs. Curtis in the manner stated by those witnesses yesterday. I carefully went over the different periods, and I certainly cannot recollect. The only occasion I can call to mind was that of boxing her ears when Mr. Flood came in": which certainly is too feeble a denial to induce me to discredit the positive testimony of the other witnesses. While these disputes about going to Australia were going on, Mr. Flood expressed an intention of making the children wards in Chancery, to prevent their being removed from this country, and on Friday the 3rd or on Saturday the 4th of July, Mary Gully, the witness, removed the two eldest children from Mr. Curtis's lodgings without his knowledge; they were afterwards taken back by Mr. Flood's order, and on the next day were removed by Mr. Curtis to his mother's, and he then resolved upon going to America and taking them with him.

It appears that he had some apprehension that it was Mr. Flood's intention to endeavour to get him placed in a lunatic asylum; his wife then said that if he was so shut up she would remain with him, and, at his desire, confirmed this with an oath. Mr. Curtis, in pursuance of his plan of going to America, went down to Liverpool next day, accompanied by his mother, his wife, and children, and on the following day he, with his wife and children, embarked for America.

Having carefully examined the evidence affecting this part of the case, I have come to the conclusion that the wife was most unwilling to leave England with her husband, and was only induced to do so by the apprehension of having her children taken from her and removed to a foreign land. Condonation was not pleaded by the respondent in answer to the petition, but if the evidence established a plain case of condonation, the Court would probably take notice of it, although **[200]** not pleaded; for acts condoned and not revived by subsequent misconduct, could not be considered by the Court as a legitimate foundation for a decree of judicial separation.

But there are one or two points connected with the doctrine of condonation in general, and especially with reference to cases of alleged cruelty, which it may be proper to notice. I quite concur in the opinion expressed by Lord Stowell in *D'Aguilar* v. *D'Aguilar*, 1 Hagg. 781: "All condonations by operation of law are expressly or impliedly conditional, for the effect is taken off by the repetition of misconduct,—condonation is not an absolute and unconditional forgiveness." It has also been well observed by Sir John Nicoll, in *Westmeath* v. *Westmeath*, that the cruelty which has been recognized as a sufficient ground for a divorce à mensâ et thoro must, with few exceptions, consist of a series of acts; therefore condonation is not lightly

to be presumed from a continuance of cohabitation after one, or even several, acts of cruelty. Again, such continuance may be obtained by the apprehension of some evil which is considered greater than the peril of personal injury,—*e.g.* the privation of children, and their removal to a foreign land under the unrestricted control of a harsh and excitable father. Had it been necessary to determine the point in this case (but subsequent events render it unnecessary), I should have had great difficulty in finding as a fact, or laying it down as a matter of law, that the wife, merely by accompanying her husband to America, had condoned all the preceding acts of cruelty which she now imputes to him.

No act of cruelty was imputed to Mr. Curtis during the voyage to New York, but the wife alleged, and the husband denied, that he struck her on the evening of their arrival. They changed their lodgings once or twice, and in the month of August were lodging in Hudson's Place, New York, when Mr. Flood arrived from England. Mrs. Curtis stated that on several occasions about that time he was very violent, and pushed her about the room, but she did not speak positively to blows, and did not complain of any to her father. Mr. Flood made some offer to Mr. Curtis to induce him to return to England; but he refused to do so, and Mr. Flood returned in the month of November. It appeared that at that time [201] Mr. Curtis apprehended that it was Mr. Flood's intention to get him placed in a lunatic asylum if he returned to England, and, because he would not promise not to do so, Mr. Curtis refused to return. In the month of March, 1852, Mrs. Curtis wrote to her mother, giving an account of the manner in which she was then living, and that letter was produced at the desire of Mr. Curtis, and by him given in evidence, it must therefore be taken as evidence against as well as for him :—

"At Mr. Shave's, Eighth Avenue,
"Between the 53rd and 54th Streets, New York.

"My dearest Mother,—I write to you this time, as I have things to say to you which I could not say to papa, and therefore you must look upon it that this letter is to you privately; besides, I am so dreadfully low-spirited to-day, and so confused, perplexed, and stupefied, that I hardly know what I am doing, or what I had better do. I know your advice before I ask it; but I do not dare to do it. I am afraid of the reproaches of my own conscience afterwards; first of all, your guess as regards myself is only too true. I am afraid I shall be likely to have another baby this next summer. I cannot tell you with any exactness, for I paid so little attention to the matter at first, thinking such a thing out of the question; but I think the end of June or the beginning of July. You see, dearest mother, it is having this in prospect that makes me so dreadfully anxious about my other children: if it were not for this, I should be comparatively easy. I am sorry to tell you that things have not been going on so well lately; I do not know what to make of Curtis, he completely baffles my penetration, but I sometimes fear his mind is going again, not into madness, but imbecility; and this terrifies me as regards the children while I am out of the way. I will just, as I am writing to you alone, tell you what has happened since yesterday; but I am afraid of colouring it too highly, as indeed my feelings are greatly excited. Two little girls who live in this house, one four years old and the other six, came to play with my children yesterday afternoon, for the first time. My poor dears were delighted; it did my heart good to see them; they went upstairs altogether to the girl at supper-time, and I was on the point of following the minute after, when Curtis came [202] in, having been upstairs first, and having found the children together. He was evidently much put out and excited, and asked me what I meant by allowing strange children, of whom I knew nothing, to play with his children, and went on, in an angry and excited manner, to say that all the misery of his life had arisen from immoral habits learnt from other children, and that he insisted I should go upstairs and separate the children, and never allow them to be together out of my presence. I said they had not left my presence more than a minute, and agreed they should only play in my presence; but unfortunately, on his going on to be much excited, and to talk as I thought very disgustingly, I got angry, and said I refused to talk of such things, as I thought it corrupting. This only made matters worse, and at last I said, 'Really, if things go on in this manner I shall be obliged to put my children under the protection of the Government.' I said it, thinking it might do good to shew a little spirit, and also from being really angry and disgusted; but the words were hardly out of my mouth when I saw the mistake I had made; and really, my own

mother, the persecution and humiliation I have undergone since have been enough to break a heart of stone. Seeing that I had been wrong, and only made him worse, and being convinced that opposition did no good, I said I was sorry for what I had said, and begged his pardon, but all in vain. Ever since I have hardly known what to do. In the first place, he would not let me come to prayers with the children, or have anything to do with them last night, and went on perpetually at me the whole evening; next, he made me beg his pardon over again in the presence of my servant, explaining to her that I had been impertinent to him, and the poor girl not knowing which way to look from not liking to be made such a fool of: then this morning there has been the same thing over again,—scolding, scolding, scolding without end, and I can conscientiously say without provocation, pointedly helping the servant to bread at breakfast before me, and at last, on my making some slight remark, sending me out of the room to finish my breakfast in my bedroom.

"I should have told you before, that last night he said he was not satisfied with the sincerity of my repentance, and should therefore devise some punishment for me, and so **[203]** accordingly he came into my room when I had finished my breakfast, and said he had for this day given the charge of the children to Ann, that is the girl, instead of to me; that I might go out, or do as I pleased, but that I was not to see the children, or meddle with them in any way; and on the children running into the room, he sent them off, telling them repeatedly that mamma was naughty. He then told me that by submitting to his punishment with a good grace, I could shew my repentance, and praying God to bless me, he went out, and the girl tells me that a he went away he was crying, and several times while he was lecturing both last nigh' and to day he appeared on the point of bursting into tears, and often at other times also. So you see, dearest mother, here I am to-day. I can only see my children by stealth, and telling lies when he comes in, and pretending I have not seen them; and though this punishment is only to last one day, is it not a cruel and outrageous thing to do? I feel certain that it is chiefly done from a feeling of fanatic enthusiasm, and thinking that I belong to the world and not to God. I am so stupefied, and my mind is so completely lost by perpetual thinking on the same subject, that I know not what to make of it. I had a great mind to go off to Dr. Nicoll, after he was gone out to-day; but what can I say to him so long as Curtis is well enough to do his work, and satisfy his employers?

"I ought perhaps to have told you that I think the real offence to Curtis was, that seeing him as I thought getting more odd for some time, and thinking it fair to warn him, I told him, I am afraid not in the most judicious manner, that it appeared to me that his mind was trembling on the verge of insanity, and this, I fear, is what rankles in his mind. I told it him simply because I thought it right to give him warning. But you see I went against the plan I laid down for myself, and I did wrong. Now I certainly will never contradict him again. I would to God I could tell what to do, but he seemed so wrapped up in the children that I do not like to take them away, in spite of anything I may suffer, and I do not see that they are at present threatened. Then there is this horrible confinement business, which though I do not in the least fear it for myself, I fear it for my poor dears. And my girl wants to go as soon as I can get another, the work is **[204]** too much for her. Besides which, she does not like the whole concern, which I cannot wonder at. Fancy Curtis saying in his rage last night that by my opposition I laid on him the temptation of being obliged to pray that he might not wish for me to die in childbirth, that he might be able to bring up his children in the fear of God, etc. I don't see what can be done. If you were even here, my dearest mother, it would do no good; and when you were gone, he would again be worse. Betsy, I think, could do no good, as I could not have her here in the house, secretly; and papa would only make him furious. I would to God he would do something that would set me at liberty. I often wish he would strike me, but that he never attempts,—indeed, he seemed much kinder for a while; but the plain fact is, that he carries the idea of his authority to a mania. I should feel that I could leave at any moment were it not for this confinement, but that is the great difficulty. As far as my own health is concerned, I am perfectly well and quite strong. I am a wonder to myself; nothing seems to hurt me, and I will take care to have a proper doctor, nurse, and all things needful, so that for myself I have no fear; besides Curtis has a great notion of doing what he pleases to consider proper for me in the way of a nurse and so on. I feel my own irresolution and weakness are to be blamed as much

as you can blame them, but it is very hard to know what to do. He is so particular that, finding a magazine I had bought to read (Harper's Magazine, considered the best here), he tore it all to bits, and burnt all but a few pages, telling me not to bring books into his house until he knew what they were about. I hardly like to bring a book into the house, for fear of his objecting to it. Pray continue, dearest mamma, to send the papers: they help to keep me sane.

"I suppose I must give Curtis yet another trial, and see what constant humouring will do; but it is so impossible and wicked to be always deceiving and telling lies, and the children get such chatterboxes, that the other night, after little Mary had a powder, she told her papa of it when he came in, and I was obliged to deny it, which grieved me much. I have been obliged to have Dr. M'Kenna, unknown to Curtis, to see Mary; she was covered with spots, which I think chicken-pox; he ordered powders and other things, which **[205]** have done her much good, and she is now quite well again. My servant-girl even asks me how I could come to America with Curtis. She is in a great hurry to go, and I must try and find another, and a better one if I can. I wish to induce Curtis to go to Hoboken or Brooklyn, which are the same as New York, only on the other side of the water, and much healthier for the summer, but I fear if I spoke of it he would only set himself against it. I saw Mrs. Ashton the other day; she sat with me some time; she tells me she was obliged to keep her children in New York one summer until after her confinement in July, and that though they suffered much from the heat, they were not seriously ill. I am encouraged at hearing this, but I fear that Curtis's notions, such as hating blinds, and liking the full blaze of the almost tropical sun, will do harm, for one's only chance is in keeping the rooms as dark as possible. He unfortunately found out that Mrs. Ashton had called, by finding some particular kind of cake which she always brings; he opened the drawer in which it was. He was very angry with me for not telling him she had been, and this morning desired Ann to tell him in future if anybody called. He cannot get over not knowing Mr. Ashton himself. You see it is necessary in everything to flatter his amour propre if he is to be kept in tolerable humour. He now says boldly that his object is to bring up his children away from the world, and you may be sure that is what keeps him here.

"I mean this letter for you especially, my dearest mother, because I think papa has undergone so much from Curtis that he would think too much of all I say; but indeed I am very, very miserable. If I ought to leave, I ought to leave of myself, and not from anything you say; and when I look at those precious children, and think of perhaps dying here and leaving them, you cannot wonder that my heart should seem near breaking. If I even felt sure I was doing right in staying and suffering, and complying with all Curtis's notions, I should be less miserable! but the uncertainty from day to day what is best for me to do, or who is in the right, distracts me. I will write another letter, which I suppose you will get at the same time with this. I have written myself into better spirits, dearest mamma, and have stolen in to look at my darling as **[206]** he lies asleep,—God have mercy upon us all! I do not like to be a trouble to people, but I am much tempted to go to the hospital on Monday at twelve o'clock and try if I can see Dr. Nicoll; but I do not know whether I ought to pay him, or how much; and in fact, as I said before, while Curtis keeps on going to the office and getting his wages, I don't see that anything could be done; still I should like to know certainly. The extreme seclusion of the life which we lead is, I am sure, very hurtful to the mind; one does not know right from wrong, and I am sure I could not say at this moment whether Curtis is right or I am right. Still I cannot get over the fact that his mind is going. He seems to me to be nearly as bad as he was for a day for two before he took the wine. The extraordinary mixture of arrogance, self-love, love of power, with religious feeling and enthusiasm, is too much for me to understand, and especially when, added to all this, there is the occasional breakdown into tears and misery.

"Good-bye, my own dearest mother; forgive me for all the grief I cause you, and believe how much I love you. Pray God to direct your child, my own mother. Good-bye, ever your own most affectionate, F. H. CURTIS."

I presume that the object of the respondent in reading this letter was to draw the attention of the Court to two passages, as affecting the charge now made by the petitioner of cruelty towards herself and her children. The first of these is: "I would to God I could tell what to do, but he seems so wrapped up in the children

that I do not like to take them away, in spite of anything I may suffer, and I do not see that they are at present threatened." The other is in these words: "Would to God he would do something that would set me at liberty. I often wish he would strike me, but that he never attempts; indeed he seemed much kinder for a while, but the plain fact is, he carries the idea of his authority to a mania."

The first of these passages is certainly inconsistent with the idea of his being habitually cruel to the children; but the latter part of it, "I do not see that they are at present threatened," rather leads to an inference that at other times they had been in peril of ill-usage, and, taking the whole together, it is not by any means sufficient to induce me to reject as untrue the evi-[207]-dence of Mrs. Curtis on this head, although it is possible that her excited feelings have caused her to give a somewhat highly coloured account of the acts complained of. The respondent before the Court admitted the habit of chastising the children, but denied any such severity as was imputed to him by his wife and her father. But the correction, as described by himself, which he administered to a girl not four years of age, and to a boy hardly two and a half, was not that which might have been expected from a father wrapped up in his children, unless he was subject to fits of passionate excitement strong enough to overcome, for a time at least, his parental affection.

Again, with regard to the wish expressed, that he would strike her, but that he never attempted it,—taking it in connection with the evidence given, it rather leads me to the conclusion, not that he had never been guilty of such an act, but not recently, and that she considered that some fresh act of violence was necessary to found an appeal to the law.

The whole letter taken together gives a melancholy picture of the condition in which the petitioner was then living, and there is an air of truth, sincerity, and candour about it, which is well calculated to gain the confidence of this Court. It is true that the letter proves that she had not recently before that time suffered any personal violence; but assuming the whole letter to be true, she was treated with great harshness, insulted in the presence of her servant, displaced from her proper position in her house, and rendered subordinate to her own servant; not indeed on account of any immoral propensities of the respondent, but from a violent and unreasoning exercise of authority,—a course of treatment, in my mind, constituting a breach of the implied condition which the law would annex to any condonation of earlier acts of cruelty, and sufficient to excite a well-founded apprehension of further violence.

In consequence of this letter Mr. Flood went again to America, and after a short time applied to the British consul at New York, caused Mr. Curtis to be apprehended as a dangerous lunatic, and to be confined in a lunatic asylum. Mrs. Curtis gave birth to a daughter shortly after her husband's apprehension, and seven days after her confinement Mr. Flood took her and her children on board a steamboat, and brought [208] them to Ireland, where she continued to live at his house till 1857.

Upon this transaction I make no comment, for Mr. Flood is not before the Court in any other character than that of witness; and it is, therefore, no part of my duty to observe upon his conduct, except as a witness, or as taking part in transactions that have an immediate bearing on the question to be decided; but I must observe that he seems to have been actuated by a feeling of animosity towards Mr. Curtis, which induces me to receive with caution his statement of facts, where he is likely to have taken an impression respecting them under the influence of excited and hostile feelings. Before she left New York the petitioner wrote to her husband, and on the 15th of August, 1852, he wrote to his wife a letter, in which he admitted having acted towards her with great harshness and unkindness, and expressing hopes that if they lived together again he might do better for the future.

The learned Judge here read the letter:—

"Bloomingdale Lunatic Asylum,
"August 15, 1852.

"My own dear Fanny,—I had been very anxiously expecting some tidings of you and the dear children, when the doctor kindly allowed me to read your note of inquiry to him, and though you say nothing as regards yourself and the dear children, it was so far satisfactory that, from your saying nothing to the contrary, I hope it shews that you all arrived in safety, and I trust therefore, dearest, that you are all well and are enjoying the comfort and happiness which you hoped to derive from your return to your mother and to England.

"The doctor has kindly given me permission to write to you without my letter being subjected to examination, as is the ordinary rule of this place, and I do trust, dearest, that, when you write in return, you will assure me that you neither have nor will allow this or any other letter I may write to be read by or shewn to anyone other than yourself. I hope, dearest, you will now discard from your mind all feelings of resentment as regards the past, and I entreat you fully and freely to forgive me for all the wrong I have done you. I have much time for reflection since I have been here, and I [209] now see how unloving, unkind, and uncharitable all my conduct has been; but pray, dearest, to believe that (notwithstanding all that has passed) my love and affection for you remain unchanged. On many points, also, the conceptions on which I acted I now see were erroneous, and could only have arisen from extreme anxiety, coupled with the disadvantageous circumstances and impressions under which we mutually laboured. I am anxious to have some idea as to what course to pursue in reference to the future. I should be glad, therefore, my own dearest Fanny, if you would let me know candidly the state of your views and feelings on that point, and whether you think that we could manage to get along together again. Write fully, dearest, your opinion on these points, and, above all, let us both earnestly pray to God for His assistance and guidance. I shall be so glad to hear how you and the dear children are. Pray kiss them over and over again, and as regards the last, give her her first blessing from her father. I want you, if you have not already named her or fixed upon some other name, to call her Frances. Try and make peace for me with your father, and write me word what the state of his mind is as regards me. Kiss your dear mother for me, and make peace with all. I shall most anxiously await your reply; and meanwhile pray much for me, and much for yourself, dearest, and let us both hope that God may turn these present troubles into blessings upon ourselves and our children. When you write, communicate with me freely as to your present pecuniary position, and also as to what steps you take as regards the different money and other matters, of which I pointed out to you the papers as those it would be necessary to take charge of in the event of my death. Good-bye, dearest; don't criticize or comment on this, my first letter, too severely, I pray. Accept a kiss from your own affectionate husband, J. G. C. CURTIS.

"P.S.—You must ask your father to forget all that I said that was flippant, harsh, or unkind. Try, dearest, as I said before, your utmost to make peace between us. You, who have had time for reflection, will readily see how much of my conduct and views to both yourself and your father were occasioned by the lingering weakness incidental to my previous aberration of [210] mind, and by the deep impression which your father's threats unfortunately produced; but let us hope and trust to set matters right as regards the future; and above all, dearest, as I said before, let us pray to God that He will guide us in all our works and ways. Good-bye, dearest, again may God bless you and the dear children, and join us all to Him."

Now this letter is important, for although it does not describe the particular acts of unkindness for which the writer reproached himself, it affords a strong confirmation to the evidence given by the petitioner on her oath before the Court. His mother went over to America, and soon afterwards procured his discharge from the asylum. He then went to Spain, and obtained some employment in the way of his profession there, nor did he attempt to have any communication with his wife until January, 1856, when he wrote to her from Spain the following letter:—

"10, Piazza de las Barcas, Valencia, Spain,
dated at Madrid, 19th March, 1856.

"My dear Mrs. Curtis,—I duly received your letter of the 9th of last month. I had written previously to your brother Edward, and from him you will most probably have heard of my intention of coming up to Madrid. From my communications with the central authorities, I found that the revenue for the Valencia harbour works had become the subject of a law, which is now before the Cortes, and I fear the ultimate decision as regards the Valencia harbour project will, in consequence, be delayed for some time; and as the works, if let by contract, will be put up to public auction, the obtainer of a concession for the supplying of the stone, etc., will thereby be rendered a matter of doubt. The parties connected with me are, however, very desirous that, if the contracts for the supplying of the stone be obtained, it should be placed under my direction. I am therefore looking out for something else to occupy myself with till the Valencia affair is decided, and, amongst other matters, am in

treaty with an eminent capitalist, under whom I have been employed before, for the making of the studies for a proposed branch railway, about half-way from Madrid to Valencia. I write these details to show you that my future movements are somewhat uncertain. My health, thank God, is very good, and I think **[211]** it right again to assure you that I am very anxious to maintain an uninterrupted correspondence with you. If you write immediately, please address your letter thus:—

"J. G. C. Curtis,
"Yugeanai, Calle del Principe, No. 20,
"Marta Pral,
"Madrid.

"If any time elapses, I think you had better address as before, in conformity with the printed heading. Pray give my kindest love to your dear parents and the rest of your family; and, notwithstanding all that has transpired, and of your having by your conduct released me from all ties or obligations as regards yourself, I do hope and trust that you will always believe me to remain,

"Your sincere friend and well-wisher,
"J. G. C. CURTIS."

In 1856 he came to England, and did not attempt then to see his wife, but sent another letter to her through her brother, in these terms:—

"8 Bury Square, St. Mary Axe, Leadenhall Street,
"London, June 25, 1856.

"My dear Madam,—I write to inform you that I have this day arrived in London from Spain, and also to notice that I have as yet received no answer to the last two letters which I wrote to you, viz. of the 19th of March and the 4th of June instant. I can only, therefore, again repeat that, notwithstanding all that has transpired, I shall always be glad to hear from you; and with kindest love to your dear mother and family, I remain, my dear Madam,

"Your sincere friend and well-wisher,
"J. G. C. CURTIS."

In 1857 he went to her father's house in Ireland, in the county of Wexford, and presented himself to her, and pressed her to return to live with him. This she refused to do; high words ensued on both sides; he became much exasperated, and, as she stated, called down curses on her and her father, which he does not deny; whereupon she quitted the room, and soon afterwards quitted Ireland with her children, assumed a feigned name, and resided at Hornsey, Middlesex. **[212]** The respondent caused placards to be issued and posted in the neighbourhood of Mr. Flood's residence with respect to his wife's evasion, couched in very intemperate language:—

"£10 REWARD.

"Whereas Frances Henrietta, wife of John George Cockburn Curtis, civil engineer, of 30 Great George Street, Westminster, county Middlesex, England, and eldest daughter of Frederick Solly Flood, of Broomley Cottage, Kyle, county Wexford, Ireland, Esq., and Justice of the Peace, having left the protection of her husband, and absconded from her father's residence on or about the 25th of July, 1857, without the knowledge or consent of her said husband, taking with her his three children, Mary, John, and Frances.

"Notice is hereby given, that the reward of £10 will be paid to any person who will give such information as will lead to the recovery of the said children, or a reasonable sum will be paid to any person giving information as to their whereabouts.

"The descriptions of Mrs. Curtis and her three children are as follows:—

"Mrs. Frances Henrietta Curtis, native of England, aged 35, height 5 feet 3 inches, figure inclining to stout, hair very dark brown, eyes blue, not very prominent, complexion fair and fresh, eyebrows not strongly marked, nose slightly turned up, front teeth rather large, great expression of countenance, manner self-possessed and quiet.

"Mary Curtis, age 9 years, height 4 feet, hair dark brown, eyes dark blue, complexion fair and rosy, nose straight, movements lively.

"John Curtis, age between 7 and 8, height about 3 feet 9 or 10 inches, hair dark brown, eyes dark grey, with a slight cast in one eye, complexion not so fresh as his sister Mary's, usually accompanied by his mother, movements lively.

"Frances Curtis (usually called Fanny), age 5 years, height 3 feet 4 inches, hair dark brown, eyes blue, movements lively.

"Any information will be gladly received and promptly attended to by the deeply-afflicted father of the children, addressed to his present residence at Kavanagh's Park, Kyle, county Wexford, Ireland.

"Kavanagh Park, Kyle, 19th September, 1857."

**[213]** After some months he discovered her abode in England, went there and claimed to have possession of his children, whereupon this suit was instituted.

With regard to the conduct which Mrs. Curtis in her letter of the 17th of March, and in her evidence, imputed to her husband at New York, his answer did not amount to a contradiction, but only to a belief that it could not be true, and that any violence of which he had been guilty must be ascribed to his having never perfectly recovered from the effects of the brain fever by which he had been attacked in November, 1850. It is possible, perhaps not improbable, that there is truth in that suggestion: but if it be true, is there not reason to apprehend now a repetition of the same conduct? Has not the respondent since shewn himself liable to violent excitement, both in the scene with his wife at her father's house in Ireland, and, afterwards, by the act of issuing and posting placards in the unwarrantable terms adverted to? Whatever may be the cause, I cannot but think that the respondent is now liable to become so much excited in any controversy with his wife, that their cohabitation would be attended with danger to her; and the observations made by the learned Judge of the Consistory Court in *Dysart* v. *Dysart*, 1 Robert. 116, are applicable to this case; he there says: "When I find conduct towards a wife likely to prove dangerous to her safety, but not in other cases, I shall consider it within my cognisance, whatever may have been the cause thereof, whether having arisen from natural violence of disposition, from want of moral control, or from eccentricity It is for me to consider the conduct itself, and its probable consequences; the motives and causes cannot hold the hand of the Court, unless the wife be to blame, which is a wholly different consideration."

If, indeed, an act of violence were committed under the influence of an acute disorder, such as brain fever, and it were made clear that, the disorder having been subdued, there was no danger of a recurrence of such acts, the case would be different. But, if the result of such a disease has been a new condition of the brain, rendering the party liable to fits of ungovernable passion which would be dangerous to a wife, then undoubtedly this Court is bound to emancipate her from such peril.

**[214]** Believing then, as I do, that before the petitioner and her husband left England for America she had been treated with cruelty by him; that his conduct at New York was such that, bearing in mind his former acts, danger was reasonably to be apprehended from it, and that his more recent behaviour in Ireland proves that such danger still exists, I feel bound to grant the prayer of the petitioner and decree a separation between her and her husband.

Having thus disposed of the question of judicial separation, it remains for me to deal with the very delicate question of the custody of the children.

It appears to have been the intention of the Legislature to invest the Court, now entrusted with the duty of deciding nullity of marriage, dissolution of marriage, and judicial separation, with power to provide for the custody, maintenance, and education of the children of the parties whose marriage is to be affected by its decrees. But the Legislature has not prescribed any rules or principles by which the Court is to be governed in dealing with this peculiarly delicate subject. And I am in doubt whether it was intended that the Court should act as nearly as possible on the rules and principles by which the Lord Chancellor has been guided in questions relating to the custody of children, or whether it was intended to invest the Court with an absolute discretion, to be moulded by degrees into something like a system.

For the purposes of the present case it is unnecessary to solve that doubt. The evidence given before me by Mrs. Curtis and Mr. Flood, respecting the treatment which the children received from their father, was probably highly coloured and in no slight degree exaggerated; but after making due allowance for that, when Mr. Curtis's own admissions are taken into account, and when I consider also his long absence in Spain, without any attempt to see or inquire after them, and his assertion in the letter of January, 1856, that Mrs. Curtis had, by her conduct, exempted him from all charge and responsibility regarding them, and the great excitability since manifested by

him in Ireland, I do not think it would be right that they should be delivered up to him.

But, as I cannot vary a decree once made, and there are no funds which I can direct to be applied to the maintenance and **[215]** education of the children, and circumstances may hereafter arise which may render it expedient and just to make some fresh order, I think that the most discreet course that I can pursue is to embody in the decree an order that the children shall remain in the custody of their mother for three months. And, in the meantime, application may be made to the Lord Chancellor, whose more ample powers will enable him to deal with them now and hereafter in a manner more consistent with their advantage and the rights of their parents.

(Before the *Judge Ordinary.*)

SPRATT *v.* SPRATT. June 26, 1858.—Petition for Dissolution.—Interim Order.—Custody of Children.—In making an interim order under section 35 of the Divorce Act as to the custody of the children, the Court will adhere to, or depart from the common law rule according to its discretion.

[S. C. 6 W. R. 860. Referred to, *Thomasset* v. *Thomasset*, [1894] P. 300.]

Mr. Mills, for the husband (the petitioner), applied for an interim order for the custody of the children (sect. 35, Divorce Act). The parties were married in 1846, and separated in 1856. There were two children of the marriage, of the respective ages of seven and four years, one with the wife in London, and the other (the youngest) in the custody of her friends at Portsmouth, but under her control. The mother, according to the affidavit of the husband, was leading an abandoned life. He relied on the common law right of the father (*Rex* v. *Greenhill*, 4 A. & E. 624).

Mr. Frances, contrà: The husband has had his remedy at common law for the last two years, but has not thought fit to use it. During the whole of this time he has allowed the children to remain under the mother's control. At least the youngest child is properly with the mother.

*The Judge Ordinary.* There is a great difference between an application to this Court and to the Court of Queen's Bench. **[216]** The Queen's Bench would, by virtue of its jurisdiction, on writ of habeas corpus, have the children brought before it and deliver them to the father, unless very strong grounds were shewn to the contrary. But a suitor has no right to appeal to this Court for any such purpose. The application here is not to enforce the common law rule, but to the discretion of the Court. I think it is reasonable that the eldest child should be given up to the father; but I will make any order desired for the mother to have access to it. The youngest child is of so tender an age, that there is no fear of its being contaminated by the alleged conduct of the mother, and it may remain with the mother's friends, on her undertaking not to remove it.

The eldest child must be given up within a reasonable time, say the day after to-morrow—Monday.

(Before the *Judge Ordinary.*)

EVANS *v.* EVANS AND ROBINSON. June 26, 1858.—Petition for Dissolution.—Application under the 40th Section of the Divorce Act to send Cause for Trial to the Assizes.—Jurisdiction.—Discretion of the Court.—Assuming that the Court has the power to send the main issue in a petition for dissolution to be tried before a Judge of Assize, who could pronounce no sentence in the suit, it is a power to be exercised very sparingly, and only under peculiar circumstances.

This was a petition for dissolution of marriage at the suit of the husband by reason of the wife's adultery; the case had been set down at the last sittings of the full Court for trial by a special jury, a sufficient number of special jurymen were not present, and neither party prayed a tales.

Mr. Huddleston, Q.C., for the petitioner, now prayed the Court to direct the issue in this suit to be tried at the next assizes at Gloucester before a special jury. Upwards of twenty witnesses resided in that county. The 40th section of the Divorce Act enabled the Court to do this.

**[217]** Dr. Deane, Q.C., for the respondent, contrà: Assuming that the Court had power to send the main issue in a petition for dissolution of marriage to be tried elsewhere, nothing would really be gained, as, at all events, no sentence could be pronounced but by the full Court.

Mr. Hodgson, for the co-respondent, contrà, contended that the Court had no power to comply with the prayer of the petitioner.

*The Judge Ordinary.* I do not at present deal with the question of jurisdiction; but, assuming that the Court possesses it, I think it is a power very sparingly to be exercised. I cannot transfer the whole power of the Court to the Judge of Assize, and the matter must necessarily stand over for the decision of the full Court. There may, however, be extreme circumstances which would induce the Court to send a case to be tried in the country; but there are no such circumstances in this case. It is within my recollection that the case has been already tried at Liverpool and in London, and, on the latter occasion, very many of the witnesses were from London or its immediate neighbourhood. As to discretion, it would hardly be a wise exercise of discretion to send a case like this to be tried at an assize town a few miles distant from the place where all the circumstances of the case must have been matter of comment and gossip for the last two years. Without saying anything as to prejudice or the difficulty of getting an impartial hearing, Gloucester is certainly not a place which the discretion of the Court would choose. I reject the application.

(Before the *Judge Ordinary.*)

RATCLIFF *v.* RATCLIFF AND ANDERSON. June 26, 1858.—Petition for Dissolution.—Application for Mode of Trial.—31st Section of the Divorce Act.—Though neither of the parties desires a jury, the Court may still direct the issues to be tried before one. **[218]** Where facts are in dispute before the full Court, it is the most convenient mode of trial; but where the principal issues were addressed to the discretion of the Court under sect. 31 of the Divorce Act, it directed the petition to be heard without a jury.

[S. C. 6 W. R. 866.]

This was a petition for dissolution at the suit of the husband. The respondent and co-respondent had both given in answers to the petition.

Dr. Spinks now moved the Court to direct the cause to be heard by oral evidence, but without a jury. The pleadings raised several issues, but those which would probably be chiefly relied upon by the respondent and co-respondent were those upon which the discretion of the Court would be exercised under the latter part of the 31st section of the Divorce Act, which runs, "Provided always that the Court shall not be bound to pronounce such decree . . . if the petitioner shall, in the opinion of the Court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage . . . or of such wilful neglect or misconduct as has conduced to the adultery."

Dr. Swabey, for the respondent, and Dr. Phillimore, Q.C., for the co-respondent, concurred in not asking for a jury.

*The Judge Ordinary.* Although none of the parties desire it, it does not therefore follow that the Court will not direct the cause to be tried before a jury. Where there is any controversy as to facts in a case to be tried before the full Court, I think it is generally most convenient and desirable to have a jury. But as by the section referred to the question here to be decided seems specially addressed to the discretion of the Court, and none of the parties ask for a jury, this case may be tried without a jury.

**[219]** (Before the *Judge Ordinary.*)

PECKOVER *v.* PECKOVER AND JOLLY. June 26, 1858.—Petition for Dissolution.—Personal Service.—Where the husband has had no tidings of his wife, who left him in 1850, except as living with the adulterer in 1851, and could gain no information of her by inquiring of her relations or at the places she was last supposed to have been at, the Court directed the citation to be left in the Registry, and advertisements of that fact to be inserted in newspapers.

[Followed, *Appleyard* v. *Appleyard*, 1875, L. R. 3 P. & D. 258.]

Mr. Field, for the husband petitioning, applied, under sect. 42 of the Divorce Act, to dispense with personal service. The marriage took place in 1847; the parties cohabited till 1850, when on return from a journey the petitioner found that his wife had left him with two children. In 1851 he found some traces of her living with the adulterer; since then he had heard nothing of her. He had now made inquiry of every known relation of his wife, who all disclaimed any knowledge of her. He

had also inquired in every place where he supposed she was in 1851—at Islington, Liverpool, etc.—but without hearing anything of her.

*The Judge Ordinary.* I think under these circumstances it is impossible to require personal service. As the facts appear on the affidavit it would be tantamount to a denial of the remedy which the law gives him. The citation may be left in the registry, and notice of that fact advertised in the Times and Morning Post at an interval of a fortnight.

(Before the *Judge Ordinary.*)

WEBER *v.* WEBER AND PYNE. July 13, 1858.—Petition for Dissolution at Suit of Husband.—Alimony pendente lite.—Wife's Costs.—Where a husband had, under a deed of separation, allowed his wife a certain sum, and had ceased to pay it after the date on which he **[220]** alleged that he had obtained evidence of her adultery, the Judge Ordinary, on the wife's petition for alimony pendente lite, directed payment by way of alimony pendente lite to be made at the same rate. —The practice of the House of Lords on divorce bills warrants the Court in directing the wife's costs to be taxed from time to time against the husband in his suit for dissolution of marriage.

[S. C. 28 L. J. P. 11; 6 W. R. 867. Explained, *Powell* v. *Powell*, 1874, L. R. 3 P. & D. 189.]

This was an application on a petition for dissolution of marriage, brought by the husband against the wife, by reason of her alleged adultery, for alimony pendente lite, and for the taxation of the wife's costs up to the present date.

From the husband's answers to the petition for alimony, it appeared that the parties had been living apart, under a deed of separation; under which he stated that he had paid an allowance of £52 per annum "up to the 1st of April last, when proof of the facts of the adultery of the said Mary Emily Anne Weber was obtained by this respondent."

The amount of the husband's income did not very clearly appear.

Dr. Swabey, for the wife, applied for alimony pendente lite, and prayed that the wife's costs in the suit should be taxed up to the present time.

Mr. Macqueen, for the husband.

*The Judge Ordinary*: I think alimony pendente lite may fairly be taken, under the circumstances of this case, at the rate of the allowance agreed upon in the deed of separation. As to taxation of costs, I feel some difficulty in making any such order in a petition for dissolution. I have followed the practice of the Ecclesiastical Courts on the point in that class of suits over which those Courts formerly exercised jurisdiction; but as regards dissolution of marriage, I exercise a jurisdiction which is the creature of the Act. I don't know what authority I have to make such an order.

Dr. Swabey: The general presumption that the husband is in possession of the income, which was the ground of the practice of Ecclesiastical Courts, applies equally to petitions for dissolution of marriage. Means of carrying on suits of this nature were as necessary for the wife, and the husband was properly liable to provide such for her, unless he could shew **[221]** that she had an independent income. The practice of the House of Lords on Divorce Bills warranted the prayer now made.

By the Court: What is your authority for the practice of the House of Lords?

Dr. Swabey relied on the authority of his learned friend Mr. Macqueen, who was intimately versed in that practice.[1]

Mr. Macqueen: Certainly; the House of Lords have on several occasions ordered the husband petitioning for the bill to pay a sum of money to enable the wife to obtain the aid of professional advice in opposing it. In *Mrs. Campbell's case*, last Session, £50 was ordered to be paid by the husband for this purpose.

*The Judge Ordinary.* That, I think, though not precisely in the same form, affords me a sufficient principle on which to act, and I shall make the order for taxation of the wife's costs up to the present time.

(Before the *Judge Ordinary.*)

BOSTOCK *v.* BOSTOCK. May 24, 25, and July 19, 1858.—Judicial Separation.—Cruelty.—Condonation.—Revival.—Acts of violence and cruelty which have been condoned may be revived, without actual violence, by threats of such a

[1] Macqueen's Practice of the House of Lords, 531-2.

nature and so expressed as to satisfy the Court that further cohabitation would be attended with danger to the party threatened Where, after thirty years of married life, during which the parties had continually quarrelled, and the husband had been guilty of unjustifiable violence, and up to May, 1855, there was undoubted condonation, the wife left her husband's house in June, 1856, and brought a suit for divorce à mensâ et thoro, relying on threats alleged to have been uttered by the husband between February and June, 1856, the Court, not being satisfied that [222] the threats were such as to have caused a reasonable apprehension of bodily injury, or that, in fact, the wife quitted the husband's house on that account, dismissed the suit.

[S. C. 6 W. R. 868.]

This was a suit for a divorce à mensâ et thoro, commenced in the Consistory Court of London, and transferred to the Court for Divorce and Matrimonial Causes. The facts and circumstances are sufficiently stated in the judgment.

The case was argued in May last, by Dr. Deane, Q.C., and Dr. Robertson, for Mrs. Bostock.

The Queen's Advocate (Sir J. D. Harding) and Dr. Twiss, Q.C., for Mr. Bostock.

Cur. adv. vult.

July 19.—*The Judge Ordinary.* This was a suit instituted by the wife in the Consistory Court of London for a divorce à mensâ et thoro on the ground of the cruelty of the husband, and transferred to this Court by stat. 20 & 21 Vict. c. 85.

The libel, which was brought in on the 2nd of April 1857, alleged that the parties were married in 1827, and that they have had thirteen children, eight of whom are still living; that soon after the marriage the husband began to treat her with cruelty, and then in several articles specific acts were mentioned; the sixth article alleged that in 1839 he presented a pistol at her; the seventh article, that in 1840 he was in the habit of saying, in the hearing of his wife and children, that she would not die a natural death, and that she and his children would be found with their throats cut; the eighth article, that in August, 1841, he struck her in the face, and caused her earring to cut her face; the ninth, that in November, 1842, in consequence of his violent and abusive language, she went to bed in a room adjoining her husband's and locked the door, that he broke it open with a hammer and endeavoured to drag her out of bed, and that she in consequence, about five o'clock in the morning, left her home and went to reside with her mother, but on his promising not to ill-treat her again returned to him in July, 1843; the tenth, that in July, 1845, he beat her violently, and that her face was in consequence swollen and bruised for several days; the eleventh, that in November, 1848, he attempted to strike her [223] with a constable's staff; the twelfth, that in September, 1853, he burst open the door of his daughter's bedroom, in which his wife was, and used towards his wife violent and threatening language: that he told her next morning to go to her solicitor for the purpose of making arrangements for a separation; that as no arrangement was made, she, being alarmed for her safety, on the 31st October, 1853, left her home and took lodgings at Greenwich, in the house of her son, but, not having the means of supporting herself, she returned to her husband on the 10th of December, 1853. The thirteenth and three following articles alleged threats uttered at various times between the middle of February and the 13th of June, 1856, that he would serve her as Corrigan had served his wife: the seventeenth, that on the 13th of June, 1856, she, dreading further personal violence from him, finally quitted his house and went to reside with her mother. To this libel the personal answer of the husband was taken; then he brought in a responsive allegation, to which the wife gave her personal answer. Then witnesses were examined on both sides at considerable length. That evidence was examined and commented on by the learned advocates on each side.

It is unnecessary for me to enter into any examination of the greater portion of it. There can be no doubt that during the thirty years that have elapsed since these parties were married they have often quarrelled, and the husband on several occasions was guilty of inexcusable violence, excited by more or less of provocation on the part of his wife; but whatever might have been the result of any proceeding founded at the time on those acts of violence, it is indisputable that down to the summer of 1855 all quarrels had been followed by reconciliation and condonation; and in the month of May in that year Mrs. Bostock, having gone to Hastings, wrote to her husband to announce her arrival there, and gave a description of her lodgings. In the letter

there is this passage: "My room has a four-post bedstead and a nice feather bed, and I fancy I shall sleep so soundly to-night; I only want you with me; I cannot bear sleeping alone." The decision of the Court must therefore depend upon what happened after that time. It was hardly alleged, and certainly not proved, that the husband was guilty of any personal vio-**[224]**-lence after the date of that letter; but in 1856, a person named Corrigan having been convicted and executed for murdering his wife by cutting her throat, it is said that the husband Bostock threatened to treat his wife in the same manner, and that in consequence of those threats she quitted the house with a resolution never to return. On behalf of the wife it was contended that where there has been personal violence followed by condonation, subsequent threats are sufficient to revive former transactions. On the other hand, it was alleged that threats are insufficient for that purpose, unless accompanied by some act amounting to an assault at common law.

After an examination of the authorities on this point, to be found in the reports of cases in the Ecclesiastical Courts, I do not hesitate to declare my opinion, that where there have been acts of violence followed by condonation, threats subsequently uttered, if of such a nature and so expressed as to satisfy the Court that further cohabitation would be attended with danger to the party threatened, do constitute a sufficient ground for a decree of judicial separation.

Now Mrs. Bostock, in her evidence given on the thirteenth article of her libel, on examination in chief as to these threats, says, "On several occasions my husband, in his excited state, declared to me that he would serve me in the same way as Corrigan had served his wife; and he used to say that if he were to do it, he was sure any jury would acquit him. He repeated this so often, and at the same time he looked at me in such a dreadful way, that I got quite terrified and apprehensive whether he might not carry this threat into execution." On the fourteenth article she says, "I was awoke by feeling his hand on my throat; he did not threaten to serve me as Corrigan had done his wife, but he asked me how I should like to be served as Corrigan had served his wife. I was a good deal frightened; it was not done in joke, oh no." On the sixteenth article she says, "Three or four times in the course of the 12th of June, 1856, the day before I left his house for the last time, my husband, in the presence of my children, threatened to serve me as Corrigan had served his wife." On the seventeenth, after describing her fears at night, she says, "I determined then that nothing should induce me **[225]** to pass another night within his power, and when I left the next day, as I did, I did so with the determination never to return; I quitted and went to my mother's, who took me next day to the seaside." Now this is not altogether a candid statement. On the thirty-ninth interrogatory she says, "I will swear that I left the house, having the determination, as I then had, that I would not return; that after the night of dread I had passed I would never pass another night within his power, only because I feared that he would murder me. I had been going to Margate on that day in any case, but going as I did with the determination never to return, was in consequence of my fear of his murdering me. I will swear that I left with the intention of saving my life, which I considered in danger, and with the intention that if I ever returned again it should be under protection, and to live wholly separate from my husband, so as never to pass another night in his power. I did before I left take luncheon with the ministrant and the three children; at least, I sat at the table. If I am obliged to say what my ideas were, I answer that I did think of returning shortly, but only with the determination of living separate from my husband and out of his power to injure me."

Catherine Elizabeth Bostock, one of the daughters, says, "Several times after there was that trial of Corrigan for murdering his wife, I heard my father threaten my mother that he would serve her as Corrigan had done his wife, and his looks at the time he said it proved that it would be no idle threat. The looks of hatred that he cast at my mother at these times were so horrid that they quite made my blood run cold. I heard him threaten my mother in this way many times in the course of the spring of last year." Charlotte, another daughter, speaks much in the same manner. One of the sons, on the thirteenth article, speaking of the threats to serve Mrs. Bostock as Corrigan had his wife, says, "I recollect on one Sunday in particular, whilst we were at dinner, my father said to her before us that, if he were to do the same to his wife as Corrigan had done to his, no jury would hang him." Samuel, another son, says, "I often heard my father use the threat to my mother that he

would serve her as Corrigan had served his wife; I have [226] heard him at such times say to her that he would serve her as Corrigan had served his wife, and add, that if he did, the jury would not bring it in as murder. He did not say why they would not: that was what we wanted to know, why they would not bring it in as murder against him. My father uttered these threats against my mother in a very cool way—a sort of determined way."

Now the respondent, on the twenty-third article of the responsive allegations, gives his version of these threats:—"It is not true, as alleged in the libel, that on several or any occasions happening in the second week in Lent or in the month of February, 1856, I threatened to serve my wife as Corrigan had done his wife (meaning thereby that I would murder her by cutting her throat), or that I ever threatened her at all. When I have been much provoked by her conduct to me, I have on occasions expressed myself to the effect that, if I were to serve her as Corrigan did his wife, considering the amount of provocation she had given me by her disrespectful treatment, and constant neglect and desertion of me and her children—though a jury of my country would find me guilty of the offence, I was certain I should be recommended to the merciful consideration of the Crown. It was only with the 'if' or 'were I,' and under such circumstances as those just described, that ever I alluded to anything of the kind; not that I ever entertained the least notion of doing anything of the sort. It was merely an ebullition of anger at her conduct, for there is a limit to human endurance. I never lifted my hand against my wife but once, and that was on the occasion I have before referred to. I always regretted very much that I should have been provoked so far by her as to do it then, and often and often have expressed that regret to my wife."

Comparing Mrs. Bostock's statement on the thirty-ninth interrogatory, "He has on occasions before the children expressed himself to the effect interrogated, viz.: 'If I were to serve you as Corrigan did his wife, so great have been my provocations that a jury would acquit me'; but to myself he has said, 'I will yet serve you as Corrigan served his wife'; and also he has added, 'and if I do so no jury would condemn me'"; comparing this with the evidence of the children and Mr. [227] Bostock's own version, I am inclined to think his account of these alleged threats is the correct one.

The two servants who were then in Mr. Bostock's service had been so but for a short time, and knew very little of the quarrels that had occurred between him and his wife, but they both prove that Mrs. Bostock left him avowedly for the purpose of going to the seaside with her mother, without giving them any reason to suppose that she would not return.

Upon this evidence I have to say whether I think that the wife's person was in danger from the violence of her husband at that time. The angry expressions of the husband, whether amounting to threats or not, had been repeated on various occasions between February and June, and no act of violence during that time had been committed, nor do I believe that Mrs. Bostock was in danger of any such injury as she says she feared, or of any other bodily injury. I cannot upon that evidence be satisfied that Mrs. Bostock really entertained any such fears, and that she quitted her home in consequence of them: for her evidence on this point is far from candid; she had previously made an arrangement to accompany her mother at that time to Margate. Her statement on the seventeenth article is, that she left in consequence of her husband's threats, not daring to pass another night within his power, and with a determination never to return; but her answer to the thirty-ninth interrogatory, to which I have already adverted, gives a very different aspect to the case.

The result of this examination is, that I am satisfied that all quarrels between this excitable and unhappy couple had been from time to time arranged, and that so late as May, 1855, there was full condonation by the wife of any acts of cruelty of which her husband had been guilty, and that I am not satisfied that the wife had reasonable ground to apprehend bodily injury when she quitted her home, or that she did actually quit it under the influence of such apprehension. The history of the married life of these parties is most melancholy: for thirty years they have been continually quarrelling; they have brought up a large family of children, upon whom the example of their parents cannot have failed to produce injurious effects; but I cannot, because they make each other unhappy, decree that they shall be separated. To use the [228] language of Lord Stowell, in *Evans* v. *Evans*, 1 Consist. 36, "Everybody must feel a wish to sever those who wish to live separate from each other, who cannot live

together with any degree of harmony, and consequently with any degree of happiness, but my situation does not allow me to indulge feelings, much less the first feelings, of an individual; the law has said that married persons shall not be legally separated upon the mere disinclination of one or both to cohabit together, the disinclination must be founded upon reasons which the law approves, and it is my duty to see whether those reasons exist in the present case." In my judgment such reasons did not exist at the time when this suit was instituted, and I must dismiss the husband from it.

(Before the *Judge Ordinary.*)

MARCHMONT *v.* MARCHMONT. July 20, 1858.—Judicial Separation by reason of Cruelty.—Mode of Trial.—The 28th and 36th sections of the Divorce Act leave it in the discretion of the Court to direct the issues in a suit for judicial separation to be tried by jury; but the Court will generally make such order at the prayer of either party, and in the present case did so on the undertaking of the respondent not to interfere with or annoy the petitioner pending the suit.

[S. C. 6 W. R. 870.]

This was a suit for judicial separation by reason of cruelty, brought by the wife against the husband; the petition had been filed in the course of the last month, and there was an answer and replication.

Dr. Deane, Q.C., for the petitioner, moved the Court to direct the cause to be heard by oral evidence without a jury, and to be pleased to name some early day. The latter part of the motion was founded on affidavits of the petitioner and others as to the state of her health, and apprehensions of interference or annoyance from her husband in endeavours to repossess himself of her by force.

**[229]** Dr. Swabey, for the respondent, moved the Court to direct the cause to be heard before a jury, and relied on a counter-affidavit of the respondent as to there being no grounds to take the cause out of its regular order on the list.

*The Judge Ordinary.* On comparing the 28th and 36th sections of the Divorce Act, I do not think you can, in a petition for judicial separation, demand a jury as of right; but I am much inclined to order a jury wherever either party asks it. In the present case, however, as this is not a matter of right to the husband, but in the discretion of the Court, I expect that the respondent will undertake not to annoy or interfere with the petitioner between the present time and the trial; and that must be made part of the order of the Court directing the mode of trial. I can name no particular day for this cause; it must come on in its due course.

(Before the *Judge Ordinary.*)

CUDLIPP *v.* CUDLIPP. July 19, 1858.—Petition for Judicial Separation.—Desertion. —A. left his home at Birkenhead in 1843, and left unanswered letters from his wife telling him that an execution was in the house. She was obliged to go into lodgings, and subsequently supported herself as a governess. In 1844 A. made by letter some vague offer of rejoining her, and in 1848 wrote, bidding her farewell for ever.—The Court held that there was a wilful desertion of the wife in the winter of 1843-4, and no distinct offer afterwards to find another home.

This was a petition for a judicial separation brought by the wife by reason of the husband's desertion.

Dr. Twiss, Q.C., for the petitioner.

The citation had been served on the respondent at Loughborough, in Leicestershire, and an appearance had been entered, but no answer filed.

It appeared that the marriage took place in 1832. Mr. **[230]** Cudlipp was an attorney at Birmingham, where he became embarrassed in his circumstances. In 1843, being then resident at Birkenhead, he went in the month of November to Birmingham, where, according to Mrs. Cudlipp's own evidence, she stopped a fortnight with him at an inn. She then, at his suggestion, went to a Miss Swinnerton's, in Staffordshire. The petitioner's evidence then continued to the following effect:— "He said he should come to me there soon. I remained there a fortnight, but he did not join me. I returned to our house at Birkenhead, where I found an execution in the house. I wrote several letters to my husband, but got no answer. The furniture was sold, and I went into lodgings, where I lived at the expense of my friends from December to the end of the next May, and then went out as governess. I have been in three different families as governess; I have supported myself. In the

year 1848 I had a communication from my husband by letter, which is the last I received from him, and in which he bade me 'farewell for ever.'"

By the Court: "When I left him to go back to Miss Swinnerton's, he gave me no intimation that he did not intend to return home. I have never seen him since. He once wrote, proposing to rejoin me in May 1844; the letter was very vague. I answered, when he could place me in as good a situation as I could keep myself in by my own industry, it would be time enough to talk about that." Other witnesses proved that they went to Birmingham, at Mrs. Cudlipp's request, in January and February, 1844, and saw Mr. Cudlipp, with the object of inducing him to return to his wife. But he said it was not convenient, that he had debts to collect in Birmingham, and could not come away. Mr. Cudlipp had never since returned to his wife.

*The Judge Ordinary.* I think there was a wilful desertion of the wife in the winter of 1843-44. They had a home, and he refused to return to it. I was anxious to ascertain whether he had subsequently offered to provide a home, but by the petitioner's answer I gather that he never made any definite or distinct proposal or offer of another home. He [231] deserted the original home, and has provided no new one. I make a decree for the separation.

(Before the *Judge Ordinary.*)

THOMPSON *v.* THOMPSON. July 16 and 20, 1858.—Judicial Separation.—Desertion.—20 & 21 Vict. c. 85, sec. 16.—Where a husband, having failed in business in Leeds, went to London in 1842 in search of business, leaving his wife and children at her father's, and she neglected to answer his letters written during several months after he so went to London (though there was an interview between the parties in 1850)—Held, that to constitute wilful desertion on the part of a husband, his absence and cessation of cohabitation must be in spite of the wish of the wife, and that she must not be a consenting party to it. That the husband did not desert his wife by going to London in search of employment, and that the wife was a consenting party to the prolonged absence or separation, and not now entitled to a judicial separation on her petition by reason of desertion without just cause.

[S. C. 4 Jur. (N. S.) 717; 6 W. R. 867.]

This was a petition for a judicial separation, brought by the wife against the husband by reason of his desertion. It appeared that the parties were married at York in 1838 without the knowledge of the wife's parents. They resided together for two years in Leeds, when he lost his situation as an engraver, and in 1842 took a provision store in the same city, but failed in that business, and sold off his stock in the course of a few months. His wife returned, with two children, to her father's house, and after that time the parties never cohabited, nor did the husband contribute to the support of his wife and children. The husband went to London, whence, during the remainder of the year 1842, he wrote four letters to his wife. In the two first, dated June the 8th, and August the 1st, he expressed great anxiety to hear from his wife, and entreated her to write to him. He stated he was in low spirits in consequence of being separated from those he loved most dearly, and that in thought he frequently reverted back to the pleasant scenes of their early days, and the pleasant hours [232] they had spent together. He hoped that the time was not far distant when he should be able to maintain them all without the assistance of anyone, and that they should be comfortably settled together again; he had no fear that he should be able to obtain a situation shortly. It appeared the husband and wife had an interview in Leeds between the dates of these two letters, but she did not reply to either of the letters. In a letter, dated September the 19th, 1842, he commenced, "I really know not how to address you, as I have received no answer to my last letter; I think you treat me very unkindly for the situation I am placed in; I deserve a little notice from you." He then complained that she was cold to him when he last saw her at a Miss Conyer's house at Leeds, and requested she would write and explain why she had not written before; he then continued, "I think you are in duty bound to let me know how the children are: when I had plenty you were welcome to it; now I have nothing, I am treated thus. P.S. Though I have not mentioned it before, I have not forgot my kind love to you and the children, hoping they are well and will prove a credit to you." The fourth letter was dated October the 3rd, 1842:—"Dear wife,—As by this title I have still the prerogative to address you, I

am at a strange loss how to account for your conduct towards me. I have written two letters, and you have deigned to answer neither of them. What can be your motive for such cool reserve I cannot divine; but let me tell you this is the third and last time of asking. If you will not write to me, you cannot expect anything more in the shape of correspondence from the person you should love. Let me request you will write and give an explanation, or at least charge me with something, that I may defend myself. . . . You may probably think that you are causing me some trouble, and punishing me by not writing; but mind and be cautious you do not punish yourself in the long run, for it's a long lane that has never a turn: perhaps fortune may yet smile upon me, then what will you say? I know you have some ill advisers, for I am sure your conscience and your better feelings could not let you act thus; but let me beg of you not to take their advice, but act according to your own feelings, and let me know what are **[233]** your real sentiments towards me; for, although you are under good protection at present, you may survive it, and still there may not be sufficient left to maintain you and your small family; then, I would ask, who would become your protector and support in the time of need?"

This letter was not answered, and Mrs. Thompson heard no more of or from her husband till the summer of 1850, one of the children having died in the interval; he then met her on her way to chapel, and inquired why she had not sent to him when his child had died. She answered, that he had done nothing for it when alive, and he could not do anything for it when dead. After her return from chapel, Mr. Thompson came to his wife's mother's house, intoxicated, and claimed his wife and surviving child; Mrs. Thompson asked him whether he had a house to take them to; he said he had plenty of money, and would come the next morning; his wife answered, "Come sober." He did not return; and from that time to the present year, the wife had not seen or heard from her husband. She admitted that she had never attempted to renew the correspondence with her husband, or make any application to him to return to cohabitation.

Evidence was given that for the last thirteen years Mr. Thompson had been bookkeeper to a firm at Huddersfield.

Dr. Middleton for the petitioner.

No appearance was given for the respondent. Cur. adv. vult.

July 20.—*The Judge Ordinary.* This case was heard the other day on the wife's petition for judicial separation, on the ground of the husband's "desertion without cause" for upwards of two years. This is a new ground for judicial separation; it is a new authority conferred on this Court, which takes a new jurisdiction created by the Divorce Act, not transferred from the old jurisdiction of the Ecclesiastical Courts. There is a difficulty in defining "desertion," and cases may arise in which it would be very difficult to say whether the facts proved would fall within the meaning of the statute. Without attempting to lay down a precise definition of "deser-**[234]**-tion," I think it undoubtedly must mean a wilful absenting himself by the husband; and that such absence and cessation of cohabitation must be in spite of the wish of the wife; she must not be a consenting party. As to the facts of the present case, it appears that the parties were living in Leeds, and went to York to be married without the consent, indeed without the knowledge, of her parents; they returned to Leeds, and the marriage was kept secret, the wife living at her father's house, until in the course of a few months the latter discovered what the facts were, and required her to leave his house and go to her husband. He was then in a situation, which he afterwards lost. He then tried to establish a shop, but the business failed; she returned to her father's and he went to London in search of employment, and from that time the desertion is supposed to have commenced. But it appeared that he wrote to her from London a letter expressive of great affection and attachment, speaking of his prospects of getting a situation, and of their living together again. A few months after that he had an interview with her at Leeds, when he said he had not yet succeeded in his undertaking, but still hoped to do so. It appeared at this interview that she was rather cold, and he tried to pique her by mentioning some lady in London who had made him a present. He returned to London and wrote another letter in very affectionate terms, speaking of the probability of his entering on an engagement at a small salary and hard work, but which he hoped might improve; to that she returned no answer. He again wrote, expressing anxiety about her and his children, and praying her to remember that she was his wife and ought to communi-

cate with her husband. This was unanswered, and he wrote a fourth letter in an angry tone, complaining of the other letters remaining unanswered, and saying that, if she took no notice of his letters, he must suppose that she no longer wished to be on any terms with him. I asked the petitioner why these letters were not answered; she said the earlier letters were not answered because she was busy nursing her children, and that the last was insulting. There certainly were some expressions and allusions in it which had better have been omitted, but these were very frivolous reasons for a wife not to answer her husband's letters; **[235]** and when I pressed her further, it came out that her father would have objected to her writing. And this seems to be the truth, that the father had never approved of the marriage, and when his daughter went to live with him, did not wish her to have any further communication with her husband. His absence was, in the first instance, a necessary absence to seek employment, having failed in Leeds; and, looking at the conduct of the wife, I cannot consider the continuation of that absence as desertion within the meaning of the statute, and must dismiss the respondent from the suit.

CARGILL *v.* CARGILL. July 24 and 29, 1858.—Judicial Separation.—Desertion for Two Years.—Offer to Return.—20 & 21 Vict. c. 85, s. 16.—Where the offence of desertion without cause for two years is once completed, the spouse deserted has, at least since the Divorce Act came into operation, a complete right to the relief given by the statute, although the other party may, subsequently to the two years, have made a bonâ fide offer to return.—Semble, the same rule would apply to the wife's right to a dissolution of marriage by reason of adultery coupled with desertion, under the 27th section of the Divorce Act; but not to the "desertion" mentioned in sect. 21 as the foundation of an order for protection of the wife's property.

[S. C. 27 L. J. P. 69; 4 Jur. (N. S.) 764; 6 W. R. 870. Approved, *Mahoney* v. *M'Carthy*, [1892] P. 21; *Heard* v. *Heard*, [1896] P. 191; Cf. *Houghton* v. *Houghton*, [1903] P. 150.]

This was a suit for judicial separation at the suit of the wife, by reason of the desertion of the husband for two years and upwards without cause.

Dr. Deane, Q.C., and Dr. Middleton appeared for the petitioner.

The husband gave no appearance.

It appeared on the evidence that the desertion commenced in December, 1850, but that in the early part of the year 1858 the husband wrote, proposing to return to cohabitation. To this offer the wife made no answer, but filed her petition for a judicial separation. Assuming such offer to be a bonâ fide offer on **[236]** the part of the husband, the Judge Ordinary expressed a doubt whether it would not have the effect of terminating the "desertion for two years without cause," mentioned in the 16th section of the Divorce Act, and so bar the wife of the relief prayed.

Cur. adv. vult.

July 29.—*The Judge Ordinary.* This was a petition for judicial separation, on the ground of desertion by the husband without cause for two years and upwards. The petition was filed on the 12th of May, and the citation was served on the husband on the 14th. No appearance was entered for him. The marriage took place on the 7th of June, 1848; on the 2nd of December, 1850, the husband sent his wife back to her father's with a letter accusing her of misconduct, of which not the slightest evidence was given, and declaring that he never would live with her again. He soon afterwards quitted his house, sold his effects, and went to Australia, and his wife never heard from or of him till March in 1858, when, having returned to England, he addressed a letter to her at her father's house from an hotel in London, proposing that they should live together again; the wife returned no answer, and filed the petition with which I have now to deal.

There is no doubt that the respondent deserted his wife for two years and more, nor is there any evidence of any cause for it; and the sole question is, whether her right to the relief, which the statute would otherwise have given, was taken away by his proposal to live with her again. Various remedies are, by different sections of the 20 & 21 Vict. c. 85, given to a wife deserted by her husband. The word "desertion" may not in all places mean the same thing; thus, by sect. 21, it is enacted that a wife deserted by her husband may at any time after such desertion apply to a magistrate or certain other authorities for an order to protect any property she may

acquire by her own lawful industry, and property which she may become possessed of after such desertion; "and such magistrate, etc., if satisfied of the fact of such desertion, and that the wife is maintaining herself by her own industry or property, may make an order," etc. In that section I apprehend that desertion means, not only that the husband has absented himself, but has left his wife unprovided for, and such desertion **[237]** must continue at the time of making the order, and a bonâ fide offer of the husband to return and provide for his wife would take away her right to have such an order made.

By sect. 27 a wife is authorized to present a petition praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of adultery, coupled with desertion without reasonable excuse for two years and upwards. I think that in this instance the Legislature could never have intended that the wife should be deprived of the right to a dissolution of marriage which accrued on the expiration of the two years, by a subsequent offer on the part of her husband to return and cohabit with her. In such a case he certainly could have no right to call upon her to return to cohabitation with him, for by so doing she would have to condone the adultery of which he is supposed to have been guilty. I consider, therefore, that adultery, coupled with desertion without reasonable cause for two years, is a compound offence, giving a right to relief by dissolution of the marriage, no part of which could be blotted out without condonation by the wife. The 16th section gives a minor remedy for either part of this compound offence, viz. judicial separation for adultery, or for desertion without cause for two years and upwards; and I see no more reason for saying that the husband can obliterate either, when separate, without condonation by the wife, than when they are combined. Either, when committed, gives the wife a right to proceed, of which she cannot be deprived without her concurrence. This being my opinion as to the true construction of the statute, it is unnecessary to consider the terms of the letter addressed to her by her husband, for the purpose of ascertaining whether it was written in good faith or not. Assuming that it was, I nevertheless hold that the wife is entitled to the remedy for which she has petitioned, and I decree a judicial separation.

**[238]** IN THE GOODS OF ELIZABETH STONE JAMES (Widow, deceased), on Motion. May 1 and June 26, 1858.—Erasures.—Substitution.—Probate in Blank.—Practice. —The testatrix after the execution of her will erased certain parts thereof, substituting in their places other words. Probate granted of the will with those parts erased in blank, the original words not being discernible on the face of the paper, and there being no evidence to shew what they were.

Elizabeth Stone James, the deceased in this case, died on the 21st of December. 1857, leaving a duly executed will, dated the 1st of August, 1850, whereof she appointed Samuel Blount, Esq., J. W. Williams, and "Mary Ann Johnson, her faithful, trusty servant," executors.

There were several interlineations, erasures, and substitutions on the face of the will, and the amount of one of the legacies, and several other important words, as well as the words "Mary Ann Johnson, my trusty servant," in the clause appointing executors, were written on erasures. There were no means of discovering what the words obliterated originally were, either by ocular inspection or by parol evidence.

Dr. Tristram moved "for probate of the will in its present state to be granted to the said Mary Ann Johnson as one of the executors named therein." He submitted that it might be inferred from certain observations which fell from the deceased when she executed the will, that the interlineations, erasures, and substitutions had been made by her prior **[239]** to the execution: and cited *Doe d. Shallcross* v. *Palmer*, 16 Q. B. 747.

Dr. Deane, Q.C., for Mr. Blount and Mr. Williams, the other executors, opposed the motion, and prayed for probate of the will to be granted to Mr. Blount, as executor.

*Sir C. Cresswell* was of opinion that the presumption was, that the interlineations, erasures, and substitutions had been made by the deceased subsequent to the execution of the will; and decreed probate of the will to Mr. Blount and Mr. Williams as executors named therein; the probate of the parts erased, and upon which certain words had been written by way of substitution, to go in blank.

NICHOLS AND FREEMAN *v.* BINNS. July 26, 27, and August 2, 1858.—Will.—Habitual Insanity.—Evidence of Lucid Interval.—Tests of Sanity.—Next of Kin.—Costs.—W. P., who for many years had been afflicted with habitual insanity, accompanied with intermissions, executed a will when confined in a lunatic asylum. The instructions for it were designed and written by himself without assistance, and the will made a natural and equitable distribution of his property. Probate of the will was opposed by the next of kin on the ground of the testator being of unsound mind at the time of its execution. The executors contended that it was executed by him in a lucid interval. The jury having found a verdict for the executors, probate of the will was decreed: Held, that where a person afflicted with habitual insanity, with intermissions, makes a will, the fact that the will is a rational one and made in a rational manner, though not conclusive, is strong evidence of its having been made in a lucid interval.—That where a person is labouring under an insane delusion, his sanity is to be tested by directing his attention to the subject-matter of such delusion; but that where a person is afflicted with habitual insanity unaccompanied with delusions, his sanity is to be tested by his answers to questions, his apparent recollection of past transactions, and his reasoning justly with regard to them, and with regard to the conduct of individuals.—That the will in question was made under remarkable circumstances, **[240]** and such as would have justified the next of kin in calling upon the executors to prove it in solemn form: that the next of kin having put the executors to a very expensive trial, although she had previously received from them full and complete information respecting its execution, was not entitled to have her costs out of the estate. The Court declined to make any order as to costs.

This was a cause of proving in solemn form the last will and testament of Mr. William Wiggett Parkinson, who died on the 27th of August, 1857, in the Heigham Hall Lunatic Asylum, Norwich, promoted by Nichols and Freeman, the executors named therein. The will in question was dated the 15th day of November, 1851, and was signed by the deceased during his confinement in the above-named asylum, and attested by three witnesses, two of whom, Dr. Rankin and Mr. Mills, were in the medical profession, and the third, Mr. Bishop, was curate of the parish of Heigham. Probate of the will was opposed by the defendants, H. B. Binns and Mary Ann, his wife, who was the niece and sole next of kin of the deceased, on the ground that at the time of its execution he was of unsound mind.

The plaintiffs admitted that the testator for some time before, and even after, the date of this will had been afflicted with habitual insanity, but alleged that during such period he had frequent intermissions of his mental malady, and that at the time of the execution of the said will he was in the enjoyment of a lucid interval. He left real and personal property to the amount of between £12,000 and £15,000.

He first became insane in 1840, and on the 5th of December in that year he was placed in an asylum called The Retreat, near Norwich. In August, 1841, he was found by an inquisition to have been of unsound mind without lucid intervals from the 5th day of December, 1840, and subsequently Mr. and Mrs. Freeman (the latter being his niece) were appointed joint committee of his estate and person. In 1847 he had so far recovered as to be able to be removed from The Retreat to the house of Mr. Freeman; he remained there until June, 1851, during which period he had occasional fits of insanity. In June, 1851, he again became insane, and was removed to Heigham Hall Lunatic Asylum, where he remained until his death in August, 1857.

In 1837 he married his brother's widow; he had no issue **[241]** by her, and she died shortly after the marriage. At that time his nearest relations were a nephew and two nieces, the children of his only brother Mr. Joseph S. Parkinson, namely, Joseph W. Parkinson and Elizabeth Sarah Parkinson, who in 1838 married Mr. Freeman, one of the plaintiffs, and Mary Ann Parkinson, who in 1840 married Mr. Binns, the defendant.

On the 4th of February, 1837, he made a will, which was the next one in date preceding the will in dispute, by which, after giving his wife a life-interest in some property and making other specific devises and bequests, he devised one-third of the residue of his real estate to his nephew, the said Joseph W. Parkinson, absolutely; one other third to Mrs. Freeman, with a power of appointment, and in default of appointment to her for life, with remainder to her children, and for want of children,

with remainder over to Mrs. Binns; and the remaining one-third to Mrs. Binns with a like power of appointment, and in default of appointment, to her for life, with remainder to her children, and for want of children, with remainder over to Mrs. Freeman. The residue of his personal estate he divided between his said two nieces equally.

In 1845, the testator's nephew, Joseph W. Parkinson, died a bachelor, and in January, 1847, his niece, Mrs. Freeman, died, leaving three children her surviving. By these deaths the interest of Mrs. Binns under the will of 1837 became greatly increased, and that of Mrs. Freeman's children diminished, Mrs. Binns being thereby entitled to the whole of the testator's residuary personal estate, and to one moiety of that portion of his real estate devised to Joseph W. Parkinson.

For some time previous to August, 1851, the testator was intent upon making a new will, and on the 4th of August of that year he expressed a determination to make a more equitable arrangement in regard to the disposition of his property, and on the same day drew up with his own hand, and without assistance, the following instructions for the preparation of a new will:

"My will is that whatever amount of property I may die possessed of may, at my decease, be applied for the use and benefit of the three children which my late niece, Elizabeth Sarah Parkinson, bore to Mr. Charles Jeremiah Freeman, **[242]** her husband, in equal proportions. And also a like sum for my niece, Mary Ann, the wife of Mr. Horace B. Binns, for her absolute use and benefit, independently of any control over the same by her said husband, and she having an only child, a son, which she bore to her said husband, a similar sum to be applied for his education and support until he shall attain to the age of twenty-one years, then the amount to become his property absolutely and exclusively. And my will is that each of these several five shares or divisions of my property may be fairly and equitably made and applied as directed above. And for the purposes of carrying out and completely executing the intentions of this my will, I hereby appoint as executors thereof with full powers."

On the 6th of August, 1851, these instructions were by his request taken by Mr. Watson, at that time one of the proprietors of Heigham Hall Asylum, to Mr. Simpson, a solicitor in Norwich, who had formerly been concerned for the deceased. Mr. Watson added to the written instructions some verbal explanations as to the wishes of the deceased. Mr. Simpson prepared a draft will in accordance with these instructions, and on the following day took the draft to, and had an interview with, the deceased, when he, before reading or shewing to him the draft, questioned him as to his intentions in regard to his will. The deceased said his previous will would not have the effect he wished, and stated what his wishes were (which coincided with his written instructions), and that he wished Mr. Nichols and Mr. Freeman to be his executors. Mr. Simpson also drew his attention to the fact of his being in an asylum, and told him it would be more likely to be effectual if he would copy it himself. He said he would try to do so, and the draft was left with him for that purpose. The deceased however felt himself unequal to the task. The execution of the will was deferred until the month of November following in consequence of the testator having in the meantime been subject to one of his ordinary recurrent fits of insanity. On the 5th of November he sent the draft to Mr. Simpson with a request that it might be engrossed for execution. Mr. Simpson acted thenceforward in the matter under the advice of counsel. The draft will was engrossed and executed by the testator on the 15th of November, 1851, having been first read over to, and approved of by **[243]** him, and was attested by two medical gentlemen, Dr. Rankin and Mr. Mills, and the curate of the parish, Mr. Bishop.

The three attesting witnesses, also Mr. Simpson, Mr. Nichols, and Mr. Watson, who were present at the execution of the will, and other persons, were examined in support of it.

By the will the testator appointed Mr. Nichols and Mr. Freeman executors, and devised all his real and personal estate to them upon trust to sell the real estate, and to stand possessed of the proceeds of such sale and of his personal estate upon trust, after payment of debts, as to one-fifth part, to lay out the same in the purchase of an annuity payable to Mrs. Binns for her life; as to one other fifth part, to stand possessed of the same for the child of Mrs. Binns on his attaining twenty-one, and during his minority to apply the income for his benefit, and in the event of his death under twenty-one, his one-fifth to go over to Mrs. Freeman's children; and as to the

remaining three-fifth parts, and also the fifth part given over as aforesaid, to hold the same upon trust for Mrs. Freeman's three children in equal shares on their attaining twenty-one, with the right of survivorship between them in the event of any of them dying under age and unmarried.

The defendants called no witnesses.

The Attorney-General (Sir Fitzroy Kelly), Dr. Addams, Q.C., and Mr. Hannen, for the plaintiffs (the executors).

Mr. Collier, Q.C., Honble. G. Denman, and Mr. Archibald, for the defendants.

*Sir C. Cresswell* (to the jury). The question for your decision is, whether Mr. Parkinson, the deceased in this case, who is proved to have been insane at times and for long periods of time during many years, was in the enjoyment of a lucid interval when he executed this will.

Where a person is never shewn to have been insane, the law presumes that he is sane; but if insanity is once proved to have been during a period of his life his normal state, it is necessary, in order to establish the validity of any act which he may have done during that period, to shew that he was sane at the time of his doing that act.

**[244]** I have referred to the case of *Cartwright* v. *Cartwright* (1 Phill. 90), which is a decision by Sir William Wynne in the Prerogative Court, and is one which has been frequently quoted. The testator in that case was a lady afflicted with permanent insanity, and living under restraint, but who was proved to have had intermissions of her complaint; she drew up, without assistance and in proper form, a will in her own handwriting; she was apparently, almost at the moment of preparing it, in considerable excitement; for she was seen at the time to write upon several pieces of paper and tear them up in a wild and excited manner and throw them into the fire; but the will in question appeared certainly to have been a right and natural will for her to have made, and was held to be a good will. Sir William Wynne in his judgment in that case is reported to have said: "If it can be proved that this is a rational act rationally done, the whole case is proved. What can you do more to establish the act." But this expression of the learned Judge cannot be applied strictly to all cases. The mere fact that the act is rational, and done in a rational manner is not, I think, in itself conclusive evidence of sanity; although in every case it will be very strong evidence of sanity, tending greatly to satisfy the mind of a rational person that the party so doing that act was at the time in full possession of his senses. But after a paroxysm of insanity has passed away, insanity may still be lurking in the mind of the patient, although there is nothing apparent on the surface to shew it.

It was argued by counsel in opposition to this will, that although when the deceased made it, apparently he was restored to sanity, yet that there might have still been insanity lurking within, which was not observable; and he told you of two or three remarkable instances, the traditions of the bar in Westminster Hall, in one[2] of which a great and experienced advocate cross-examined a witness a long time before he could discover that he was insane. He did not do so until he touched upon the subject upon which he laboured under a delusion. But in all those cases you will, I believe, find that the person was labouring under an insane delusion; and where this is the case, unless you discover what the delusion is, and bring the subject of his delusion under his attention, you **[245]** may not discover that he is insane. This will not apply to the present case, for there is no proof that the deceased was ever subject to any delusion. Indeed it appears according to the evidence of one gentleman, Mr. Nichols, who gave his evidence, I thought, very sensibly, that the deceased's was a case of recurrent mania, and that his existence was passed under three different sets of circumstances—raving madness; depression, amounting to an insane state of mind; sanity. And Mr. Watson said, that as his bodily health became stronger, there was again an increased and inflammatory action of the brain, and again he became violent; then came another fit of depression, and then sanity, and so on in a regular course. But in no part of their evidence do they ever say there was anything like a delusion by which at any period they could test whether he was sane or not. It was therefore only by his answers to questions, his apparent recollection of past transactions, and his reasoning justly with regard to them, and with regard to the conduct of individuals, that anyone could judge whether he was sane or not.

It appears that the deceased (and there is no doubt about this) had two nieces, one

[2] Mr. Greenwood's case.

(Mrs. Freeman) who had always pleased, and the other (Mrs. Binns) who had disobliged him. Mrs. Freeman had three children, and Mrs. Binns had one. He had made a will in 1839, the arrangements of which were entirely defeated by the death of Mrs. Freeman and her brother; so that if no new will were made, nearly the whole of his property would have gone to the niece who had disobliged him, to the exclusion of those with whom he had always been satisfied, and upon whom he had bestowed a great share of his affection. It is also admitted that when he was removed from the first lunatic asylum in which he was placed, I mean Mr. Dalrymple's asylum, the house he went to was Mr. Freeman's. He went there and remained there for nearly four years (in the course of which he had occasional fits of insanity), and during that time there does not appear to have been any trace of friendly or kindly intercourse between him and Mr. and Mrs. Binns.

There is no doubt that the execution of this will was a very responsible transaction; and that a will prepared and executed in a lunatic asylum by a man not generally in possession **[246]** of his faculties, ought to be regarded with great care and jealousy; but this should not be carried too far; for a person may be in a lunatic asylum because he is affected by a malady which makes it necessary that he should be placed under restraint, but who at times may be perfectly sane; and if he was prevented from disposing of his property according to his wishes it would be a great hardship upon him. I can fancy a case where such a person being conscious that he was labouring under restraint, and feeling that his property, if he did not make a disposition of it, would not go as he thought right and just, would be much affected if he thought that he could not otherwise dispose of it. We have some trace of this kind of feeling in the present case. Mr. Watson says, "The deceased frequently mentioned to him his family; and said he wished to make, if possible, a fresh and more even adjustment of his property, and that he mentioned the death of Mr. Joseph Parkinson and also of his niece, Mrs. Freeman, and said that in consequence of their death the whole would go to Mrs. Binns, which was not his wish or intention." Then, again, there is the remarkable circumstance spoken to by Mr. Nichols, that this annoyed him very much, and distressed and disturbed him, and that he was very anxious about it; that he knew his position—that he was in a lunatic asylum—and felt that there was a difficulty about making his will, and had asked him if it could not be done.

It is said that there is some little difference between the instructions and the will. But the will is substantially in accordance with the instructions; it was read over and explained to the testator, and he was perfectly satisfied with it.

In addition to this, you have the evidence of Mr. Nichols, Mr. Watson, Dr. Rankin, and Mr. Mills, whose characters are high in the profession to which they belong. Two of these gentlemen, Mr. Nichols and Mr. Watson, tell you that in the month of August, 1851, they saw the testator in the lunatic asylum, and that they had no doubt of his sanity at that time; and the other two gentlemen were called in for the purpose of ascertaining the state of his mind in November, and although they do not recollect the questions they put to **[247]** him—Dr. Rankin says that he was with him for about three-quarters of an hour, and that he endeavoured to test his understanding—and they both say that they were perfectly satisfied of his competency at that time.

At the conclusion of the learned Judge's charge, the jury having retired for a few minutes found by their verdict that the will was made by the deceased in a lucid interval.

Mr. Collier, Q.C., submitted that the defendant's costs ought to come out of the estate.

*Sir C. Cresswell*: I will consider the question. My present impression is that it is almost an undefended case.

Mr. Collier: I did not call witnesses in the exercise of my own discretion.

*Sir C. Cresswell*: It really will not make much difference to the defendants. They have two-fifths and the other party have three-fifths of the residue. If I allowed costs at all to come out of the estate, your parties would have to pay two-fifths of them.

Cur. adv. vult.

August 2.—Dr. Addams, Q.C., moved for probate of the will. He understood that an application would be made on the part of the defendants to have their costs paid out of the estate. He should oppose the application. The defendants had so

conducted their opposition to the will as to put the estate to great and needless expense. Moreover, they knew beforehand what the case of the executors was; for it appeared in the evidence that early in the progress of the cause, the defendant's attorney had subjected Mr. Watson (the proprietor of the asylum in which the testator had been confined since 1851) to an examination which lasted for three hours, and that during such examination he had answered all the questions put to him, and had given him every information in his power. Under these circumstances he submitted that the Court ought to reject the application.

Hon. G. Denman, for the defendants: This is one of those **[248]** cases in which the next of kin had reasonable cause for putting the executors on proof of the will, and they ought to have their costs out of the estate. The will was made in a lunatic asylum, at a time when the next of kin had no access to the testator. It was made without her knowledge, and she never heard of it until six years after it was made. If she had had earlier information of its execution she could have then instituted inquiries which might have averted the present suit. The defendants had not called any witnesses, because their witnesses could have spoken to the state of the testator's mind only before and after the execution of the will, and this part of their case was proved by the plaintiff's witnesses. It was admitted by the plaintiffs, that the testator before and at the time of his death had been affected with permanent insanity; but they contended, and the jury found, that the will was made during a lucid interval. In deciding under such circumstances, whether the next of kin had or had not just cause for putting the executors on proof of the will, the Court would bear in mind the difficulties attending proof of a lucid interval in cases of permanent insanity. In *Brogden* v. *Brown*, 2 Adds. 444, Sir John Nicholl said: "In cases of permanent proper insanity, the proof of a lucid interval is matter of extreme difficulty, as the Court has often had occasion to observe, and for this, among other reasons, namely, that the patient so affected is, not unfrequently, rational to all outward appearance, without any real abatement of his malady; so that, in truth and substance, he is just as insane in his apparently rational, as he is in his visible raving fits." This is one of those cases in which it might be said that there was a just cause of suspicion, whether the testator when he made his will, though apparently rational, was not really insane. Under these circumstances he submitted that the costs should come out of the estate.

*Sir C. Cresswell.* In the first place, I decree probate of the will.

The question of costs is a very important one. There has been a great difference between the practice of the Ecclesiastical Courts and the practice of the Courts of Common **[249]** Law on this point. If an executor or an heir-at-law enter into a contest at common law as to the validity of a will, they do so at the risk not only of not receiving, but of paying costs. The Courts of Common Law have no power to give costs out of the estate. But by the practice of the Ecclesiastical Courts, where there was a fair case for inquiry, the next of kin might call on the executors to prove the will in solemn form, and, generally speaking, at the expense of the estate. This I understand has gone so far, that they had a right[1] to insist upon certain witnesses being called, to give them an opportunity of examining them. I am not inclined to enlarge this rule

In the present case there is no doubt that the will was executed under very remarkable circumstances. I am not surprised at Mrs. Binns resisting it, and I think she would have been perfectly justified in calling upon the executors to prove it in solemn form. The three attesting witnesses, two of whom were highly respectable medical men who had previously made themselves acquainted with the testator's condition, and the other the curate of the parish, must then have been called, and she would have had an opportunity of cross-examining them. It does not appear that Mrs. Binns made any application to them for information which was withheld. And further, when the contest was embarked in, Mr. Watson, under whose care the lunatic was, and who would be able to give the best information as to his state of mind, submitted to an examination for three hours by Mrs. Binn's solicitor. There is no pretence for saying that any information which Mrs. Binns asked for was withheld. Under such circumstances, if the next of kin chooses to go to the expense of such a trial as took place last week, I cannot make the estate bear her costs. I do not condemn her in costs, which would have been the case in a Court of Common Law. I make no order as to costs.

---

[1] See *Cartwright* v. *Cartwright*, 1 Phill. 94.

**[250]** IN THE GOODS OF EDWARD GREVES (deceased), on Motion. December 3, 1858.

Will.—Incorporation.—The Court will not extend the principle of incorporation as laid down by the Privy Council in *Allen* v. *Maddock*.

[S. C. 28 L. J. P. 16; 7 W. R. 86.]

Edward Greves made his will bearing date the 22nd day of April, 1856, but did not appoint any executor thereof.

In the fifth sheet of the will the following clause appears: "And I also give to the said Sarah Florence some household furniture, to be delivered to her in one week after my decease, which she has got a list of, if she lives with me at the time of my death."

At the time the will was executed, the list referred to was not produced.

Sarah Florence deposed that the testator, about the year 1852, on making a former will, stated to her (she being at the time his housekeeper), that it was his intention to leave her some portion of his furniture, and that thereupon he handed to her a list of such furniture, which he desired her to keep. The list was in the testator's own handwriting, and began, "List of goods I give to my godson, Edward Florence," and ended thus, "my violin and clarionets." That on the testator executing his last will, on the 22nd of April, 1856, he again requested Sarah Florence to keep this said list, which she had then in her possession, and that she did so until his death. She further deposed that the deceased never gave her any other list, and that she believed the same to be the one referred to by the deceased in his will, and intended by him to be a bequest to her.

John Edward Florence, mentioned in the above list, was an illegitimate son of the deceased by the said Sarah Florence.

Dr. Wambey moved "for letters of administration with the said will, and also the said list of furniture annexed, as together containing the will of the deceased, to be granted to A. Greves, the residuary legatee named in the will." This list was the only one given to Sarah Florence by the deceased, and it was in existence prior to the execution of **[251]** the will. He submitted that the identity was sufficiently proved. *Croker* v. *The Marquis of Hertford*, 4 Moore P. C. R. 339; *Haynes* v. *Hill*, 1 Rob. Eccl. Rep. 795.

*Sir C. Cresswell.* The question to be decided is not whether there are grounds for conjecturing that the testator referred to the list produced, but whether it is proved by legitimate evidence that he did so. The doctrine as to incorporation was very fully discussed in the Privy Council in the case of *Allen* v. *Maddock* (11 Moore, P. C.). The list purports to be a list of certain property intended by the testator to be given to another person and it does not correspond with the one mentioned in the will. If I granted the motion, I think I should be extending the principle laid down by the Privy Council in the case I have referred to, and this I am not inclined to do, although I entirely concurred in that decision. Motion rejected.

WARE AND GROVE *v.* CLAXTON AND CLAXTON. December 23, 1858.—Pleading.—Practice.—Leave to amend.—Conditions.—B. died in May, 1850, leaving a will, dated May, 1849, and two codicils dated May, 1850. Probate of these papers was taken in common form in July, 1850. In April, 1858, two legatees under the will intimated their intention of disputing the two codicils; whereupon the surviving executors commenced a suit and filed their declaration on the 25th of June. On the 21st of July the defendants filed pleas: first, alleging that the codicils were unduly executed; and secondly, that the testator was of unsound mind at the time of their execution. On the 18th of November the plaintiffs set the case down for hearing, but it had not come on for trial. The defendants now, on the affidavit of their solicitor, applied for leave to amend their pleas by inserting similar pleas as against the will, on the ground that since the pleas were filed, their solicitor had received information impeaching the validity of the will. The Court, hæsitanter, allowed such amendment, on condition of a portion of a legacy already received by one of the defendants being brought into Court, the costs of the motion being paid, and the pleadings amended within a week.

[S. C. 7 W. R. 145.]

This was an application for leave to amend the pleas.

The testator died in May, 1850, leaving a will, dated 17th **[252]** May, 1849, and two codicils, dated respectively 16th and 17th of May, 1850, whereby he appointed his wife, Susannah Claxton, and the plaintiffs, executors. Probate of these papers was

granted to the executors in 1850. The defendants were legatees under the will, and though the pecuniary legacies were not due till after the widow's death, George Claxton had received certain sums on account of his legacy; and Thomas Claxton and Ann his wife had, by indenture dated the 26th June, 1852, assigned over their legacies. Mrs. Claxton, the widow, died in February, 1857, and in April, 1858, the surviving executors received a letter from the defendants' solicitors, intimating that they disputed the validity of the two codicils, which led to the institution of the present suit. On the 25th of June the plaintiffs filed their declaration; and on the 21st of July the defendants filed their pleas: first, that the codicils were not executed according to the provisions of 1 Vict. c. 26; secondly, that the testator, at the date of the alleged codicils, was not of sound mind, memory, and understanding.

The defendants, in their affidavit of scripts, admitted the validity of the will. On the 18th of November the plaintiffs set the cause down for trial, and filed notice. The summons, on which the present motion was originally founded, was on behalf of the defendants, "to shew cause why the defendants should not be at liberty to amend their pleas herein (notwithstanding the cause has been set down for trial) by adding two additional pleas similar in form to those already filed against the alleged codicils, so as to raise the question of the due execution of the alleged will, and the capacity of the testator at the time of the alleged execution or date thereof."

Mr. Field now moved the Court accordingly, on an affidavit made by the defendants' solicitor, of which the following were the important paragraphs:—4. That this cause had been set down for trial during the present sittings, but he had been informed that it could not come on for trial during such sittings. 5. That after the pleas were delivered, namely in the month of November last, he obtained information which induced him to believe that not only the codicils of the testator, but also his will, were not duly executed; and if he had re-**[253]**-ceived the information he now possessed before the pleas had been delivered, they would have been prepared so as to raise the question of the validity of the will as well as of the two codicils. 6. That in consequence of such information, he took an opinion of counsel, and was advised by him that it was necessary, in order to contest the validity of such will, to amend the pleadings by adding two pleas against the alleged will, similar in form to those already pleaded against the alleged codicils, so as to raise the question of the due execution of the alleged will, and the capacity of the testator at the time of the alleged execution or date thereof.

Dr. Addams, Q.C., contrà: At least the Court will order the money received by one of the defendants under the will to be brought in, before it grants such a motion.

*Sir C. Cresswell.* I have great difficulty in granting this motion at all; and apart from the question of time, there is another consideration, whether there is now any satisfactory ground laid for the proposed proceeding. The affidavit of the solicitor is very loose, and gives me very little opportunity of being satisfied of the bona fides of the application. I am, however, always exceedingly unwilling to shut out any matter that parties wish to bring before the Court or a jury. I can detect nothing like a vexatious intent in the present application, otherwise I should certainly have refused it. On condition that any legacies received are brought in, the costs of the present motion paid, and the pleadings amended within a week from this date, I grant the motion.

IN THE GOODS OF HER ROYAL HIGHNESS THE DUCHESS D'ORLÉANS (Widow, deceased), on Motion. January 13, 1859.—Administration with Will annexed. —Foreign Grant to Minor.—Practice.—The Court will not follow the grant of the country of domicil when it would, by so doing, be acting in contradiction to the law of this **[254]** country. An application for a grant of letters of administration to a minor, assisted by his uncle, his curator, lawfully appointed according to the law of the domicil, refused.

[S. C. 28 L. J. P. 129; 5 Jur. (N. S.) 104; 7 W. R. 269. Discussed, *In the Goods of Earl*, 1867, L. R. 1 P. & D. 452. Explained, *In the Goods of Meatyard*, [1903] P. 125. Referred to, *In re Cocquerel*, [1918] P. 5. Referred to, *In the Estate of Rankine*, [1918] P. 139.]

This was a question of granting letters of administration, with the will annexed, of the late Duchess d'Orléans, in accordance with the grant which had been made in France, the country of the deceased's domicil, as acquired by her marriage, and

not lost by her compulsory residence out of France under the decree of the French Republic of the 26th of May, 1848.

The Queen's Advocate (Sir J. D. Harding), (Dr. Spinks with him,) moved the Court to decree letters of administration with an official copy of the will annexed of the personal estate of the testatrix in England, as having had, at the time of her decease, a legal domicil in France, to be granted to His Royal Highness Louis Philippe Albert d'Orléans, Count de Paris, a minor, assisted by his uncle, His Royal Highness Louis Charles Philippe Raphael d'Orléans, Duke de Nemours, his curator lawfully appointed at a family council, held at Paris, on the occasion of his emancipation to assist him (according to the law of France), and to Her Majesty Maria Amélie, Princess of the Two Sicilies, widow of His Majesty Louis Philippe, deceased, the grandmother and the lawful guardian, according to the law of France, of His Royal Highness Robert Philippe Louis Eugène Ferdinand d'Orléans, Duke de Chartres, a minor, for his use and benefit, and until one of them shall attain the age of twenty-one years, the said Count de Paris and the Duke de Chartres being the only children of the testatrix and the residuary legatees named in the said will.

*Sir C. Cresswell.* There is no difficulty whatever about the domicil. I am quite satisfied that the domicil of the Duchess continued to be French, and that this paper is a valid will. But although, in these cases, the Prerogative Court has followed as far as possible the practice of the Court of the country of the deceased's domicil, is there any instance of its having so acted in contradiction to English law? In this country the minor is under a disability. There seems to be no instance of its having granted administration to a minor, **[255]** who cannot take upon himself the liabilities which the law casts upon an administrator—he cannot, for instance, execute a bond.

The Queen-dowager's claim is beyond doubt. I think the Count de Paris should follow the usual practice and elect his next of kin, Her Majesty Marie Amélie, his grandmother, to be his guardian, for the purpose of taking administration on his behalf. The grant of administration may then be made to Her Majesty the Queen-dowager, as guardian of both the Count de Paris and the Duke de Chartres.

IN THE GOODS OF JANE THOMAS (Widow, deceased), on Motion. January 13 and 17, 1859.—Will.—No Attestation Clause.—Presumption of Execution.—A. made her will in 1842; at her death there appeared the names of three subscribed witnesses, but no attestation clause. The only surviving witness, whose name stood first of the three, stated that the testatrix signed the will in his presence only; that he suggested the necessity of two witnesses, but could remember no more particular circumstances.—Held, that the presumption of due execution was not rebutted by the affidavit of the surviving witness.

[S. C. 28 L. J. P. 33; 5 Jur. (N. S.) 104; 7 W. R. 270. Referred to, *Harris* v. *Knight*, 1890, 15 P. D. 170.]

In this case the will of the deceased bore date the 10th of October, 1842. By it Jane Burnet, wife of James Burnet, formerly Jane Bishop, spinster, was appointed executrix. The signature was attested by three witnesses, but there was no attestation clause. The signatures appeared under the word

"Witness,
"Benjamin Franklyn,
"John Skeggs,
"Mary Skeggs."

B. Franklyn, a spirit merchant at Plymouth, deposed on affidavit that he remembered being requested by the testatrix to attest her signature to the will, and that she did sign her name in his presence, and that he thereupon subscribed his name in her presence; "and further, that after the interval of so many years he was unable to recollect exactly all the **[256]** circumstances attending his so subscribing the said will; but, as well as he remembered, the testatrix and he were the only persons present at such time, and the signatures of John Skeggs and Mary Skeggs, which now appear subscribed to the said will immediately under his signature, were not so subscribed in his presence. He remembered that he made a suggestion to the deceased, at the time he subscribed the will, that another witness ought to be present, but what further passed on the subject he was unable to recollect. That he had no knowledge whatever whether the testatrix afterwards acknowledged the signature of the said will in the presence of the said two witnesses whose names appeared

subscribed thereto, or of the circumstances under which such witnesses so subscribed the said will."

John Skeggs and Mary Skeggs were since dead. They were people of some consequence at Devonport. Their handwriting was spoken to by two witnesses.

Dr. Spinks moved the Court to decree probate of the will to the executrix therein named. He cited the remarks of Dr. Lushington in *Burgoyne* v. *Showler*, 1 Rob. Eccl. Rep. 10: "If a party is put on proof of a will he must examine the attesting witnesses. On the present occasion there are two subscribed witnesses; if these persons were dead, the law would presume the will to be duly executed," etc. He submitted, that though Franklyn's affidavit made his signature unavailing, yet the presumption would now be that the testatrix afterwards duly acknowledged the signature in the presence of Skeggs and his wife, and that they duly subscribed their names.

*Sir C. Cresswell*: I cannot at present grant this motion. The presumption which would arise on the face of this paper with regard to the three subscribed names, is in part rebutted by the affidavit of Franklyn. Does the rest of the presumption hold good as to the other names? They have not the appearance of being written in the same ink. Cur. adv. vult.

January 17.—*Sir C. Cresswell.* I think I may fairly assume that the will was duly executed. The first subscribed witness **[257]** who survives states in his affidavit that he explained to the testatrix that two witnesses were required to be present at the execution of a will, and it appears that some time afterwards the testatrix obtained the signature of two other witnesses. It is a fair presumption, that she acted upon the information given to her, and got these two last witnesses to attend in order that she might acknowledge her signature in their presence. Probate granted.

IN THE GOODS OF FREDERICK WAINWRIGHT (deceased), on Motion. November 19, 1858.—Administration.—Death of Husband and Wife.—Uncertainty as to Survivorship. Form of Oath.[1]—F. W. perished with his wife and only child, an infant, in the Cawnpore massacre, leaving no will. There being no evidence as to survivorship, the Court granted administration of the personal estate of F. W., as having died a widower, to his mother, as his next of kin. The administrator's oath, instead of being in the usual form, may state that there is no reason to believe that the wife survived the husband.

[S. C. 28 L. J. P. 2. Followed, *In the Goods of Beynon*, [1901] P. 141.]

Frederick Wainwright, a lieutenant in Her Majesty's 32nd regiment of foot, perished in the massacre at Cawnpore, on the 27th of June, 1857, leaving no will. It appeared from the official returns that he, his wife, and only child, were all massacred on or about the 27th day of June, 1857, but which of them died first or whether any of them survived the others, could not be ascertained. These facts were deposed to in an affidavit made by the mother of the deceased, who was a widow.

Dr Twiss, Q C., moved the Court to grant administration to the mother, dispensing with the usual words of the oath, that the deceased died a widower, without child.

*Sir C. Cresswell.* As there is no evidence to shew that the deceased's wife survived I think administration may go as prayed. Motion granted.

**[258]** IN THE GOODS OF LIEUTENANT-COLONEL EWART. June 8, 1859.

Dr. Phillimore moved for administration of the effects of the late Lieutenant-Colonel Ewart to be granted to E. C., his next of kin. The deceased, in June, 1857, left Cawnpore in a boat, accompanied by his wife and several other Europeans, who were all under the protection of Nana Sahib; and whilst proceeding down the Ganges, the boat was attacked, and the deceased and his wife (with the rest on board) perished. There was no evidence to shew which of the two survived, and he must therefore ask the Court to direct that the administrator should not be required to swear that the deceased died a widower according to the usual form of the oath.

*Sir C. Cresswell.* I will grant the motion. With regard to the form of the oath to be taken, it may state that the deceased and his wife perished at the time named, and that [1*] there is no reason to believe that the wife survived her husband.

---

[1] See next case:—*In the Goods of Lieutenant-Colonel Ewart.*

[1*] Or that, after making inquiries, he had no reason to believe that the wife survived her husband.

SCOTT *v.* SCOTT. January 24, 1859.—Will.—Undue Execution of a later Will.—Destruction of the former Will.—Revocation not sustained.—A will was destroyed by the testator, on the supposition that he had substituted another for it, but which was not duly executed. Probate of a copy of the first will granted.

[S. C. 5 Jur. (N. S). 288. Distinguished, *Newton* v. *Newton*, 1861, 12 Ir. Ch. R. 118.]

The deceased in this case died on the 6th of December, 1857, having duly executed a will dated the 21st of February, 1852 (appointing his brother, John Scott, executor), and a codicil, dated the 25th of May, 1854. On the 20th of August, 1857, the deceased signed his name to a document, purporting to revoke this will and codicil. After he had executed this document a suggestion was made to him that he might burn the previous will and codicil, inasmuch as he had made a new one, when he observed, "I suppose there is no use in keeping the old ones, as I have made a new one"; and ac-**[259]**-cordingly burnt them. It subsequently turned out that the document, dated the 20th of August, 1857, was not duly executed. A declaration was filed, propounding copies of the will dated the 21st of February, 1852, and the codicil dated the 25th of May, 1854; but inasmuch as the facts of the case were not disputed, both parties agreed to take the opinion of the Court on motion, and that the costs should come out of the estate.

Dr. Addams, Q.C., on the part of the plaintiff, after stating the facts of the case, and that by the affidavits it was proved that the will dated the 21st of February, 1852, and the codicil dated the 25th of May, 1854, were duly executed, and that correct copies of them were before the Court, submitted that the deceased had only destroyed these papers on the supposition that the later will was valid, and duly executed; and that, as that was not so, they were entitled to probate.

Dr. Deane Q.C., for the parties interested in an intestacy, submitted to the decision of the Court.

*Sir C. Cresswell.* The construction put upon this transaction by Dr. Addams is, I think, the correct one. There is no reason to doubt the truth of the affidavit. I must take the fact to be that the deceased having, as he supposed, duly executed a second will, said, "Now I have executed this will, the former will and codicil are of no use"; and destroyed them. He intended only to destroy the first will in substituting another for it. The first will and codicil, therefore, are entitled to probate.

IN THE GOODS OF CHRISTOPHER DODGSON (deceased), on Motion. February 16, 1859.—A Grant of Administration limited to carry on a Suit in Chancery and to receive a particular Fund, the Subject-matter of the Suit.—Where a party applying for administration has no direct interest in the personal estate of the deceased, but only as assignee of part of it, **[260]** he cannot obtain a grant extending to the whole of the deceased's property; the grant must be limited to the particular fund to which it is entitled.

[S. C. 28 L. J. P. 116; 5 Jur. (N. S.) 252.]

The deceased, Christopher Dodgson, having been an idiot from his birth and so found by inquisition, died on the 11th of June, 1858, entitled to some money in Chancery.

Robert Dodgson, who was the father and next of kin of the deceased, had, during the lifetime of his son, assigned all the right and interest in the property which would devolve to him at his son's death to Richard Davies, as a security for a sum of money. On the 13th November, 1858, administration of the effects of the deceased, under the usual limitations, for the purpose of appearing upon and supporting a petition to the Court of Chancery, was granted by the Court of Probate, on motion, to a nominee of Richard Davies, in default of the appearance of Robert Dodgson to a citation served upon him. When, however, application was made for payment of a sum of £4743, 11s. 8d., £3 per cents., standing in the name of the Accountant-General of the Court of Chancery to the account of the deceased, to the administrator of his effects, the registrar of that Court objected to draw up an order for payment, unless letters of general, and not merely limited, administration were produced. On the 28th January last the Lords Justices, to whom the matter was referred, supported the objection.

Dr. Phillimore, Q.C., now applied for a grant of administration of the effects

generally, without limitation, of the deceased to be made to Richard Davies or his nominee. He admitted it was contrary to the usual practice.

*Sir C. Cresswell.* A general administration is out of the question, for Mr. Richard Davies has no interest whatever in the personal estate of the deceased, except as assignee of the father, Robert Dodgson. The Lords Justices say that the administrator appointed has only authority to carry on the Chancery suit, and no right to receive the fruits of it. Perhaps, therefore, it will answer the purpose if I alter the words of the previous decree, so as to authorize the administrator not only to carry on the suit, but to obtain the sum of money **[261]** in dispute. The most convenient course will be to revoke the administration already issued, and to make a fresh grant to the nominee of Mr. Davies, limited to carry on the suit in Chancery, and to receive the particular fund assigned by Mr. Robert Dodgson, the subject-matter of that suit, namely, £4743, 11s. 8d., £3 per cent. consols, standing in the name of the Accountant-General of the Court of Chancery to the account of Christopher Dodgson, deceased, together with the interest thereon. Let the grant issue in that form. I do not think that it is necessary to cite the father a second time.

IN THE GOODS OF JOHN HOLGATE (deceased), on Motion. February 16, 1859.—Will.—Imperfect Recollection of the attesting Witnesses.—Presumption of due Execution.—Probate.—A will, in the handwriting of the deceased, admitted to probate, although the attesting witnesses did not recollect whether it was signed by the testator, or his signature acknowledged in their presence.

[S. C. 5 Jur. (N. S.) 251; 7 W. R. 19.)

The deceased, John Holgate, died on the 13th September, 1858, leaving a will in his own handwriting, which terminated thus:—

"This 15th day of August, 1851.

"Signed by me, John Holgate, the testator, as and for his last will and testament. In the joint presence of us present at the same time, who in his presance, at his request, and in the presence of each othior, have hereunto subscribed our names as witnesses. "JOHN HOLGATE.

"JOHN HODGSON. HENRY GUY."

The attesting witnesses in their affidavits stated "that they signed the paper at the request of the testator, who said when he brought it to them, 'I want you to sign this,' or 'Put your name to this,' or words to that effect, but they could not recollect the exact words; that they were both present at the time, and subscribed the will in the testator's **[262]** presence; they could not say positively, whether the said will was signed when he, the testator, brought it to them or not, but to the best of their recollection and belief it was, though they could not recollect whether he signed it in their presence or not, their impression being that he did not, but that it was signed when he first brought it to them; that the signature was in the handwriting of the deceased; that, to the best of their recollection, the testator did not mention that the said paper he so requested them to sign was his will, but they could not be sure that he did not, but they then thought and considered it was his will." The will was executed at the house of the witness John Hodgson, and shortly afterwards was handed by the testator to his daughter, in whose custody, or in that of her husband, it remained until after the death of the testator.

Dr. Middleton cited *Faulds* v. *Jackson* (6 N. C., App. 1), and submitted that the evidence of the witnesses, and the position of their signatures, established that if the testator did not sign his name in their presence, his signature must have been seen by them when they subscribed their names.

*Sir C. Cresswell.* The witnesses cannot recollect whether the testator brought it signed, or signed it in their presence. In either case it is entitled to probate.

Probate granted.

IN THE GOODS OF ROBERT DAVY (deceased), on Motion. February 23, 1859.—Will.—Codicil.—Clerical Error by the Attorney who prepared the Codicil.—The deceased duly executed a will, wherein he named three persons executors; he subsequently instructed his attorney to prepare a codicil to this will, for the sole purpose of altering two bequests therein contained. The attorney, in drawing the codicil, concluded with the following paragraph, "and in all other respects I

revoke my said will," intending to have written for the word "revoke," "confirm." —The codicil was read over to the deceased, and executed with the clause as originally drawn.—**[263]** Held, that there was not sufficient ambiguity on the face of the codicil to authorize the admission of parol evidence of the deceased's intention.

[S. C. 5 Jur. (N. S.) 252.]

The will of the deceased commenced:—"First I appoint my daughter Sarah Davy, my friend John Curson, of Hethersett, bricklayer, and my son Alfred Davy, executrix and executors of this my will." It then disposed of certain cottages and other property amongst the deceased's children and grandchildren, and concluded: "I give to my son Robert Davy and to my son Alfred Davy the sum of £150 each, for their own proper use and benefit respectively; and as to all the rest, residue, and remainder of my money, household furniture, etc., and generally of all my personal estate and effects, whatsoever and wheresoever, I give and bequeath the same unto my said daughter Sarah Davy for her own sole and absolute use and benefit." The will was dated the 9th of December, 1857. The codicil commenced:—"This is a codicil to the last will and testament of me, Robert Davy, of Hethersett, in the county of Norfolk, gentleman, which will bears date on or about the 9th December, 1857." It then altered a bequest contained in the will, to a legatee who had died, and continued—"And whereas I have by my said will given and bequeathed to my said son Robert Davy a sum of £150; now inasmuch as my said son Robert at this time stands indebted to me in a sum of £50 for money lent and for beasts sold him, I do hereby revoke the said legacy of £150, and in lieu thereof I do hereby give and bequeath to my said son Robert a legacy of £100, to be paid within six months after my decease; and I do declare and direct that my said executors shall not require a payment of the said sum of £50, or any part thereof, so now due from my said son Robert; and in all other respects I revoke my said will." This codicil was dated the 16th of November, 1858. Mr. John Pilgrim, the solicitor who prepared it, in his affidavit, stated that on the 6th of November Mr. Davy called upon him, and gave written instructions for the preparation of a codicil to his will; that on the 16th of November he received a message, purporting to come from the said Robert Davy, to the effect that he was taken unwell, and wished the codicil to be immediately forwarded to him for execution; that he ac-**[264]**-cordingly prepared the codicil in accordance with the instructions, and, as he usually did in preparing a codicil to a will, he intended to add the words, "and in all other respects I confirm my said will," but that instead thereof he inadvertently and by mistake added, "and in all other respects I revoke my said will"; and without having observed the mistake, he delivered the codicil to his clerk to take the same to the deceased; that the whole of the codicil was drawn in pursuance of the instructions of the said Robert Davy, save and except that he received no instructions to insert, and by mistake, and contrary to the expressed intentions of the said Robert Davy, he inserted the sentence, "And in all other respects I revoke my said will"; but he was not aware of the mistake, nor does he believe anyone else was, until after the death of the said Robert Davy. Thomas Skiffins, one of the attesting witnesses, read over the codicil of the deceased previous to the execution of it, but neither he nor the deceased observed the clause of revocation.

Dr. Spinks moved the Court to rectify the error in the codicil, and to decree probate of the will and codicil to the executors named in the will. The codicil was an absurdity as it stood, for the only bequests in it were alterations in the will.

*Sir C. Cresswell.* The rule is, the last words of a will and the first words of a deed must prevail. The testator may have meant this:—"I alter the destination of the property devised by the codicil, but as to all the rest I die intestate." I must reject the first part of the motion and leave it to another Court to decide what effect the codicil has upon the will.

But the testator gives directions as to what his executors are to do, thereby implying that their office still exists, and I can therefore grant probate to them as the executors named in the codicil. By the codicil he revokes a legacy of £150 to his son Robert, and gives him £100, as the latter was indebted to him in the sum of £50, directing the executors not to require payment of the £50. This direction saves their appointment.

**[265]** IN THE GOODS OF FRANCIS KEENE (deceased), on Motion. February 23, 1859.—Limited Administration.—Probate.—20 & 21 Vict. c. 77, s. 73 —Deeds.—Practice.—It is not sufficient, in order to make out the title to a term of years, etc., with the view of obtaining administration, to refer to deeds, deducing such title in affidavits; the deeds themselves must be brought into the Registry.

[S. C. 28 L. J. P. 34.]

By indenture bearing date the 27th day of January, 1817, after reciting that Thomas Burge, or George Bennett in trust for him, then stood seised of a certain estate in fee-simple, the said George Bennett and Thomas Burge demised a certain parcel of land therein comprised to Francis Keene, his executors and administrators, to hold the same for the term of 1000 years, at a peppercorn rent, in trust, after the respective deceases of Thomas Burge and Sarah his then present wife, for such persons as William Burge, the son of Thomas Burge, should by any deed or deeds executed by him, or by his last will and testament appoint, and in default of such appointment, in trust for the executors or administrators of William Burge.

By indenture dated the 9th day of September, 1819, made between Francis Keene, of the first part, Sarah Burge, the widow of Thomas Burge, then deceased, of the second part, William Burge, of the third part, and William Foord, of the fourth part, for the consideration of £100 paid by William Foord to Sarah Burge and William Burge, the said premises described in the former indenture were mortgaged to William Foord, subject to redemption on payment to the said William Foord of £100, and interest as therein mentioned; and William Burge, pursuant to the power reserved to him, appointed the said premises after the decease of Sarah Burge to remain in Francis Keene, his executors and administrators, during the remainder of the said term of 1000 years, upon trust for William Foord, until payment of the said sum of £100 and interest, and subject thereto upon trust for William Burge, his executors, administrators, and assigns, for the remainder of the said term.

**[266]** The said mortgage security was afterwards assigned by William Foord to John Suy, to whom the principal and interest secured by such mortgage were paid off in December, 1825.

William Burge died on the 29th of April, 1820, intestate, and letters of administration of his effects were granted by the Episcopal Court of Wells in October, 1820, to Elizabeth Burge, his widow. She afterwards married Robert Edney, and died leaving him her surviving. William Burge left two sons, George Burge and Sylvester Burge, his only children, who, together with his widow, were the only persons entitled in distribution to his personal estate and effects.

In 1832, George Burge and Sylvester Burge, by two separate instruments, released all their right and interest in the said premises and other the personal estate and effects of the said William Burge, deceased, to Robert Edney and Elizabeth his wife, whereby, and by virtue of his marriage with the widow of William Burge, Robert Edney became the sole person entitled to the said premises for the remainder of the term of 1000 years.

Robert Edney died on the 21st of November, 1858, having made his will, whereof he appointed George Burge and Robert Edney executors, who duly proved it in the District Court of Wells in December, 1858. Under the trusts of the will, the two executors had sold the said premises for the remainder of the term, but were unable to make a legal title thereto for want of a personal representative of Francis Keene in this country.

Francis Keene died in the United States in April, 1852, leaving a will dated the 14th of August, 1849, whereof he appointed his son, Francis Keene sole executor, who was then, and still is residing in the United States, and who was not likely to return to England. The said will of Francis Keene was not likely to be proved in England, and the parties interested were desirous of having letters of administration of the personal estate and effects of the said Francis Keene, limited to his interest in the said premises and the remainder of the said term, granted to George Burge, as one of the executors of Robert Edney, deceased.

Affidavits of George Burge and Robert Edney were relied upon in proof of these facts.

**[267]** Dr. Wambey moved the Court to decree letters of administration of the goods of Francis Keene, deceased, to be granted to George Burge, as one of the executors of the will of the said Robert Edney, deceased, limited to the remainder

of the said term of 1000 years in the premises above mentioned. The Court had power, under the sect. 73 of 20 & 21 Vict. c. 77, to make such a grant.

*Sir C. Cresswell.* The deeds referred to in the affidavits, for the purpose of shewing the deduction of the title to the term, must first be brought into the registry. I cannot act on affidavits that A. assigned to B., C., D., etc.

The executor of Francis Keene, the trustee who proved his will in the United States, must also be cited. Motion to stand over.

IN THE GOODS OF HARRIET COOKE. February 23, 1859.—Administration.—Practice under 20 & 21 Vict. c. 77, s. 73.—Administration will not be granted under sect. 73 of 20 & 21 Vict. c. 77, to a person not by law entitled to the grant, when the person who is entitled to it is resident abroad, and has not received notice of the application, unless the Court is satisfied that it is necessary and convenient that the grant should be made. A general statement upon affidavit that "it is necessary for the preservation of the personal estate and effects of the deceased that administration should be granted," will not satisfy the Court in the absence of such notice.

[S. C. 28 L. J. P. 43, 56.]

Harriet Cooke, a widow, died at Barrackpore, on the 5th of December, 1857, leaving a will bearing date the 4th of November, 1854, whereof she appointed her brother-in-law, John Francis Griffith Cooke, sole executor and residuary legatee in trust, and wherein she also named her children residuary legatees. She left four children her surviving, viz. Frances Harriet Harris (wife of Philip Harris), Bryan William Darwin Cooke, Mary Jane Durell Cooke, and Charles Edward Cooke.

The executor duly renounced his right to the probate of the will and also to the letters of administration with the said will annexed. Two of the deceased's children, Mary Jane Durell **[268]** Cooke and Charles Edward Cooke, who were in this country, being minors, had elected their maternal uncle W. T. Scott to be their guardian, for the purpose of taking administration (with the said will annexed) for their use and benefit. Francis Harriet Harris, one other of the deceased's children, having attained the age of twenty-one would be entitled, as one of the residuary legatees named in the will, to have letters of administration (with the said will annexed) granted to her; but she was then resident at Canton in China, and was not likely soon to return to this country, in which she had no agent.

The fourth child, Bryan William Darwin Cooke, was then also resident abroad, at Diamond Harbour, in New Zealand, and was still a minor.

An affidavit of these facts was made by the uncle William Treuren Scott, which thus concluded:—"It is necessary, for the preservation of the personal estate and effects of the said testatrix, that letters of administration (with the said will annexed) shall be granted." A proxy of renunciation by the executor, and proxies of election of William Treuren Scott as their guardian by the two minors resident in England, were also filed.

Dr. Wambey now moved the Court, under the 73rd section of 20 & 21 Vict. c. 77, to grant admininistration (with the said will annexed) of the personal estate and effects of the said Harriet Cooke, widow, deceased, to William Treuren Scott.

*Sir C. Cresswell.* The affidavits do not explain anything, or mention any circumstances to justify the grant. Application should have been made to Mrs. Harris for her consent to this motion, which might easily have been done. A case of pressing necessity should be made out, if I am to use the extraordinary powers given by the 73rd section. As Mr. Cooke is not willing to take probate, I might unquestionably have made the grant, if I had been satisfied that it was, according to the words of the section, "necessary or convenient." You ought to have shewn that there is a necessity, in order to bar one of the deceased's children of her rights; and the very general words at the end of Mr. Scott's affidavit do not satisfy me of the necessity.

Motion rejected.

**[269]** (Before *Sir C. Cresswell* and a Special Jury.)

TODD AND PRICE *v.* SUMPSION AND SPRIGGES. January 21, 1859. Will.—Pleading.—Amendment at Trial.—Costs.—Practice.—The inclination of the Court is to allow the record to be amended at the trial by the addition of a new plea, rather than to shut out any defence which might be raised. The defen-

dants were allowed to put on the record at the trial a plea, that the will in dispute had been obtained by the undue influence of one of the plaintiffs, subject to the postponement and rehearing of the cause, if required by the plaintiffs, and to the payment by the defendants of all expenses incurred by such postponement.

[Applied, *Purcell* v. *Barlow*, 1874, Ir. R. 9 Eq. 370.]

This was a cause of proving in solemn form the last will of Benjamin Tratt, deceased, promoted by Sarah Todd and Thomas Price, the executors named therein. The will was propounded by the plaintiffs, who alleged in their declaration that the deceased made his last will and testament, bearing date the 27th of January, 1858, and in the said will appointed the plaintiffs executrix and executors thereof; that the said will was duly executed by the testator, and that the testator was, at the time of its execution, of perfect sound mind, memory, and understanding. The defendants in their plea alleged, first, that the paper writing bearing date the 27th day of January, 1858, and alleged by the plaintiffs to be the last will and testament of the deceased, was not made by him, and was not the will or testament of the deceased as alleged; secondly, that the will was not duly executed by the deceased according to the provisions of 1 Vict. c. 26; and, thirdly, that the deceased at the time the alleged will bore date was not of sound mind, memory, and understanding. Upon these pleas the plaintiffs took issue.

Serjeant Pigott and Dr. Deane, Q.C., were counsel for the plaintiffs.

Mr. M. Chambers, Q.C., Dr. Phillimore, Q.C., and Mr. Thompson Chitty, for the defendants.

Mr. M. Chambers offered evidence to shew that the deceased made the will under the dictation of Todd the plaintiff.

**[270]** *Sir C. Cresswell*: You have placed no plea on the record of the will having been made under the undue influence (of Todd); the evidence you propose to give is inadmissible.

Mr. M. Chambers: Evidence of gradual submission to dictation would tend to show weakened capacity, and would be admissible under the third plea.

*Sir C. Cresswell*: I shall tell the jury, that if they are of opinion that the testator had competent understanding when he executed the will, however he may have been dictated to by others, they should find for the plaintiffs.

Mr. M. Chambers: The defendants in their first plea allege that the will was not the will of the deceased. If the will was made under Todd's dictation it was not the act of the deceased. He submitted that the evidence was admissible in support of the first plea.

*Sir C. Cresswell* ruled that the evidence was not admissible under the first plea.

Mr. M. Chambers asked for leave for the defendants to amend their pleas by putting on the record a fourth plea; viz. that the making of the said will was procured by the undue influence of (the plaintiff) and others acting with her.

*Sir C. Cresswell*. I am disposed to allow the amendment; I am inclined to take any course rather than one which might preclude the defendants from raising every possible defence. But if I allow this plea to be put on the record, I shall only do so subject, if required by the plaintiffs, to a postponement and rehearing of the cause; and I will then discharge the jury, so as to give the plaintiffs time to prepare a defence against the new plea; and for this indulgence asked on their part the defendants must pay all the expenses incurred by the postponement of the trial.

Counsel for the plaintiffs ultimately consented to allow the **[271]** new plea to be put on the record without requiring the trial to be postponed.

The jury found a verdict for the plaintiffs on all the issues.

BRAINE *v.* BRAINE AND BRAINE. December 1 and 10, 1858.—Taxation of Costs.—20 & 21 Vict. c. 77, s. 29.—Number of Counsel allowed.—Discretion of Registrar.—Costs of Application.—Practice.—In taxing a bill of costs, the Registrar is not bound by the practice of the Prerogative Court as to the number of counsel to be allowed, but should exercise his own discretion in the matter. In making an allowance for briefs, he should consider whether they have been made unnecessarily long and expensive. The question brought before the Court on this application having been raised by the Registrar, costs of the application were not allowed against the plaintiff.

[S. C. 29 L. J. P. 151.]

This was a question as to the revision of taxation of costs in the above suit, relating to the validity of the will of George Henry Braine, deceased, which was tried on the 4th and 5th of July, 1858. The question was argued on an act on petition, commenced by the proctor for the defendants.

In the petition the proctor for the defendants alleged, that the suit was instituted by the plaintiff against the defendants, who were the executors named in the said will, for the purpose of trying the validity of the said will; that the issues raised by the plaintiff were that the said will was not executed in pursuance of the provisions of 1 Vict. c. 26, and that the deceased at the time of its execution was not of sound mind: that the cause was tried before the judge of the Court of Probate and a special jury, when a verdict was found for the defendants; that the plaintiff was condemned in the costs of the said suit, and that his Lordship certified that it was a fit and proper one to be tried by a special jury; that the defendants' bill for costs in the said suit was afterwards submitted for taxation to Edward Francis Jenner, Esq., one of the Registrars of the Court; that the said Registrar disallowed divers items of the said bill, and certified the amount of the [272] said bill as taxed at the sum of £375, 15s. only. On the part of the defendants the certificate of the Registrar was objected to on the ground that he had disallowed certain charges, fees, and disbursements particularly set forth in the schedule annexed, being the expenses consequent upon and incidental to the retaining and employing one of the counsel retained and employed in the said trial on behalf of the defendants, and had also disallowed two of the three consultations held with counsel previous to and during the said trial; and that by reason of the magnitude of the interests involved in the result of the said trial and that the issue raised by the plaintiff as to the deceased's incapacity rendered it necessary for the defendants to produce a large number of witnesses, of whom sixteen were actually examined upon the said trial; and by reason that the solicitor of the plaintiff gave notice to the defendants to produce at the trial numerous and voluminous account-books kept by the deceased, it was deemed necessary to retain and employ three counsel to conduct the trial, and also to have three several consultations with counsel thereupon; and the petition concluded by praying that the certificate should be referred back to the said Registrar for amendment and to direct that the fees, charges, and disbursements set forth in the annexed schedule be allowed as costs against the plaintiff, and to make such other order as might to his Lordship seem meet.

The plaintiff in his answer alleged, that admitting it was necessary for the defendants at the trial to produce a large number of witnesses, of whom sixteen were examined, and that the plaintiff had given notice to the defendants to produce at the trial the account-books referred to, nevertheless the said Registrar properly disallowed the said fees, charges, and disbursements in the petition referred to, and in so doing exercised a proper discretion and acted according to the practice of the Court, and prayed that the certificate might not be referred back to the Registrar.

The Registrar made the following report to the learned Judge on the subject:— In taxing the bill of costs on behalf of the defendants, the Registrar has, in the absence of any rule, experienced considerable difficulty as to the principles on which he ought to proceed, viz. whether on those adopted in [273] cases at common law, or on those of the late Prerogative Court of Canterbury. The 29th sect. of the Court of Probate Act, 1857, enacts that the practice of the Court of Probate shall, except where otherwise provided by that act or by the rules and orders, be, so far as the circumstances of the case will admit, according to the practice of the Prerogative Court. The Registrar has therefore endeavoured to steer a middle course, viz. to adopt the principles of the Common Law Courts where applicable to the case, and in other instances, where he has found it possible so to do, he has followed the practice of the Prerogative Court. For instance, in the Prerogative Court, it has not been the practice to allow a third counsel, nor when costs are taxed (as in this case) between party and party to allow consultations with counsel. In this case, however, the Registrar considered that as the witnesses were examined vivâ voce, a proceeding until very recently unknown in the Prerogative Court, one consultation previous to the hearing should be allowed—and he has accordingly allowed one. As to the disallowance of the third counsel, the Registrar has not, for the reasons above stated, felt himself at liberty to allow more than two, but he understood that at common law, if more than ten witnesses were called and examined, a third counsel is allowed. In

the present case, sixteen witnesses were examined on behalf of the defendants, and if the Registrar had felt himself at liberty to exercise his own discretion, he would have allowed a third. The Registrar understood that at common law it is not necessary for the defendants to have a junior counsel, a barrister of the outer bar; he has therefore allowed the fees paid to two Queen's Counsel, instead of one Queen's Counsel and one junior. EDWARD F. JENNER,

November 19, 1858. Registrar.

Mr. Manisty, Q.C. (Dr. Spinks with him), for the defendants, submitted that there was no rule in the superior Courts of Common Law, or in the Court of Probate, to preclude the Registrar from allowing, in the exercise of his discretion, fees for three counsel in taxing a bill of costs. The present case was a proper one (and such was the opinion of the Registrar) to allow the charges for retaining and employing three coun-[274]-sel. There were twenty-seven witnesses supœnaed, and sixteen examined on the part of the defendants.

The Registrar, however, did not exercise his discretion in the matter, considering himself bound by the practice of the Prerogative Court. The rule of the Prerogative Court on this matter might be applicable to the mode of conducting suits in that Court, where the evidence was taken before an examiner, and the witnesses were not subjected to an examination or cross-examination by counsel; but the practice as to the conduct of suits in the Court of Probate being assimilated to that of the Courts of Common Law, the practice as to costs should also be assimilated to it.

If the case had been tried in a Court of Common Law, three counsel would have been allowed. In the case of *Sharp* v. *Ashby*, 12 Mee. & W. 732, which was an action on a bill of exchange, in which the defendant pleaded several pleas, and served a notice on the plaintiff to produce proceedings in Chancery, the plaintiff in consequence went to trial prepared with many witnesses and much documentary evidence, but at the trial he closed his case after the examination of two witnesses; the Master allowed the plaintiff the costs of two briefs only, considering himself bound by a supposed general rule not to allow costs for more than two counsel, except in cases where ten witnesses at least were examined on the trial.

The Court directed the Master to review his taxation and said, "The Master must exercise his discretion as to these costs. No doubt the number of witnesses must form a material ingredient in his consideration, and indeed the principal one; because it certainly is in the examination of witnesses that a division of the labour amongst counsel is most likely to occur; but he is not bound by any such general rule as has been supposed. It is easy to suppose a very trivial case with a great number of witnesses and a very difficult and heavy one with but few. The Master will reconsider the matter and take all the circumstances into his consideration." See also *May* v. *Turn and Others*, 12 M. & W. 730; *Morris* v. *Hunt*, 1 Chitty's Reports, 550. In this latter case one of the objections to the Master's allocatur being, that he had allowed three counsel, Mr. Justice Bayley says, "With respect to the number of counsel, it appears that [275] the Master has allowed three, and it seems to me, that the Master ought in these cases to exercise discretion; which discretion must be regulated to a certain degree by the nature and magnitude of the cause and number of witnesses which are likely to be examined. It is fit in cases of difficulty, in which points of law may arise, that the leading counsel should have the assistance of other gentlemen to suggest what may be necessary in the course of discussion. In cases of that description the allowance of counsel should not be regulated in the same manner as in a common action for goods sold and delivered, or in any ordinary case in which no difficulty is likely to arise." See also *Steward* v. *Steele*, 4 C. B. 460.

The 29th section of the Probate Act (1857) would be relied on for the plaintiff, but it did not apply to the circumstances of this case.

Hon. G. Denman, for plaintiff, contended that the Registrar was bound to follow the practice of the Prerogative Court in taxing costs. Cur. adv. vult.

December 10.—*Sir C. Cresswell.* In this case an application was made to review the taxation of costs. The Registrar favoured me with his opinion on the subject, which I read in Court the other day, when the case was under discussion, and it appeared that with reference to the allowance of the counsel he had not exercised a discretion, thinking it better to apply to the Court, before he departed from the practice which had obtained in the Prerogative Court. And if that practice had been applicable to the present state of things, the Court would have been bound to

abide by it, but I think it was very well put by Mr. Manisty, and I agree with him in thinking, that the rule as to allowing two counsel only is not applicable to this Court.

The course of proceeding in the Prerogative Court was so different, that I think the practice in reference to the number of counsel to be allowed is inapplicable, and that the Registrar is not bound by it. I think therefore he must exercise his discretion as to the number of counsel to be allowed. In doing that he will consider the number of the witnesses exa-**[276]**-mined, or whose examinations were reasonably introduced into the briefs.

In making the allowance for briefs, he will of course consider whether they have been fairly and bonâ fide prepared or whether there is any reason to suppose that they have been made unnecessarily long and expensive.

With these directions the matter will be referred back to the Registrar.

Dr. Spinks: Will your Lordship allow the costs of this application?

*Sir C. Cresswell*: No, I think not upon a question raised by the Registrar.

EDWARDS *v.* PAYNE AND REEVE. March 9, 1859.—Will.—Verdict and Costs for Defendants.—Taxation thereof.—Practice.—A. propounded a will of April, 1858, and was opposed by B. and C., executors of a will of April 1847. Verdict for the defendants, and A. condemned in the costs. B. and C. objected to the Registrar's taxation of costs, disallowing, first, sixteen witnesses out of twenty-seven who were not examined by the defendants' counsel, though their evidence was briefed and they were in Court; secondly, two witnesses out of the eleven examined as immaterial to the issue; thirdly, the third counsel and brief; fourthly, consultation at end of plaintiff's case. The Court confirming the Registrar's taxation, except as to the second point,—Held, that the fact referred to in the second objection, which the two witnesses were called to prove, was material to the issue, but that, as it was not a fact controverted in the case, it would have been sufficiently proved by one witness, and the costs of one were allowed accordingly. That the Court will not interfere with the Registrar's discretion as to the number of counsel to be allowed, and that more than one consultation in the progress of a cause is never allowed.

[S. C. 29 L. J. P. 145.]

This was a question as to the revision of taxation of costs in the above suit relating to the will of Alice Corri, who died on the 21st of August, 1858, aged seventy-eight years. The plaintiff propounded a will purporting to have been executed **[277]** on the 22nd of April, 1858, of which he was sole legatee and acting executor, the other executors named having renounced. The defendants were the executors of a will executed by the deceased on the 10th of April, 1847.

The case was tried before a special jury on the 5th and 6th of January. At the end of the plaintiff's case on the first day, the counsel for defendants determined on consultation to examine eleven only out of the twenty-seven witnesses whose evidence had been briefed on behalf of the defendants. The jury found a verdict for the defendants, and the Court condemned the plaintiff in the defendants' costs, which were taxed in due course. The present application was on behalf of the defendants for a revision of the taxation of their costs, too much, according to their view, having been disallowed.

March 2.—Mr. Francis moved for a rule nisi on the plaintiff to shew cause why the taxation of the defendants' costs should not be referred back to the Registrar for review, on the following grounds:—First, the Registrar had disallowed sixteen witnesses on the ground that they had not been examined, as it is understood, though they were sworn to have been material and necessary witnesses. Secondly, out of the eleven examined the Registrar had disallowed two—Mr. Bailey the solicitor and Rodwell his clerk—who were called to prove the execution of the will of 1847, on the ground that their evidence was irrelevant to the issue before the jury. Thirdly, the Registrar had disallowed the third counsel and his brief; and Fourthly, the consultation which took place at the close of the plaintiff's case, though the result of that consultation was materially to abridge the proceedings on the next day.

By the Court: I shall not interfere with the discretion of the Registrar as to the third counsel; on the other points you may take a rule to shew cause.

March 9.—Dr. Addams, Q.C., shewed cause against the rule. As to the first objection, the defendants' proctor was challenged at the taxation to point out in his

counsel's brief any evidence that the witnesses not called could give other than a reiteration of the evidence of the nine witnesses examined, but he [278] failed to do so. The Registrar was therefore right in disallowing their cost. He submitted also that on the other points objected to, the Registrar's decision ought not to be overruled.

Mr. Francis, in support of the rule. As to the first objection, the Registrar should have made further inquiry before he disallowed the sixteen witnesses not examined. Many of them might have been able to speak to some fact of importance in confirmation or independent of the evidence given by those examined. The cause might in the progress of the trial have assumed such an aspect as to incline the jury to determine it on the weight of the evidence. In this case the additional number of witnesses would have gone towards making up the weight of the evidence. This should have been taken into consideration by the Registrar; it was his duty to have examined the whole case for himself, but this he did not do. As to the second objection, the proof of the execution of the former will was material to the issue. As to the third, the case was a proper one for the Registrar to have allowed three counsel; and as to the last objection, the result of the consultation was materially to abridge the length of the trial, and save expense to the plaintiff.

*Sir C. Cresswell*: As regards the first point, I am of opinion that the Registrar has done his duty in the exercise of his discretion as to the number of witnesses allowed on taxation. Nine witnesses were examined to prove the incompetency of the testatrix. The Registrar probably thought nine witnesses about enough. He was told that the sixteen others were in Court, and that the party expected them to be allowed. He said, "Shew me any different facts which the other sixteen were to have proved"; in his opinion the defendants' proctor failed to do so, and I cannot think that the Registrar was bound to read all the briefed evidence, especially when the party who had prepared it could not point out any further facts which the evidence of these witnesses was required to prove. I cannot impugn the Registrar's discretion, especially as he is borne out by the defendants' own counsel who thought it unnecessary to examine them. On the second point, though it is true there was no issue raised as to the fac-[279]-tum of the former will, yet it was material to the issue to shew that a former will of a different tenor had been executed; but, as it was not a fact in controversy, one witness would have been sufficient to prove it, and one only will be allowed. Thirdly, as I said before, the question of number of counsel is altogether in the discretion of the Registrar; but indeed it was admitted by counsel that if the objection on the first point failed, this almost necessarily follows. Fourthly, in disallowing the consultation, the Registrar was guided by the usual rule, never to allow more than one consultation in the progress of a case.

FYSON AND OTHERS *v.* WESTROPE AND CUTTING. January 17 and 24, 1859. Will. —Heir-at-Law cited.—Plaintiffs and Defendants.—Costs.—20 & 21 Vict. c. 77, ss. 29, 61, 64, 65.—A., B., and C., executors, propounded a will and two codicils. D., an executor under the will, opposed the second codicil, pleading undue influence and fraud, and that the testator was ignorant of the contents. E., the testator's heiress-at-law, being cited to see proceedings, entered an appearance. By an order made in chambers at the instance of the executors, she was required to plead or to be barred from ever disputing the will, and thereupon pleaded unsoundness of mind and undue influence as regarded the will and first codicil, as well as to the second codicil. The jury found a verdict for the plaintiffs on all the issues, and the Court condemned the defendants, generally, in the costs. On motion, on behalf of the heiress-at-law, to review the decree as to costs:—Held, that the position of an heir-at-law, cited under the 61st section of the Probate Act, is similar to that of the next of kin when cited to see proceedings in the Prerogative Court, and that E. having placed the above pleas on the record, and having totally failed in proof of them, was liable to costs. That as between the defendants, each party was liable to that part of the costs which belonged to his own case. That where costs had been incurred in any matter equally applicable to both parties, so that the Court could not assign them more to one than the other, such portion of costs was to be taxed equally between them.

[S. C. 29 L. J. P. 139; 5 Jur. (N. S.) 250; 7 W. R. 347.]

This was a question of costs, arising out of a suit, which was promoted by Fyson,

Hustwick, and Frost, the executors named in the will and two codicils, dated respectively [280] the 17th of January, 1857, the 23rd of May, 1857, and the 4th of August, 1857, of Eyre Coote, deceased. Westrope, an executor under the will, prayed to be joined in the probate of the will and first codicil; but he opposed probate of the second codicil, on the ground that its execution was procured, first, by the fraud of Fyson and Hustwick; secondly, by means of their undue influence and control; and thirdly, that the deceased, when he executed it, was ignorant of its contents and purport. Cutting, as husband of the heiress-at-law, was cited to see proceedings under 20 & 21 Vict. c. 77, s. 61, whereupon he entered a caveat, on behalf of his wife, against the will and first codicil; and upon the caveat being warned on behalf of the plaintiffs, he entered an appearance, without taking any further steps, until he was summoned by the plaintiffs before the Judge in chambers, when an order was made for him to plead, if he intended to take part in the contest respecting the validity of the will and codicils of the deceased. He then filed pleas, denying the validity of the will and of both the codicils, on the ground, first, that the testator at the time of their execution was of unsound mind; and secondly, that they were procured by undue influence.

The cause came on for trial in the Court of Probate before a special jury; the defendants appeared by separate counsel; the verdict was in favour of the plaintiffs, and Sir C. Cresswell decreed probate of the will and two codicils; and, considering that there was a total failure in shewing any reasonable ground for disputing the will or either codicil, condemned the defendants, generally, in the costs.

January 17.—Dr. Twiss, Q.C., for the heir-at-law, prayed the Court to restrict the decree as to costs to Westrope, or to make such other order as that the heiress-at-law should not have to pay the costs incurred before she took part in the suit. He contended, first, that an heir-at-law, when cited to see proceedings in the Court of Probate, should be placed in the same position with regard to costs as he would be in Chancery, when cited to see proceedings taken there to establish a devise. That in Chancery he was generally entitled to costs, and would have been under the circumstances of this case (Daniel's Chancery Practice, p. 1032; *Grove* v. *Young*, 5 De G. & Sm. [281] 41; *Roberts* v. *Keslake*, 1 K. & J. 751; *Smith* v. *Dearmar*, 1 Y. & J. 278); secondly, that if the Court would not adopt the rule of the Court of Chancery, it would at least place him in as favourable a position as the next of kin, when cited to see proceedings, and not condemn him in costs. Next of kin were favourites of the Court of Probate. (*Urquhart* v. *Fricker*, 3 Add. 56.)

Mr. O'Malley, Q.C. (Mr. Keane with him), contrà, for Westrope.

Dr. Deane, Q.C., contrà, for the executors, the plaintiffs.

Cur. adv. vult.

January 24.—*Sir C. Cresswell* (after mentioning the facts as above stated). I am asked to reconsider the order I made in this cause on the subject of costs. At the trial the jury found a verdict for the plaintiffs on all the issues, and as I thought there were no reasonable grounds for disputing the will or either of the codicils, on being asked to condemn the defendants in costs, I did so in general terms. I am now asked to reconsider my decree with respect to costs in two ways: First, as to whether the heiress-at-law ought to be liable to any costs at all; and, secondly, if I am of opinion that she is, then to consider whether she should be condemned to pay an equal proportion in respect of all the costs. Undoubtedly the original decree was imperfect as to costs; its operation might have been to charge either of the defendants with the whole costs; and I think I am bound to distribute them in certain proportions between the defendants. As regards the liability of the heiress-at-law, Dr. Twiss referred to several passages in Mr. Daniel's valuable treatise on Chancery Practice, to shew in what way heirs-at-law are treated in the Court of Chancery when made parties to a suit there depending for establishing the validity of a will of realty; but the statute under which I act (20 & 21 Vict. c. 77, s. 29) directs me (except where otherwise provided by the Act or by the rules and orders to be from time to time made under the Act), so far as the circumstances of the case admits, to follow the practice of the Prerogative Court; and by the third and fourth rules (1857), [282] it is ordered that next of kin and all others who, previous to the passing of the Probate Act, had a right to put executors or others to the proof of a will in solemn form of law, or to intervene in a suit, shall continue to possess the same rights and privileges and be subject to the same liability as to costs as heretofore.

Now the 61st section of the Probate Act enacts, that "where proceedings are taken under this act for proving a will in solemn form, or for revoking the probate of a will on the ground of the invalidity thereof; or where in any other contentious cause or matter under this act the validity of a will is disputed, unless in the several cases aforesaid, the will affects only personal estate, the heir-at-law, devisees, and other persons having or pretending interest in the real estate affected by the will, shall, subject to the provisions of this Act, be cited to see proceedings, or otherwise summoned in like manner as the next of kin, or others having or pretending an interest in the personal estate affected by a will, should be cited or summoned, and may be permitted to become parties or intervene for their respective interests in such real estate, subject to such rules and orders and to the discretion of the Court."

I think the effect of these clauses is to put the heir-at-law so much in the same position as the next of kin, that in deciding the question of costs I ought to apply the same principles in both cases, and consequently the heir-at-law is liable to costs to the same extent as the next of kin was in the Prerogative Court. In this view, therefore, parties setting up a will affecting real estate are bound to cite the heir-at-law and bring him into Court; if they have omitted to do so, and take probate in common form, and afterwards have occasion to use the probate in a suit with the heir-at-law, he would be at liberty to dispute its validity (s. 64); but then the 65th section leaves it to the discretion of the Court before which in any such action or suit the original will shall be proved and produced, to direct by which of the parties the costs shall be paid; and this confirms the view I take of the position of heir-at-law when cited in this Court. Now that being so, and applying the practice of the Prerogative Court, an heiress-at-law pleading such pleas as she did in this case, is in a position analogous to the next of kin in [283] the Prerogative Court, who, not content with putting the executor on proof of the will, had actually disputed the will, had brought in an allegation responsive to the case set up by the executors, and had failed in proof of it. By the practice of that Court, such next of kin incurred the risk of being condemned in costs from the time of bringing in such allegation; and so in this case I think the heiress-at-law is liable in the costs incurred since she entered the caveat against the will and first codicil. As regards Westrope, I have not the least doubt that he is liable to costs. But they ought to be distributed in certain proportions. I think it will be fair to apply the course of practice adopted in the Common Law Courts, where parties are called upon to plead separately and several issues are raised, and some are found for the plaintiff and some for the defendant, each party is held liable in respect to that part of costs which belongs to his own case. I therefore order that the Registrar shall tax against the heiress-at-law such portion of the briefs and witnesses as belong to the issues raised as to the will and first codicil from the time of the entry of her caveat against them;—against Westrope, the costs of such parts as relate to the second codicil; but where costs have been incurred in any matter equally applicable to both parties, so that they cannot be assigned more to one than the other, that portion of costs should be taxed equally between them; Mr. Westrope to pay such costs as preceded the caveat entered by the Cuttings. I make no order as to the costs of the present motion.

SWINFEN *v.* SWINFEN. March 28 and 30, 1859.—Will.—Next of Kin.—Executrix.—Costs.—A., a party entitled in distribution, and who was also heir-at-law, filed a bill in equity against B., the executrix of a will; and an issue, devisavit vel non, was directed to be tried, which ultimately ended in a verdict for the executrix. Immediately after filing the bill, A. cited B. in the Prerogative Court of Canterbury to bring in the probate of the will which had been granted to her in common form. B. propounded the will and examined three witnesses, to whom A. administered unobjectionable interrogatories. The evidence was published on the prayer of A., just before the first trial of the issue at [284] common law, and no further step was taken in the cause till the ultimate decision as to the real estate in favour of the executrix, when A. consented to probate being taken by B. On a question as to A.'s costs—Held, that though, under the circumstances of the will A. would have been entitled to his costs out of the estate, if the suit in the Prerogative Court had been brought with the simple object of taking the opinion of that Court on the will, yet that as it appeared that the

suit was brought with the view of eliciting facts and evidence to be used at the trial of the issue, A. ought not to be allowed his costs out of the estate.

[S. C. 29 L. J. P. 153; 7 W. R. 461. For former proceedings in Chancery see 24 Beav. 549; 2 De G. & J. 381; at law, 18 C. B. 485; 1 C. B. (N. S.) 364.]

This was a question of costs, arising out of a suit with respect to the validity of the will of Samuel Swinfen, who died on the 26th of July, 1854, leaving a will executed on the 7th of the same month, by which he left the Swinfen estate of the value of about £2000 per annum, and personalty, to about the value of £10,000, to Patience Swinfen, the widow of his son, whom he made his executrix, and he also bequeathed an annuity of £20 to a nurse. On the 14th of November in the same year, probate of this will was granted to the executrix, the personalty being sworn under £16,000: there was no disposition of the residue in the will. At the time of the testator's death, John Swinfen, his only surviving brother of the whole blood, and his heir-at-law, was in a state of imbecility, and died in April, 1855. There were several brothers and sisters of the half-blood, and Frederick Hay Swinfen, the plaintiff in this suit, and his sister, children of a deceased brother of the half-blood, entitled in distribution to his personal estate. Frederick Hay Swinfen was with his regiment in the Crimea at the time of the testator's death; he returned to England in March, 1855; by his uncle's death in April, 1855, he became heir-at-law, and instituted inquiries as to the circumstances of the execution of the will, which led to the filing of a bill in Chancery on the 12th of July 1855, as to the real estate, and on the 13th of July, a citation issued under the seal of the Prerogative Court of Canterbury, calling upon Mrs. Swinfen to bring in the probate, which was done on the 7th November, 1855; an allegation propounding the will on behalf of Mrs. Swinfen was admitted on the 7th January, 1856, and Captain Swinfen's answers on oath brought in on the same day. On the allegation the three attesting witnesses, Charles [285] Simpson, Charles Swinfen, and Thomas Rowley, a physician, were examined, and interrogatories administered to them on behalf of the plaintiff, who gave in no plea, and on the 1st of February, 1856, publication was decreed at the prayer of Captain Swinfen's proctor, Mrs. Swinfen's proctor praying the Judge to to suspend publication till the first session of the following term.

On the 30th July, 1855, the Court of Chancery directed an issue, devisavit vel non, which was tried at Stafford, on the 17th and 19th of March, 1856, and ended in a compromise. The compromise was repudiated by Mrs. Swinfen, and she obtained an order for a new trial, which terminated in a verdict in her favour in July, 1858. On the 8th of January, 1859, a motion for a new trial was dismissed by the Master of the Rolls with costs. On the 1st of March the bill as to the real estate was dismissed without costs, but the costs of the issue tried were directed to be paid by Captain Swinfen. Captain Swinfen now withdrew his opposition to the will in the Court of Probate, and consented to probate being taken by Mrs. Swinfen.

March 23.—Dr. Spinks, for Mrs. Swinfen, now prayed the Court to decree probate. He did not press the Court to condemn Captain Swinfen in costs, but as it had been intimated that Captain Swinfen intended to ask for his costs out of the estate, he submitted that it was for his counsel to shew that he was entitled to them, he having failed in his opposition to the will.

The Queen's Advocate (Sir J. D. Harding) and Dr. Phillimore, Q.C., for Captain Swinfen, submitted that there were sufficient grounds for inquiry into the validity of the will; there had been no delay on the part of Captain Swinfen in commencing the suit; it had not been improperly or vexatiously conducted; and his cross-examination had elicited material facts. They cited *Armstrong* v. *Huddleston*, 1 Moore, P. C., 478-90; and *Prinsep* v. *Dyce Sombre*, 10 Moore, P. C. 301; also *Ross* v. *Chester*, 1 Hagg. 227.

Dr. Spinks, in reply: The fact is, the party proceeding used the suit in the Prerogative Court in the nature of a bill of discovery for the benefit of his suit respecting the real estate as [286] heir-at-law. This might be inferred from the circumstance of his pressing for publication just previous to the trial of the issue at Stafford in March, 1856. From that time till the present no step was taken in the cause. He contended that he was not entitled to have his costs out of the estate.

Cur. adv. vult.

March 30.—*Sir C. Cresswell*, after stating the facts of the case as above, said: It is now arranged by the parties to the suit that the Court of Probate shall pronounce for

the will; the only question that remains is, whether Captain Swinfen is to have his costs out of the estate. The executrix did not press to have him condemned in costs. It was argued for Captain Swinfen, that he, being a party entitled in distribution, had a right to call upon the executrix to prove the will in solemn form; that the suit had been properly conducted on his part; that he gave in no allegation, but merely cross-examined the witnesses; that he had many reasons for viewing the will with suspicion; and that he had, in his interrogatories put to the witnesses examined for the executrix, elicited important facts concerning it, and that therefore he should have his costs out of the estate. Two cases were relied upon, as going further than the present application: the first was that of *Prinsep and the East India Company* v. *Dyce Sombre*, 10 Moore, P. C. 232, in which the will and codicil of Mr. Dyce Sombre were propounded in the Prerogative Court by Mr. Prinsep, one of the executors therein named; and after a severe contest in that Court, judgment was pronounced against their validity on the ground that the deceased was not of sound mind when he executed the same, and Mr. Prinsep and the East India Company were condemned in all the costs occasioned by that suit. From this decree there was an appeal to the Judicial Committee of the Privy Council, where the judgment of the Prerogative Court was affirmed so far as it pronounced against the validity of these instruments, but was varied with respect to costs, giving no costs against the appellants, but allowing them one set of costs out of the estate. At page 302 of 10 Moore, P. C., Dr. Lushington, who delivered their Lordships' judgment, observes:—"After the history which we have given of this case, is it possible to deny that before the evidence in [287] the case had been produced, there were doubts, and very grave doubts, as to the testamentary capacity of the deceased at the period when the will and codicil were made? Men of the greatest eminence in the medical profession had expressed the strongest opinions as to his sanity; gentlemen who had been in the habit of associating with him, persons of judgment and of unimpeachable honour, had declared the same conviction. . . . Then was there any misconduct on the part of the appellants which should subject them to the payment not only of their own costs but of those of their adversaries? . . . We have no hesitation therefore in declaring our opinion, that the judgment, so far as it awards costs against Prinsep and the East India Company, cannot be maintained. A much more doubtful question is, whether we can give them costs out of the estate: very great expense has been incurred in this case by the course of pleading adopted by the several parties. There are two distinct parties asserting the validity of these papers; there are three separate parties opposing them. The case is in many respects very peculiar. Though the commission of lunacy against the deceased was never superseded, he was treated under it in a manner in which no other lunatic, in our experience, ever was treated. He was entrusted with the whole income of his large property, after making a provision for his wife; and the circumstances altogether were such as to make it, in our opinion, essential to the purposes of justice that the validity of these papers should be submitted to judicial decision. Upon the whole, therefore, we have decided humbly to advise Her Majesty to vary the decree of the Court below with respect to costs; to give no costs against the appellants, but to allow them out of the estate one set of costs only, between Prinsep and the East India Company, including the costs of this appeal."

The other case relied upon was *Armstrong* v. *Huddleston*, 1 Moore, P. C. 491, when Lord Brougham, in delivering judgment, said: "Now we think that this is a case peculiarly circumstanced in many respects. I have adverted to some very strong features; there are others which are exceedingly marked, which I have not dealt with; it is not necessary. It remains to observe that this is a large property; that the [288] family of the testator had been exceedingly beloved by him; that a very great change had taken place in his intentions within a very few months; that at the period of the making of the will his mind was enfeebled by his affections; his affections prevailed; not that his judgment was weak, but that his affections were stronger. The result of that was, instead of having a comparatively large fortune left them, the family, whom he had cherished with great affection—an affection mutual between the parties—were left with a legacy only of £1000, and nearly the whole, if not the whole, was left to the widow Mrs. Armstrong. Their Lordships are of opinion that the estate in this case should bear the costs of the whole proceeding, with the exception of that needless part to which I have adverted." I cannot help

being struck by the language in which that judgment was given, as if the Court were embarrassed to find reasons for giving costs out of the estate. In the present case there is no change of intentions, no disappointment of expectations held out; it is simply the case of a party entitled in distribution calling for proof of the will, and administering unobjectionable interrogatories; and if I had thought that the object of the proceeding in the Prerogative Court had been simply to take the opinion of that Court upon the will, I should have considered that the circumstances of the case warranted a decree for costs out of the estate; but I cannot avoid coming to the conclusion that these proceedings were not taken for that purpose alone, but as ancillary to the other suit pending in respect of the real estate, and in the nature of a bill of discovery to get evidence which might be available on the trial of the issue at common law. I shall make no order as to costs.

IN THE GOODS OF JANE BELL, on Motion. March 9, 1859.—Administration.—Wife's Next of Kin.—Renunciation of Husband's personal Representative.—Practice.—A. died in 1831, being at the time of her death entitled to the reversion of a share of £200, leaving (B.) her husband and several children by him her surviving. The husband subsequently married (C.), and died **[289]** in 1832 intestate, leaving C. and several children by his two marriages him surviving. D., a creditor, took out administration to his effects. In 1857, A.'s reversion came into possession; D. renounced his right to administer to A.'s estate. On application to the Court to grant administration of it to C. as B.'s relict—Held, that the children of A., and not C., were entitled to the administration.

Jane Bell, the deceased in this case, died in 1831, in the parish of Heddon, Northumberland, leaving her husband, George Bell, and children by him her surviving. At the time of her death, she was entitled in reversion to one-third part of £200 upon the death of Jane Barker. George Bell remarried, and died in September, 1832, intestate, leaving Elizabeth Bell, now Elizabeth Wallace, his widow, and six children by his first marriage and one by his second marriage him surviving.

In December, 1832, letters of administration of the personal estate and effects of George Bell were granted by the Consistorial Court of Durham to William Stephenson, a creditor of George Bell, the said widow and children having been first cited, but not appearing.

By the decease of the said Jane Barker, in 1857, the reversionary interest of the said Jane Bell in the £200 became due and payable to her estate.

The said William Stephenson having satisfied his own debt out of the estate of George Bell, had renounced his right to the administration of the personal effects of Jane Bell.

Dr. Tristram now moved the Court "to grant letters of administration of the personal estate of Jane Bell to Elizabeth Wallace." Mrs. Wallace, through her former husband took a derivative interest in Jane Bell's one-third share of the £200, amounting to one-third of the property unadministered to; and though George Stephenson, and not Mrs. Wallace, was his personal representative, yet, as he declined to administer to the property, the Court might grant her the administration.

*Sir C. Cresswell.* Mrs. Wallace cannot claim to take out letters of administration to the effects of Jane Bell, as the representative of George Bell. She cannot claim as representing his former wife. If Stephenson, the representative of **[290]** George Bell, declines to take out administration, the children of the former wife, as representing her, are entitled to take the grant. They are the proper persons to take out administration, and not Mrs. Wallace. Motion rejected.

WARREN (by his Guardian, Badnell) *v.* KELSON. February 15 and March 9, 1859.—Letters of Administration with Will annexed.—Grant de bonis non.—Residuary Legatee.—Next of Kin.—A. died in 1856, leaving a will on the construction of which, in respect to a question between B. the asserted residuary legatee, and C., the next of kin, the Judge of the Prerogative Court of Canterbury decreed letters of administration with the will annexed to C., the testator's sister and next of kin. A bill was subsequently filed in Chancery for the administration of the estate, in determining which Wood, V.C., held that B. was the beneficial residuary

legatee. Afterwards C. died, leaving goods unadministered, and a question arising in the Court of Probate as to the grant de bonis non between B. and another next of kin—Held, without going into the construction of the will, that the suit before Wood, V.C., was substantially an appeal from the decision of the Prerogative Court. Administration de bonis non granted to B. in accordance with the decision in Chancery.

[S. C. 28 L. J. P. 122; 5 Jur. (N. S.) 415; 7 W. R. 348.]

This was a question of administration with the will annexed of the unadministered goods of William Hall, who died on the 23rd of October, 1856, leaving a will bearing date the 17th of January, 1853, in his own handwriting, by which he gave all his real and personal estate to William Unsworth and John Atkinson, whom and their executors, administrators, and assigns he appointed executors of his will. W. Unsworth predeceased the testator, and Mr. Atkinson renounced probate. The testator died a widower, without child or parent, leaving him surviving Sarah Rudall, his sister and only next of kin, and several nephews and nieces entitled in distribution.

A question arose as to the right to administration with the will annexed between Sarah Rudall, as next of kin, and Warren, **[291]** a minor, by his guardian, claiming as residuary legatee under the following clause: "I will my freehold house, No. 71 Queen's Road, Bayswater, to be given to the inhabitants of Bayswater, to found a lying-in asylum for unmarried women, and poor married women if there is more than three beds to spare. I will that there shall be no paid parson, priest, or chaplain, whose services is not gratis, attend the said asylum. I will that the same be called Hall's Maternal Asylum for Unmarried Women. I will that my said executors do call a meeting of the neighbours and inhabitants of one mile round the said house, as soon as convenient, to appoint a committee and trustees to carry out the same. I do appoint my godson, William Hall Warren, one of the said trustees, leaving to the inhabitants to make choice of as many more as they may please; but in the event of the said inhabitants not appointing a committee, or not willing to carry out the same scheme, I then will that all my said property so given to the said maternal retreat, or lying-in asylum, shall absolutely belong to my godson, William Hall Warren; and I will that the deeds of the said house be given to my trustee or trustees; I will that the said trustee or trustees be my residuary legatees to this my will." The will proceeded to give further legacies, some to the legatees only for life, to revert "to my residuary legatee or legatees for asylum mentioned." There was no further disposition as to residue. It was agreed that the devise of the freehold was void under the Mortmain Act. The question as to the right to administration was argued before the late Judge of the Prerogative Court of Canterbury; and on the 4th of June, 1857, Sir John Dodson, being of opinion that the bequest attending the void devise failed, and that the bequest over to Warren would, under the circumstances, be of no effect, decreed administration with the will annexed to Mrs. Rudall as next of kin, and ordered the costs of both parties to be paid out of the estate: *Rudall* v. *Warren, by his Guardian*, Deane & Swabey, 306. The question of the construction of the will then came before Wood, V.C., and was argued and determined in the course of July, 1858, when the Vice-Chancellor held that the gift over to the godson took effect, and that it extended to all the property devised for the benefit of the charity: *Hall* v. *Rudall*: **[292]** *Warren* v. *Hall* (4 Kay & Johnston, 603). Sarah Rudall, the administratrix, with the will annexed, died on the 14th of September, 1858. A caveat was then entered on behalf of Jane Kelson, a niece of the testator; the caveat was warned, and an appearance entered for her; and a petition was filed on behalf of William Hall Warren, praying a grant of administration with the will annexed, of the goods unadministered, to be made to Emma Badnell, the guardian lawfully appointed by the High Court of Chancery of the person and estate of W. H. Warren the residuary legatee for his use and benefit and until he should attain the age of twenty-one years. The answer to the petition stated, among other matters, the intention of the next of kin to appeal from the decree of Wood, V.C., and prayed administration to be granted to Jane Kelson, as one of the next of kin.

The case was argued on February 15th by Dr. Deane, Q.C., and Mr. De Gex, for the asserted residuary legatee.

Dr. Spinks, and Mr. Osborne, for the next of kin.

*Sir C. Cresswell* directed the case to stand over, to ascertain whether the parties

could agree on an independent person to take the grant. The parties being unable to agree, judgment was subsequently given.

March 15.—*Sir C. Cresswell.* This was a petition for letters of administration, with the will of William Hall annexed, of the goods left unadministered by Sarah Rudall, deceased, to whom administration, with the will of W. Hall annexed, was granted by the Prerogative Court in 1857. The case for the petitioner was, that the grant of administration having been made to Rudall, a bill was filed in the Court of Chancery for the administration of the estate of the testator, and that Vice-Chancellor Sir W. Page Wood had, by his decree, declared that the petitioner, W. H. Warren, was entitled to his own use to the residuary, real, and personal estate of the testator, including his estate and interest in the freehold and leasehold houses, devised and bequeathed for the purposes of the maternal asylum, in the pleadings mentioned; subject, as to such of **[293]** the said houses as were devised or bequeathed to tenants for life, to their life estates therein respectively. The case on the other side was, that Sir J. Dodson decided that the petitioner had no beneficial interest in the residue; that he was made residuary legatee solely for the purpose of carrying into effect the scheme for a charity, in favour of which the testator had devised and bequeathed his property; that such devise was void, and the devise over was void also, and therefore he granted administration to Sarah Rudall, next of kin to the testator. As the estate will be administered under the direction of the Court of Chancery, it seemed to me that the contest was about a mere matter of form, and I entertained some hopes that the parties would be able to agree upon some person acceptable to both to whom the grant might be made. In this I have been disappointed, and I must now dispose of the question raised before me. There is no doubt that the opinions of the late Sir J. Dodson and Vice-Chancellor Sir W. Page Wood as to the effect of the will of William Hall are at variance, and I was pressed by the counsel for one party to abide by that which was held by Sir J. Dodson—whom I am bound to consider in some sort as my predecessor—and by the counsel for the other party to defer to the very elaborate judgment of Sir W. Page Wood. If it were necessary for me to state which construction of William Hall's will I think correct, I should be prepared to do so; but it seems to me that I am not called upon to do this, and I the more readily avoid it, in consequence of the statement made at the bar, that the parties interested have appealed to the House of Lords, having accidentally omitted to lodge an appeal to the Lord Chancellor in due time. The Court of Probate does not habitually act as a court of construction; that is not its proper function, save in cases where it is absolutely necessary in order to determine the rights of litigant parties. In this case Sir J. Dodson was bound so to act; but having given his opinion, and granted administration to the next of kin, resort was had to the Court of Chancery to obtain the opinion of that Court; and according to the opinion of that Court the estate of the testator must ultimately be administered. I therefore consider that the proceeding in the Court of Chancery is in the nature of an appeal from the judgment of the Prerogative Court, and that **[294]** I ought to follow the last decision, viz. that of Vice-Chancellor Sir P. Wood. The grant will, therefore, be made as prayed by the petitioner.

IN THE GOODS OF JAMES MUIR (deceased), on Motion. March 23, 1859.—Probate.—English Domicil.—Personality in Scotland.—Sec. 14 of Confirmation and Probate Act, 1858.—A note or memorandum of the domicil of the deceased cannot, under sect. 14 of the Confirmation and Probate Act, be endorsed on the probate after it has issued. The Court will not revoke a probate which has been rightly granted, and was not taken out under a mistake.

[S. C. 28 L. J. P. 49; 5 Jur. (N. S.) 445; 7 W. R. 361.]

James Muir, the deceased in this case, who was a Scotchman by origin and married in 1838, being then domiciled at Greenock in Scotland, entered into a post-nuptial contract with his wife, Maria Muir, whereby, with certain exceptions, all the property belonging to them at the time of their respective deaths was settled on the husband, the wife, and the survivor of them for their respective lives, and on the death of the survivor on the children of the marriage. The deceased subsequently left Scotland and settled in England, where he acquired, and up to the time of his death retained, an English domicil. In October, 1858, he died at Glasgow, whither he had gone for a temporary purpose, leaving a will which he made in 1857, when

he was domiciled in England, whereby he gave the bulk of his personal property to his said wife, Maria Muir, for life, or during her widowhood, with remainder to trustees in trust for his children; and he appointed his said wife sole executrix of his will. Mrs. Muir had in the first instance been advised that the whole of her husband's personal estate had passed under the post-nuptial contract, and that his effects might be properly sworn under £20. She accordingly took out probate in the principal registry of this Court; afterwards, she was advised that, by the law of Scotland, the post-nuptial contract operated only on a portion of the property therein referred to, and that in respect [295] to the other portion of the property, namely, that which her husband acquired after he became domiciled in England, the will would operate, and that a fresh probate duty would be payable on about £4935, of which about £630 was in England, and the residue in Scotland.

Mr. W. F. Robinson moved the Court on behalf of the executrix, to direct that a note or memorandum of the deceased having died domiciled in England, should be made on the probate which had issued, under sect. 14 of 21 & 22 Vict. c. 56.

*Sir C. Cresswell*: Upon the 14th section I had occasion, soon after the Act passed, to bestow a good deal of consideration, and I then came to the conclusion that the note or memorandum should be indorsed upon the probate upon its issuing, and that it could not be done afterwards.

Mr. W. F. Robinson then moved the Court to revoke the probate, in order that a new one might be obtained, in which the English domicil of the testator might be stated, or whereon it might be noted.

*Sir C. Cresswell.* The only ground for this part of your application is, that the probate has been taken out for too little. There is no instance in the registry of what you apply for having ever been done. It is not necessary that you should take this proceeding; I think it better not to introduce a new practice, which may be attended with a good deal of inconvenience. It is better to say that a probate rightly granted, and not taken out under any mistake, cannot be revoked. I must leave you to the old practice. Motion rejected.

IN THE GOODS OF CHARLES GOLDSBOROUGH AND OTHERS (all deceased), on Motion. March 23, 1859.—Administration Bond.—Power of Attorney.—Alteration of Condition of Bond.—Alteration of Terms of Affidavit.—When a party entitled to administration is abroad, and has given a [296] simple power of attorney to his agent in England to take out the administration for his use and benefit, the Court will only grant administration to the agent on the same terms as it would have granted it to the party himself. The Court, on application, refused to alter the usual conditions of the administration bond and the terms of the ordinary administration oath.

[S. C. 5 Jur. (N. S.) 417; 7 W. R. 375.]

Charles Goldsborough and eleven other persons, all deceased, and who were at the time of their respective deaths resident and domiciled in the United States, were severally entitled for a certain time to a share of the dividends arising from a sum of Bank Stock standing in the name of the Accountant-General of the Court of Chancery in a certain case, which since the year 1811 had been pending in that Court. This cause having at length been brought to a close, it was now requisite to obtain a representation to the different parties who, when alive, were entitled to the accumulated dividends. Mr. Tomlin, the solicitor in the suit in Chancery, by the direction of Vice-Chancellor Kindersley, proceeded in September last to the United States, to make inquiries (amongst other things) as to who were the parties entitled to the accumulated dividends. He then ascertained the parties entitled, and that they were all resident in the United States, and obtained from each of them a power of attorney, duly executed, appointing him, Mr. Tomlin, respectively their attorney, to apply for and obtain letters of administration of the personal estate and effects of the person to whom such power of attorney related, to be granted to him on behalf of the party giving the power. Mr. Tomlin had applied in the registry for a grant of administration, but he objected to enter into administration bonds with sureties, and to make affidavits for the due performance of the office of administrator, in the usual forms, as there required.

In the cases where the deceased had left a will, the condition of the bond was to pay the debts of the deceased, and then the legacies contained in the said will annexed

to the letters of administration to be granted, and afterwards to pay the residue to such person or persons as should be by law entitled thereto; and in the cases where the deceased had died intestate, to pay the debts, and then to pay over the residue [297] to the persons entitled in distribution. He was also required in each case to make an affidavit in conformity with the condition of the bond.

Dr. Spinks, under the special circumstances of the case, applied to the Court "for a special order, under the 81st section of the Probate Act, that the condition of the bond, instead of being in the usual form, should be for Mr. Tomlin, after collecting and converting the effects, etc., to pay the same to the person for whose use and benefit the letters of administration to the goods, chattels, and credits of the deceased had been granted to Mr. Tomlin; and also that the terms of the affidavit should be so altered as to conform with the condition of the bond as altered." Many of the persons originally entitled had been dead for several years, and it would be extremely difficult, if not impossible, for Mr. Tomlin to ascertain if all their debts had been paid, or, where they had left wills, if all the legacies bequeathed had been discharged; it would also be very difficult for him to undertake the distribution of the residue, which would be governed by the discordant laws of the States in which each of parties deceased happened to have been domiciled at the time of his death. Mr. Tomlin objected to the bond being kept hanging over his head for an indefinite number of years.

*Sir C. Cresswell.* Where a person is authorized by a simple power of attorney to take out administration, the Court ought to decree to him such administration as it would have granted to the person who conferred the power, if he had applied for it himself. If I decree administration to Mr. Tomlin, in pursuance of the power, the grant must follow the terms of the power. The power is for a general grant; I cannot, therefore, make a special grant. Mr. Tomlin must also take the usual administrator's oath, which will follow the terms of the conditions of the bond. If this course is, in any case, objected to, the party entitled can take out administration, and send a power of attorney to someone in this country authorizing him to act for him. Application rejected.

[298] SOUTHALL AND HUXLEY *v.* JONES. March 5 and 23, 1859.—Power of Appointment under Settlement.—De facto Marriage with deceased's Wife's Sister.—Will.—In contemplation of a marriage between A. and B., certain personal property of B.'s, the intended wife, was placed in the hands of trustees to hold in trust for her till marriage; then in trust for A. and B. during their respective lives, and then for the children of the marriage; and if there were no issue, and in case B. should die in the lifetime of A., in trust for such persons as B. should by will appoint. A marriage de facto took place between A. and B. in July, 1842; but such marriage was void in law, B. being the sister of A.'s deceased wife. In October, 1842, B. made a will (confirming the settlement) purporting to be made under the power therein contained, and by all other powers, etc., and left various legacies to be paid six months after the death of A., and thereby also disposed of the residue of the trust-properties. A. died in December, 1846; after which part of the trust-estate, consisting of money in the funds, was transferred to B.'s name, and securities in which other parts were invested were handed over to her; and she, with her solicitor's consent, destroyed the marriage-settlement. B. died in January, 1857. The will was found a few days after her death among some title-deeds of property which had belonged to A.; but under advice of counsel as to the invalidity of the will, C., her sister and next of kin, took out letters of administration to B. as dead intestate. The executors named in the will called in these letters of administration, and propounded the will.—Held, that the will was valid under B.'s general power of testamentary disposition, though she might have made it thinking it might operate under the settlement; her intention to benefit the legatees being clear, though she had certainly intended A. to take a life-interest in the property. Probate granted, and the costs of the defendant ordered to be paid out of the estate.

[S. C. 28 L. J. P. 112; 5 Jur. (N. S.) 369; 7 W. R. 381.]

This was a question as to the validity of the will of Catherine Crane (otherwise Wood), purporting to be made under a power contained in a deed of settlement, executed in contemplation of the marriage of Catherine Wood and Benjamin Crane,

the widower of her deceased sister, which marriage de facto took place in July, 1842. In October of the same year, Catherine Crane made a will purporting to be made under the power contained in this settlement, and by all other powers to her belonging, whereby she confirmed the said settlement, and left various legacies to be paid six months after **[299]** the death of Benjamin Crane, and disposed of the residue of the trust property. Benjamin Crane died in 1846, after which part of the trust estate, consisting of money in the funds, was transferred to the name of Catherine Crane, and securities upon which other parts were invested were handed over to her, and she, with the consent of the solicitor, destroyed the marriage settlement. As no facts were in dispute, the case was argued and determined on affidavits; the facts as to the transfer of the stock and securities to the testatrix after Benjamin Crane's death, and the destruction of the marriage settlement, appeared by the affidavit of the solicitor, who was a party to the settlement and drew the will. From the affidavit of Ann Jones the defendant, it appeared that the deceased, her sister, died at her house, in January, 1857, after a few days' illness; that, in answer to a question put to the deceased by the deponent's late husband, "whether she had made her will?" the deceased replied, "Ann (meaning Mrs. Jones) is heir to all I have."

The will was found amongst some title-deeds of the deceased's property a few days after her death, but her sister the defendant, being advised by counsel that it was invalid, took out letters of administration to the deceased, as dead intestate.

The executors named in the will had since called in those letters of administration and propounded the will. The remaining facts appear sufficiently in the judgment.

Mr. Shapter, Q.C., and Dr. Addams, Q.C., for the executors, contended that the marriage between Catherine Wood (the testatrix) and Benjamin Crane was invalid; that the trustees consequently held the property assigned to them by the instrument dated July, 1842, in trust for the testatrix; that she had, at the date of the will, the jus disponendi of this property by will, and that the will in question was a valid disposition of it, although there was a reference therein made to the power; for that the testatrix had not only referred to the power in the settlement, but also all other powers enabling her to dispose of the property; and cited *Robinson* v. *Dickinson*, 3 Russell, 339; *Dobbins* v. *Bowman*, 3 Atk. 408; *Habergham* v. *Vincent*, 2 Ves. jun. 204; and *Burton* v. *Collingwood*, 4 Hagg. 176.

**[300]** Dr. Deane, Q.C., for the next of kin, admitted that the marriage between Catherine Wood and Benjamin Crane was void, but contended that from the reference to the power made in the will, the testatrix intended to make a contingent will, and one which was only to operate in the event of Benjamin Crane surviving her, as was proved by several passages in it. The intention of the testatrix must alone be regarded. *Parsons* v. *Lenst*, 1 Ves. sen. 189. See also *Nichols* v. *Nichols*, 2 Phill. 180, where a will, not written with testamentary intention, was set aside. He submitted that probate ought not to be granted of this paper.

Mr. Shapter, Q.C., in reply.

*Sir C. Cresswell.* The plaintiffs in this case claimed to be executors of Catherine Wood, otherwise Crane, and propounded as her will an instrument executed by her so as to satisfy 1 Vict. c. 26. The defendant, who was only sister and next of kin of the deceased, denied that the instrument propounded was the last will and testament of the deceased, having been executed as under and in pursuance of a power which never arose.

The circumstances of the case were singular. The deceased, Catherine Wood, was about to marry Benjamin Crane, a widower, who had been the husband of her sister then deceased, and in contemplation of the intended marriage a deed was executed, whereby certain property of Catherine Wood was vested in trustees in trust for Catherine Wood till the marriage, afterwards in trust for Benjamin Crane and Catherine during their respective lives, and after the decease of the survivor in trust for the children of the marriage, and if no child the trustees were to stand possessed upon the trusts following, namely, in case the said Catherine Wood should survive Benjamin Crane, then in trust for Catherine Wood, but if she should die in the lifetime of Benjamin Crane, then in trust for such persons as the said Catherine Wood should by deed or will, notwithstanding her coverture, appoint; and in default of appointment, for her next of kin. The marriage was, in form, solemnized, and afterwards, on the 4th of October, 1842, Catherine Wood executed an instrument as a will, which is to the follow-**[301]**-ing effect:—"I, Catherine Crane, wife of Benjamin

Crane (late Catherine Wood, spinster), do make, publish, and declare this to be my last will and testament, in manner following; that is to say, whereas, by the settlement made previous to and in contemplation of my marriage with my said dear husband, Benjamin Crane, bearing date the 29th day of June last past, and made between James Best, Jemima Woods, myself, as executor and executrixes of my late father Richard Wood, deceased, of the first part; myself, of the second part; the said Benjamin Crane, of the third part; and W. R. Grape and Edward Southall, of the fourth part; certain moneys and personal estate lately belonging to me were transferred to and vested in Mr. W. P. Grape and Mr. Edward Southall, the trustees of such settlement, in trust for myself and my said dear husband successively during our respective lives; and after the decease of my dear husband, in case of his surviving me and in case I shall leave no child, in trust for such person or persons, for such estate or estates, interest or interests, in such parts, etc., as I shall, by my last will and testament in writing, or by any codicil or codicils thereto, to be respectively executed by me in the presence of and attested by two or more witnesses, direct, appoint, give, or bequeath the same. Now I do hereby ratify and confirm the said settlement, and in pursuance and exercise of the power thereby reserved to me, and of all other powers enabling me in this behalf, I do by this my last will and testament direct and appoint that the said W. P. Grape and Edward Southall, or other the trustees or trustee for the time being of the said settlement, do and shall stand possessed of and interested in all and singular the trust-moneys, etc., from and after the decease of the said Benjamin Crane, and such failure of issue as in the said settlement mentioned, in trust for such of several persons hereinafter named, as shall be living at the time of the decease of the said Benjamin Crane." (Then about sixteen legatees in specific sums are constituted.) "And as to the residue of the trust-moneys and personal estates comprised in the said settlement, from and after the payment of the said legacies, which I direct to be paid at the end of six months after the decease of the said Benjamin Crane, and the expense of proving this my **[302]** will, I do hereby give and bequeath one moiety thereof to such person or persons as my said dear husband, Benjamin Crane, shall by deed or will direct or appoint, and in default of appointment, to his next of kin, and the other moiety thereof to my sister. And whereas on my marriage with my said dear husband, Benjamin Crane, he became entitled in right of such marriage to certain personal estate belonging to me, which was not comprised in the before-mentioned settlement, and I am desirous of leaving certain legacies payable immediately on my decease, I do therefore hereby request my said dear husband to pay out of such personal estate, notwithstanding the same is now become all his own property, the following legacies," etc.

Benjamin Crane died in 1846; Catherine Wood *alias* Crane, in 1857.

For the plaintiffs it was contended that no marriage between Catherine Wood and Benjamin Crane ever took place, and that consequently the trustees always held the property in trust for her, and that her will was a valid disposition of it, notwithstanding the reference therein made to the power, for that the testatrix not only referred to the power in the settlement, but to all other powers enabling her to dispose of the property: and the case of *Dobbins* v. *Bowman*, 3 Atk. 408, was relied on.

On the other side, for the next of kin, it was not denied that the marriage solemnized in form between Catherine Wood and Benjamin Crane was altogether void, but it was contended that the reference to the power shewed that the testatrix intended to make a contingent will only,—that is, a will to take effect in the event of her nominal husband surviving her, and not otherwise. But I am of opinion that I cannot presume that the testatrix intended that her will should have such a limited operation. Why should she wish to benefit certain persons, if she had a limited and contingent authority to do so, and not if it was absolute and unlimited? It is clear that she did not mean her will to dispose of the property until after Benjamin Crane's death, and there is reason to suppose that she thought her right to dispose of it depended on the power in the settlement, and therefore she referred to it; but I think it cannot be disputed, that she intended to give the money in a certain **[303]** manner in whatever way her authority to do so was acquired, and as she had an absolute power over it, that supports the will, although the special power never arose. The observations in Sugden on Powers (p. 309, 5th edit.) on *Dobbins* v. *Bowman*, shew that the learned author considered it an authority to this extent. He there says, "But if the testator exercised a power by will, and it turn out that the power was either not

well created, or was defeated by the happening of a contingent event subsequently to the will, the devisor's interest at the time of the will shall come in aid of his disposition, for in a will there are no particular words required to pass the estate, but any words that shew the intention of the testator are sufficient." I must therefore decree probate as prayed.

Dr. Deane, Q.C., asked for the defendant's costs out of the estate, which the learned Judge granted.

IN THE GOODS OF HENRY BISHOP (deceased). March 30, 1859.—Administration.—Presumption of Death at Sea.—Lapse of Time insufficient.—Inquiries after Crew of lost Vessel.—H. B., on the 20th of October, 1858, sailed in command of a vessel from Demerara bound to London. Nothing having since been heard of the vessel, she was supposed to have foundered at sea with all her crew. On application for a grant of administration to the widow of H. B.—Held, that the time which had elapsed since the vessel sailed being only five months, the application was premature; that inquiry should be made at Demerara whether anything had been heard of any of the crew who might have survived.

[S. C. 28 L. J. P. 93; 7 W. R. 375.]

Henry Bishop, master mariner, sailed on the 20th day of July, 1858, from Cork, in command of the brig "Zarifa," bound on a voyage to Barbados and Demerara, and from thence back to London. The brig arrived at Demerara towards the end of September, 1858, and on the 23rd day of October following sailed from Demerara with her master (Henry Bishop) on board, bound for London. Since that time neither the [304] brig, the master, nor any of the crew had been heard of, and it was supposed that the brig, with all on board, had perished at sea. J. Eagle, a friend of the deceased, who was at Demerara when the "Zarifa" sailed, deposed that a hurricane had passed over the West Indies five or six days after the vessel sailed from thence. The vessel was insured, and one of the part-owners of the vessel deposed that the underwriters were satisfied of the loss, and had arranged for the payment of the amount insured thereon.

Mr. Swan moved the Court to decree letters of administration of the effects of the said Henry Bishop, deceased, as having died in or since the month of October, 1858, intestate, to be granted to Emma Bishop, his widow.

*Sir C. Cresswell*: The underwriters have not yet proved their belief in the loss of the vessel by payment of the policy. Independently of this, I think probably the vessel is lost, but it does not appear that any inquiries have been made at Demerara, as to whether any of the crew have arrived there, or have been heard of. I think also you have made your application too early, and that it would not be safe as yet to grant letters of administration. It is only five months since Henry Bishop sailed from Demerara; he may have been picked up by some ship, and carried to some distant port, whence he has not hitherto been able to make his way home. I am not aware that the Court in a case of this nature has ever acted so speedily. I reject the motion.

Mr. Swan: Will the Court name any time when it would feel able to grant the motion?

*Sir C. Cresswell*: No; I cannot name any time. Inquiries ought to be made after any of the crew who may have survived. Motion rejected.

[305] IREDALE *v.* FORD AND BRAMWORTH. April 6, 1859.—Administration.—Bankrupt.—Majority of Interests.—Practice.—Of the two rules for the guidance of the discretion of the Court in granting administration, where parties in equal degree dispute it, viz. "that, cæteris paribus, the male is preferred to the female," and "that the grant will follow the majority of interests"—the latter is the more stringent. The fact of a man having been bankrupt many years since is not to be pressed against him; but when he has been a second time a bankrupt, and under the second bankruptcy no dividend has been paid, quære, whether such bankrupt could be said to have any interest in the intestate's estate?—The grant being made to persons representing three-fourths of the interest, their sureties were ordered to justify to the extent of the other fourth; their costs were directed to be paid out of the estate, and no order was made as to costs of the other party.

[S. C. 5 Jur. (N. S.) 474; 7 W. R. 462.]

This was a question heard on petition and affidavit, as to the administration of the effects of T. Iredale, who died intestate, a widower, without child or parent, leaving William Iredale his brother, Sarah Ford, wife of T. Ford, Elizabeth Bramworth, widow, and Mary Richardson, widow, his sisters, his only next of kin, and the only persons entitled in distribution. The deceased had been for many years a lunatic, and William Iredale has since 1838 been the duly appointed committee of his person.

Dr. Waddilove and Mr. Malcolm Kerr applied for the grant to be made to William Iredale the brother, and relied on the maxim, that by the practice of the Court the male is preferred to the female, as more likely to be acquainted with and able to conduct business. *Chittenden* v. *Knight*, 2 Lee, 559. As to the fact of his having been twice bankrupt, in 1827 and 1837, and no dividend paid under the last bankruptcy, *Bell* v. *Timiswood*, 2 Phill. 22, would be relied on by the other side; that case was decided in 1812, and there is no reported case since which shews that it has been followed. Iredale offered two unexceptionable securities for the due administration of the estate.

Dr. Spinks and Mr. Swan, for the two sisters: It was for **[306]** the other side to shew that these parties are not proper to be entrusted with the administration. We rely on the general maxim that the grant follows the majority of interests; the corollary from which is, that when persons equally entitled are disputing the administration, the grant will follow the majority of interests, unless there is a substantial objection to the party asking for the grant. *Budd* v. *Silver*, 2 Phill. 115; *Warwick* v. *Greville*, 1 Phill. 123. Our application is supported by three-fourths of the interests. Two of the sisters apply for the grant, and the third has executed a proxy of consent. It is doubtful whether Iredale under the second bankruptcy has any real interest in the matter.

Dr. Waddilove, in reply.

*Sir C. Cresswell.* There are several dicta in the books on the subject of the rules which guide the discretion of the Court in granting administration, where the statute does not apply. Dr. Waddilove is right in stating that, cæteris paribus, males are preferred to females; but there is another principle relied on by Dr. Spinks, that the grant will follow the majority of interests, and will be made as desired by the majority of interests. I think this is a more stringent rule than the one giving a preference to males over females. Here three-fourths, at least, of the interests desire the administration to be granted to the two sisters; the remaining fourth—supposing the brother has any interest at all, which is very questionable—wishes it to be granted to himself. He has been twice a bankrupt, and as he paid no dividend under the last bankruptcy, it is probable his whole interest would vest in his assignees. In many cases it might be very hard to press against a man the circumstance of his having been bankrupt many years ago; he may have entirely recovered himself; but that is not the case here. It is further said that he has by deed assigned his interest in his property; and he does not deny that he executed such a deed, but says that he is advised that it cannot be enforced in law. Again, with reference to the position of the parties, I dare say he is a respectable man; he has been committee of the person of the lunatic for several years. The committee of the lunatic's estate offers **[307]** to become surety for him, and speaks well of him; and, what is more to the purpose, it may be presumed that the authorities in lunacy were satisfied with his conduct. But there are a good many judgments against him in a rather short time in County Courts; two are unsatisfied, and his explanation as to those—that he had made himself liable for debts of his son-in-law—is by no means satisfactory. Mr. Emmett is a well-known solicitor; but from his affidavit he does not seem to have had much confidence in his own client, for he stipulates that the whole of the business should be transacted in his own office. As to the sisters, they may be in a humble position in life, and their means small; but it does not appear that he has any means at all. On the whole, therefore, but principally on the rule that the grant should follow the majority of interests, and bearing in mind that this is not a case of forcing joint administration, which should certainly be avoided, I think I am bound to grant administration to the sisters; their sureties to justify to the extent of the one-fourth not included in their consent. I shall not condemn Iredale in costs; he had several plausible topics to advance. Those who have succeeded are entitled to their costs out of the estate, and I make no order as to Iredale's costs.

[308] (Before the *Judge Ordinary.*)

WELLS *v.* WELLS. July 16 and 29, 1858.—Costs of Wife.—Plea of Condonation not Established.—Practice.—A husband promoted a suit in the Consistory Court of London against his wife for a divorce à mensâ et thoro by reason of her adultery.—A libel was brought in by the husband charging the adultery, and a responsive allegation by the wife denying it; witnesses were examined on the libel and allegation, and after publication of their evidence the wife brought in additional articles (verified, according to the practice of the Ecclesiastical Courts, by the wife's affidavit), pleading condonation during the progress of the suit.—Witnesses were examined on the additional articles, but at the hearing the plea of condonation set up by them was abandoned by the counsel for the wife on the ground that the evidence in support of it failed. Upon an application by the proctor for the wife for an order on the husband to pay the costs incurred by him in respect of the additional articles—Held, that in the Ecclesiastical Court the proctor of a wife defending a suit for divorce was entitled to receive from the husband the reasonable costs for conducting her defence.—That a proctor refusing to bring before the Court any defence set up by the wife not plainly unfounded would incur a very grave responsibility, and that the wife's proctor was therefore, in the present case, entitled to have his costs from the husband.

[S. C. 27 L. J. P. 95. Referred to, *Jones* v. *Jones*, 1872, L. R. 2 P. & D. 337.]

This was a cause for divorce à mensâ et thoro, which had been transferred to this Court from the Consistory Court of [309] London, promoted by George Wells against his wife, Eliza Amelia Wells, by reason of her adultery.

A libel was brought in on behalf of the husband, in Hilary Term, 1857, wherein he charged his wife with adultery with two persons of the names of Berriman and Wildman, and witnesses were examined upon it; the wife brought in a responsive allegation on the 6th of May, 1857, denying that she had committed the adultery charged against her in the libel, upon which witnesses were also examined.

The evidence was subsequently published, and after its publication in December, 1857, and a few days prior to the Act of 20 & 21 Vict. c. 85, coming into operation, by which the jurisdiction of the Ecclesiastical Courts in matters matrimonial was transferred to this Court, additional articles were given in on behalf of the wife, alleging that during the pendency of the suit, namely, in the same month of December (1857), the husband had condoned the alleged adultery of the wife.

The wife, in the additional articles, pleaded:

1st. That on Sunday, the 13th of December, 1857, George Wells (the husband) having met her (the wife) in the street, accosted her in the presence of Joseph Shanti, asked her forgiveness for his past conduct towards her, and said he had the same heart and hand for her as he formerly had; that after further conversation between them he appointed to meet her in the afternoon of the following Tuesday, at the house of a mutual friend, M'Quillin. 2nd. That pursuant to the said appointment they met on the following Tuesday (December the 15th) at the house of M'Quillin, and were then and there reconciled, and mutually forgave each other for and in respect of all matters which had been in dispute between them, and that the husband in token of such reconciliation with his said wife then gave her a ring. 3rd. That on Monday, the 21st of December, 1857, they again, by the husband's appointment, met at the house of M'Quillin, when the husband promised to bring their little boy to see the wife on the following day. 4th. That on the following morning they again met at the said house of M'Quillin. That during the last-mentioned interview the husband expressed to his wife his disbelief of the charges which he had been induced to make against [310] her in the Consistory Court of London, and promised to return to her on Monday the 28th instant, and bring their children to see her; and further, that during the said interview the husband and wife were alone in a room in the said house together, and had sexual connection. 5th. That the husband by reason of the aforesaid facts had condoned the previous acts of adultery pleaded by him to have been committed by his said wife, if the same had indeed taken place.

On the 1st and 2nd of the additional articles Joseph Shanti was examined, and on the 2nd, 3rd, and 4th, M'Quillin. By the evidence of both of these witnesses, it appeared that the husband had only promised to forgive his wife and to take her back in the event of her not being proved guilty of adultery, which he said would soon be seen. With reference to their having had sexual connection on the 22nd of

December, as in the 4th article alleged, M'Quillin deposed that the husband and wife on the occasion referred to were only together for about twenty minutes in the front sitting-room of his house, the window of which was next to the pavement, and the sill not more than three feet high, so that passers-by could see what was going on in the room; that there was then no blind to the window; that the said front room was adjoining to that used as the common sitting-room of the family, with a door of communication between the two rooms; that whilst Mr. and Mrs. Wells were alone in the said front room the said door was ajar, and several of the family were in and out of the said adjoining sitting-room; and that under these circumstances he did not believe they could have had sexual connection on that occasion. That if they had been in the back parlour he might have thought of something of the kind taking place.

This witness further stated that he had refused to receive Mrs. Wells into his house, in consequence of her saying that Mr. Wells had connection with her in his front parlour.

Dr. Addams, Q.C., and Dr. Curteis appeared for the husband.

Dr. Tristram appeared for the wife, and contended that the evidence failed to establish the adultery charged against her. **[311]** He, however, abandoned the plea of condonation set up by the additional articles on the ground that there was not sufficient evidence to support it; but he asked the Court to order that the costs incurred by the proctor of the wife in respect of the additional articles should be paid by the husband. By the practice of the Ecclesiastical Court the proctor of the wife, against whom a suit for divorce had been instituted, was entitled to receive from the husband the costs incurred in defending her. These, with the exception of the costs of the additional articles, had been paid. An application had been made, prior to the hearing, to his Lordship in chambers for them. This application had been opposed, and the discussion of the question was directed to be reserved until the hearing of the cause. It was submitted, that though the evidence failed to sustain these articles, the wife's proctor under the circumstances of the case was still entitled to the costs incurred by him in respect of them. By the practice of the Ecclesiastical Court additional articles were not admitted after publication of the evidence, unless the party bringing them in verified the facts therein pleaded by affidavit. Mrs. Wells had communicated the facts pleaded to her proctor; she subsequently verified them by affidavit; and if established, they would have been a good answer to the suit. Her proctor, thus informed, was bound to bring them in. It might be said on the other side that, before bringing them in, he should have satisfied himself that they would have been sustained by M'Quillin's evidence. But M'Quillin was an unwilling witness; and he even stated that if Mr. and Mrs. Wells had been together alone in the back parlour instead of in the front room, he might have suspected that they had had connection.

Dr. Curteis, in reply: It was entirely through the negligence of the proctor in not ascertaining that he had good evidence to support the additional articles that these costs were incurred. The husband ought not, therefore, to have to pay them.

Cur. adv. vult.

July 29.—*The Judge Ordinary* now delivered judgment: After an examination of the evidence he pronounced the charge against Mrs. Wells of adultery with Berriman not to have been proved, **[312]** but the charge of her having committed adultery with Wildman to have been established, and thereupon decreed a judicial separation. He then continued:—I must now dispose of a question that was reserved respecting the costs of the additional articles setting up condonation. In the Consistory Court the proctor defending a wife in a suit for divorce was always considered to be entitled to receive from the husband the reasonable costs for conducting that defence, but it was said in this case that the period at which the condonation, which was made the subject-matter of the additional articles, was alleged to have taken place, ought to have excited the vigilance of the proctor, and that if he had exercised reasonable care in ascertaining what evidence his client could produce to support them, he must have known that there was no ground for such a defence, and therefore he ought not to have put the husband to the costs occasioned by it. It is difficult to draw the line in such cases, and a proctor refusing to bring before the Court any defence set up by his client, and not plainly unfounded, would incur a very grave responsibility, and therefore I think the costs must be allowed, although I cannot doubt that there was a

miserable conspiracy to entrap the husband into a position which might be urged as evidence of condonation; and if anything were necessary to confirm my opinion as to there being good ground for the suit, it would be supplied by this attempt to defeat it by matter subsequent.

(Before the *Judge Ordinary.*)

MARSH *v.* MARSH. November 9 and December 10.—Judicial Separation at Suit of Wife.—Cruelty by a Husband addicted to Intemperance.—Custody of Children. —20 & 21 Vict. c. 85, s. 75.—A husband, who had for six years been addicted to intemperance, and had suffered from delirium tremens, had on occasions inflicted bodily injury on his wife, and had by his general course of conduct towards her materially injured her health.—**[313]** Held, that the Court being satisfied from the whole course of the evidence, that the wife could not return to cohabitation without incurring great peril of a renewal of the bodily injuries inflicted upon her, she was entitled to a judicial separation.—That where the Court decrees a judicial separation at the suit of the wife by reason of cruelty, it will, in making an order as to the custody of the children under section 35 of the Divorce Act, according to the circumstances of the case, exercise a discretionary power, exceeding that which is exercised by Courts of Law and Equity respecting the custody of infants.—In the present case, though there was no suggestion that the children had been cruelly or improperly treated by the husband, the Court directed the children to remain in the custody of the mother so long as she maintained and properly educated them without expense to her husband (he to have proper access to them), till they should respectively attain fourteen years of age.

[S. C. 28 L. J. P. 13; 5 Jur. (N. S.) 46; 7 W. R. 129. Approved, *Boynton* v. *Boynton*, 1861, 2 Sw. & Tr. 295. Applied, *Chetwynd* v. *Chetwynd*, 1865, 4 Sw. & Tr. 151.]

This was a petition for judicial separation by reason of cruelty, at the suit of the wife against the husband; there was also an application for the custody of the children. The substance of the evidence is fully stated in the judgment.

Dr. Deane, Q.C., and Dr. Spinks for the petitioner.

Mr. Macnamara for the respondent.

As respects the custody of the children, some remarks of Lord Eldon in *Wellesley* v. *Wellesley*, 2 Russ., were cited, and it appeared in evidence that the children were at the time of the hearing being maintained and educated at the expense of the mother.

Cur. adv. vult.

December 10.—*The Judge Ordinary.* This was a petition for judicial separation on the ground of cruelty: the respondent denied the cruelty charged. The evidence was very short. The parties were married in 1850; according to the evidence of the wife, two years after the marriage her husband's habits became very intemperate and his conduct to her very harsh; he frequently swore at her and called her vile names without any cause or provocation. His intemperance increased to so great an extent, that in 1856 he would sometimes lie in bed for two or three weeks, and compel his wife to supply him with drink there. In November, 1856, on one of these occasions, he **[314]** desired his wife to get up in the night and fetch him drink; she remonstrated, whereupon he seized her by the throat and said he would throttle her if she did not bring it; she exclaimed, "William, you will never murder the mother of your children," whereupon he relaxed his hold, and she fled to his mother's room, who got up, and passed the night with her downstairs, and two farming men were called in to remain with him. In July, 1857, another scene of the same kind occurred; he was still more intemperate, and his fits of violence were more frequent. On one occasion when she had left his room for a few minutes to walk in the garden, on her return he was angry, leaped out of bed, and took her by the throat. She cried out; his mother came in and threatened to call to his farming men for assistance if he did not release her. He did so, and she and his mother left the room together. In March, 1858, he had another long fit of intemperance, and kept his bed for some weeks. His wife and a female servant slept on the floor in his room; one night he called for drink, and on her hesitating to go for it, he got up, seized the poker, and threatened to beat her brains out; the servant interposed to protect her; the two then went and brought him drink, and he afterwards fell asleep. After this she never remained with him alone. On Saturday, the 20th of March, she passed the night in his room by his desire, a man named Parker, the farm bailiff, being placed there also for her pro-

tection. In the morning she went into another room, and was looking out at the window, when the respondent came behind her, seized her by the throat with both hands and squeezed it so violently that she was much injured, and the marks of his nails and fingers were seen by more than one witness; the female servant went to her assistance, and then he released her. In consequence of this outrage, and the advice of her brothers, she left him and went to her mother's, and has remained there ever since. It appeared further, by the evidence of a medical man, that when she returned home her health was much broken; she was emaciated, so as to appear in a rapid decline; her appetite had entirely failed, and she was in a state of nervous apprehension, which deprived her of sleep. The respondent, on his own behalf, did not deny that he at times used violent language, but ascribed it to his having indulged in drinking **[315]** in consequence of pecuniary losses. He asserted that he had no recollection of threatening to throttle her or of taking her by the throat, and he positively denied having done so on the last occasion deposed to by her. To corroborate his statement, he called the man Parker, who disgraced himself as a witness by endeavouring to give a false colour to the transaction, but was obliged to admit that he was placed in Mr. Marsh's room to prevent his offering violence to his wife. If the account given by the wife was not true, his mother would have been an important witness for him, but she was not called, nor any reason assigned for not doing so. The evidence given by and on behalf of the wife convinced the Court that she had been on various occasions treated with cruelty, and that her health had been materially injured by the husband's general course of conduct towards her; nor did the counsel for the defendant controvert this, but he contended (and it was the only ground on which the respondent's case could be rested), that apparently on the occasions spoken to he was suffering from delirium tremens; and that having recovered from that disorder, he was now to be treated as a sane man, and not to be punished for acts done when he was not a responsible agent. But the whole course of the evidence satisfies me that the wife could not return to cohabitation with her husband, without incurring great peril of a renewal of the bodily injuries inflicted upon her. The respondent had undoubtedly for six years led a life of gross intemperance; on various occasions for weeks together he displayed a total want of self-control, and his wife was in constant danger of bodily injury. I am slow to believe in the sudden reformation of a confirmed drunkard, and certainly there was nothing in the demeanour of the man, when examined in Court, calculated to create confidence in the temperance or calmness of his future conduct. I feel, therefore, bound to protect the wife from the peril of a renewed cohabitation with such a man, and accordingly decree a judicial separation between them. Another and more embarrassing question was raised respecting the custody of the children of these parties. It appeared that they have four; the eldest a girl aged seven, the second a boy aged four, and two girls younger. The section of 20 & 21 Vict. c. 85, which gives me authority in this respect, is the 35th: "In any **[316]** suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, or on any petition for dissolving a marriage, the Court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree as it may deem just and proper with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery." "Just and proper,"—this is not a general power of dealing with the custody of children; it exists only where there is a suit for obtaining a judicial separation, a decree of nullity or dissolution of a marriage. I apprehend, therefore, that the words "just and proper" are to be construed with reference to the circumstances affecting the suit, and not merely with reference to the rules by which courts of equity and common law have been governed in questions respecting the custody of infants; in short, that it was the intention of the Legislature to give a discretionary power to the Court exceeding that which had been previously exercised by courts of law and equity, and I collect that such is the opinion entertained by Lord St. Leonards from a passage in his Handy Book, p. 75. I think it would not be just to compel the unoffending mother to resort to any place where the father might choose to place them—perchance to his own house—for the purpose of seeing them. If he is put to any trouble about going to see them, that will arise from his own misconduct; and therefore, although

it does not appear that he was ever guilty of any cruelty or unkindness to his children, and there may not at present be any fear of their being contaminated by his evil example, I think it just and proper that they should remain under the control of their mother so long as she has the means of giving them a suitable education and the inclination to do so. I therefore make it part of my decree that the children shall remain in the custody and under the control of their mother, the petitioner, until the age of fourteen, when they may by law exercise their own choice in the matter, provided she keeps and maintains at school such of them as are of a fit age to be sent there, without subjecting **[317]** her husband to expense. The husband always to have information of the schools at which they are placed, and to have the same access to them there as is allowed to the parents of other children at the same schools. As long as any one of them is kept by its mother at her home, as being too young to be sent to school, the respondent to have access to it there once a week at any reasonable hour.

(Before the *Judge Ordinary.*)

SHIRLEY *v.* WARDROP (FALSELY CALLED SHIRLEY). December 11, 1858.—Suit for Nullity of Marriage.—Alimony pendente lite.—Reduction.—In April, 1857, in a suit for nullity of marriage brought by the husband against the wife, alimony pendente lite was agreed upon at £300 per annum, and confirmed by order of Court. On application for reduction of such rate of alimony, on the husband's affidavit that his income in 1857 was £1200, and now only £949, but not explaining how such reduction had been caused, nor stating when or how a certain sum of £10,000 had been spent, the Court refused to interfere.

This was an application for reduction of alimony pendente lite. A suit for nullity of marriage, which was instituted in the Consistorial Court of London, was now transferred to this Court, and had been pending between Colonel Shirley and his wife since November, 1856. In April, 1857, alimony pendente lite was taken by consent of the parties at the rate of £300 per annum—a sum based on the actual income then enjoyed by Colonel Shirley, viz. £1200 per annum—and confirmed by an order of the Court. Colonel Shirley now claimed a reduction of alimony, on the ground, as stated by him in an affidavit, that since April, 1857, his income had decreased, and that he had now no more than a net income of £949, of which he set forth the particulars. Mrs. Shirley, in a counter-affidavit, stated that besides the sums specified by Colonel Shirley, he had received **[318]** in or about the year 1852, about £10,000 on selling out of his then regiment, and in the year 1856, a legacy of £500 under the will of his father. In a further affidavit, Colonel Shirley admitted the receipt of between £9000 and £10,000 for the sale of his commission; but stated that such money had been subsequently spent as well as the £500 he received under his father's will; that his income when the rate of alimony was agreed upon was £1200, and was now reduced to £949.

Dr. Twiss, Q.C., for Colonel Shirley, cited, in support of his application, *Cox* v. *Cox*, 3 Add. 276, where, in a suit for restitution of conjugal rights, a sum of £300 per annum, as alimony pendente lite, on an income of £1680, had been allotted, and the Court, on the husband's affidavit that his income, as one of the commissioners for settling Spanish claims, had been reduced from £1500 to £1000 per annum, and that another source of income had produced only £80 instead of £150 as admitted in his answer to the allegation of faculties, was pleased to reduce the alimony to the rate of £220 per annum.

Dr. Phillimore, Q.C., contra: This is a suit for nullity of marriage after twenty years' cohabitation; no slur whatever can be inferred against Mrs. Shirley's moral character; the rate of alimony was taken by consent, so that Mrs. Shirley had never had any opportunity of filing an allegation of faculties or petition for alimony; as regards Colonel Shirley's affidavit non constat, the sums sworn to have been spent were not spent before the rate of alimony was agreed to.

*The Judge Ordinary.* Under the circumstances of this case, I shall not interfere to reduce the alimony.

It seems that shortly after the suit was instituted an arrangement was made between the parties, that Colonel Shirley should pay his wife by way of alimony pendente lite £300 per annum. He now asks that this arrangement may be altered, on the ground that when he agreed to it, his income was £1200, and that it is now reduced to £949. If he had shewn, **[319]** that it had been diminished owing to any

misfortune, or to events over which he had no control, he would have brought himself within the case of *Cox* v. *Cox*, where it seems that the husband's income had been diminished in consequence of the reduction of his stipend under the Government without any default on his part. But Colonel Shirley does not tell the Court how his income came to be diminished, or what he had at the time of the arrangement which has now failed him, nor does he state when or how he spent the £10,000 he received for his commission. If he has been indulging in wilful expenses or extravagant amusements, I do not think that, at the present stage of the proceedings at least, the wife should suffer. Motion rejected.

(Before the *Judge Ordinary* and a Special Jury.)

CHERRY *v.* CHERRY. December 15, 1858.—Petition for Restitution of Conjugal Rights. —Plea of Cruelty.—Practice.—Right to begin.—In a petition for restitution of conjugal rights by the husband, to which the wife answered by pleading his cruelty, and the husband took issue thereon, the Court, after hearing counsel, held that substantially the affirmative issue was on the respondent, and that her counsel had a right to begin.

[S. C. 28 L. J. P. 36. Followed, *Smith* v. *Smith*, [1900] P. 68.]

This was a petition for restitution of conjugal rights, at the suit of the husband against the wife. She pleaded cruelty, and issue was joined thereon. The case was set down for hearing before a special jury. The record for the jury (see sections 37, 38, of Divorce Act, and rule 22) was in the following terms:—"*Henry Curtis Cherry* v. *Emily Cherry.*

"Henry Curtis Cherry did, in his petition presented in this cause, allege that the said Emily Cherry did, on the 29th of September, 1855, without lawful cause, leave his residence at Burghfield, and did from the said day up to the date of the said petition, to wit, the 15th of February, 1858 (with the exception of two or three days in the month of September, **[320]** 1856), withdraw herself from cohabitation with him, and refuse to render him conjugal rights. And Emily Cherry did in answer thereto deny that she withdrew herself from cohabitation with the said H. C. Cherry, the petitioner in this cause, as set forth in the said petition, without lawful cause; and the said Emily Cherry did further say that, from the date of her marriage, to wit, the 22nd of August, 1853, and up to the 8th of September, 1856, inclusive, she frequently suffered from the insulting, degrading, and cruel conduct of the said H. C. Cherry; and more particularly on the 31st of August, 1856, and the 8th of September, 1856, at Reading; and also on the 8th and 9th of September, 1856, at the residence of the said H. C. Cherry; and that by reason of his threats of further personal violence, she, subsequent to the 9th of September, 1856, has been compelled to obtain protection from Her Majesty's Court of Queen's Bench.

"Whereupon the said H. C. Cherry denied the truth of the allegations contained in the said answer, and joined issue thereon. Therefore let a jury come."

Mr. Wilde, Q.C., Dr. Deane, Q.C., and Mr. Maude, for the petitioner.

Mr. Huddleston, Q.C., Dr. Robertson, and Mr. Coleridge, for the respondent.

On the question of right to begin after hearing counsel,

*The Judge Ordinary.* I think substantially the affirmative issue is on the respondent. She means by her answer not to deny that she withdrew at all, but she denies that she withdrew without reasonable cause, and specifies that cause, which she is bound to prove. I think, therefore, her counsel have a right to begin.

**[321]** (Before the *Judge Ordinary.*)

STUDDY *v.* STUDDY. December 20 and 23, 1858.—Judicial Separation.—Construction of Agreement to live separate.—Adultery.—Leave and License.—Connivance.—A husband and a wife executed an agreement to live separate on certain conditions. The last clause in the agreement was as follows:—"Mrs. Studdy (the wife) promises, that if she does not fulfil her part of the agreement, Major Studdy (the husband) shall have the full power of a husband over her, whatever his way of living may be." The wife petitioned for judicial separation, by reason of her husband's adultery before the separation (unknown to her), and also since the separation. The husband pleaded connivance, and in support of his plea relied on the last clause in the agreement.—Held, that the words in the agreement,

"whatever his way of living may be," might be construed to apply to the place where and to the mode in which the husband might choose to live in reference to his establishment, and that as an innocent meaning might fairly be given to these words, the Court would not presume the immoral contract asserted to have been intended, and that the petitioner was entitled to the relief prayed.

[S. C. 28 L. J. P. 44; 7 W. R. 144.]

This was a petition for judicial separation at the suit of the wife by reason of adultery; the husband relied on the terms of an agreement to live separate, which was signed by the parties in October, 1857, as amounting to leave, license, and connivance. There was no other point of consequence in the case, and the agreement is set out in the judgment.

Dr. Addams, Q.C., and Mr. T. Jones, for the petitioner.

Mr. K. Macaulay, Q.C., and Dr. Spinks, for the respondent.

Cur. adv. vult.

December 23.—*The Judge Ordinary.* In this case Mrs. Studdy petitioned for a decree of judicial separation, on the ground of adultery, and the petition stated that the marriage was in 1852; that in 1855 the respondent committed adultery with Jane Hodges, their domestic servant, but that the fact had only recently come to the petitioner's knowledge; that in October, 1857, a separation took place between her and her **[322]** husband, and that she had recently discovered that after the separation he carried on an adulterous intercourse with Jane Hodges, and that they were still cohabiting together as man and wife. The respondent, in his answer, stated that the petitioner was, in 1855, well aware of his having committed adultery with Jane Hodges, and afterwards continued to cohabit with him until October, 1857; and that as to his subsequent cohabitation with Jane Hodges, the petitioner had no right to complain, for that at the time of the separation she gave him leave and license to live as he thought proper, and that the petitioner at such time well knew that he (the respondent) purposed seeking for, and, if possible, cohabiting with the said Jane Hodges, and offered no objection, but on the contrary, assented thereto, and connived thereat. The petitioner replied that her continued cohabitation with the respondent was in ignorance of the adultery with Jane Hodges, and she denied the license and connivance alleged, but said that her husband, by threats of ill-treatment, compelled her to write from his dictation a paper which both signed. The respondent rejoined that he did not by threats compel her to write and sign the said paper.

The paper is in these words:—"Mrs Studdy to make over to Major Studdy Oldways and its land, and all she possesses at this present time in the funds, above £275 per annum when Oldways is let, and above £250 when vacant. Major Studdy to make no further pecuniary or other demands on his wife, even should any money or other property be given her; but should any of her relations die, excepting her sister Mary Denistoun, she has agreed to give her husband at the rate of £25 in every £100 of any money she may be receiving above the £275 per annum. Major Studdy to give Mrs. Studdy all the property she possessed before marriage and since, such as clothes, trinkets, plate, pictures, etc., etc., which, however, revert to him at her death. Major Studdy to allow Mrs. Studdy to reside where she pleases, and with whom she pleases, and not to compel her to live with him again, or to go near her or molest her in any way; and Mrs. Studdy promises that, if she does not fulfil her part of the agreement, Major Studdy shall have the full power of a husband over her, whatever his way of living may be.—Mar-**[323]**-garet Studdy. T. B. Studdy. October 13, 1857. Witnessed by—Thos. Michelmore. Robt. Farwell." And it was proved that the paper was signed in the presence of two witnesses, and that the petitioner then stated that she signed it of her own free will. No evidence was given of any act of adultery committed by the respondent in 1855 being made known to the petitioner; but evidence was given that after the separation the respondent cohabited with Jane Hodges at Plymouth, where they passed as man and wife, and that this had been recently discovered and made known to the petitioner.

The case, therefore, depends entirely upon the meaning to be ascribed to the paper signed by the parties: if the wife thereby gave leave to her husband to commit adultery in future, that would satisfy me that she condoned any such acts previously committed; if she did not give any such leave, then any condonation of previous acts is immaterial, for that would not deprive her of the right to proceed in respect of her husband's subsequent misconduct. The case of *Barker* v. *Barker*, 2 Add. 286, was

relied on by the respondent, and upon that an argument was founded that the wife, by signing such a document, intended to give the license contended for; and that she was bound to rebut that presumption. But I am of opinion that I must decide this case upon the words of the document itself: even assuming that I could take into consideration surrounding circumstances had they existed, and construe it by their aid, none such were proved. The first part of the document gives a large license to the wife to reside where she pleases and with whom she pleases, but no one could say that such license extended to living with a paramour. Then follows a promise by the petitioner, that if she does not fulfil her part of the agreement (which related solely to giving up certain property, and not to any license given to her husband), he shall have the full power of a husband over her, whatever his way of living may be; it has no reference to time past, and cannot be read "whatever his way of living may have been," nor "whatever his way of living may henceforth be." If either of those readings could be adopted, I should think that it pointed at some course of conduct on his part which, but for the agreement, would have enabled her to resist **[324]** any attempt by him to exercise the authority of a husband; but it seems to me that the words were intended to apply to the future; to the time when he should be exercising the power of a husband, and I cannot suppose that she meant to give him a license to commit adultery when they should be living together, no such license having been given during the separation. A different meaning will be given to the words if they are construed to apply to the place where, and the mode in which, he may choose to live, with reference to his establishment—whether (ex. gr.) in a house or in lodgings, whether he keeps a permanent residence or wanders from place to place, and other matters of that nature; it is therefore unnecessary to resort to the supposition that the immoral contract contended for was contemplated in order to find some meaning for the words used.

This being the meaning that I ascribe to the words, I am of opinion that the respondent has failed to prove that the petitioner connived at the adultery committed by him since the separation, and that the petitioner is entitled to the decree which she prays.

Confirmed on appeal to the full Court (Lord Campbell, C.J., Martin, B., and the Judge Ordinary), on the 22nd of May, 1859.

(Before the *Judge Ordinary.*)

BOYNTON *v.* BOYNTON. December 22, 1858.—Petition for Dissolution at Suit of Wife.—Interim Custody of Child.—20 & 21 Vict. c. 85, s. 35.—In April, 1858, the wife left her husband's house, with the view of instituting a suit for dissolution of marriage, by reason of cruelty and adultery, taking with her their boy, between seven and eight years of age, whom she placed in a school kept by an intimate friend of her own. On application for an interim order, to prevent the father removing him from such school—Held, that the wife's intimate friend could not be considered an indifferent person between the parties.—**[325]** The Court ordered the child to be given up to the husband's mother, who, from the letters, appeared to be on good terms with the daughter-in-law, and attached to the boy.

[S. C. 7 W. R. 181.]

This was a question as to the interim custody of a child, arising in a suit for dissolution of marriage, brought by the wife against her husband for cruelty and adultery. The husband (Captain Boynton), in his answer, denied both the cruelty and adultery charged in the petition. The marriage took place in 1849, and there was one son born in 1851; Mrs. Boynton left her husband's house in April, 1858, for the purpose of commencing the present suit, and took the boy with her, and placed him at a school with a clergyman of the name of Manning, an intimate friend of her own. Captain Boynton had seen the boy there a few weeks since, and Mr. Manning had then undertaken that he should not be removed from his custody till after the 23rd of December. The application was for an interim order, to prevent the child being removed by the father.

On the part of the husband, his mother, Lady Boynton, was suggested as a fit person to have charge of the boy.

Dr. Addams, Q.C., contrà.

*The Judge Ordinary.* These are difficult and embarrassing questions, the ultimate order much more so than the interim order, which may be varied. If Mr. Manning's

school had been selected for the boy, under the authority of the father, before the separation of the husband and wife, I should have ordered the boy to remain in his care. But that is not so Mrs. Boynton left her husband's house, and without his sanction placed the boy in Mr. Manning's custody. Considering the terms of friendship which appear to subsist between Mr. Manning and Mrs. Boynton, I cannot look upon Mr. Manning as a person indifferent between the parties to this suit, and the husband may be right in wishing to remove him. On the other hand, as Lady Boynton's letters shew a very kind feeling on her part towards Mrs. Boynton, and great attachment to the child, she would seem to be the most proper person to be entrusted with his custody. "Order the child to be delivered up to Lady Boynton or to some person, other **[326]** than her son, deputed by her, Lady Boynton and Captain Boynton both undertaking not to remove him till further order be made in the matter: the mother to have access at all reasonable times."

(Before the *Judge Ordinary.*)

BROOKES *v.* BROOKES. December 23, 1858.—Petition for Separation.—Desertion by Husband.—Offer to return before 20 & 21 Vict. c. 85 came into operation.—A husband deserted his wife without cause in 1833. In 1850 he personally proposed to the wife to renew cohabitation, which she refused; in 1858 she petitioned for a judicial separation, under the 16th section of the Divorce Act, by reason of his wilful desertion.—Held, that no remedy having accrued to the wife in 1850 under the then state of the law, the offer of the husband in that year terminated the desertion, and that the petition must be dismissed.

[S. C. 28 L. J. P. 36; 5 Jur. (N. S.) 76; 7 W. R. 143.]

This was a petition for judicial separation at the suit of the wife by reason of the husband's desertion. The husband was a bootmaker in Birmingham; the desertion commenced as long ago as 1833, but it appeared at the hearing, that about the year 1850 the husband had personally requested Mrs. Brookes to return to him, which she refused to do. This raised the question whether, no remedy having accrued to Mrs. Brookes, as the law then stood, in 1850, the request made by the husband had not put an end to the desertion. (See *Cargill* v. *Cargill*, 1 Swab. & Tris. 235.)

Dr. Wambey appeared for the petitioner. Cur. adv. vult.

*The Judge Ordinary.* This was a petition by the wife for a decree of judicial separation, on the ground of desertion without cause for two years and upwards.

The evidence proved that the parties were married in 1823. The husband behaved extremely ill, and left his wife on several occasions. In 1833 he left for the last time, and they have never lived together since; but eight years ago he went to the petitioner and proposed that they should live together **[327]** again, which she refused; and the question is, whether she is, under such circumstances, entitled to a decree.

The question depends upon the construction to be put upon the 16th section of 20 & 21 Vict. c. 85:—"A sentence of judicial separation (which shall have the effect of a divorce à mensâ et thoro under the existing law, and such other legal effects as herein mentioned) may be obtained either by the husband or the wife on the ground of adultery, or cruelty, or desertion without cause for two years and upwards."

For the wife it was contended that the husband having deserted her in 1833, and having never offered to return to live with her till 1850, she was not then bound to receive him, and may now proceed for such desertion. If he had not offered to return until after the Act passed, so that when the offer was made the law had given her a right to petition, I think he could not have deprived her of that right by returning or offering to return. But the right to petition for judicial separation on the ground of desertion was first given by this Act. Desertion was not an offence previously known to the ecclesiastical or common law of the land. In that respect it differs from adultery and cruelty, the two other grounds for judicial separation mentioned in the same section. If a husband was guilty of either of those offences, the wife had a remedy in the Ecclesiastical Court, and the jurisdiction of that Court having been transferred to the Court for Divorce, it may take cognizance of those matters. But until this Act passed, desertion not being an offence cognizable by the Ecclesiastical Courts, no right to proceed for it could be transferred. Is then the clause to have a retrospective operation, so as to make that act an offence now, which was not an offence when it was done? So to construe it would give it another effect, which could

hardly have been contemplated: at any time after the wife refused to return to cohabitation, the husband might have sued for restitution of conjugal rights, notwithstanding his long absence; but if the statute were to have a retrospective operation, it would take away a right to that remedy already vested. It may be that in this case the wife would have another and different defence to such a suit; but that does not alter the argument. It seems to me that, as no **[328]** offence against the wife cognizable by the ecclesiastical law had been committed by desertion before the Act passed, and there has been nothing which can be called desertion since it passed, the petition cannot be supported, and must be dismissed.

(Before the Full Court.—*Lord Campbell, C.J.*, *Martin, B.*, and the *Judge Ordinary.*)

EVANS *v.* EVANS AND ROBINSON. January 8 and May 20, 1859.—Decree for Dissolution.—Co-Respondent.—Costs.—Practice.—20 & 21 Vict. c. 85, s. 34.—On application to the full Court for a decree of dissolution on the verdict of a jury, the marriage must be proved if it was not put in evidence at the trial before the jury. Generally, where the husband's petition is opposed, and the verdict and decree are in his favour, the co-respondent will be condemned in the whole costs of the proceeding. Where the wife's taxed costs up to the trial, and a sum of money to meet her further expenses had been paid into Court by the husband before the trial was allowed to proceed, the Court, after decreeing dissolution, and on motion that such sum should be at once paid out to the husband, directed such sum to remain in Court till the whole costs should be taxed; and on subsequent application for payment of the wife's taxed costs, directed such costs to be satisfied out of the sum of money to be paid into Court.

[S. C. 28 L. J. P. 136; 5 Jur. (N. S.) 606; 7 W. R. 181.]

This was a petition for dissolution of marriage, at the suit of the husband, by reason of the wife's adultery. The adultery had been put in issue, and the answer also pleaded desertion, on which issue was taken. On these issues the case was tried before Martin, B., and a special jury, who found a verdict on both points for the petitioner.

Mr. Huddlestone, Q.C. (with him Mr. H. Hawkins and Mr. W. G. Harrison), now moved the Court to decree a dissolution of the marriage.

*Lord Campbell, C.J.*: That involves a question as to whether the marriage was proved. Before this Court can make such **[329]** a decree, it must see most positive and direct evidence of everything that entitles a party to their prayer.

*Martin, B.*: On reference to my notes, I see the marriage was proved at the trial by the evidence of Mr. Bagshawe.

Whereupon the Court decreed the dissolution as prayed.

Mr. Huddlestone then applied for costs against Robinson, the co-respondent. By the 34th section of the Divorce Act, wherever the alleged adulterer shall have been made a co-respondent, and the adultery shall have been established, it shall be lawful for the Court to order the adulterer to pay the whole or any part of the costs of the proceedings. In the present case, Robinson states that a verdict was returned in his favour in the first action for crim. con. brought against him; that in the second action the verdict was against him, and that he paid £500 damages and costs. Proceedings were then taken against Mrs. Evans in the Arches Court for a divorce à mensâ et thoro, on which Mr. Robinson was examined as a witness. That suit was dismissed, and Robinson was indicted for perjury on account of his evidence given in the Arches Court; when the jury could not agree on their verdict, and were accordingly discharged. When the Divorce Act came into operation, Mr. Evans brought his petition in this Court, where Robinson appeared and was heard by his counsel, though he examined no witnesses.

Serj. Pigott (Mr. Hodgson with him), contrà: The Court has a discretionary power under the section referred to. In this case, Robinson has already paid damages and the costs of one action. (*Ling* v. *Ling and Croker*, 1 Swab. & Tris. 187.)

*Lord Campbell, C.J.* I am clearly of opinion that we are bound to say the costs of the proceedings in this Court should be paid by Robinson. *Ling* v. *Ling and Croker* is no precedent in this case. We do not now intend to lay down any inflexible rule upon this point; generally costs of these proceedings should be paid by the adulterer, but there may be in some cases peculiar circumstances to induce the Court, **[330]** in the exercise of its discretion, to order otherwise. The present case, however, seems to be

one of great aggravation, holding definitely, as we are bound to do, that Mr. Robinson committed adultery with Mrs. Evans.

*Martin, B.* I am of the same opinion. This is not an application for a penalty, but merely to indemnify Mr. Evans for the costs he has been put to by these proceedings, and I think he is entitled to be indemnified as far as it is in our power.

*The Judge Ordinary.* I am of the same opinion. Unless there are circumstances to make an exception, I think the co-respondent ought to be called upon to pay the costs; it was, I presume, one of the benefits intended by the Legislature to make the adulterer amenable to costs. It has been suggested on behalf of the co-respondent, that he called no witnesses in his favour, but Mrs. Evans did, and their defence was precisely the same; if that were allowed to be a ground for exercising our discretion, witnesses would always be called by the wife, and never by the co-respondent. For the purpose of deciding this question we must take it that he did commit adultery, and must therefore have known it.

Mr. Huddlestone then moved that £76, the amount of Mrs. Evans's taxed costs up to the trial, and a further sum of £700, paid by Mr. Evans into Court to meet Mrs. Evans's further costs before the trial was allowed to proceed, should now be directed to be returned to Mr. Evans. The question is, whether Mrs. Evans's proctor is to take this sum of money, or to repay it to Mr. Evans and go against Mr. Robinson for their costs.

By the Court: Let the money remain in Court till the costs are taxed; and this motion may stand over.[1]

**[331]** On May 20th, Dr. Deane, Q.C., moved the Court to direct the respondent's taxed costs to be satisfied out of the sum of money paid into Court.

*Lord Campbell, C.J.*: The wife's proctor has a lien on the sum.

Mr. Huddleston, Q.C., contrà: The decree of the Court condemned the co-respondent in the whole of the costs; the petitioner's cost were taxed at about £1200, and we cannot get even those from the co-respondent. During the year in which the trial was pending, Mr. Evans, without any order of the Court, paid £250 towards Mrs. Evans's costs.

*Lord Campbell, C.J.*: The respondent's costs have been **[332]** taxed; we cannot now reopen that question. An order must be made for payment of that sum, and costs of the present application.

---

[1] The summonses and orders thereupon in respect to the above sums of moneys were in the following terms:—

"Let the petitioner's solicitor, etc., attend Sir C. Cresswell, Knight, on Saturday next, the 3rd day of July, at twelve of the clock at noon, to shew cause why the costs of the respondent's proctors in this cause should not be taxed, and the amount, as taxed, be paid by the petitioner, or his solicitor or agent, to the said proctors, on or before the first day of August next.

"1st July, 1858. A. F. BAYFORD, Registrar."

"Upon hearing the agents for both parties, I do order that the respondent's costs be taxed by the registrar.

"July 17, 1858. C. CRESSWELL."

"Let the petitioner, etc., attend Sir C. Cresswell, at Westminster, on Wednesday next, the 24th Nov., at eleven o'clock in the forenoon, to shew cause why the sum of £73, 6s. 10d., the amount at which the costs of the respondent, in pursuance of the order of the Right Hon. the Judge, of the 17th July last, have been taxed, should not be paid by the petitioner to the solicitors of the said M. S. Evans, on or before the 26th Nov. inst., and to shew cause why the further costs of the respondent up to the hearing should not be taxed previously thereto, and why the amount thereof as taxed, as also the expenses of the briefs and expenses of counsel disallowed by the registrar in pursuance of the directions of the Judge, on the 17th July last, should not be paid by the said A. L. Evans to the said solicitors previously to the hearing of this cause.

"Nov. 20, 1858. H. L. STRONG, Registrar."

"Upon hearing the agents for all parties, I do order that before the hearing of this cause the costs already taxed to be paid to the respondent or her proctor, and that a sum of money be paid by the petitioner into Court, or that (if the registrar think fit) he should give security for defraying the necessary expenses on the part of the respondent bringing her case before the full Court for trial.

"Dated Dec. 2, 1858. C. CRESSWELL."

*The Judge Ordinary*: I directed the respondent's costs to be rigidly taxed; and the costs of this application are made necessary by your parties refusing to take my orders in chambers.

(Before the *Judge Ordinary.*)

SEYMOUR *v.* SEYMOUR. January 17, 1859.—Judicial Separation.—Desertion.—Permanent Custody of Children.—Practice.—A. deserted his wife and went to Australia in March, 1854; in 1858 the wife filed a petition for judicial separation by reason of desertion; the husband was personally served, but gave no appearance. The Court pronounced for the judicial separation, but refused to make any order for the custody of children. It seemed unnecessary, as they were now in the mother's custody, and the father in Australia.—Semble, when permanent custody is intended to be asked for, it should be inserted in the prayer of the petition.

This was a petition at the suit of the wife for judicial separation, by reason of her husband's desertion. It was proved that the husband, who had been doing a good business in London as a goldbeater, in March, 1854, sold off his stock and went to Australia, refusing to take his wife with him or to allow her to be sent out after him. He wrote to his wife in March, 1854, according to her evidence, a most insolent letter, and she did not hear from him again until after the petition was filed, when she received from him a most disgraceful letter. The wife wrote to him till September, 1855, and sent him a letter in December, 1857.

There were six children of the marriage, four boys and two girls, varying from sixteen to five years of age—the youngest, a boy, having been born after his father went to Australia. **[333]** Personal service had been effected on the respondent, but he gave no appearance.

Upon the decree for judicial separation being pronounced, counsel for the petitioner prayed the Court to make an order for the custody of the children.

*The Judge Ordinary.* I feel great difficulty in making any order as to custody of children in such a case. In the first place, the application is not embodied in the prayer of the petition, so that the husband has had no notice that it is to be made; secondly, I cannot see that any such order is called for in the present instance. The children are in the mother's custody, and the husband in Australia, and not very likely to interfere with them.

Decree judicial separation, but make no order as to custody of children.

(Before the *Judge Ordinary*, on Motion.)

HAYWARD *v.* HAYWARD. January 17, 1859.—Suit for Restitution.—Compromise by Counsel.—Practice.—So long as the suit remains on the Court book, the Court cannot consider as binding any agreement to compromise made by counsel of parties to a matrimonial suit, but is bound to hear such suit, if either party desires it, after such agreement made.—Quære, whether this Court can sanction or consider as binding any agreement for a husband and wife to live apart?

This was a suit for restitution of conjugal rights, brought by the wife. The pleadings disclosed some very peculiar circumstances (*Hayward* v. *Hayward*, ante, p. 81). The case was set down for hearing before the Judge Ordinary in the sittings after Trinity Term, 1858; but the leading counsel on either side having with the assent of both parties to the suit agreed to a compromise, it did not proceed. Mrs. Hayward was dissatisfied with the arrangement, and subsequently repudiated it, on the ground that when she assented to it she had been taken by surprise.

**[334]** Dr. Waddilove moved the Court to allow the case to be heard.

Mr. Slade, Q.C., contra, contended that Mrs. Hayward was bound by her counsel's arrangement.

*The Judge Ordinary.* I think whatever arrangement may have been made between the parties, as the cause is still on the books and the petition has not been dismissed, I ought to hear it. I much doubt, however, whether this Court can sanction or consider as binding any agreement between the parties to live asunder. Although such an agreement would be recognized at law or in equity, it would not have been recognized in the Ecclesiastical Courts.

(Before the *Judge Ordinary* and a Special Jury, and before the Full Court (*Lord Chelmsford, C., Wightman, J.*, and the *Judge Ordinary*), on motions for decree and new trial.)

KEATS *v.* KEATS AND MONTEZUMA. December 13 and 14, 1858, and February 1, 4, and 5, 1859.—Dissolution of Marriage.—Condonation.—Evidence.—Damages.—Wife's Costs.—Annuity to Wife.—20 & 21 Vict. c. 85, ss. 32, 33.—A wife was charged in a petition with adultery, to which she pleaded condonation; counsel for the husband, in order to repel this plea, by shewing that at the time of the alleged condonation the husband was not cognizant of the whole of the wife's adultery, tendered evidence of acts of adultery not laid in the petition, and which were committed prior to, but were unknown to the husband at the time of the alleged condonation; the Judge Ordinary ruled, hæsitanter, that, as the petition contained no averment of the acts of adultery, the evidence was inadmissible.—There can be no condonation, by the law of England, which is not followed by conjugal cohabitation.—Quære, whether condonation may not be constituted per verba?—On a decree of dissolution of marriage by reason of the wife's adultery, she having under a marriage settlement the interest, after her husband's death, of £10,000, and a right to dispose of one-fifth of that sum, the Court directed the husband to secure her an annuity during his life of £150, quamdiu casta vixerit, on condition of her giving up **[335]** the right to dispose of the £2000; and directed the damages assessed against the co-respondent to go, first, in payment of wife's costs; secondly, in payment of husband's, and thirdly, any surplus in satisfaction of the annuity to wife.—The wife's costs will not be taxed against the husband after trial, when she has failed in her suit.

[S. C. 28 L. J. P. 57; 5 Jur. (N. S.) 176; 7 W. R. 377. Discussed, *Bernstein v. Bernstein*, [1893] P. 292.]

This was a petition for dissolution of marriage, filed by Frederick Keats against his wife, Esther Elizabeth Keats, on the ground of her adultery with the co-respondent, Don Pedro de Montezuma.

The petition, which was filed on the 22nd of May, 1858, pleaded the marriage of the petitioner with the respondent on the 11th of July, 1854; that the respondent had no property, but that the petitioner had by a settlement, executed in contemplation of their marriage, secured to the respondent in the event of her surviving him the income of £10,000 consols, during her life, with power, in default of issue of the marriage, to dispose by will, notwithstanding her coverture, of one-fifth part thereof; that there had been no issue of the marriage; that the respondent in the year 1858 committed adultery with the co-respondent, Don Pedro de Montezuma, in Ebury Street, at Dover, and in Dublin, and prayed that he might be condemned in damages and the costs of the suit.

The respondent appeared, and on the 18th of June, 1858, filed an answer denying the adultery. On the 6th of December, 1858, she filed a further answer, wherein she alleged that after the original answer to the said petition was filed, and before the said 6th day of December, 1858, the petitioner had condoned the adultery (if any) alleged in the said petition to have been committed by her.

The co-respondent also appeared, and filed an answer denying the adultery.

These issues were directed to be tried before the Judge Ordinary and a special jury.

Mr. Phinn, Q.C., Dr. Addams, Q.C., and Mr. Hardinge Giffard, for the petitioner.

Dr. Phillimore, Q.C., and Mr. Thring, for the respondent.

**[336]** Mr. J. P. Murphy for the co-respondent.

The important facts, as proved in evidence, were as follows. The petitioner was possessed of considerable property, and was also a partner in the firm of Fortnum & Mason, in Piccadilly. On the 11th of July, 1854, being a widower, and having three children—a son and two daughters—by his former wife, he intermarried with the respondent, then Miss Esther Elizabeth Marrett, a lady who was a native of and a resident in Jersey. At the time of their marriage she was thirty years of age, and the petitioner was about sixteen years her senior. She had no fortune, and on their marriage a sum of £10,000 consols was brought into settlement by Mr. Keats, limited to himself for life, with remainder to Mrs. Keats for life, with remainder to the issue of the marriage; and in default of issue, as to four-fifths of the principal sum, for Mr. Keats, his executors, administrators, and assigns; and as to the remaining one-fifth of the principal sum, upon and for such trusts, intents, and purposes as Mrs. Keats

should, notwithstanding coverture, by will appoint; and in default of appointment, in trust for Mr. Keats, his executors, administrators, and assigns.

For some period after the marriage they appeared to have lived happily together, residing at Braziers, in Oxfordshire (Mr. Keats's country residence), and also at his house in town. In 1856, Mr. Keats entered upon the office of sheriff for London and Middlesex. In the summer of 1857, he made a short tour on the Continent, accompanied by Mrs. Keats and his children. During this tour they had several quarrels, and on three occasions Mr. Keats was said to have spoken of his wife as a whore; they would appear, however, from a letter which she wrote to him shortly after their return from the Continent, to have become subsequently reconciled. In September, 1857, they returned to England, and took up a temporary residence at Brighton. Here Mr. Keats became acquainted with the co-respondent, who was a Spaniard by birth, and was possessed of considerable musical talent; he invited him to his house, where the co-respondent soon became a frequent visitor; but his attention to Mrs. Keats having excited Mr. Keats's suspicions, led to further quarrels and altercations between them. In November, 1857, they left Brighton and went to reside in [337] Westbourne Terrace. Don Pedro continued his visits at Westbourne Terrace; Mr. Keats remonstrated with him; but a few days afterwards his suspicions, on some grounds not explained, were quieted, and he wrote to him on the 28th of November, 1858, expressing his regret for his rudeness towards him, on the Tuesday previous, and stating "that nothing was further from his intentions than to give him pain after the numerous pleasing attentions he had been kind enough to shew him and his family," and invited him to his table. Shortly afterwards his suspicions of his wife's infidelity were revived, which led to renewed altercations between them, and on two occasions, in consequence of differences with her, he left his house accompanied by his daughters, but on each occasion returned the following day. Negotiations for a separation were entered upon; the sum of £500 was fixed as the allowance to be made by him to his wife; a deed of separation was prepared and approved of by the solicitors of both parties (the selection of a trustee being the only part of the arrangement which was not completed), when on the 9th of January, 1858, Mrs. Keats, in consequence of a further quarrel, left the house and took lodgings, unknown to her husband, in Ebury Street, but afterwards wrote to him giving him her address. Here she was visited by Don Pedro, and on the 20th of the same month she went to the Lord Warden Hotel at Dover, where she took rooms for herself and maid, and also a room for Don Pedro. He visited her there; and in about a fortnight they left and went together to Dublin, where they lived for about three months, always in the same house, but occupying separate bedrooms, and passing as brother and sister. Don Pedro then left Mrs. Keats, who went to live with her mother at St. Leonards.

Mrs. Keats's adultery with Don Pedro was admitted, and the only question raised was one of condonation. For the wife it was contended, that, by reason of certain expressions used by Mr. Keats in the course of an interview he had with her during the pendency of the suit in November, 1858, he had condoned the adultery, and it was urged, that feelings of remorse for previous harshness and unkindness towards her had prompted him to take this step. But the Judge Ordinary was of opinion, that the evidence failed to shew that Mrs. Keats had been treated by her husband with unkind-[338]-ness or harshness previous to her intimacy with Don Pedro. The important evidence in support of the plea of condonation was as follows:

Miss Amelia Janvrin, the first material witness produced, was an aunt of Mrs. Keats, and had had a correspondence with Mr. Keats on the subject of an arrangement. It was opened by Mr. Keats himself in the following letter:—

"Inverness Terrace, October 14, 1858.

"My dear Madam,—It is now a very long time since I addressed you, but hearing that you have recently had an addition to your family, I conceived I might take the opportunity of congratulating you on the happy event that has occurred. As you were the first person who informed me of the deception practised on my credulity by Mrs. Keats, I now apply to know if that lady is in Jersey or in England. I have heard various rumours, but I am quite at a loss to know what has become of her; and although it would be quite impossible for us to meet again, yet sooner than she should become an object of poverty, the scoundrel with whom she eloped having left her, I should be glad to see some member of the family to confer with on this sad and disgraceful elopement, which is as lowering and detrimental to all the members of a

respectable family as well can be conceived. Would you kindly, as you have always shewn great interest in Esther's affairs, communicate with me direct on the subject, but strictly confidentially. For myself, I do not wish for law, but would greatly desire that an understanding might be come to finally, to avoid further litigation. The law would entitle me to a divorce, but the exposure must be great and withering to all parties. Pray think of this and write me a confidential letter. Very sincerely yours, "FRED. KEATS."

To which Miss Janvrin wrote in answer:

"October 17, 1858.

"Dear Sir,—I received your letter yesterday, and hasten to acknowledge it, and to say I will with pleasure do anything in my power to promote a reconciliation, though the task is difficult. In the first place, I do not understand that part of your letter, in which you say, 'As you were the first person who **[339]** informed me of the deception practised on my credulity by Mrs. Keats, I now apply to know whether that lady is in Jersey or in England.' Feeling unconscious of having blamed Esther in any way, and having a copy of the letter I wrote to you, I venture to say that I shall overlook that as coming from an angry feeling whilst writing. Dear Esther is in England, living with a respectable widow lady; her mother is with her, and she tells us her health is greatly improved. I shall ask her leave to give you her direction, for, alas! poor thing, she has been sorely tried I mean from great worldly society to complete retirement. As to the grief of inward feelings, she has not once uttered; Christian fortitude has prompted her to bear in silence, and when driven to despair through the neglect of one who promised to cherish till death, she has chosen a quiet home, and, with a light conscience, her health is improving. Allow me to lay before you, that considering you were so much older, and having an unprincipled governess, hinting evil into your ears, you must reflect and be thankful to the Almighty that she, who was young and with little experience, had not been driven to madness. Allow me to say also, Mr. Keats, that the moment you left her, for weeks together, alone in lodgings, without money, she of course was compelled to accept the needful assistance. Pray do assure her of your ill-adviser; and in a frank and open acknowledgment prove the whole affair of troubles false. The whole tenour of your letter indicates love towards her you have plighted your troth to; and may those sacred words, 'Those whom God has joined together, let no man put asunder,' be with you in our earnest prayer. My dear mother's health has been much shaken by this trial; but I am thankful to say she seems picking up now. She sincerely hopes matters will be agreeably settled," etc.

To this letter Mr. Keats sent the following reply:

"October 19, 1858.

"My dear Miss Janvrin,—The receipt of your considerate letter reached me this morning on my return to London, having been some few days at Braziers, etc. In a letter it is hardly possible for me to convey to you the unjustifiable means that were resorted to to injure me and my character and that of your niece, Mrs. **[340]** Esther Keats. It would be almost impossible to conceive that a female in the responsible situation you mention could possibly have indulged in such methodical, combined wilfulness with family intrigue. That cold, calm, pretended, calculating smile put on to snare the victim, who unfortunately employed and gave her a home. I do not hesitate to say that I have discovered the deceit. She has left my service, but I much fear is still in England. What I alluded to in my letter to you was one that was forwarded to me when Esther first left her home, and from the tone of which I admit I was highly incensed. I enclose you the copy. You must understand that before Mrs. Keats left her home to go, as I understood, to Jersey, on a visit to yourself, we had some words about my children, and my wife was induced by some bad adviser, who I cannot now mention, to take the unjustifiable course she did; but the fact of deliberately asking a separate maintenance for herself after the liberal manner I had treated her during the whole year of shrievalty, did, I admit, wound my feelings, and convinced me she was the dupe of some heartless villain. But I will say no more. I inclose you the copy of the note received just as I made it when I received it months ago, the original being in the hands of counsel From this you will immediately perceive that such indirect influence has been used, and probably still is continued even at the present moment. After what has passed, and the position I have taken as plaintiff, under the advice of my family, I cannot help it, but shall be most happy to meet yourself or one of your family relative to this distressing

event for all parties. More than this I cannot say,—more than this at the present time I dare not do. Trusting I may have another letter from you shortly," etc.

To this Miss Janvrin replied that she sees that it is impossible to settle the matter through post, and proposes to come over to England. Mr. Keats, in answer, offered to receive her in his own house, and said, "As matters stand we must be very careful, as we are watched, but there can be no harm in my seeing Esther's best friend as to an amicable arrangement without law."

The following letter from Mrs. Marrett (Mrs. Keats's mother) was also put in evidence.

[341] "October 27, 1858.

"Dear Mr. Keats,—Having heard the contents of your letter to my sister Amelia of the 4th instant, and your reply to her answer, I am now stopping with Esther, with the natural desire to soothe her wounded feelings caused by unjust and unfounded accusations, which have been made by you on suspicion only. I quite agree with you that the exposure of this law business, whatever the result may be, will be dreadful to all parties, and should by all means be avoided. It would certainly not be for the happiness of either of you that Esther should ever again reside with you, and, using your own words, would be quite impossible. So long as I live she can be under my protection, but you must remember that she is still your wife, and you must make her such a provision as is necessary for her due maintenance. Esther has received your message; she is willing to come to some arrangement if you will make her an allowance. Sincerely hoping that matters may soon be arranged. Believe me," etc.

There was an answer from Mr. Keats, dated October the 30th.

"My dear Mrs. Marrett,—I received your letter of the 27th instant yesterday, the 30th, as I was from home when it arrived. I hasten to say I shall be most happy to communicate with you relative to the disagreeable and vexatious exposure to all parties concerned, relating to the mutual separation between myself and your daughter, my wife Esther E. Keats. I do not hesitate to state she has been the dupe of the most outrageous family plot that probably ever was exposed, and it is most satisfactory to me that men of such high character as Mr. Bircham, her trustee, in this most disgraceful attempt at deceit should be her guardian. I know very little of the individual who has undertaken these law proceedings and instituted the suit for a divorce contrary to my wish.

"From the tenour of your letter, I presume Miss Janvrin will not come to London. As you, as your daughter's natural protector, will be sufficient, it is my most painful duty to inform you that a great deal of this deception emanated from Barnes, where unfortunately Esther lived so long. I am living at Braziers, where you can communicate with me. Be-[342]-lieve me, etc. Pray give Esther my sincere regards for her welfare. F. KEATS."

Miss Janvrin came over to England; Mr. Keats met her in town, and agreed to go down with her to St. Leonards to see his wife: this was on the 2nd of November; but he first went with Miss Janvrin to his solicitor, Mr. Guy. On their way there, he said he had feelings for his wife, and he loved her, and if he could get this matter over, he should be happy. He thought they might be happy, because Esther had no children. The result of the interview with Mr. Guy was, that he did not go to St. Leonards; and on the 5th of November he wrote as follows to Miss Janvrin: "After the evidence I have heard this afternoon, it will be quite impossible for me to see or communicate with Mrs. Esther E. Keats, and I very much regret you should have come to England on this business. I can do nothing more in the matter than refer you to Mr. Guy, my solicitor in Sir C. Cresswell's Court."

Subsequently to this, Mr. Keats communicated by letter with Mr. De Brisay, a brother-in-law of his wife, and a clergyman of the Church of England, in which he referred to having had further most unpleasant disclosures respecting Mrs. Keats, but stating that he should be very happy to meet him and talk over the unfortunate affair, and should wish to settle the matter quietly for his own sake and the children's.

This resulted in Mr. De Brisay, on the 27th November, driving up with his wife and Mrs. Keats to Mr. Keat's house. Mr. De Brisay's account of what occurred is as follows:

He, Mr. De Brisay, at first went into the house alone, and on entering into conversation upon the subject, Mr. Keats began by saying he was the victim of a foul conspiracy, and that all his relations were in league against him, and were all wishing

to deprive him of the custody of his children. He then began by abusing his partners, and said he had been brought into this matter without his own wish or consent, and that his lawyer had pressed him on a great deal beyond what he himself had intended to have gone. He then stated he would be very glad if he could settle the matter quietly. Mr. De Brisay urged him to do so, both for his own sake and for his children; he said he **[343]** dreaded the exposure very much; and that two persons were at the bottom of it all. Mr. De Brisay asked him what were his own feelings with regard to his wife—whether he really thought she had so much wronged him; he replied that the evidence was very painful, but that he should like some explanation. He then began asking him for some explanations, to which Mr. De Brisay said, that if he wished for an explanation, the best way would be to see his wife. To this Mr. Keats at first made no direct answer, but subsequently stated he should like to see her in the presence of some third party. He also stated that he should like to see Mrs. De Brisay. Upon being told by Mr. De Brisay that she was at the door in the carriage, he went out to bring her in, and then saw Mrs. Keats. Mr. Keats brought Mrs. De Brisay into his house, and Mr. De Brisay followed with Mrs. Keats. After a pause, Mrs. Keats asked her husband whether he did not intend to speak to her. He said, "Well, Esther, I have not seen you for so long, I don't know what to say." He then asked her where she had been living, and about her debts. Mr. De Brisay continued, I told Mr. Keats that our only object was to make friends. He said it was his most anxious desire. He then asked us if we would have some luncheon. Whilst it was being got ready, he turned to his wife and said, "Wouldn't you like to see the drawing-room?" We all went upstairs and saw it. He noticed several things in the room to her. We came down to lunch, and he made several remarks to her about the furniture. I then pressed upon him, as he was so anxious to settle the matter quietly, he should write a note to Mr. Guy. He said he would see him, and proposed that we should go together. We accordingly all went together, and saw the clerk only. Mr. Keats told the clerk that he wished the matter to be settled quietly. The clerk said it was far too important a matter for him to deal with. It was arranged that I should go back to Mr. Guy's on the following Monday. Mr. Keats turned to his wife whilst driving in the carriage with her, and shook her twice by the hand, and said, "Well, my dear, we shall understand one another better, and we must not revert to the past." She said, "Will you come and see me at St. Leonards?" He replied, "The matter is so nearly on the eve **[344]** of being settled, that I will not come now, but I will afterwards." I then said to him, "Then we will go to Mr. Guy's on the Monday morning, on the distinct understanding that you tell him you have seen your wife, and that you wish the matter to be quietly settled, and have forgiven her." He said, "Yes." He then turned to me and said, "I thank you very much for what you have done to-day. I have expressed very fully to you my real feelings." On the Monday morning, Mr. De Brisay and Mr. Keats met at Mr. Guy's office, when Mr. Guy persuaded Mr. Keats to go on with the suit. On cross-examination, Mr. De Brisay admitted that he and his wife brought Mrs. Keats to her husband's house, with the view, if possible, of getting her admitted into the house, and that before Mr. Keats went out to the carriage to bring Mrs. De Brisay into the house, he did not tell him that he would see his own wife with her. That they were about three hours in the house altogether, and that Mr. Keats had asked his wife whether she had seen Don Pedro since she had been in Dublin, and that she said, "No."

Mr. Phinn now proposed to call a witness to prove that Mrs. Keats had committed adultery with Don Pedro since she had left Dublin. It was laid down in *Snow* v. *Snow*, 2 Notes of Cases, Supp. p. 1, "that there was no condonation where the whole of the adultery was not known to the party."

Dr. Phillimore, contra: There is no averment in the petition of Mrs. Keats having committed adultery with Don Pedro after she left Dublin. He submitted that it was not competent to the petitioner to give evidence of adultery not laid in the petition.

*The Judge Ordinary*: The exact position of the parties is this: there is a petition in which the petitioner alleges certain acts of adultery against his wife, in respect of which he claims a divorce. Dr. Phillimore, for the wife, says, that the offence laid in the petition has been condoned, and has given evidence for the purpose of establishing that point. Mr. Phinn, on the other hand, admitting that there is evidence to be laid before the jury that the petitioner, with the **[345]** knowledge of certain facts, has

condoned the acts of adultery laid in the petition, yet says that, inasmuch as the Ecclesiastical Courts have always held that unless the party aggrieved knew all his condonation would go for nothing, he is entitled to prove other acts of adultery, which were not at the time of the alleged condonation known to the petitioner, and of which he has not complained in the petition. What was the practice of the Ecclesiastical Court? Would that evidence of condonation be disposed of by evidence of additional adultery?

Dr. Phillimore: Evidence of additional adultery would have been inadmissible unless it had been pleaded.

*The Judge Ordinary*: I think that Mr. Phinn might urge this: that the respondent must be taken to know the full meaning of the word condonation; that the petitioner had condoned knowing everything; and that she must be prepared to shew that he had full knowledge of everything. It is a very difficult question. My impression is rather in favour of Dr. Phillimore's objection. If I am in error in shutting out this evidence, and the jury make it necessary to inquire further, the Court will have an opportunity of correcting it. If I am in error in admitting it, though it is possible that it might have an effect on the verdict, it is also possible that the verdict might have been the same without it. Though I have great doubts upon the point, I will reject the evidence. Dr. Phillimore says that no evidence of adultery not alleged in the petition is to be admitted. I rule this hæsitanter.

*The Judge Ordinary*, in charging the jury on the question of condonation, said: The question you have to try is that of condonation. Mrs. Keats no longer says, "I am not an adulteress," but she says, "You have condoned the adultery with which I am charged." Now until this Court was established, a question of this nature was left to the decision of a single judge in the Ecclesiastical Court, and he, having the whole matter before him, compared in his own mind the law with the facts, and formed his opinion thereon, as to whether condonation was established or not. The Legislature has thought fit that questions of fact should in such cases **[346]** now be determined by a jury, and it is therefore necessary to separate the consideration of the law from that of the facts. I have not been able to find in the Reports of cases decided in the Ecclesiastical Courts, any precise definition of what was meant in those Courts by the word "condonation"; but looking to the circumstances under which former judges have held condonation to have been established, I have come to the conclusion that condonation means a "blotting out of the offence imputed, so as to restore the offending party to the same position he or she occupied before the offence was committed." This is the best definition that I can give you of the term of condonation.

The term "forgiveness," as it is commonly current in the English language, does not fully express the meaning of "condonation." A party may "forgive" in the sense of not meaning to bear illwill, or not seeking to punish, without at all meaning to restore to the original position. If you have a clerk or a servant who has robbed you, you might forgive him, and say, "I forgive you," without having the slightest intention of replacing him in your service, or of restoring him to the position he had forfeited. I take it, "condonation" would mean more than this; to use the language of Lord Stowell, it is like releasing a debt; it makes the debt as if it had never existed.

Again, it has been held that the person condoning, in order to condone, must know of the offence, otherwise he cannot be supposed to have condoned it. That perhaps is not strictly applicable in all cases, because a man may condone whether he knows of the offence or not, in this way: he may say, "I have heard stories about my wife. A. and B. have told me she has committed adultery. I can hardly believe it. I am in doubt about it; but whether guilty or not, I will take her back; she shall be restored to my bed." That would be a condonation without actual knowledge; and I think if after this he took her to his bed again, he could not afterwards, on acquiring more certain knowledge, revive the charge, as to which he had himself said, "I care not whether it is true or false; I do not know whether it is true or not; but be it one or be it the other, I would equally take her back to my bed."

**[347]** Again, where a man has had information of the guilt of his wife, he is presumed to know of her guilt, and if he does that which demonstrates condonation, under such circumstances he is presumed to condone with knowledge of the guilt.

But it may be that a man has knowledge, that he has information, but his intellect is obtuse. Generally speaking, you assume a man to know and to believe that which a reasonable man would believe under such circumstances. This is a safe presumption, but the contrary may be proved. If a man write a letter to A. B., and says he has seen his wife commit adultery, which is positive information, a man of ordinary capacity may say, "I believe the evidence, and I condone the offence"; and a man of less firm mind may be operated upon by argument or insinuation, so as to ascribe the information he has received to some evil motive, or to some plot on the part of the informant, and so, although he has the information, he may not believe it, and therefore, in taking his wife back, he may not intend condonation.

Again, condonation in this case is by word of mouth only. In the Reports of decisions in the Ecclesiastical Courts, there is no case precisely in point with the present one. In almost all of them, the great proof of condonation was the recommencement of matrimonial cohabitation, or some act done; and if the husband, knowing that his wife has been guilty of adultery, takes her to his bed again, he being clearly his own master in that particular, and quite able to choose for himself, if he is so regardless of the wrong done to him as to take her back again, it is always held that this is such a proof of condonation that it cannot be got over. With reference to a wife, to whom a knowledge of her husband's adultery has been brought home, and who has yet continued to share his bed, the rule has not been so strict. The wife is hardly her own mistress; she may not have the option of going away; she may have no place to go to; no person to receive her; no funds to support her; and therefore her submission to the embraces of her husband is not considered by any means such strong proof of condonation as the act of the husband in renewing his intercourse with his wife.

I do not mean to say that condonation may not be by words, because if my view of condonation be right, the act of **[348]** the person condoning intending by that condonation to restore the offending party to her original position, may be manifested by words. Certain acts are sufficient in themselves to prove condonation, but the party may express his intention in writing, or he may say in terms, "I do so and so."

The jury, after a lengthened deliberation, returned as their verdict:—

1. That Mrs. Keats had committed adultery.

2. That Mr. Keats had not condoned the adultery; and assessed £1000 as damages against Don Pedro.

February 1, 1859.—Mr. Phinn, Q.C., moved the Court[1] to decree a dissolution of the marriage, and to condemn the co-respondent in the damages assessed by the jury, viz. £1000, and in the costs of the suit.

Dr. Phillimore, Q.C. (Mr. Thring with him), moved the Court for a rule to shew cause why the verdict should not be set aside, and a new trial granted, on the grounds —first, of misdirection; secondly, that the verdict was against the evidence. I. As to misdirection. The definition given by the Judge Ordinary to the jury of condonation is incorrect, and if incorrect, there must be a new trial. He defined it as a "blotting out of the offence imputed, so as to restore the offending party to the same position which he or she occupied before the offence was committed." The part of the definition sought to be impugned is that which makes the restoration of the offending party to his or her former position indispensable to condonation. This doctrine is novel to our matrimonial law, is inconsistent with the established principles of condonation as recognized in our Ecclesiastical Courts, and, if admitted, would lead to mischievous consequences. The word and doctrine of condonation was introduced into the law of England from the Canon law. The expression "condonatio" does not even occur in the civil law. The definition is not correctly deduced from the etymology of the **[349]** word. Condonare, from which it is derived, is used in three senses: first, as donare, largire; secondly, remittere, non exigere quod debetur; thirdly, to forgive or remit a debt or offence, and is so used by Cicero: "Nec deprecaturi sumus ut crimen hoc nobis condonetis" (Cic. Pro Milone). "Qui pecunias creditas debitoribus condonandas putant" (De Off. l. ii. c. 22). Condonation, at the furthest, means no more than forgiveness. The definition is also at variance with the doctrine of condonation as recognised in the Canon and English law. According to

[1] Coram The Lord Chancellor (Lord Chelmsford), Wightman, J., and the Judge Ordinary.

the Canon law, there were two kinds of condonation: 1st, express condonation by words only; 2nd, implied condonation, deduced from the conduct of the party injured, as from renewing or continuing cohabitation. Thus Sanchez, De Matrimonio, lib. x. Disp. 14, s. 1: "Observandum est cum (Barbosâ) reconciliationem conjugis adulteri esse duplicem, quandam expressam, aliam vero tacitam. Expressa est, quando expresse remittitur adulterium. Tacita autem est, quando facto ipso animus condonandi indicatur." Ayliffe, in his Parergon, p. 226, mentions as one of five bars to a suit for divorce on the ground of the wife's adultery:—"If the husband has reconciled himself to her after the adultery committed by her, or knowingly retains her after she has committed adultery." This doctrine is substantially translated by Lord Stowell in *Beeby* v. *Beeby*, 1 Hagg. Eccl. 793, where he says:—"Now condonation is forgiveness legally releasing the injury. It may be express or implied, as by the husband cohabiting with the delinquent wife; for it is to be presumed that he would not take her to his bed again unless he had forgiven her." And at p. 797: "What is the effect of condonation? In general it is a good plea in bar: it is not fit that a man should sue for a debt which he has released.—A man, it is true, who has forgiven adultery cannot bring a suit."

The definition of the Judge Ordinary is moreover inconsistent with the clearly established doctrine of implied condonation, evidenced by matrimonial intercourse with the wife after knowledge of her adultery. For he may have sexual intercourse without restoring her to her former position. He may refuse to live with her or to allow her to associate with his children, and yet by having connection with her he will **[350]** not have condoned her adultery. Apply the principles enunciated by Sanchez and Lord Stowell to the facts of this case and it will be found that there is a clear case of express condonation.

II. But even assuming this definition of condonation to be correct, the verdict is against the evidence. The expressions used by Mr. Keats to his wife at their interview, "I hope we shall understand each other better, but we must not revert to the past," did, under all the circumstances of the case, and taken in connection with his correspondence with Miss Janvrin, and with what he said when going to Mr. Guy's, "that he loved his wife, and if he could get this matter over he should be happy; he thought they might be happy, as Esther had no children," and with his correspondence with Mrs. Marrett, prove an intention on his part of restoring her to her former position.

*The Lord Chancellor*: At the utmost, the evidence shews no more than an intention to condone.

*The Judge Ordinary*: I find no trace of any evidence that Mr. Keats intended to live with his wife again after "the matter was quietly settled."

Rule Nisi granted.

February 4.—Mr. Phinn, Q.C., Dr. Addams, Q.C., and Mr. H. Giffard, shewed cause. I. There has been no misdirection. The definition of the Judge Ordinary is correct. Condonation in Ecclesiastical law has a technical meaning. It signifies such forgiveness as is pleadable in bar to a suit for divorce. Sanchez used it as equivalent to reconciliation, which implies the restoration of the guilty party to her former position. By the law of England, condonation is only constituted by continuing or renewing sexual intercourse. [The Judge Ordinary: You are raising rather a serious question, because if so, there can be no condonatio per verba.] It is submitted, that Sanchez's doctrine of condonatio per verba was never incorporated into our Ecclesiastical law. It may be doubted whether the passage in *Beeby* v. *Beeby*, which is relied on by the other side, emanated from Lord Stowell. It is in-**[351]**-consistent with what he had said in *Dance* v. *Dance*, 1 Hagg. Eccl. 794, n. "They never, as far as appears, bedded together afterwards, and therefore what has been said of condonation is out of the question." The report of the judgment in *Beeby* v. *Beeby* may be incorrect, and it appears that it was only a collation of two contemporary manuscript notes. Ibid. p. 799, n. Moreover, if Lord Stowell did say what he is there reported to have said, it was extrajudicial. There is no reported case of condonation having been established by forgiveness per verba. According to the books of practice in the Ecclesiastical Courts, forgiveness, if it is not followed by sexual intercourse, does not amount to condonation. Oughton's Ordo Judiciorum, tit. 214. *Savile* v. *Savile* is the only case in the books in which mention is made of constructive condonation. It is referred to by Sir John Nicholl in his argument on *Matthews* v.

*Warner*,[1] where the question raised was whether a Commission of review should be granted upon a sentence of the Delegates, and Lord Hardwicke mentioned it as one of the circumstances which inclined him in favour of granting the Commission, that the sentence tended to establish a proposition of great importance to future cases, and which had not been before established by any decision in this country, namely, the law of the Canonists and Civilians, that forgiveness of adultery might be collected from facts and circumstances, so as to bar the husband from the right of divorce.

II. If the Judge Ordinary's definition is correct the verdict is not against the evidence. There is no evidence of Mr. Keats having manifested an intention of restoring his wife to her former position.

Dr. Phillimore, Q.C. (Mr. Thring with him), in support of the rule. I. Condonation as a bar to the husband's suit for divorce may be constituted and evidenced by words as well as by acts. This doctrine, as enunciated by Sanchez,[2] was recog-[352]-nised by Lord Stowell in *Beeby* v. *Beeby*, and by Dr. Lushington in *Snow* v. *Snow*, 2 Notes of Cas., Supp. XIV. The authority of the Report in *Beeby* v. *Beeby* has been impugned, yet it is well known that Lord Stowell never allowed his judgments to be printed unless supervised by himself. *Savile* v. *Savile*, if anything, is in favour of the respondent. For Lord Hardwicke there did not throw out any doubts as to the recognition by the law of England of condonatio expressa, but of condonatio tacita. If the contention of Dr. Addams is correct, that there is only one mode by which condonation can be constituted and evidenced, namely, by sexual intercourse, what would be the consequences? A husband might invite his guilty wife to return to his home, she might come back and live under the same roof with him, and yet if sexual intercourse were not proved, there would be no condonation. Again, suppose the case of a husband separated from his wife by an involuntary absence from her in foreign parts, who may have had information of her adultery, and is desirous of condoning it, he would be precluded from doing so by reason of their separation. The doctrine of condonation is not so understood in the books of practice. In Poynter on Marriage and Divorce, p. 232, it is said condonation may be direct or implied: "direct, when expressed by words or in writing; and implied, if the husband, after reasonable knowledge of the infidelity of his wife, continues to admit her as the partner of his bed." This is in conformity [353] with both the Scotch and American law. 1 Frazer's Law of Scotland, p. 666; Bishop on the Law of Marriage and Divorce, l. iv. c. 19, s. 356; 2 Kent's Commentaries, p. 100; *Quincey* v. *Quincey*, 10 New Hampshire Reports, 233.

By condonation a husband gives up his right to sue in a court of justice for the injury inflicted on him by his wife. According to Sanchez, it is a concession of the jus divortii. A man may intend to give up this right without intending to restore his wife to her former position. It does not follow that because a wife is not in a position to compel the restitution of conjugal rights, the husband may not have barred himself from his right to a divorce. In *Beeby* v. *Beeby*, p. 797, Lord Stowell says: "It does not follow that the same act which will bar the remedy, will operate

---

[1] 4 Ves. 202, and referred to in *Best* v. *Best*, 1 Add. 413.

[2] The passages cited from Sanchez were lib. x. Disput. 5, s. 19: "Ultimus casus est quando conjux innocens alteri condonet adulterium et sic reconciliantur. Cum enim divortium fit in favorem innocentis potest innocens cedere jure suo, delictumque condonare et sic cessabit jus divortii. Hæc autem remissio est duplex, quædam expressa quando scilicet verbis expressis innocens conjux adulterum sibi reconciliat, condonans delictum. De quâ reconciliatione loquitur textus . . . probans ex tunc minime audiendum esse maritum de adulterio accusantem . . . non tamen satis esset remissio mente retenta nec signo aliquo externo conjugi nocenti expressa. . . . Alia autem est remissio tacita, ut si conjux adulterii conscius alium non exclusit à consortio maritali vel exclusum admisit." Again, lib. x. Disput. 14, s. 1: "Jam in præsenti disserendum est quando censeatur condonatum adulterium ita ut ratione illius divortium celebrari nequeat, aliave accusatio criminalis aut civilis intentari. Et observandum est cum Barbosa reconciliationem conjugis adulterii esse duplicem, quandam expressam, aliam vero tacitam. Expressa est quando expresse remittitur adulterium; de quâ loquitur textus . . . decidens ex tunc maritum volentem accusare, audiendum non esse. . . . Tacita autem est quando facto ipso animus condonandi indicatur, nam factum non minus quam verbum animum indicant."

on the other side." [The Judge Ordinary: You must take that passage secundum subjectam materiem. Lord Stowell is dealing with the question of compensatio criminum, where both parties are guilty.] Condonation is the remission of the penalty incurred by the wife, namely, the remission of her right to sue for a divorce. [The Lord Chancellor: You rather limit the nature of the penalty incurred by the wife. Her liability to be sued for a divorce is not the whole of the penalty. She has also forfeited her right to insist upon cohabitation. If condonation is a release of the whole of the penalty, you should embrace in your definition her right to insist upon renewed cohabitation.]

II. We submit that even if the definition is correct, there is evidence of an intention on the part of Mr. Keats to restore his wife to her former position.

*The Lord Chancellor* (*Lord Chelmsford*). In this case an application is made to the Court for a new trial on two grounds: first, that the Judge Ordinary misdirected the jury as to the law of condonation; secondly, that even if there were no misdirection, the verdict of the jury was contrary to the evidence in finding that there was no condonation. The first question is undoubtedly one of very great and general importance, as the Court is called upon to decide whether a definition of condonation, which the learned Judge had for the first time to give, is or is not correct, and whether it is to **[354]** be adopted as the principle upon which all similar cases are for the future to be decided. It is admitted that there is nothing to be found in the Reports in the Ecclesiastical Courts in explanation of this term, the reason of which was clearly explained by the Judge Ordinary. The Judges of the Ecclesiastical Courts were judges both of the law and of the facts, and when any question of condonation arose before them, the law was never argued, because it was supposed to be well known, and in the breast of the judge, and the argument therefore turned upon whether the facts proved amounted to condonation. This word is one which has long become peculiar to the Ecclesiastical Courts, and, like many other words which are familiar to us by daily use, was believed to be thoroughly understood till the necessity arose for defining it. The Legislature having directed that, in cases of this description, questions of fact should be decided by a jury, it became necessary for the learned Judge to explain to them in this case what amounted in law to condonation. This he did by stating that it meant "a blotting out of the offence imputed, so as to restore the offending party to the same position which he or she occupied before the offence was committed." Every one who heard this clear enunciation of the meaning of the term would know that the learned Judge, by the words "blotting out the offence," could not be understood as speaking literally, because the offence having been committed, could not actually have been blotted out, but must have been received in the sense of its being no more remembered against the offending party. We have the highest sanction for this form of expression, "I am He that blotteth out thy transgressions, and will not remember thy sins." That, of course, is not a promise of the obliteration of things past, which is impossible; but it means, I will so act towards you as if the transgression had not taken place, and the sin shall be no more imputed to you. But the second part of the proposition, as stated by the learned Judge, explains as well as restricts the first part. It must be such a blotting out of the offence as restores the wife to her former position. This is contended to be incorrect, because it excludes a condonation by words only; for it is said there are two sorts of condonation, one express or by words only; the **[355]** other implied, as by taking back a delinquent wife and cohabiting with her. On the other hand, the distinction in the law of condonation is denied, and it is asserted that no condonation by words only, however strong, will be sufficient, unless they are followed by sexual intercourse. I think it is unnecessary to resort to the Roman classics for the interpretation of the term condonation, or to Sanchez for his definitions and distinctions. Words in the course of time often depart very widely from their original meaning, and a foreign author, however learned, may be entitled to deference, but cannot be regarded as an authority by the Court. The description of condonation by Lord Stowell in *Beeby* v. *Beeby*, that it is a "forgiveness legally releasing the injury," is that which is principally relied upon by the counsel for the wife, and it has been insisted that it proves that words alone are sufficient to amount to condonation. In the course of the argument it was even mentioned that, if the husband with knowledge of the adultery, were to say, "I forgive you, but will never see you again," the forgiveness is complete by the first words, which are not susceptible of any qualification.

But surely such a proposition is not reasonable, and if it were admitted, it would lead to every species of artifice or influence to extort from the injured party the healing words which are to be of such powerful and uncontrollable efficacy. The strong and sudden impulse of recollected affection, the importunity of friends, or the surprise of weakness, each of these might produce a hasty expression of forgiveness which, when once uttered, would be irrevocable. How naturally, too, compassion for a guilty creature, associated with the remembrance of former days of happiness, would find vent in such an expression. Those who felt that perpetual separation must be the inevitable consequence of the unpardonable fault, might still anxiously desire to lighten the load of despair by some kind words of consolation and peace. This is not the forgiveness which amounts to condonation, but rather which declares it to be impossible. If I might be permitted to borrow an illustration from poetry, the distinction between forgiveness and reconciliation is nowhere more strikingly shewn than by a poet who, more than most other men, has sounded the depths of human feeling, and who supposes the **[356]** question put to the husband of an adulteress, "Her did you freely from your soul forgive?" to which he replies:

"Sure as I hope before my judge to live,
Sure as the Saviour died upon the tree
For all who sin—for that dear wretch and me—
Whom never more on earth will I forsake or see."

But following out the idea conveyed by Lord Stowell's language in *Beeby* v. *Beeby*, that a condonation is a good plea in bar, as it is not fit that a man should sue for a debt which he has released, the counsel for the wife argued that it must be wrong to say that the forgiveness must be such "as to restore her to her former position," because the debt which the wife has incurred is the liability to be sued for a divorce, and that if the husband gives up his right to proceed against her, her offence is condoned, although her former position is not restored. There is no greater fallacy than that of carrying analogy too far, and supposing that because there is resemblance between two things in one point, they therefore correspond in every respect. In this instance, the injury which a wife has committed by her infidelity is compared to a debt, for the purpose of illustration; it is something which the person to whom it is owed has the right to release. But the condition in which an unfaithful wife stands to her husband is rather that of a person who has incurred a penalty; she has exposed herself to a proceeding to dissolve the tie of marriage, and she has lost her right to insist upon cohabitation. The release of the husband's right to proceed for a divorce does not reach the whole of the penalty incurred, and therefore cannot be complete forgiveness, because it falls short of restoring her to her former position. If it is true that forgiveness (as was argued) is an act of the mind, it can only be manifested by words or by outward acts. The acts which prove forgiveness may be so strong and unequivocal, as by taking home an offending wife and cohabiting with her, that they may conclusively establish condonation. But words, however strong, can at the highest only be regarded as imperfect forgiveness, and, unless followed up by a something which amounts to a reconciliation and of a reinstatement of the wife in the condition she was in before she transgressed, it must remain incomplete. It has been argued **[357]** that nothing less than renewed sexual intercourse will be sufficient to establish condonation. It is obvious, without adducing instances to illustrate my meaning, that that in some cases may be a test wholly inapplicable. But I am willing to adopt an expression which was happily used by Wightman, J., in the course of the argument, and to say that in my judgment there can be no condonation which is not followed by "conjugal cohabitation." This is clearly the opinion of Dr. Lushington in the case of *Campbell* v. *Campbell*, Deane's Ecc. Rep. 288. To say that condonation requires conjugal cohabitation or connubial intercourse, leaves the nature of the cohabitation or intercourse to be adapted to the varying condition and circumstances of different parties. This will also justify the language of the learned Judge Ordinary, that the forgiveness must be shewn by a restoration of the wife to her former position. This does not mean that the cohabitation is to be renewed with all the circumstances which surrounded her former life; to accomplish this is beyond the power of the husband. She may live with him as a wife, but live as a degraded wife. The degree or extent to which all her former privileges may be restored to her does not enter into the question; by her infidelity she has forfeited all her title to be regarded as a wife. Condonation is a pardon which is not necessarily absolute, but which may be

accompanied with conditions. I see no reason at all to differ with the Judge Ordinary in the way in which he has stated the law of condonation to the jury; but with him I think that the forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation, and that this must be shewn by the reinstatement of the wife in her former position, which renders proof of conjugal cohabitation, or the restitution of conjugal rights, necessary. Secondly, it is however said that, even if the definition of the learned Judge is correct, yet the verdict is contrary to the evidence. But I have great difficulty in understanding how, if the first point of misdirection fails, the other can possibly succeed; because, if condonation requires all the circumstances stated in order to render it available as a defence, it can hardly be contended that the proof given approaches at all near what is necessary. Even if the more favourable proposition, "that the act of pardon may be done by word of **[358]** mouth," is accepted, still the evidence falls short even of this. There is nothing which shews anything more than an inclination, or it may be an intention, to condone. The husband was anxious to avoid publicity; he desired an amicable arrangement. The wife's family availed themselves of this disposition to endeavour to draw him on to a reconciliation, but they never succeeded; and it would be occupying time most unnecessarily to shew that the evidence fully justified the verdict which was pronounced.

*Wightman, J.*, entirely concurred with the Lord Chancellor.

Rule discharged.

Mr. Phinn then prayed the Court to decree a dissolution of the marriage, and to condemn the co-respondent in damages and costs.

Dr. Phillimore prayed to be heard as to the wife's costs.

By the Court: You are too late for that now; your application should have been made before the cause was heard. The foundation of the rule of the Ecclesiastical Court was, that the wife should be enabled to bring her case to a hearing, and defend herself, and so up to any time previous to the hearing the husband was generally liable to have the wife's costs taxed against him, and the Court has so far followed the rule, as in *Evans* v. *Evans and Robinson*, ante, p. 328; but if the wife has brought her case to a hearing, howsoever, and fails, the husband has never then been made liable to her costs.

Dr. Phillimore then asked for a sum of money to be secured to the wife, under the provisions of the 32nd section of the Divorce Act. Mrs. Keats had no fortune. On the marriage a settlement was made by Mr. Keats, by which, in case she survived him, she would be entitled to the interest of £10,000 for her life, with the power of disposing, by will, of one-fifth of that sum.

Mr. Phinn proposed, on the part of Mr. Keats, that he should secure to Mrs. Keats an annuity of £150, on condition of her releasing her interest under the settlement.

**[359]** By the Court: We have no desire to interfere with the settlement; on the whole, we think it fair that a deed should be prepared by a conveyancing counsel, securing, during Mr. Keats's life, an annuity to his wife of £150 quamdiu casta vixerit, on condition of her giving up the power of disposal of the one-fifth under the settlement. With respect to the £1000 damages assessed by the jury, let that sum go, 1st, in payment of Mrs. Keats's costs; then, to Mr. Keats's costs, and the surplus, if any, in satisfaction of the annuity to be paid to Mrs. Keats.

(Before the Full Court,—*The Lord Chancellor* (*Lord Chelmsford*), *Wightman, J.*, and the *Judge Ordinary.*)

SMITH *v.* SMITH. February 4, 1859.—Petition for Dissolution.—Desertion not proved.—Decree for Judicial Separation.—Where the wife asks for a dissolution of marriage on the ground of desertion and adultery, she must prove affirmatively that the absence of her husband commenced and continued against her consent; in absence of such proof the Court refused to decree the dissolution prayed, but the adultery being clearly proved, decreed a judicial separation.

[S. C. 28 L. J. P. 27; 7 W. R. 382.]

This was a petition for dissolution of marriage at the suit of the wife, by reason of the husband's desertion and adultery. The petition alleged the marriage in December, 1848, and cohabitation in Birmingham, and that on or about the 30th of January, 1852, the husband had deserted the wife, without cause, and from that time

lived apart and contributed nothing to her maintenance; and had cohabited at different periods with two women, whose names were set out in the petition. The prayer of the petition was simply for a dissolution of the marriage.

The respondent did not appear, and the case now came on for proof by oral evidence.

A married sister of the petitioner was the principal witness as regarded the desertion. From her evidence it appeared that the respondent was, at the time of his marriage, working [360] in a gun-barrel factory at Birmingham, where they afterwards resided. About six months after the marriage, the petitioner, upon the death of her father, became entitled to £80, which was received and spent by her husband; he soon became of drunken and dissipated habits, treated his wife with great harshness, frequently using foul and threatening language towards her, and on one occasion, on a cold night in January, 1850, he turned her out of doors, and only readmitted her on the earnest entreaties of the witness. In consequence of his neglecting his business his employers discharged him, and he became principally dependent on his wife's earnings, as a dressmaker, for support. In the beginning of January, 1852, he sold off some furniture to buy drink, and on the witness remonstrating with him for so doing, he replied, "that he would sell and break every damnation thing in the house, and make her (meaning his wife) keep him." Later in the same month, the respondent told his wife (in the witness's presence) that he should "leave her, and that she might walk the streets for a living." Shortly afterwards he told his wife that he was going to leave the town, that she should never see him again, and then went away, taking his clothes, etc., with him. The petitioner remained in the house about a fortnight, and then (the respondent not having returned), without making any inquiries for him, went to her sister's, where she had remained ever since, principally supporting herself by dressmaking. A witness by the name of Parkes, who had long known the petitioner, had traced the respondent as having been living at Bristol, Liverpool, Dublin, and Wolverhampton since 1852, and had seen him on the 10th of May, 1858, in Birmingham, when he urged on him to do something to support his wife, who was then in ill-health. The respondent said he would do nothing voluntarily, and if any attempt were made to force him, he would leave the town, as he was determined to have nothing more to do with her. He also admitted that he was living in adultery.

*The Lord Chancellor*: The petitioner has this difficulty to contend with. She has not shewn that the respondent knew where she was living after he left her. It does not appear that he has known where she has been residing since that time.

[361] The petitioner's sister was recalled, and stated that she was not aware that the respondent knew her address, or that the petitioner had been living with her since he had left her.

*The Judge Ordinary*: Have you any evidence to shew that the separation was against the wish of the wife?

Dr. Spinks: Under the circumstances of the case it cannot be said that the wife was a consenting party to the separation. There is no evidence that she ever said anything assenting to it. She remained a fortnight in the house after he had left her, thereby giving him an opportunity to return, if he chose. That does not look like assent.

*The Lord Chancellor*. The petitioner in this case is the wife, and she prays for a dissolution of her marriage by reason of the adultery of her husband, coupled with desertion, without reasonable excuse, for two years and upwards. It is necessary that the Court should be very strict indeed in regard to the proof of the circumstances which enable the wife to obtain a decree of dissolution of marriage.

It is essential in this case, as the foundation of the decree prayed for, that the petitioner should shew clearly and satisfactorily that there has been desertion. Here it appears to the Court, that the proof of desertion entirely fails. There is nothing to satisfy the Court that, when the parties separated, the husband went against the will of his wife. On the contrary, there are circumstances in the case which induce the Court to believe that it is extremely probable that they parted by mutual consent. It is shewn that the respondent was a man of vile habits and bad temper, and treated the petitioner with great cruelty, and that on one of the last occasions they were together, he told her "he should leave her and that she might walk the streets for a living."

When the separation took place, part of their furniture had been sold by him, to indulge his passion for drink, but some remained. There is nothing to shew that the wife was desirous of retaining the husband at that time; on the contrary, there appears to have been a desire on her part to separate, for she goes to live with her sister, and makes no inquiries **[362]** after her husband for a considerable period of time, and there is no proof that he knew where she was living. If the Court were to permit this evidence to be taken as satisfactory proof of desertion, it would lead to great laxity. Desertion in this case is the very foundation on which the right of the wife to a dissolution of her marriage rests.

But the Court is of opinion, that, although the petitioner applies only for a dissolution of marriage, yet that it is competent to it to grant such relief as the facts of the case warrant. Here there is ample evidence (adultery having been proved) to warrant the Court not in pronouncing for a dissolution of the marriage, on account of the absence of satisfactory proof of desertion, but for a judicial separation. That sentence will have all the consequences of a sentence of dissolution of marriage, except that the petitioner will not be able to marry again.

The Court, therefore, decrees a judicial separation, and condemns the husband in costs. Judicial separation decreed with costs.

(Before the Full Court,—*Cockburn*, *C.J.*, *Wightman*, *J.*, and the *Judge Ordinary.*)

ROBINSON *v.* ROBINSON AND LANE. June 14, 15, 16, 21; November 26, 1858; and March 2, 1859.—Petition for Dissolution.—Co-Respondent.—Evidence.—Admissions by Respondent.—Competency of Witnesses.—Counsel.—Practice.—21 & 22 Vict. c. 108, s. 11.—Co-Respondent dismissed from the Suit and examined as a Witness.—Effect of Wife's Admission of Adultery unsupported by confirmatory Evidence.—The admissions or confessions of the respondent are not admissible evidence against the co-respondent.—The counsel for the respondent is entitled to address the Court before the counsel for the co-respondent, but this may be varied by arrangement between the counsel.—Where by such arrangement the co-respondent's counsel first addressed the Court and examined the witnesses, the counsel for the respondent was not allowed to cross-examine such witnesses.—**[363]** Where the petitioner's case depended on alleged confessions contained in the wife's diary, uncorroborated by independent evidence, the Court exercised its discretion under 21 & 22 Vict. c. 108, and dismissed the co-respondent, who was thereupon examined for the respondent.—On the acquittal of the co-respondent, the alleged adulterer, the suit against the wife need not of necessity fail.—The admissions of a wife charged with adultery, unsupported by any confirmatory proof, may be acted upon as conclusive evidence upon which to pronounce a divorce, provided the Court is satisfied that the evidence is trustworthy, and that it amounts to a clear, distinct, and unequivocal admission of adultery; but where, on a consideration of the whole diary, the wife appeared to indulge unfounded imaginations and exaggerated statements as regarded her intercourse with the other sex, the Court refused to add anything by way of inference, as it would have done if similar facts had been proved by independent evidence, to the actual statements of the diary, and, as these fell short of a direct confession of the act of adultery, dismissed the petition, but without condemning the husband in costs, on the understanding that the wife had a separate income.

[S. C. 27 L. J. P. 91; 5 Jur. (N. S.) 392. Distinguished, *Wilson* v. *Wilson*, 1872, L. R. 2 P. & D. 355. Referred to, *Reg.* v. *Manning*, 1883, 12 Q. B. D. 243. Followed, *Rex* v. *Plummer*, [1902] 2 K. B. 345.]

This was a suit for dissolution of marriage brought by the husband against the wife, by reason of her adultery with Dr. Lane, the co-respondent.

The petitioner, Mr. Robinson, was a civil engineer, and in February, 1844, married the respondent, then Mrs. Dansey, a widow. She had an income of between £400 and £500 a year, which was settled upon herself. Among other places at which they resided after their marriage, was Edinburgh, and there, in 1850, they became acquainted with the co-respondent, Mr. (afterwards Dr.) Lane. In 1852, Mr. and Mrs. Robinson left Edinburgh, and took up their residence at Reading, where they renewed their acquaintance with Dr. Lane, who was then residing with his wife and her mother, as the head of a hydropathic establishment, at Moorpark, near Farnham. In that and the two following years, Mrs. Robinson paid several visits at Moorpark,

and it was during certain of these visits that the adultery charged was alleged to have been committed. In 1857, Mr. Robinson, during an illness of his wife, unexpectedly discovered three or four manuscript volumes, in her handwriting, purporting to be a journal kept by her for a period of between four and five years. Certain of the entries in this journal appeared to him to contain conclusive evidence that she had been guilty of adultery with Dr. Lane on **[364]** various occasions in 1854 and 1855, and he accordingly instituted a suit for divorce à mensâ et thoro, in the Consistory Court of London. Mrs. Robinson appeared to the suit, but her counsel admitted at the hearing, that after reading the evidence, he was unable to repel the charge of adultery, and the Court being satisfied upon the evidence[1] before it, thereupon decreed a sentence of divorce. It appeared that Dr. Lane, whilst the suit was pending, had information of these proceedings, but that he took no part in them, and was not, as he might have been at the instance of the wife, vouched or examined as a witness.

Mr. Montagu Chambers, Q.C., Dr. Addams, Q.C., and Mr. Karslake, appeared for the petitioner; Dr. Phillimore, Q.C., for the respondent; Mr. Forsyth, Q.C., and Mr. Coleridge, for the co-respondent.

Mr. Chambers, Q.C., in stating the petitioner's case, said he was doubtful whether there was evidence sufficient to fix Dr. Lane as the person with whom Mrs. Robinson had committed adultery; he proposed to put in evidence certain diaries written by Mrs. Robinson.

Mr. Forsyth, Q.C., on the part of Dr. Lane, objected to these diaries being read at all. The proceeding here was different from that before the Ecclesiastical Courts; there was now a third party, the co-respondent, before the Court. If Mrs. Robinson was found guilty of adultery, it could only be with Dr. Lane; but her admissions or confessions, if the diary were to be so taken, could be no evidence against him, and therefore ought not to be used at all

*Cockburn, C.J.*: In the Ecclesiastical Court, and on a bill before the House of Lords, such admissions would have been received as evidence. You cannot suppose that this Act intended to put the petitioner in a worse position as to evidence than he would have been under the old system.

**[365]** *The Judge Ordinary*: There seems no pretence for your objection. These diaries may be good evidence to prove her adultery, but they are not admissible to fix Dr. Lane with anything. So in the case of several persons indicted for burglary or conspiracy; one may be convicted on his own confession, which, though in terms involving the others, is no legal evidence against them.

*Cockburn, C.J.*: If the petitioner were proceeding under the 33rd section to claim damages, there might be some ground for the objection. The reason why in an action for crim. con. the wife's evidence could not be used for the plaintiff, was because it might affect a third party; but here there are no damages sought, and it would be monstrous to say that this Act, which was intended to facilitate proceedings, should limit them in this way as to evidence.

The case for the petitioner was then proceeded with; the diaries written by Mrs. Robinson were put in evidence; witnesses were also examined in support of the charge of adultery; but only one of them, namely, Levi Warren, who was subsequently shewn to be unworthy of credit, gave evidence of improper familiarities between them.

On a perusal of the judgment, it will be seen that it turns entirely on the value of the affirmative evidence produced by the petitioner, namely, certain entries in a voluminous diary kept by Mrs. Robinson, and the Court, considering that evidence insufficient by itself to support a decree of dissolution, did not feel called upon to estimate the value of Dr. Lane's evidence, who was subsequently examined. In determining the weight to be given to the particular entries relied upon by the petitioner's counsel, the Court considered the character and peculiarities of Mrs. Robinson, as disclosed by the whole journal; it is therefore thought advisable to print the following extracts from that journal, and some pains have been taken to choose such portions as should give a fair idea of the whole.

---

[1] The material evidence taken in the Consistory Courts consisted of the diary and of the then uncontradicted evidence of Levi Warren of acts of improper familiarity between Dr. Lane and Mrs. Robinson.

The petitioner's counsel relied mainly on the entries dated the 7th, 8th, and 10th of October, 1854, and June the 14th, and others printed in italics.

[366] Extracts from Mrs. Robinson's Diary.

"1852. 27th (March, at Edinburgh).—Fair, cold morning, sunny and cheerful afterwards. Rose late. Could not go to class. Boys out with Musgraves. Resolved to get ready early for the drive, to which I could not help looking forward with pleasure, not unmixed with a *dread* that something seemed to mar the pleasure I had promised myself, as it nearly always does with me. A glass of sherry gave me a confused headache; then the boys annoyed me by being rude in the garden. I dined in haste, and left home immediately, not to lose the fairness of the day. When I got there, after some delay and confusion, I found Mrs. L— was to go too, and I knew well that all hope of a pleasant tête-à-tête was over for that day. I could hardly bid her and Atty welcome, or affect good humour, much less gaiety. The boys were outside. The talk was formal and confused. Mr. L— read scraps from Coleridge and Tennyson. We talked of a paper in 'Chambers,' which he had written at my request, on the error of sudden judgments unfounded on knowledge of the subjects spoken of. They disapproved of the title of the paper, and were not interested in the subjects. We went to Cramond by Granton, got out, walked by a steep path to a sheltered sunny corner, laid out the plaids, and spread the books, but no real cheerfulness came to my heart. Mrs. L— and the boys gathered gorse, and we read a few disjointed passages from our poets ('Ode on Dejection'), talked of life, of Cana, of property, of riches, and of birth; of Mr. S. Russell and the Christmas I had spent there; of dejection, education, poverty, etc. We rose to go when the sun got low. Got into the carriage and kept up a conversation regarding Mr. Combe, his school, etc., wholly without interest on my part; duly admiring the views which were fine. We deposited the party at their home, and my own starved boys came off the box and got inside. I got back at half-past six, as much vexed, dispirited, chagrined, and cast down as I ever remember to have been. I must have left a bad impression on both of them. Mrs. L— looked several times cold and puzzled; he was constrained; the child was tired; no one was obliged or pleased. I had spent 8 shillings for worse than nothing. [367] Good God! why is it everything I plan or wish for is turned to such bitterness? Surely it must be my own fault. I long for things I ought not to prize. I find it impossible to love where I ought, or to keep from loving where I ought not. My mind is a chaos—a confused mingling of good and evil. I weary of my very self, yet cannot die. I know not where to turn for help, and a dull load of dejection and nameless oppression weighs down my very soul. I have no sympathy, no love, for I do not deserve it. My darling boys are the only ray of comfort I possess. Felt a sad relief in thus writing the history of a lost day. I read and copied some lines, and retired at 12 to a sad and lonely couch, sick and low at heart. Cold line from Mr. L— to say Dr. Guthrie would not preach on morrow. I was to have gone with them."

"7th (April).—Very fine, clear, agreeable day. Miserably and unusually depressed. Up late. Henry cross and rude; wrote to mother complaining of him. . . . Mrs. L— very kind; she is a sweet, amiable temper, and shines when there is any sorrow to be soothed. Saw them all when I called for her. Mr. L— careless in manner, and hardly looked at me. I looked very ill; everyone remarked it, both then and afterwards. . . . Mr. L— chatted with everyone in the room, and was more gay and talking than usual. I was wretched; and as I got out of the fly at my house and shook hands with them with a hand cold as marble, I felt that I was not fit for their society. Stole to my room; heard from E— that all was well, and retired to rest thoroughly mortified."

"13th.—Very fine and warm. Up eleven. Otway, not well. Alfred school, St— cross. Dinner in dining-room. Sat in garden; read Schlegel; drove shops at 4, and to Lady D—'s for Atty about 5, as he was out before. Children played in garden; St— very quarrelsome; his temper is excitable and passionate. Took Atty back at 8. Mr. L— in good humour; sat by me; Mrs. L— beyond him, at lecture. We talked of nicknames and of grave characters, and I was merry, much excited by presence. Lecture about Homer; the simplicity and nature that mark his poems; his talents; Latin, Greek poets; modern poets; passages read [368] and translated; amusing and original. We laughed much. Mr. L— walked back with me; Mrs. L—

and Miss R— walked on in front out of hearing. We spoke of weather, quoted poetry on the subject, discussed Homer, Shakespeare, talent, etc. These dark walks are very exciting; and on retiring to my lonely bed, I was too much roused to sleep, and tossed about for hours."

"26th (August, at Reading).— . . . Packing and removing to other rooms till 10. Henry came at 12; much disconcerted to find us out of sorts. E— out; in hurry for dinner. He was cross about potatoes. He went at half-past three to Pangbourne. I would not go. He did not like the place as a residence, though it lies by the steep banks of the Thames. I went in a chaise with St— to Whiteknights, a fine park, not now used; the house not inhabited; parties taking tea in it and walking about. Wishes to possess a quiet spot of earth, and get free from the petty worry and vexation of life. Returned somewhat cheered; but Henry was cross at night, and we had high words after tea. I was thoroughly vexed with the idea of living with him. The children are so dull and dejected when he is with them; nothing goes on but gloom, sullenness, silence, or fault-finding. Very unhappy; miserable day."

"31st.—Up late, being stiff and weary. Boys came to see me and then all went to river; but a thunderstorm drove them in, and the morning was spent in a desultory manner. Wrote to mother. Letter from Mrs. L—, who was just coming home. Lady D— ill. Mr. L— had met with an accident to his foot, and had not received benefit from his lonely stay at Rothesay. She thought he had written to me, thanked for the letters for Nicolini, and begged me to write. Ah, thought I, though he is not busy, and cannot even walk now, I am not in all his thoughts. Not one line either of thanks for the studs or of reply to my many notes could he write, though not an hour elapsed but my thoughts did not anxiously and fondly go towards him. Nothing but cross purposes, misplaced love, and unreturned affection goes on in this sad disappointing life. Tears came into my eyes as I thought of him lame and alone, and not the deep bitterness of finding myself so entirely neglected **[369]** could fortify my heart with pride enough to despise him and forget in my turn. Wayward and deplorable disposition. All that day and several following did the humbling, sorrowful truth of his utter forgetfulness, even of my friendship, follow me, and fill my heart with unspeakable sadness."

"1854. Reading, January 1st, Saturday.—Rose quarter 8. This day was cold, frosty, with east wind; sunny till noon, and cheering. Not well in night, but better on rising, and felt cheerful. Restored good humour to Henry by my sunshine, and greeted the children affectionately, though they seemed rather gloomy. Breakfast with Henry; talked to him about the name of the house till 10. Upstairs awhile; wrote accounts; finished old journal. We read with the children, as usual. Begun new journal, and counted up the letters I had written and received this year: 189 received, and 26 notes; 214 written, and 54 notes. I reflected also on the friends I had lost since that day twelve months: two aunts, one of them my mother's cousin; Mrs. C— and Mrs. Ch—; two children of my eldest brother, the infant and the eldest boy; poor good old Mr. S—, a sincere friend; G. D—, a brother-in-law, a trustee, and once a near neighbour, latterly a stranger and alienated; and many names from the list of acquaintances and former neighbours. Oh, how sad it is that the forward walk through life, though perhaps unmarked with many outward trials, is yet sure to remove from our side many who once walked with us, and who seemed as likely to live as ourselves. May the Great Author of the being of all beings here on earth direct our steps, and lead us to acknowledge and perceive the presence of good and order in the midst of seeming contradiction, pain, and sorrow. Out half-one with Alfred and St—; Alfred dull and out of sorts. It was agreeable in lane beyond Somer's Town, and we returned cheered by the air, the views of the hills with snow on them. Dinner good, but Henry sulky and determined to find fault. Read to children after dinner, and then had a long discussion with him as to the causes of his discontent. He railed at the servants, wanted a man-servant (with whom he would disagree in a month); wanted a study; wished I was a more active housekeeper; com-**[370]**-plained of cold, and planned how to spend less of his time here and more in London. I said all I could think of to bring him to some degree of reason; remarked on the selfishness of complaints, the reasonableness of making the best of things, and pointed out several small things that might be done to make matters better. I was wearied and ruffled with the thorough unamiableness of his

disposition, and stayed in the room till near 7; but he became more calm, and I went out with Alfred. The wind had sunk, and it was agreeable. Tea 8. Talked till after 9 about the name we should give the new house. . . . I wrote journal at half-nine, and Latin Ex., and to bed at 11; and so closed the first day of the year, not unpleasantly, though in some measure spoiled by Henry's ill-humour."

"24th (March, Reading).—Gloomy; northerly wind; cool, dry, and not unpleasant. Up quarter past 8. Had confused dreams of Mr. L— in night, and woke with my imagination heated as though with realities. I thought of the subjects that had occupied my sleeping moments all day. I was alternately depressed and excited, and the day was a desultory. Mr. Th— at half-nine; St— with me till 10. Alfred joined me soon after, and then Mr. Th— and Otway. I was really sorry for the young man; he was lifeless, dispirited, and lonely. Mr. R— had brought him to Reading and now seemed deserting him. I resolved to show him that I at least was conscious of his situation."

"3rd (June, Reading).—Fair, gleam of sun, wind northerly and fresh; fine evening; up late. Henry gone. Sent Alfred to Mr. Th—; not come, and no better; depressed, anxious, miserable, restless, tears in eyes all day. Dressed and ordered dinner, and thought he would come somehow. At 12 I heard his voice with boys, but was too much agitated to see him, and ran to room as pale as a ghost, but, recovering a little, descended and saw him in my room. He was looking thin, pale, worn, agitated, hopeless. I never saw anyone so sadly changed in a week; his great eyes seemed like pale violets, shaded with heavy, drooping lids; his cheeks were hollow, and there was a look of intense dejection about his whole person. He said he had been ill, and in despair at so abrupt a dismissal. I could **[371]** hardly command myself to talk, and had a wretched headache; my cheeks flushed, tears came every second to my eyes, and my voice was choked. We talked long and earnestly. I told him frankly that I believed his dismissal was more abrupt than it otherwise would have been owing to Henry's pride and tenacity; but I said then and later, that the result could have been no other in the end. He detailed his sufferings, his wretched sufferings; drudgery in Scotland; exclusion from everything, owing to not being an University man; and we named plans, most if not all hopeless. We strolled for half an hour in the garden and I became better, and then dined most cheerfully; but the wretched pallor never left his face. We went to my room, talked of sculptures, painting, Italian, etc., and he took coffee and whisky, and became animated enough to accompany us on foot when we rode. Alfred to his lodgings for 'Dickens,' etc., and met us in London Street. We sat a long while near lake at Whiteknights, and talked too much to read. I promised to write to his mother, and we exchanged addresses. He would not take my present of £15, but did not quite refuse to go to Farnham. We were desired to go, and rode through Whiteknights home. It was nearly our last interview, and our feelings were acute though not altogether sad. He was glad, he said, he ever came to Reading; so was I; yet, in truth, the parting was sad. Henry home and civil; tea; wrote all evening. Bed 12."

"4th (July, Reading, Moor Park).—Showery, but warm and fair for some hours in the middle day. Away (without meeting postman), and only just in time for train. Found fly waiting, and after a pleasant drive arrived before half-ten at the house, and was warmly greeted by one after another of the kind inmates. Dr. M— was from home, but Lady D—, etc., all came in one after the other. Mr. Th— came in early in the morning, but the meeting was a very constrained one. I coloured much, and the eyes of the party were keenly fixed on me. Mr. Th— stood about without daring to speak much, and I became nearly silent. . . . Chatted with Captain D—, and strolled round the garden with him and Atty. Saw Mr. Th— and Mr. B— strolling, but over the hedge, and did not say many words, though I **[372]** rather wondered that he avoided me, or rather did not seek me. Dressed and sat down to dinner about half-one, near Mrs. O— and Mrs. K—; Mr. Th— opposite, and never once spoke or looked at me. . . . After spending some time in Lady D—'s room, I went out, passed through the billiard-room, and saw Mr. Th—, who instantly left his game, and seeing I was alone, came eagerly out with me. Went to greenhouse, as it rained; sat awhile, and chatted earnestly of his interview with Mrs. R—. He had written (I found on my arrival, but the letter never reached me till Wednesday), but he said nothing about it, and had to tell me how she received him. . . . I went then to orangery, and he got me a chair and sat down, but at great

distance. We talked very earnestly, but rather hurriedly and confusedly, and not of the things which were uppermost. . . . I do not know whether he is really more silent than usual, but he was certainly strangely quiet; nevertheless, the knowledge that I was understood, and that he really liked to be with me, gave me much interest in the walk. . . . Dr. Lane had taken tea and was out walking; however, I was not long done tea when his wife called him, *and he came bounding in through the open window to greet me, with more warmth than I even expected.* Very warmly he shook hands; very cordially he sat down quite near me, and asked many questions as to my welfare. Mr. Th— sat opposite and seemed to be reading, but I know watched all that passed. . . . Dr. Lane was in the highest spirits; seated himself on the sofa I had chosen near the piano, and only left me to sing occasionally, and to speak a few words to his guests; but his eyes, his whole attention, his talk, was all mine from that time till 11. We spoke of love, of poetry, of his age, and I told him he had never looked better, although he declared he felt quite old; we spoke of music and his songs; he sang sweetly and with enjoyment both a French and a comic song, and several others, including one I asked for, 'Oh, the heart is a free and fetterless thing.' Miss B—s and the clergyman left at 10, and Mr. Th— went away too to walk with them home. He had been sitting not far from us all the evening, but had hardly moved, or spoken, or looked up. Mrs. K— alone ad-**[373]**-dressed him for a little time; and yet I knew that he watched us and felt our presence. Once he came up for a moment, knelt as Mr. L— had just been doing, and stood at my feet, and I spoke of Sydenham, and advised him to write circulars of his intended school. He looked bright and happy while I spoke, but on coming back later in the evening, he seated himself near the door, and was pale, wan, and spiritless as before. Many more songs were sung, especially one from 'Orpheus,' with the refrain of 'Eurydice' in it, and I asked Dr. L— to read Pope's Ode on 'Music,' which he did the last thing, very sweetly, to my no small delight. After this and a few more jokes and compliments, we separated, and I know not that I ever more enjoyed an evening. All headache was gone, all sense of sorrow; the old enchantment in that fascinating society was coming back upon me, and I felt that no one could compete in attraction with the handsome, graceful, lively, charming L—. *His little wife took me to my room so sweet, so kind, so unsuspicious.* He too looked in, and then they left me, but not too sleep; the bed was hard, and my spirits were far too much excited for sleep. I laid and turned till morning, and then it was late."

"11th (Reading).—Fair part of day, rain in night. Up at 7, and rather less sad. Henry to Caversham after breakfast. I busy in house. Miss S— with boys. Wrote to Mr. Th—. Out at 1 and saw her, and gave leave for boys to go with her to-morrow. Paid butcher, who had made mistake in bill, and to Caversham. Much wearied and did not enjoy it. Sat and mused sadly in house. Back after 7. Unpacked and attended to affairs. Henry cross, both then and later. Letter Mr. Th— this day at 2, to express his deep regret at my altered looks and illness, and to tell me that he was getting well and had hopes of Sydenham. It was short and somewhat unsatisfactory; not a remark about any former letters of mine; not an acknowledgment for anything. Each letter breathed less interest than the last. It was well. I must learn to let him too join the company who could live without me; he would make and find friends, and would never be lonely again. It was cool friendship now on his part. Had it ever been more? I **[374]** thought not; and was thus again punished, as oft before, for over-adhesiveness, for love of approbation and excitability. When shall I be calm, cold, tranquil, praiseworthy? Never."

"15th.— . . . *Wrote out passages from 'Athenæum,' and read it at* 1 *in the garden, under that tree that I never see without thinking of my escapade with Mr. Th—.*"

"7th (October, Moor Park).—Fine, sunny, warm, genial day, almost like the former month. Dr. L— asked me to walk with him, but I thought he only meant politeness, and I went to nursery and stayed with my little pets more than an hour. He met me there at last, reproached me for not coming, and bade me come away. I still lingered, but at last joined him, and he led me away and alone to our favourite haunts, taking a wider range and a more secluded path. At last I asked to rest, and we sat on plaid and read 'Athenæums,' chatting meanwhile. *There was something unusual in his manner, something softer than usual in his tone and eye; but I knew not what it proceeded from, and chatted gaily,* leading the conversation in talking of Goethe, of women's dress, and of what was becoming or suitable. We walked on

and again seated ourselves in a glade of surpassing beauty. The sun shone warmly down upon us; the fern, yellow and brown, was stretched away beneath us; fine old trees in groups adorned the near ground; and far away gleamed the blue hills. *I gave myself up to enjoyment; I leaned back against some firm dry heather bushes, and laughed and remarked as I rarely did in that presence. All at once, just as I was joking my companion on his want of memory, he leaned over me and exclaimed, 'If you say that again, I will kiss you.' You may believe I made no opposition, for had I not dreamed of him and of this full many a time before. What followed, I hardly remember;—passionate kisses, whispered words, confessions of the past. Oh, God! I had never hoped to see this hour, or to have my part of love returned! Yet so it was. He was nervous and confused, and eager as myself. At last we roused ourselves and walked on; happy, fearful, almost silent, we sauntered, not heeding where, to a grove of pines, and there looked over another view, beautiful as that* **[375]** *on this side, but wilder. In descending, we had seen the Browns, and now thought it necessary slowly to join them. They had observed nothing; we were safe. Constraining ourselves to converse, we succeeded in disarming all suspicion, and reached the house together, but late for dinner.*"

"8th.— . . . I laid down wearied, exhausted, nervous; he tapped at half-past 12 and bade me come out and walk, but I refused and dozed on. Mrs. L— came in, when I dressed and slowly went out to him; he joined me at the foot of the stairs and we sauntered out together, walking all round the grounds and by water, yet saying little to one another, for both were weary and feeble. I named my not having slept; he said he was in pain and could hardly get on at all. *Both were agitated, confused, and nervous, and I had asked him how it was he had acted as he did on Sunday; at last I proposed leaving the grounds, as the air was hot and moist, and getting a breeze on the hill; we climbed it slowly, and I rested among the dry fern. I shall not state what followed. We rose soon, more composed and cheerful, and we went home quickly, fearful of being too late;* the dinner was cheerful enough, and I talked all I could to Lady D—, for there were few persons present, *and turned from him, leaving him to talk to Miss T.*"

"10th.— . . . Walking through paths that I had never seen before of the greatest beauty, reaching the outer pine wood and finally returning by Swift's cottage and lower walk, we talked with the utmost confidence, but somewhat more calmly. *I entreated him to believe that since my marriage I had never before once in the smallest degree transgressed; he consoled me for what I had done now and conjured me to forgive myself; he said he had always liked me, and had thought with pity of my being thrown away, as my husband was evidently unsuited to me, and was, as he could plainly see, violent tempered and unamiable;* then we spoke of his early age, 31; his marriage, *the sweet, unsuspicious character of* his wife, rather than pain whom he would cut off his right hand, and when just discussing my often bitter misery and wish for death—my former life and fortune, when we were met by Lady D— and her daughter, who were anxiously awaiting my decision about a fly . . . they kindly received my determination to go away about 7, and **[376]** went off again without one cold or displeased look, and yet we were walking arm-in-arm through those lonely woods and talking how earnestly. . . . We drove off, Alfred soon taking place on the box. *I never spent so blessed an hour as the one that followed, full of such bliss that I could willingly have died not to wake out of it again.* . . . I remembered him of my lines from 'Paul and Virginia,' and owned they were addressed to him. *I shall not relate* ALL *that passed, suffice it to say that I leaned back at last in silent joy in those arms I had so often dreamed of, and kissed the curls and smooth face so radiant with beauty that had dazzled my outward and inward vision since the first interview 15th November,* 1850. He had always known I had liked him, but not the full extent of the feeling, and owned it had never been indelicately expressed; this relieved me. *Heaven itself could not be more blessed than those moments; while life itself shall endure their remembrance will not pass away from a memory charged with much suffering and little bliss;* how gentle, how gentlemanly he was—how little selfish!"

"29th (January, 1855, Boulogne).— . . . Up 8, not very well, dream of early home, brother Tom, mother young, father, walking in garden with her with the old affection; at what a strange waking up; all that had passed 30 years ago. I was in middle life myself, my mother old and broken, my father in the grave, my own children growing up, it was my turn to go next, a few more suns would see me decrepit and dying, I must quit this pleasing, anxious being, never fathom life's

great mystery and become as though I had never been—my thoughts, my love, my dreamings, turned to clay! O God! what hollow mockery seemed the gift of life—how I wished that my work were done and that I could lay it down; it had not been to me a blessing, my youth was blighted by the bigotry and ignorance and want of thought of those who had the charge of my bringing up. The headstrong passion of my more advanced days led me to form two marriages, both of them miserable, and now, alas! late in the day, I mourn over errors that I am unable to overcome; my soul is clouded by remorse and bitterness, and I strive with but faint hopes of success to bring up my three sons, who (with all my love for them) ought to be in better hands. The past a desert, the present thorny, the **[377]** future horrible; eternity a blank, what a dreadful fate is mine!"

"28th (February).— . . . Dreamt very painfully of a final walk with Dr. L—, of an anguished parting, of a *discovery* and *wandering* in shame and wretchedness in the world; woke (1st of March) alarmed and miserable, and had headache all day. 'I never loved anyone as I did thee, both mind and body,' I had said in my dream, and in my waking moments the same idea was breathed still in my ear."

"9th (April, Boulogne).— . . . He (M. L. P., French tutor) corrected a little more of my exercise and did not leave me till 12; there was something very gentle and almost cheerful in his manner, and he said they had enjoyed yesterday afternoon. He looked better than usual, and I found that with my usual clingingness of disposition I was beginning to think more of his presence and approbation than conduced to my peace. Foolish heart, ever thus giving away its interest and regard for those who care not one iota about thee further than their interest is concerned."

"27th (April, Boulogne).— . . . Wrote nice, long, but rather sad letter to Dr. L—, to whom I cling very warmly, and whose sweet, mournful little note quite made amends for past silence."

"9th (June, Boulogne).— . . . He took lesson, and I came in afterwards. We did some of the translation and he stayed late to finish it, but we had so much to say of Mr. Gretton and religion, music, etc., that the time flew by; he was very gay and friendly, and owned that he should miss us sadly. I felt this was more likely to be my case than his. The utter frigidity of his conduct rather surprises me: others (handsomer than he is) have found attraction in my company, and where I have shown so much and unvarying kindness as I have to him, and where gratitude is evidently felt, it is a marvel that a warmer feeling does not sometimes come uppermost. Temperaments most widely differ; and after all it is happy every way that he has this moderation."

"21st (June, to Moor Park).— . . . Got to Moor Park in time for tea; were kindly welcomed. Dr. L— came in late and looked pleased to see me; I went with him to see sunset, and reached the hill in time to see it. How often had I wished to see it with him, but now he was ill, cold, low, and sad, and could not enjoy it; into garden, sat in *bower*, *renewed the love of old times*, *but not so excitingly*. Home, and sat in his room with him till 10."

"24th.— . . . We all strolled off at last in the direction of the well. Dr. L— sat chatting with me on a seat near it, and at length took me alone up the very *valley where we had first enjoyed the happiness* of loving, changed now and so was he, and we talked only commonplace."

"25th.— . . . He came round and sat by me, and at length brought a book of old songs and sat very near me looking them over. We went out to walk, sat in our private bower, read Béranger's 'Bon Dieu,' and talked of his health and prospects, but he was cold and mentally sad. It was the shrine of the idol I had once worshipped that was left to me, but it was enough for my woman's heart; walked with him till dark, looked at his prints in the study, parted with him at 4, *after one long*, *passionate*, *clinging embrace*, and left him at last much excited. Dreamed of him all night, and longed and mused and glowed."

"10th (October, Moor Park).— . . . I begged a thousand pardons and said how much I regretted it; I must have written it in a perverse mood, I said. It was all over now, he replied, and we parted with one of those long, caressing kisses that shake my very soul, and make me dream and long for hours."

"14th (Ditto).— . . . It was 11 o'clock ere the latter rose to go. Mrs. R— had sat uneasily behind us on the sofa, too deaf to hear and unwilling to go; the two went after 11, and the Dr. after talking some little time appeared to return to hi

former kind feeling for me, caressed and tempted me, and finally, after some delay, we adjourned to the next room *and spent a quarter of an hour in blissful excitement.* I became nearly helpless with the effects of his presence and could hardly let him depart, *wept when he bade me try to obviate consequences*, and finally bade him a passionate farewell. I was alone, passion wasted, and sorrowful, sleep was far from me that night; I tossed and dreamed and burned till morning, too weary and weak to rise."

"15th.— . . . The Dr. came to my room and sat a long while talking coldly of life, reputation, chances, caution, and my partner. I cut a lock off his fine hair, said how much I **[379]** had always loved him, spoke of his love-telling eyes and fine face and mouth; still he moved not; the interview closed without even a kiss. I saw that, though I might have caused momentary passion, I was not wholly beloved, but that regard for reputation and ease were the moving springs of his conduct."

"30th (December, Boulogne).— . . . After tea Henry commenced a most unpleasant discussion; accused me of some intimacy with the Le P— family, of which he could not ascertain the extent; said he was aware of my writing and posting and receiving letters that he knew nothing about; and altogether showed such suspicion and ill-feeling, that I was alarmed and truly distressed. I said all I could to disarm suspicion, and to appear to stand firm under this blame, deserved, as I could not help feeling it, and yet excused by the harsh, narrow spirit of my partner. We did not separate till after 12, and I had headache and nervous agitation. He seemed sorry at the consequence of this stormy altercation, and said many conciliatory things. It was too late then. Love, respect, complacency, friendship, patience, were all gone; nothing on my part remained but dread, weariness, disgust, and constraint. It is my children alone that keep me; once they leave the paternal roof, and I will quit him."

The case for the petitioner was proceeded with and closed on the 14th. On the 15th, at the sitting of the Court,

Mr. Forsyth, Q.C., proceeded to address the Court for Dr. Lane, the co-respondent.

By the Court: Dr. Phillimore is counsel for the wife, and the question arises, whether he should not be the first to address the Court? His is the primary case. We presume that the intention of the Act in allowing the co-respondent to appear, is to enable him to protect his character from any charges that may be brought against him in these proceedings.

Dr. Phillimore, Q.C., intimated that it was in consequence of an arrangement between Mr. Forsyth and himself that the counsel for the co-respondent proposed to address the Court first.

**[380]** *Cockburn, C.J.*: I don't see any reason why, if any arrangement has been entered into between the counsel for the respondent and the counsel for the co-respondent that the counsel for the latter should first address the Court, we should interfere; otherwise, as the counsel for the wife appears for the primary party, and the counsel for the co-respondent only for the secondary party in the suit, the wife's counsel should begin.

Auguste Giet, a butler in the service of Dr. Lane, was sworn and examined on behalf of the co-respondent. He stated that he had never observed any improper familiarity between Dr. Lane and Mrs. Robinson, and gave evidence to discredit that of Levi Warren.

Dr. Phillimore, Q.C., proposed to cross-examine the witness.

By the Court: You have identified yourself with the co-respondent, and you cannot now cross-examine his witness. You may ask him questions, but do not put them in a leading form.

Lady Drysdale (Mrs. Lane's mother), Mrs. Suckling, and Dr. M. Richardson, who had been patients at Moor Park, deposed that they had never seen acts of improper familiarity between Dr. Lane and Mrs. Robinson, and that there was nothing in his conduct towards her at all different from his conduct towards other ladies.

Mr. Coleridge summed up on behalf of Dr. Lane.

Dr. Phillimore opened the case on the part of Mrs. Robinson. She was charged with adultery with one person only, and the evidence failed to establish that that person had been guilty of adultery. Would it be reasonable to declare Dr. Lane innocent of the charge, to dismiss him from the suit, and at the same time to divorce Mrs. Robinson on the ground that she had committed adultery with him?

*Cockburn, C.J.*: Suppose the case of a wife, who confessed that she had committed adultery with a person, who was in reality innocent, in order to conceal her real paramour: you would not compel a husband to keep such a wife?

**[381]** Dr. Phillimore: The petitioner does not charge adultery with anyone but Dr. Lane, and therefore by Dr. Lane's innocence or guilt she must stand or fall.

*The Judge Ordinary*: If Dr. Lane had not been a party to the suit, the wife's confession would have been evidence against her. How can the circumstances of his being before the Court make it no evidence against her?

*Wightman, J.*: If each party had made separate confessions, the argument would go to the extent of excluding both confessions.

Dr. Phillimore proceeded to point out that by the oral evidence no proximate act whatever was proved. He then referred to the fallacious character of confessions made in journals as compared with other confessions. For instance, the journals of Horace Walpole contained many statements which, as had since been proved, he must have known to be false when they were written. The journal before the Court had evidently been written by a woman of so flighty, extravagant, excitable, romantic, and irritable a mind, as almost to amount to insanity. He read several of the extracts from her diary (see ante, p. 365 et seq.), consisting of self-accusations; of records of conversations on various subjects with Dr. Lane and others; of her opinions on poetry, phrenology, and other matters, and containing expressions of a disbelief in a future state. He should contend that the passages relied on for the petitioner were written under the influence of an uterine disease, which had the effect of producing the most extraordinary delusions on the mind of the patient, and frequently caused them to accuse themselves of crimes of the most horrible kind. There were entries in the diary relating to her sufferings from this disease, and for which she had consulted and had been treated by medical men.

Dr. Joseph Kidd, M.D., who had been her medical attendant from 1849 to 1856, was examined. He described the symptoms under which she had suffered during his attendance on her, and stated that her mind alternated between excitement and depression. Her symptoms were referable to ute-**[382]**-rine disease; he did not refer them to it at the time, but from the statements in the diary, he thought they might be attributed to this cause. He was not prepared to state that she had suffered from "nymphomania" or "erotomania" since 1852. Since that time she had not been so directly his patient.

Sir Charles Locock, M.D., Dr. Bennet, M.D., and Dr. Forbes Winslow, M.D., were examined as to the effect of the uterine diseases, "nymphomania" and "erotomania," in producing extraordinary delusions in the mind of the patient. The disease called "nymphomania" was a local disease, and the other, "erotomania," had its origin in the brain. Both these forms of uterine disease might produce the same results—a morbid condition of the mind on sexual subjects. Instances were mentioned by them of ladies, whilst affected by one or other of them, accusing themselves, without the slightest foundation, of the most flagrant acts of unchastity.

Dr. Phillimore, Q.C., proposed to examine Dr. Lane, the co-respondent, as a witness on behalf of Mrs. Robinson.

*Cockburn, C.J.*: This is a proceeding instituted on account of adultery; Dr. Lane is a party to the suit; is it competent for him to be examined as a witness?

*The Judge Ordinary*: By 14 & 15 Vict. c. 99, the parties to a suit are made competent and compellable to give evidence in the suit; but the 4th section enacts, that nothing therein contained shall apply to any action, suit, proceeding, or bill, in any Court of common law, or in any Ecclesiastical Court, or in either House of Parliament, instituted in consequence of adultery, etc. The 16 & 17 Vict. c. 83, makes the husbands and wives of the parties to a suit competent and compellable to give evidence, but does not affect the above exception.

Dr. Phillimore, Q.C.: It was said by the Lord Chief Justice yesterday, that it never could have been the intention of the Legislature to place persons by this Act in a worse position as to evidence than they were before. This witness might have been examined in proceedings in the Ecclesiastical **[383]** Courts under the general law; if he cannot now be examined, the wife is deprived of a mode of defence which she had before the Act. The exception in sect. 4 of 14 & 15 Vict. c. 99, is grafted on the 2nd section, which would not have applied to a person in the position of the co-respondent.

*Cockburn, C.J.*: The Divorce Act simply alters the law by directing that every adulterer shall be made a co-respondent. If the Legislature puts a party in a position to which the existing law clearly applies, it must be applied to him. By the law, at the period of the passing of the Divorce Act, no party, whether he was actor or reus, could be a witness in a suit instituted in consequence of adultery. Then comes the Divorce Act, which places the adulterer in this position, namely, as a party to the suit. It appears to me that sect. 4 of 14 & 15 Vict. c. 99, must be applied to him, and that he cannot be a witness.

*Wightman, J.*: He is joined in this suit diverso intuitu, not for adultery but for damages.

*Cockburn, C.J.*: Dr. Phillimore would contend that there are two suits.

*The Judge Ordinary*: There is no petition for damages.

By the Court: Suppose, Dr. Phillimore, you were to apply to the Court to dismiss Dr. Lane as co-respondent, and we were to do so, he might then be examined.

Dr. Addams, Q.C., contrà.

By the Court: It is frequently done in criminal and sometimes in civil matters. In actions of trespass, one of the defendants under the old state of the law was dismissed from the record and examined as a witness. Dr. Lane is not a defendant in the process of divorce. If you had applied to the Court to leave him out as co-respondent, and it had done so, the other side could have called him as a witness.

Cur. adv. vult.

**[384]** *Cockburn, C.J.*: In this case we have considered the question raised yesterday as to the competency of the co-respondent as a witness on behalf of Mrs. Robinson, and we are clearly of opinion that, on the true construction of the Evidence Act, 14 & 15 Vict. c. 99, and of the Divorce Act, that the co-respondent is not a competent witness. But here arises a grave question; whether, it being admitted that there is no evidence to affect Dr. Lane independent of the confession of Mrs. Robinson (taking it for the purposes of the present argument that her diary amounts to a confession), we ought not, if we can, ex debito justitiæ, to dismiss the suit as far as regards Dr. Lane, and thereby render him a competent witness for Mrs. Robinson. That question involves such grave consequences and such serious principles as regards the administration of justice under the Divorce Act, that we are anxious to have the assistance of all the members of the Court before making a precedent. We adjourn the case till Monday, when we hope to be able to state the conclusion at which we may have arrived.

If there are any other witnesses on the part of the respondent, their evidence could be taken before the adjournment.

Dr. Phillimore then called:

Mr. Thom, who said that he was a gentleman connected with literature, and knew Mr. and Mrs. Robinson,—the latter intimately. He became acquainted with them at Reading, in 1854, and afterwards met Mrs. Robinson at Moor Park. She was a very excitable person. There was a certain amount of formality in her general behaviour, but she now and then uttered romantic and flighty observations. The witness read an entry in Mrs. Robinson's journal, containing an account of an interview with him on the 3rd of June, 1854. She described him as looking "thin, pale, worn, agitated, hopeless," said that his "great eyes looked like pale violets, his cheeks were hollow, and there was a look of intense dejection about his whole person." Her own cheeks, she added, "were flushed, tears came every second into her eyes, her voice was choked, and they talked long and earnestly." This account, the witness said, was highly coloured and exaggerated, and he was not in a state of dejection or depression. **[385]** The witness's attention was called to another entry of the 4th of July, 1854, respecting another interview, to which the same observation applied. On the 15th of July there was an entry in which occurred the words, "In the garden under that tree, which I never see without thinking of my escapade with Mr. Th." The word "escapade," the witness said, was inexplicable to him. He remembered one day that he was reading under a tree in the garden with Mrs. Robinson, when Mr. Robinson approached, and Mrs. Robinson then ran round a corner, in order apparently to keep out of her husband's way. Mr. Thom distinctly denied that any kind of impropriety had ever passed between Mrs. Robinson and himself, and characterized the entries in the diary relating to himself as romantic and rhapsodical.

On cross-examination, he said that he had acted for a short time as tutor to

Mr. Robinson's children, and had been by him introduced to Dr. Lane, with whom he had since remained upon terms of intimacy.

June 21.—*Cockburn, C.J.*: In this case we adjourned the proceedings in order that we might have the assistance of the other members of the Court in determining the questions which were submitted to our consideration as to the admission of Dr. Lane, the co-respondent, as a witness on behalf of Mrs. Robinson. It was said, in the first place, that Dr. Lane, although a co-respondent, was nevertheless a competent witness, and upon the Court expressing an opinion that he was not a competent witness, a second proposition was then submitted to us. We were asked, it being clear that there was no evidence against Dr. Lane, to allow him to be dismissed from the suit in order to qualify him as a witness. Upon the first question, we had no difficulty in arriving at the conclusion that Dr. Lane, as a co-respondent, was not a competent witness under the 14 & 15 Vict. c. 99, because he was a party to a suit instituted in consequence of adultery. With regard to the second question, it was one of so much importance that we have obtained the valuable assistance of Lord Campbell, of the Lord Chief Baron, and of Mr. Justice Vaughan Williams, in determining it. Those learned judges agree with my brother Cresswell and myself in thinking that we cannot accede [386] to the proposition that has been made to us to dismiss Dr. Lane from the suit in order to render him a competent witness. We regret that our brother Wightman, for whose opinion we entertain an unfeigned respect, has formed a different opinion. The grounds on which we have formed our opinion are these:—The Divorce Act expressly provides that the alleged adulterer shall, upon every petition founded on adultery, be made a co-respondent, unless on special grounds the Court shall think proper to excuse the petitioner from making him a co-respondent. It appears to us that this provision is imperative in a case where, at the outset, the petitioner has not, upon application to the Court, been relieved from making the adulterer a co-respondent. No such application was made at the outset of these proceedings on the part of the petitioner, and we apprehend that the alleged adulterer is, therefore, a necessary party to the suit, not only in its inception, but throughout its continuance, until final sentence is pronounced. We apprehend that we cannot take upon ourselves, without the consent of Mr. Robinson, to dismiss Dr. Lane from the record, but that he must wait out the termination of these proceedings. It is not for us to speculate on what may have been the intention of the Legislature in making this provision, or to inquire whether further legislation on the subject would be desirable; but we must interpret and administer the Act as we find it, to the best of our ability. The object of the Legislature was probably not confined to enabling the alleged adulterer to defend himself from a demand for damages and costs, because it was not left to the discretion of the petitioner to make him a co-respondent. It was probably intended to enable a person whose conduct and character were involved in a proceeding not directed immediately against himself, to defend himself by counsel and witnesses. We cannot find anywhere that a power and discretion is given to the Court, directly or indirectly, to dismiss a person from a suit who is by the Act expressly made a party to it. We have been asked to dismiss Dr. Lane ex debito justitiæ, in order that injustice may not be done, but we do not think we should be justified in doing what is contrary to a clear and intelligible rule laid down by positive enactment. Believing that we have no power to dismiss Dr. Lane from [387] the suit until we finally pronounce judgment, it is unnecessary to express any opinion as to whether this is a case in which we ought to exercise that power if we possessed it.

*Wightman, J.*: I regret that I have arrived at a different conclusion from the rest of the Court. It may be assumed that there is no evidence against Dr. Lane, and the Divorce Act contains no provision whatever applicable to a case like the present. Before the passing of the Act, the alleged adulterer would have been a competent witness for the wife, both in the Ecclesiastical Courts and in the House of Lords. Then by the Act the proceedings against the wife and the alleged adulterer are not similar, and the Court may make different orders with regard to each of them. In the event of a co-respondent claiming a trial by a jury, and obtaining a verdict, would the Court be precluded from dismissing him until it pronounced its final sentence? It is not absolutely necessary that there should be a co-respondent, and I find nothing in the statute to satisfy me that the Court has no power to dismiss the co-respondent in the course of the suit. In this most extraordinary and peculiar case, Dr. Lane is

the only person who could be called to contradict the entries in the journal. If the Court has no power to dismiss him, a wife might be precluded from having the benefit of the testimony of a person against whom there was not a tittle of evidence, by his being made a co-respondent. Not believing that the Legislature intended the Divorce Act to have that effect, I am of opinion that Dr. Lane ought to be dismissed from the suit, and admitted as a witness.

*The Judge Ordinary*: I agree with the opinion expressed by the Lord Chief Justice. I wish to state that I have formed my opinion simply upon a consideration of the statute, and without reference to any of the evidence given in the cause.

July 3.—*Cockburn, C.J.*: I have now to state that, since the last hearing of this case, considerable doubts have suggested themselves to certain members of the Court as to the propriety of the decision at which we then arrived in refusing to **[388]** accede to the prayer of Mrs. Robinson's counsel to dismiss the co-respondent, and thereby make him a competent witness. They have a strong impression that justice to a man placed in Dr. Lane's position requires, that if no case is made out against the co-respondent, he should be discharged from the suit, and enabled to give evidence on what is specially within his own knowledge. In these doubts I, having been one of the majority on the former occasion, think it right to say I now concur. It has since come to our knowledge that it is intended to introduce a clause in a Bill now before Parliament to solve this doubt, and to enable the Court, if it does not already possess the power, to dismiss a co-respondent and make him an admissible witness. It is probable that this clause will apply to pending suits; if so, we shall be too glad to avail ourselves of it in the present case. Even if such a clause should not become law, I for one should think it incumbent on the Court to reconsider the conclusion at which it had arrived, and that as matters now stand, the interests of justice do require that Dr. Lane, against whom no case is established, should be dismissed from the suit. We adjourn the case for further consideration.

In the meantime a clause was inserted in the Divorce Amendment Act (1858) to meet the supposed hardship of the present and similar cases, whereby the Court is authorized, in its discretion, to dismiss the co-respondent from a suit, so as to make him a competent witness.

November 26.—The Court accordingly exercised the power given it by 21 & 22 Vict. c. 108, s. 11: "In all cases now pending or hereafter to be commenced, in which, on the petition of the husband for a divorce, the alleged adulterer is made a co-respondent, or in which, on the petition of the wife, the person with whom the husband is alleged to have committed adultery is made a respondent, it shall be lawful for the Court, after the close of the evidence on the part of the petitioner, to direct such co-respondent or respondent to be dismissed from the suit, if it shall think there is not sufficient evidence against him or her;"—and on 26th November, 1858, dismissed Dr. Lane from the suit. He was then examined on behalf of Mrs. Robinson. He denied all criminal **[389]** or indecent conduct; said that as she was an old friend, he was more attentive to her when at Moor Park than to strangers; and on the occasion of her coming there in October, 1855, he, in consequence of some kindness of hers towards his children, received her in the hall, in the presence of his mother-in-law and other persons, with a kiss.

Mr. Bovill, Q.C., summed up the respondent's case. The case for the petitioner must be taken to stand entirely on the entries in the diary. The attempt to produce evidence independent of those entries had failed. The diary contained no explicit statement of Mrs. Robinson's guilt. It was proved, on the evidence of some of the most eminent medical men in the kingdom, that the disease under which she was labouring was likely to excite her imagination, and cause her to imagine that to have occurred which had never taken place. The fact that she suffered for several years from that disease was proved, and the means taken by her and her husband to prevent conception tended to aggravate that disease. It was manifest, from page after page of the diary, that she was under the influence of painful feelings with regard to her husband.

Their Lordships would remark that she frequently appeared to be struck with Shelley's writings, and it was natural to infer that she had also been struck with events in Shelley's life, and with the fact that he had imagined things which never existed. They would also observe that she sometimes addressed herself to a reader, as if her confessions, like those of Rousseau, were intended for the perusal of some

one after her death. She wrote on one occasion: "Reader, you see my inmost soul. You must despise and hate me. Do you also pause to pity? No; for when you read these pages all will be over with one who was too flexible for virtue, too virtuous to make a proud, successful villain. Good night! May you be more happy!" The account of the interviews with Mr. Thom were so much exaggerated, that they might be regarded as purely imaginative. The entries with regard to Dr. Lane and Mr. Thom were of the same description—they were not records of facts, but expressions of feelings.

[390] *Cockburn, C.J.*: It is hardly fair to Mr. Thom to say that he is referred to in the same terms as Dr. Lane.

(Argument continued).—The entry of October 7th, 1854, one of those upon which the petitioner relied, was written not on the day when the facts were supposed to have occurred, but on the following day, after a night of sleeplessness and dreaming. The entry itself, too, referred to dreams more than once. "He exclaimed, 'If you say that again I'll kiss you.' You may believe I made no opposition, for had I not dreamed of him and of this full many a time before?" Even setting aside Dr Lane's contradiction, the journal itself was not evidence upon which the Court could safely dissolve a marriage. All these supposed criminalities were said to have occurred in places open to the public, where no sane person would have thought of committing them; that alone was a presumption against their truth. In cases of this kind the burden of proof was upon the husband; and, as there was no evidence but the diary, which was contradicted by Dr. Lane upon his oath, that proof had failed. The explanation of the journal was, that Mrs. Robinson's mind was quite unable to distinguish the real from the unreal. It was almost incredible that any woman should deliberately write a memorial of her own infamy. On these grounds he submitted that the case had failed against Mrs. Robinson, as well as against Dr. Lane.

Mr. Montagu Chambers, in reply, submitted that Mrs. Robinson having substantially admitted herself to be guilty of adultery, the Court could not, in accordance with any known principle of law, refuse the relief for which Mr. Robinson prayed. He denied that in the Ecclesiastical Courts it was ever held that adultery could not be proved without some corroborative evidence. There was, however, a canon which prevented the Court from acting on an uncorroborated confession, whatever might be its own moral conviction. The case he had now made out was a case of confession, supported not only by probabilities, but by certainties. The very journal shewed that Mrs. Robinson was a sane woman, capable of discussing even the most abstruse and difficult questions. It was the journal of a very romantic, [391] but, nevertheless, of a very clever woman. The foundation of the defence was that Mrs. Robinson was labouring under a uterine disease, but that foundation was one of sand. No evidence was given as to her present state of health, or as to the time when her disease was supposed to have terminated. They did not even know precisely what was the disease with which she was afflicted. Dr. Kidd's evidence on that point by no means went to the extent that Mrs. Robinson, at the time when he was in attendance upon her, was suffering under the malady which was said by him and the other medical witnesses to give rise to sexual hallucinations. He only drew the inference that she had been suffering under that malady after reading the passages in the journal. But at the time when Dr. Kidd was attending her, there were no entries in the journals which could be called hallucinations. The journal itself, from first to last, contained no indications whatever of delusion. Conversations and other ordinary events were narrated in a detailed and truthful manner. In no point had his learned friends been able to contradict that journal, except by the evidence of Dr. Lane with regard to the material passages. Dr. Lane himself implicitly confirmed its accuracy in all but those points. Mrs. Robinson was in the position of a longing woman who had fallen in love with a handsome man, and who induced him, in a hapless moment, to yield to her solicitations. Not an error had been pointed out in the diary as to any matter of fact, although there were innumerable matters mentioned which might have been proved to be false. Exaggerated and highly coloured as the language was, it was nevertheless perfectly true. How was it that Dr. Lane was the only person with whom she accused herself of criminal intercourse? If this was all delusion, Dr. Lane was not the only man who would have been accused. Dr. Lane, as her journal stated, was for a long time, to his honour be it said, cold and reserved, and rejected her

advances; but his demeanour in public was no contradiction of the charge of adultery. Unless Dr. Lane was a perfect Joseph, he must have fallen under the circumstances of temptation in which he was placed. If he had really come forward now to vindicate an innocent woman, what a pity it was that he did not think of doing so when Mr. Robinson **[392]** commenced the suit in the Ecclesiastical Court. Having heard that he was implicated, why did he remain silent? If she had been innocent, she too would surely have communicated with him. Dr. Lane's denial that he had committed adultery was the only statement that it was possible for him to make when called upon to vindicate the lady accused. He was in a most difficult position; called upon both by his own wife and by Mrs. Robinson to declare his innocence, the very kindliness of nature to which Mrs. Robinson so often alluded would induce him not to hesitate. The case was one of frightful importance to Mr. Robinson. He left it in their Lordships' hands as an ordinary case of a man much tempted, who had not been able to resist temptation.

Cur. adv. vult.

March 2.—*Cockburn, C.J.*, delivered judgment: This was a suit for a divorce à vinculo, on the ground of adultery. The case was peculiar and remarkable in its character and circumstances. The only evidence to support the case of the husband, the petitioner, consisted of certain alleged admissions of the wife, the respondent, without any corroborative evidence, direct or indirect, to support them. Not but that, indeed, some evidence by way of corroboration was offered; but it was not only inconclusive, but so untrustworthy in its character, that the Court was under the necessity of discarding it as altogether undeserving of consideration. This being so, as the admission of the wife could not be used to establish the criminality of the co-respondent Dr. Lane, the Court felt itself called upon, before the close of the case (an Act of Parliament having been passed which removed all doubt as to its authority to do so), to dismiss the suit against him, and to confine the question for its decision to whether, by the admissions of the principal respondent, the wife, a case of adultery was made out which entitled the petitioner to the redress which he seeks.

But on the dismissal of the suit as against Dr. Lane, a question presented itself, whether, on the acquittal of the co-respondent, the alleged adulterer, the suit against the wife must not of necessity fail. The case of an indictment against two persons for conspiracy suggested an apparent analogy; and as, in such a case, a plea of guilty by the one, **[393]** if followed by the acquittal of the other, would not have supported a judgment of guilty against the delinquent confessing and pleading guilty, so it might be said that here, as the offence of adultery necessarily implied the joint delinquency of two, if one of the parties was acquitted, the other could not properly be condemned. We were however of opinion that a principle of so purely technical a nature should be confined to the cases in the criminal law in which it had hitherto been applied, and that it ought not to be extended to a proceeding in which the addition of the co-delinquent to the suit had been made compulsory by the Legislature with a view to his own protection, and in which but for this special provision of the Act of Parliament, the suit would have been against the wife alone. This difficulty in the way of the consideration of the case against the wife alone being removed, we proceed to consider the evidence as it affects her.

Now the evidence, as has been before observed, consists entirely of admissions made by the wife herself; and here a question presents itself, as to how far the admissions of a wife charged with adultery, unsupported by any confirmatory proof, can be acted upon as conclusive evidence on which to pronounce a divorce. If this Court had been a Court of purely ecclesiastical jurisdiction, the 105th canon, which prohibits the granting of a divorce on the sole and unsupported testimony of the wife, would have precluded us from acting on this evidence. But as this Court is not a Court of ecclesiastical jurisdiction, nor bound in cases of divorce à vinculo by rules of merely ecclesiastical authority, it is at liberty to act, and bound to act, on any evidence legally admissible, by which the fact of adultery is established; and if therefore there is evidence, not open to exception, of admissions of adultery by the principal respondent, it would be the duty of the Court to act on such admissions, although there might be a total absence of all other evidence to support them. No doubt the admissions of a wife unsupported by corroborative proof should be received with the utmost circumspection and caution; not only is the danger of collusion to be guarded against, but other sinister motives which might lead to the making of such

admissions, if, though unsup-**[394]**-ported, they could effect their purpose, are sufficient to render it the duty of the Court to proceed with the utmost caution in giving effect to statements of this kind; the more so as it must always be borne in mind that the co-respondent, though not in a legal point of view interested in the result, inasmuch as from the absence of evidence available as against him, he is entitled to an acquittal, has yet, socially and morally, the deepest interest in the result. Nevertheless, if, after looking at the evidence with all the distrust and vigilance with which, as we have said, it ought to be regarded, the Court should come to the conclusion, first, that the evidence is trustworthy, secondly, that it amounts to a clear, distinct, and unequivocal admission of adultery, we have no hesitation in saying that the Court ought to act upon such evidence, and afford to the injured party the redress sought for. The admission of a party charged with a criminal or wrongful act has at all times, and in all systems of jurisprudence, been considered as most cogent and conclusive proof; and if all doubt of its genuineness and sincerity be removed, we see no reason why such a confession should not, as against the party making it, have full effect given to it in cases like the present. With these preliminary observations as to the principles on which the Court should be prepared to deal with such a case, we proceed to consider the evidence before us. The case of the petitioner rests, as we have said, on certain admissions of the wife, which it is contended amount to a confession of adultery. These admissions are contained in a diary kept by Mrs. Robinson, and extending over a series of years; the passages relied on by the petitioner occur in the years 1854 and 1855; but the diary from the beginning of 1849 to the end of 1855 was produced before us, and we have carefully gone over the whole, with a view to gain an insight into the mind and character of the writer, as necessary to a due appreciation of the case. Abundant materials for this purpose are supplied by this remarkable journal: not only are all the events of the life, social and domestic, of Mrs. Robinson chronicled with minute detail, but her inmost thoughts and feelings, even where one would most have expected secrecy, are set forth without hesitation or reserve. We see before us a woman of more than ordinary intelligence and of no **[395]** inconsiderable attainments, but in whom sound sense and judgment were wanting to correct a too vivid imagination and too ardent passions. This is more particularly the case in all that relates to her intercourse with the opposite sex: the most commonplace attentions are invested by her flighty imagination with the character of romance and passion, to be followed in more sober moods by complaints of disappointment and confessions of her own folly in thus dwelling on delusions and dreams. We learn from her that her impatience of celibacy had twice hurried her into rash and ill-advised marriages, from which unhappiness only had resulted. Her second and present husband, Mr. Robinson, she had never loved, and at the period with which we have to deal, had ceased to respect: she dwells continually on the uncongeniality of his nature, and on the many points in which his temper and character were repugnant to her own; and finally concludes by declaring that but for her children (for whom she appears to have had great and sincere affection) she should certainly quit him altogether. In the autumn of 1850 Mr. and Mrs. Robinson, being at Edinburgh, made the acquaintance of Mr. (afterwards Dr.) Lane and his wife, an acquaintance which speedily ripened into a closer intimacy. Mrs. Robinson appears from the commencement to have been greatly taken with the personal appearance and conversation of Mr. Lane, and in the sequel to have conceived a violent and passionate attachment towards him. Mr. Lane, if the diary can be trusted, was marked in his attentions to Mrs. Robinson, seeking her society and conversation; but his intercourse with the lady does not appear at this period to have ever assumed the character of undue familiarity or of improper design. In the latter part of the summer of 1852 Mr. and Mrs. Robinson, with their family, returned to England, and in the November of that year settled at Reading. In the summer of the ensuing year, 1853, Dr. Lane had taken Moor Park, and opened the mansion there as a hydropathic establishment, whereupon the intercourse of the two families was renewed; it appears from the journal that in the interval the partiality of Mrs. Robinson for Dr. Lane had remained unabated. With the renewal of the intimacy it acquired increased vehemence, although she records her strong conviction that "friendship and respect were all he would **[396]** ever feel for her." In the latter part of the autumn, Mr. and Mrs. Robinson, with their family, went to France, from which they returned only at the close of the year. With the exception of epistolary correspondence, the intercourse with Dr. Lane

appears to have been suspended till the summer of 1854. In the meantime Mrs. Robinson appears to have conceived and to have been occupied with a fanciful predilection for a Mr. Thom, who occasionally came to give instruction as tutor to her sons; a predilection which does not appear to have been returned by Mr. Thom, much to the chagrin and mortification of the lady, who nevertheless writes of him in the most impassioned language, saying that "passion clings to her heartstrings," and that "she cannot divest herself of his image." Having thus written respecting Mr. Thom in August, on proceeding to Moor Park in the ensuing month of September, partly to consult Dr. Lane professionally, and partly on a visit to him and his family, her passion for the doctor seems to have revived in all its intensity, though Mr. Thom appears to have still retained some hold on her affection. In the following month of October scenes are recorded with Dr. Lane from which we are invited by the petitioner to infer that acts of adultery must have taken place. These passages, it is unnecessary to set forth; they were elaborately commented on in the arguments at the bar, and they are of such a character as to render it not desirable unnecessarily to repeat them; we shall therefore content ourselves with stating, further on, our opinion as to their general effect. They must be taken, however, in conjunction with the somewhat singular circumstances that within a few days of the last of these entries Mrs. Robinson, having left Moor Park, complains of Dr. Lane's coldness and indifference, speaks of him as thinking little of her, while she speaks of Mr. Thom as thinking more steadily of her, and laments her "unhappy turn of mind in clinging to shadows and delusions." In the November of the year 1854, Mr. and Mrs. Robinson left England for Boulogne, where they remained till the June of the ensuing year. In the interval we find Mrs. Robinson taken up with a French gentleman who acted as tutor to her sons; again dwelling, as in the case of Mr. Thom, on commonplace attentions as marks of devotion, and again lamenting, in the **[397]** sequel, the indifference and neglect of her supposed admirer. On revisiting Moor Park, however, on her return to England, her passion for Dr. Lane resumes its course as though it had never been interrupted. Again, we have entries in the diary of scenes of criminal familiarity, accompanied, however, as in the former instance, with complaints of disappointment, and of the coldness and instability of Dr. Lane. In the October of 1855, Mrs. Robinson is again at Moor Park, and again we have details of scenes of passionate and guilty endearments, but again followed by complaints of the want of devotion and reciprocity on the part of Dr. Lane, of whom in one passage she observes, that "a regard for reputation and ease were the moving springs of his conduct." These passages in the diary of Mrs. Robinson, to which we have been referring, are relied on by the petitioner as admissions of actual adultery, or, at all events, of a criminal familiarity from which adultery ought necessarily to be inferred. On the part of the respondent it was strongly contended that these narratives were the insane delusions of a diseased mind, to sustain which proposition evidence was adduced that Mrs. Robinson had for many years been labouring under uterine disease; and we were assured, on the highest medical authority, that the effect of such a disease was sometimes to produce mental derangement of the most painful nature with reference to sexual feelings, and an insane belief of having committed unchaste acts, which had no existence except in the mind of the woman confessing them. We find, however, nothing in this case which would warrant us in concluding that the scenes narrated by Mrs. Robinson were the delusions of a disordered mind. Had they been so, we should, no doubt, have found, what is usual in such cases, the statement or confession of them to others, not a mere recording of them among the other events of her life in a secret journal, to be seen by no eye but her own. In cases of maniacal delusion of this character, self-accusation seems always to be a feature of the disease. Probably, too, we should have found more distinct and unequivocal statements of the full consummation of her desires than are to be met with in the diary. Certainly, we should not have found, in so many instances, complaints of imperfect pleasure or of painful disappointment. As we cannot therefore adopt **[398]** the view suggested as to the insane unreality of the narrative of Mrs. Robinson, it becomes necessary to consider the effect of this remarkable document, to see whether we can conclusively collect from it that adultery has in fact taken place. Now, in the majority of instances, in describing the private interviews of Mrs. Robinson and Dr. Lane, the narrative speaks of acts which, though no doubt of most guilty character, yet do not amount to actual adultery. In other instances the language is ambiguous: it may be taken to

import actual consummation or to refer only to indecent familiarities and caresses, such as we have before referred to, and which, however criminal, would not justify us in decreeing a divorce. In one instance language of the sort, which might be construed into a complete confession of adultery, is afterwards used under circumstances in which it is plain that no such meaning can attach to it. In no instance do we find a clear and unequivocal admission of adultery having taken place. The strongest passage is that in which Mrs. Robinson states that, after one of these interviews, Dr. Lane desired her to take care to "obviate consequences;" but even here the "consequences" referred to may have been those of detection in a criminal intimacy, not those resulting from actual adultery. It is true, that, where we are dealing with admissions by a wife of criminal and indecent familiarities bordering upon, and, morally speaking, partaking of adultery, the disposition of the Court would be, for obvious reasons, to give the fullest effect to the language. But in the present case these are considerations which lead us to think that the language of Mrs. Robinson in her diary must be construed by a different rule. We are dealing with one whom an ardent imagination and a too passionate nature too often lead away beyond the bounds of reason and truth; and who, in all that related to her intercourse with men for whom she had conceived a partiality, was prone to exaggerate and overcolour every circumstance which tended to her gratification. Of this we have a striking instance in her intimacy with Mr. Thom, where we find her magnifying into the most serious importance circumstances which were proved to us by that gentleman to have been of the most ordinary and trivial character. In the present instance this tendency would be more strongly brought into **[399]** play by the strength and ardour of her passion for Dr. Lane. It is plain that she dwells with impure gratification on the portraiture of these scenes, and on the details of the guilty endearments and caresses which she narrates. It is impossible to say how much of all this may not be the work of an imagination corrupted by sensuality and dwelling with morbid satisfaction on its own impure creations, or how far any groundwork of fact may be distorted and overcharged by the fanciful additions of the writer. At all events we are of opinion that all that comes from such a quarter on such a subject, far from being taken as a ground for drawing further inferences of criminality, must be received with very great allowance and distrust. Having no further evidence than the statements of a writer in whose judgment and fidelity to truth in the particular matter we can place no confidence, and whom we believe capable of distorting and discolouring facts to gratify her disordered fancy and morbid passion, we should have had great doubt whether, if her admissions had amounted to a clear acknowledgment of adultery, we ought to have given effect to them; but, looking to the ambiguous character of the expressions, coupled with her reiterated complaints of the absence of equal ardour on the part of Dr. Lane, we cannot under all the circumstances of the case come to the conclusion that we have any such admission of adultery as we should be justified in acting upon. True it is, that upon evidence aliunde of acts of guilty familiarity such as are here detailed, the Court or a jury would have no hesitation in inferring actual adultery; but we are here dealing with confessions made by a party who seems to have had every disposition to overstate rather than to suppress, and who in these admissions must be taken to have gone to the utmost limits of reality. To statements so made it is not open to us to add anything by way of inference. It is unnecessary to take upon ourselves the difficult task of determining whether the whole of Mrs. Robinson's revelations are imaginary, or how much is to be set down as fiction, and how much as fact: it is enough that, on the whole, we come to the conclusion that we have not before us evidence of adultery on which we should be justified in pronouncing a sentence of divorce. We regret the position of the petitioner, who remains burdened with a wife who **[400]** has thus placed on record the confession of her misconduct; or, at all events, even if the most favourable view be taken of the case, of unfaithful thoughts and unchaste desires; but we can only afford redress on legal proof of adultery, and that proof we cannot find in the incoherent statements of a narrative so irrational and untrustworthy as that of Mrs. Robinson. Entertaining the opinion we do, that the evidence derived from the journal itself is not sufficient to warrant our pronouncing a decree for dissolution of the marriage, we have thought it unnecessary to enter into the consideration of the evidence given by Dr. Lane. In the view we take there remains no course open to us but to dismiss this petition.

Mr. Bovill, Q.C., asked for Mrs. Robinson's costs to be taxed against the husband; she was the successful party in the suit.

Dr. Addams, Q.C., contrà: Independently of the peculiar circumstances of this case, Mrs. Robinson has an independent income.

On this being admitted by her counsel, though the amount was not precisely agreed upon,

*Cockburn, C. J.*: We are of opinion that this is no case for costs, assuming that the wife has any separate income.

Mr. Bovill, in the absence of Mr. Forsyth, Q.C., asked for Dr. Lane's costs; there was no evidence against him.

By the Court: Not anticipating that this question would be raised to-day, we are not prepared to decide it. It may be mentioned again, if in the exercise of their discretion his counsel think fit so to do.

**[401]** SYMES *v.* GREEN. April 12 and 20, 1859.—Will.—Insane Delusion.—B., a captain in the army, and having an appointment at Chatham, was attacked with illness in the beginning of August, 1857, which affected his mind. In the course of a fortnight he became better, and went on a visit to friends at Lewes, with whom he remained till the last week in September, and apparently conducted himself quite rationally. About a fortnight before he left Lewes he received, after conference with and the approbation of the incumbent of the parish, the communion for the first time. He returned to Chatham on the 29th of September. On the 30th he wrote a testamentary paper, which was executed by him, and attested by two brother-officers on the 1st of October. He had immediately on his return to Chatham shewn symptoms of returning or reviving mental disease, which specially took the form of an uncontrollable idea that he must be eternally damned for having received the communion unworthily. A few days after the date of the will he was pronounced insane by a medical board, and died in September, 1858, in a lunatic asylum: Held, that if a will, rational on the face of it, is shewn to have been executed and attested in the manner prescribed by law, it is presumed, in the absence of any evidence to the contrary, to have been made by a person of competent understanding. But if there are circumstances in evidence, which counterbalance that presumption, the decree of the Court must be against its validity, unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind when he executed it. —That though the will propounded was sensible on the face of it and contained no trace of any reference to or connection with the testator's then subject of delusion, yet that, as the production of an unsound mind, it was not entitled to probate.

[S. C. 5 Jur. (N. S.) 742.]

**[402]** The facts of the case, which turned entirely on the condition of mind of the alleged testator, are sufficiently detailed in the judgment. The evidence was taken and the case argued before Sir C. Cresswell on the 12th of April.

Dr. Deane, Q.C., and Mr. J. B. Karslake, for the plaintiff.

Dr. Addams, Q.C., and Dr. Twiss, Q.C., for the defendant.

Cur. adv. vult.

April 20.—*Sir C. Cresswell*: In this case William Symes propounded a will made by Captain William Nott, late of the 83rd Regiment, and averred in the usual form that it was duly executed, and that the alleged testator was of sound mind. The defendant, a nephew of Captain Nott, and his sole next of kin, by his guardian pleaded that the will was not duly executed, and that Captain Nott was not of sound mind at the time.

The execution of the will, as required by the stat. 1 Vict. c. 26, was duly proved. The real controversy was as to the competency of the testator, and in order to determine that question, it will be necessary to examine the evidence that was given before me. Before I proceed to do so, I will endeavour to explain the principle of law to which in my judgment that evidence must be applied.

If a will rational on the face of its is shewn to have been executed and attested in the manner prescribed by law, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding. But if there are circumstances in evidence which counterbalance that presumption, the decree of the

Court must be against its validity, unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind when he executed it.

The personal history of Captain Nott was rather singular. He was the son of an attorney named Green; he was apprenticed to a surgeon, and after two years quitted him, and without the knowledge of his parents enlisted in the 83rd Regiment in 1827, in the name of William Nott, which he always bore afterwards. In 1841 he obtained a commission as the reward for good conduct, and rose to the rank of captain in **[403]** that regiment. After serving in India for several years, he returned to this country with invalids in 1854, and in 1855 was appointed instructor in the School of Musketry at Chatham. After his father's death his mother married the plaintiff. She died in 1846, and plaintiff married again. On Captain Nott's return from India in 1854, he spent three months at the plaintiff's house; and the latter with his wife, on more than one occasion, afterwards visited Captain Nott at Chatham. Captain Nott's brother (defendant's father) died before his return from India, and his son, the defendant, was then living in London under the care of Mr. Cobb, his guardian, and Captain Nott occasionally, when in London, went to see him. The duties of Captain Nott's office were very arduous, but he continued to discharge them without the occurrence of any thing remarkable till the end of July, 1857. On or about the 1st of August in that year, it was manifest that he was seriously ill. He laboured under great excitement, was extremely restless, at times could not articulate, and had occasional fits. The medical staff officers considered him insane, and not in a state to take care of himself, and an hospital orderly and his own servant were charged to keep watch over him. That he was insane was fully established, for he had many delusions, sometime fancying that persons were coming to take him away; at others, that his attendants were going to murder him, and that his servant had attempted to destroy him by fastening poisoned pills to his legs, which the military surgeon had rubbed off. On more than one occasion he manifested a desire to commit suicide. When he had been for about a fortnight in this state he became more tranquil, and was allowed to go, attended by an hospital orderly, to the house of Mr. Symes at Lewes; the orderly left him next day, and he remained at Mr. Symes's house until the 29th of September. According to the testimony of Mr. and Mrs. Symes, and two ladies, Mrs. Ireland and Miss Symes, who were on a visit there during different portions of that interval, he was then quite rational, constantly associated with the family, employed his time in reading aloud to them, or in listening to them when reading, in walking about and conversing with them; and had there been no evidence of a further manifestation of insanity I should have thought that he had perfectly recovered **[404]** from the attack at Chatham. But it appeared that about a fortnight before his return to Chatham he had a desire to receive the sacrament of the Lord's Supper; that he had scruples on the ground of his being unworthy; that he conversed with the incumbent of the parish on the subject, and, encouraged by him, attended that holy ordinance on the following Sunday. During the service he told Mr. Symes, who was with him, that he could not receive it, for he felt unworthy; but, encouraged by him, he went to the altar and partook of the consecrated elements. After the service was over he became much excited, expressed a strong conviction that he had committed an unpardonable sin in receiving that sacrament unworthily, and then became miserably depressed, feeling that he was irrevocably doomed to eternal perdition. On the 29th he returned to Chatham, accompanied by Mr. Symes, whose opinion as to his then state of mind may be collected from his own account. He stated that while going from Lewes to London the captain was calm, but that the effect of the journey was to excite him. That at Chatham he met in the barrack-yard Dr. M'Lean, first-class staff surgeon, and said to him, "I have brought Captain Nott back in a very excited state, and put him under your charge. I do not know what to do with him; he has frightened my wife, who is a very nervous person." Dr. M'Lean's version of the conversation was: "I have brought him back again as bad, if not worse, than ever." Query, "Then why did you bring him back?" To which he answered, "The fact is, he has frightened my wife nearly out of her senses." Dr. M'Lean visited Captain Nott immediately, and from his appearance and manner thought him quite insane. Captain Nott told him that he was a miserable man, that he had taken the sacrament unworthily, and was for ever damned, and felt so, and this he repeated in substance on the same day to several other persons—Dr. Huish, Robert Rankin, the hospital orderly in attendance upon him, and John Harrington his servant. The doctor ordered his servant and the

hospital orderly to watch him, and on the next day the case was handed over to another staff surgeon now serving abroad, and whose evidence therefore could not be obtained. This evidence was confirmed by that of Dr. Huish, another staff surgeon at Chatham, who saw him on the 30th of September, and then thought him quite insane, **[405]** and advised that a medical board should be held to consider his case, which met on the 6th of October, and reported him to be insane; and on the 7th he was removed to Fort Pitt, an establishment at Chatham for insane patients. The men who were in his service before he went on leave in August, and after his return, gave similar evidence. Another witness, James Menzies, who had known him for several years, and who had rooms on the same floor in Chatham barracks, stated that he saw him on his return on the 29th of September, and sat with him for an hour. He thought him quite insane, and described him as sitting for five minutes together looking at him without speaking, then getting up, exclaiming, "Those horrid thoughts," and rushing into his bedroom. On the 30th he went into Menzies' room and said he was about to make his will; he seemed much excited, and said he had written one or two which did not please him, and he had torn them up. Menzies, in consequence of his opinion as to the state of his mind, tried to dissuade him; he left the room and never mentioned the subject again. It appears that on the same day the will now propounded was written, although not then executed. It was in these terms:—

"I, William Nott, captain in her Majesty's 83rd Regiment of infantry, being of sound mind and memory, do hereby direct that all my personal estate whatsoever, after the settlement of my just debts, be equally divided between William Symes, Esq., of Schott-hill, county of Essex, and Lucy Ellen Tildesly, of Charlton, near Sunbury, Middlesex, England, and all which goods, chattels, or credits, I do hereby give and bequeath for their sole and absolute benefit; and if one of them only should be alive at the time of my decease, then the whole to be his or her sole property—as witness my hand, this 30th day of September, 1857.

"WILLIAM NOTT, Captain 83rd Regt.

"Signed by the said William Nott, in the presence of us, who in the presence of each other, and at his request, have hereto subscribed our names, this day and year above written.

"EDWARD NEL. BRAY, Captain 83rd Regiment,
"Chatham, 1st October, 1857.
"JOHN M. LYLE, Captain 29th Regiment,
"Chatham, October 1st, 1857.

**[406]** "Codicil to my will as above:

"In addition to the above, I bequeath my gold watch to my step-godmother, Mrs. Symes.

"W. NOTT, Captain 83rd Regiment."

Lucy Ellen Tildesly, to whom a moiety of his property was bequeathed, was a lady with whom he had been acquainted from a very early age, and to whom he was engaged to be married in 1832, and so continued until after his return from India. In December, 1854, he broke off the engagement: of this transaction no explanation was given. It appears, however, that after some entreaties on her part he had consented to correspond with her, and one letter from him of the 21st September was read, but was not so material as to require further notice. On the 1st of October this will was executed by Captain Nott, in the presence of Captain Lyle and Captain Bray, whose evidence is very material. Captain Lyle's evidence was to the following effect:—"I became acquainted in 1855 with Captain Nott. He was instructor of musketry at Chatham. The duties were very heavy; the office has since been divided. Was on leave at Jersey when he was taken ill. I saw him on the 29th, when he returned; I saw him in his own quarters. I went up and said, 'I am delighted to see you back; how are you?' He said, 'Lyle, I'm better, thank you; but I have not been well' (pointing his hand to his head). 'I have returned to try if a little work will do me good.' I saw him at mess, I believe, next day. One day, I think I was going up to his room, he met me and asked me to go up to his quarters; I found an officer I had not known before. I afterwards became acquainted with him as Captain Bray, of the 83rd. After a time Nott asked me to witness his will. I can't remember the words he used. I think, to the best of my belief, I saw him sign it; but I won't swear; the paper was placed on the table by the first window. Captain Bray signed it and then myself." (On the will being shewn to the witness), "What

was written below my name was not on the paper at the time. I don't know what became of the will after I signed. We had conversation on general subjects for some time. He was excited and had a suspicious look. I could detect nothing wrong in his conversation. I should not have thought about it if I had not heard that he [407] had been very ill." On cross-examination, he said: "Before I witnessed the will I had been told by the medical man and by his servants that he had been insane; but I was pleased to find he was not so bad as I had expected from the accounts. Deceased was excited, suspicious; but he was always more or less a curious man. I have said I signed the will to pacify him; I was doing him a kindness, doing my duty towards him in so doing. I believed at the time I signed the will the law would put it aside. My ideas of the law were that a man insane was not fit to make a will." On re-examination, he said: "Having considered all that came under my observation, I now think he was capable of making a will." In answer to a question put by the Court: "I saw nothing at that time in Captain Nott's conversation and behaviour irrational beyond what seemed to me a suspicious look."

Captain Bray said: "I was in India in 1851 with the 83rd, when Nott was with the regiment; some years after Nott left to go to England. In 1857 I returned from India. I went to Chatham two or three days before the 1st of October, 1857. I had not seen Nott in the interval. I saw him on the 29th of September; he was the officer in command of my depôt, and we had conversation. He treated me when I entered as if he had seen me the day before, whereas we had not met for four years, which made me at once observe him. Was with him at least an hour, talking on professional matters. He talked rationally, but not according to his usual habit as I had known him; he had been a most precise, methodical man, and quiet to a degree in conversation and manner; now he was excitable, restless, his eyes wandering about the room. I don't distinctly recollect whether I saw him next day. I remember being in his room when Captain Lyle was sent for, and Nott asked us to sign his will." (Nothing however turned on the fact of execution, which was not disputed.) "Now I recollect, I must have seen the will before Lyle came into the room, because I had tried to put him off signing it." On cross-examination: "I had heard he was under treatment for insanity at the time, so I tried to put him off signing it. My idea was that he was not fit to make a will. I did not think that he had any relations, or that it was a matter of [408] much importance one way or other whether he made a will or not. My idea was derived from what I heard and observed myself. He was then very excitable, quite different from what he used to be; he insisted on signing; I saw it was necessary to please him."

Now, excluding from consideration for the moment the circumstances of receiving the sacrament and the effect which it produced on Captain Nott's mind, the case would stand thus: Captain Nott in August was decidedly insame. He went to Mr. Symes's house at Lewes on leave; he conducted himself as a rational being—conversed, read, and acted as a sane man. Returned to Chatham on the 29th of September, wrote a will on the 30th, which, on the 1st of October, was executed in the presence of two witnesses, who, from his previous illness and his manner and demeanour then, thought him insane. Could the Court, under such circumstances, have safely pronounced that this was the will of a competent testator? The will itself is rational on the face of it, but the evidence of the attesting witnesses is sufficient to counterbalance the first presumption of sanity; and then, weighing the decisive evidence of previous insanity and the evidence of the attesting witnesses against the evidence of his rational conduct at Lewes, could I say that the affirmative of sanity is established? and, if not, the will could not be admitted to probate. But when, in addition to this, the fearful condition of mind in which Captain Nott returned to Chatham is considered, I can no longer hesitate as to the decree which ought to be pronounced. Far be it from me to say that a man is insane because he takes a gloomy and desponding view of his spiritual condition, or because he puts a different construction on certain passages of Scripture from that which is attributed to them by the most learned and pious persons, and torments himself with fears which to most men may seem groundless. But in this case the unhappy man seems to have been unable to control or suppress his thoughts, or to reason about them. See how he wrote to Mrs. Ireland (a lady whom he met at Mr. Symes's house) on the subject:—

"Chatham, September 30th, 1857.

"Dear Mrs. Ireland,—Mrs. Symes wrote to you on my present distressed state of

mind. I'm glad she did so; but, before I give you a state-**[409]**-ment of the circumstances, I beg of you totally to divest your mind of any opinion (as formed by the doctor and Mrs. Symes) that this depression arises from any excitement consequent on my late illness. I appeal to yourself if any man could have been more cheerful and happy or recovered sooner than I did." [He then narrates his preparation for receiving the sacrament, interviews with the clergyman, etc.] "Just before the ceremony I told the doctor that I did not feel prepared. He said that he felt so the first time; all people did. I allowed myself to be persuaded against my own convictions. I went, and from the next day I was not only not a happy man, but certainly the most miserable. The doctor and Mrs. S. may tell you (as they repeatedly did me) that it was excitement at first. I could not rest at night; the doctor gave me strong opiates, and was early at my bedside in the morning. In a few days I had most horrible (thoughts)—to horrible to think of. I tried all I could to suppress them; but I sometimes thought they were so perfectly involuntary they might not be put to my charge. I did not acquaint the doctor or Mrs. S.—it would have distressed them; but they plainly saw I could rest nowhere. The two causes of taking the sacrament unworthily appear to be—first, receiving the bread and wine as a common meal, not discerning the body and blood of Christ therein. I had got thus far when I received the plainest warning from God not to write what I was going to say. There could be no mistake; it was as plain as if God had spoken Himself. I was sure these horrible thoughts could never have arisen had not I committed some dreadful crime. I see it all now. If God Almighty does not not forgive this sin and be gracious, I am lost to all eternity. I can only ask your prayers and any consolation you can give to such a miserable wretch as "W. NOTT."

Mrs. Symes received a letter, dated Chatham, October, 1857, in the same strain, referring to the letter he had written to Mrs. Ireland, and describing its interruption as follows:—

"I said, firstly, by eating the bread and drinking the wine without discerning in them the body and blood of Jesus Christ, I was proceeding to say that I did not think I had done so; but before I could make the first letter I received a most powerful and solemn warning not to proceed, convincing me **[410]** that if I did it would be a lie, and giving me the strongest internal assurance that I had then unworthily taken the communion. I think it must be the same description of manifestation of the Lord's Spirit as given in the former days. The conviction could not have been stronger on my mind had the Almighty spoken in the room. Of course, after such a warning, I wrote no more on this to Mrs. Ireland. What I did conclude my note with I really do not know. I most solemnly declare that this assurance and conviction of my sin was thus wonderfully given as described; it occurred about ten of forenoon—no night-dream. . . . Last night not one moment's sleep, walking about the room till morning. If I laid down I found the bed worse than walking by day (except when engaged) by these horrible thoughts."

After such letters as these it is hardly possible to suppose that his feeling as to his then state was that of a man reasoning upon his fitness or unfitness to attend a solemn religious ordinance, or that it was anything else than a fresh manifestation of that aberration of intellect under which he had previously laboured. Even assuming that a temporary restoration of sanity had taken place, can I doubt that the brain was liable to be again disturbed by any exciting cause, and that his attendance at the altar was sufficient for the purpose, and that the feelings which ensued were not the result of reason and reflection, but of insanity? A very learned divine, enumerating various causes of religious terror, includes amongst them disorders of the mind, and says: "The melancholy man, who thinks himself in a state of damnation, without any reason or power to reason on the case, is as certainly on this point a madman as the poor wretch whose disorder has taken another turn and makes him believe himself to be a king or an emperor." In that opinion I concur, and such I take to have been the condition of Captain Nott; and although there is nothing irrational in the will itself, and there was no proof of any connection between the will and the particular manifestation of insanity, if it was the offspring of a mind diseased, it cannot be accepted as the will of a person of a sound and disposing mind. There was nothing in the subsequent history of Captain Nott's case to alter this view. Soon after his removal to Fort Pitt he became much worse; **[411]** his memory of recent events quite failed, he became subject to various delusions, and was not rational on any

subject. Towards the end of November there was some improvement, but he soon experienced a relapse, and on the 31st of December was removed to a private asylum at Henley-in-Arden, where he remained quite insane until the month of September, 1858, when he died.

The decree of the Court therefore is against the will, and the probate is refused.

Dr. Deane applied to the Court to make an order for the plaintiff's costs to be paid out of the estate.

*Sir C. Cresswell* declined to make the order.

Probate refused.

JEAN DE CHATELAIN AND CLARA DE CHATELAIN *v.* VICTOR DE PONTIGNY. April 16 and 27, 1859.—Married Woman.—Will.—Alleged Power.—Duty of Court of Probate under *Barnes* v. *Vincent* (5 Moore, P. C.).—B. died in 1857, leaving a testamentary paper in her own handwriting, and signed by her, dated July, 1832, by which she bequeathed her whole property, whatever it might be at her death, to her daughter. Under articles of a marriage-settlement the trustees held certain property in trust for B.'s separate use during coverture, and after her decease for such persons as B. should by her last will, by her signed and published in the presence of and attested by three witnesses, appoint. In July, 1832, B.'s husband was alive, but predeceased her. The testamentary paper contained no reference whatever to the power, and was not published or attested. In the pleadings the plaintiffs alleged that it was made in pursuance of a power, and the marriage articles giving some power were not disputed.—The Court held that *Barnes* v. *Vincent*, 5 Moore, P. C., was conclusive; that where a power is before it, and an averment that a testamentary paper was made in pursuance of a power, the Court is bound to grant probate, and thereby to leave it to the competent court of construction to decide whether the testamentary paper is a due execution of or operative under the power.

[S. C. 29 L. J. P. 147; 5 Jur. (N. S.) 579; 7 W. R. 497.]

This was a question on application for a grant of adminis-**[412]**-tration, with the will annexed, of the goods of Mary de Pontigny. The plaintiffs were the son-in-law and only daughter of the deceased, the defendant her only son. The alleged testamentary papers were found in a bureau of the deceased after her death, in August, 1857, and were in the following terms:—

"My Will. Having made mature reflections on the subject of disposing of my property, and considering that my son is in all probability amply provided for, and that my daughter stands the chance of receiving but little from any other source, I, Mary de Pontigny, have resolved to bequeath unto my daughter Clara de Pontigny the whole of my property, whatsoever be the amount that it may be at the time of my death. I entreat my dear children to believe that this is not dictated from any partiality, for I love them equally, but that it appears to me but justice, considering circumstances. This is my last will; no other will be found except an exact copy of this.

"Witness my hand, MARIE DE PONTIGNY,
"Norfolk Street Strand.

"2nd July, 1832."

This document was admitted to be in the handwriting of the deceased, and to be written on the day of which it bore date; it was also admitted that her husband was then alive. This was accompanied by a letter of the same date, addressed to her children, by which she desired that they should divide between them her books, drawings, prints, trinkets, etc., and left her son £20 to be laid out in any mourning ornament. It will be observed that these papers bore date before the present Wills Act came into operation. The other facts of the case were all admitted, and those pertinent to the question will be found sufficiently stated in the judgment.

On April 16 the case was argued by

Dr. Phillimore, Q.C., and Mr. T. Chitty, for the plaintiffs.

Dr. Deane, Q.C., and The Hon. G. Denman, for the defendant.

Cur. adv. vult.

April 27.—*Sir C. Cresswell*: The plaintiffs in this propounded **[413]** the will of Mary de Pontigny, bearing date July 2, 1832. The defendant pleaded that, at the time of the making of the will, Mary de Pontigny was a married woman, and that

the will was not made with the consent of her husband, nor in pursuance of any power of appointment. Plaintiffs replied that it was made in pursuance of a power; that a considerable portion of the personal property left by the testatrix consisted of savings out of her separate income; that the will was made with the consent of her husband. Clara de Chatelain and the defendant were the only children of the testatrix. The suit was an amicable one, and all the facts were admitted.

The material facts were, that the testatrix was the only child of John and Ann Livie. On her father's death intestate she became entitled to certain real property, subject to her mother's dower, and to certain personal property. In 1803 Mary Livie, then a minor, was about to contract a marriage with Victor de Pontigny, and articles were entered into, reciting, amongst others, the facts above mentioned, and that it had been agreed that all the property, real and personal, of Mary Livie should be conveyed to trustees upon trusts thereinafter declared; and Victor de Pontigny covenanted that, from and after the solemnization of the marriage, upon Mary Livie's attaining the age of twenty-one years, he would convey and settle the freehold property of Mary Livie, and any freehold property that she might thereafter become entitled to, and all her personal estate and all personal estate that she might thereafter become possessed of or entitled to during the said intended coverture, or which he, Victor de Pontigny, in her right should become possessed of, and all accumulations of such property, to the trustees named and their survivors, for her sole and separate use during coverture, and after her decease in trust for such person and persons and for such uses, etc., as the said Mary Livie, notwithstanding her said intended coverture, and whether she should be covert or sole, should by her last will and testament in writing, or any writing in the nature of or purporting to be her last will and testament, to be by her signed and published in the presence of and attested by three credible witnesses, should direct, limit, or appoint: and in default, etc. The marriage was solemnized, and in 1808 a settlement was made in pursuance of the articles. From the time of the marriage till 1819 Victor **[414]** de Pontigny and the testatrix lived together in London and had two children, Clara de Pontigny and the defendant; they then separated, and she left London and lived in Paris till 1828. In 1828 he went to live in France, and remained there till his death in 1845; in the same year (1828) his wife returned to England, and remained there, and from that time both her children lived with her. The annual income of Mary de Pontigny's separate property was about £120. From 1828 till 1835 her husband made her an annual allowance of £120, and a similar allowance was made by Ann Livie, her mother, who died in 1840, and by her will left the residue of her property, amounting to about £20,000, to trustees for her daughter for life, with remainder to her two children, Clara de Chatelain and the defendant, in equal shares. The plaintiff married in 1843, when a settlement was made, in which mention was made of a sum of £640, which Mary de Pontigny had lent out of accumulations or savings, etc. It was admitted that the said sum of £640, or a considerable portion of it, had been saved or accumulated by or to the said alleged testatrix out of the property settled by the deeds of 1803 and 1808 at the time of the making of the alleged will in 1832. At her death she was possessed of much more property, which she had saved out of the settled property and that which was bequeathed to her by her mother.

Victor de Pontigny, the father of the defendant, when living in France, made a will leaving all his property to his son. His power to do so was contested, and it was decided that he had power to dispose by will of one-third only, and that the other two-thirds must be equally divided between the two children. But it seems to me that this does not in any way affect the question to be determined by this Court.

Upon this state of facts it was contended for the plaintiffs that, inasmuch as the settlement conferred upon Mary de Pontigny a power to dispose of her property by will, notwithstanding coverture, if she made a will this Court must grant probate of it, without inquiring whether it duly executed the power or not; and the case of *Barnes* v. *Vincent* (5 Moore, P. C. 201), was relied on. It was admitted that the will cannot be sustained on the ground of its having been made by assent of the husband, inasmuch as he died before her; but it was argued that, even if not to be received on the ground **[415]** of the power, Mary de Pontigny had a right to dispose by will of her savings out of her separate income. On the other hand, it was admitted that the decision of the Judicial Committee in *Barnes* v. *Vincent* is binding on this Court where applicable; but it was suggested that probably the whole will was not set out in the

report of the case in 5 Moore, 203; for Lord Brougham, in his elaborate judgment, speaks of the will as professing or purporting to be made in execution of a power; whereas the will, as set out, contains no reference to it. Mr. Moore has been kind enough to furnish me with the printed papers that were before the Judicial Committee, and it appears that the will is correctly set out in 5 Moore, as might have been expected from the well-known accuracy of the reporter. It appears that in the allegation propounding the will, it was averred that the will was made in execution of a power; and I cannot but suppose that Lord Brougham's reference must have been to that fact, and not to anything supposed to appear on the face of the will.

The whole scope of the judgment appears to apply as well to prevent this Court from inquiring whether the will is in the form required by law for the execution of a power, as whether it has been executed with the formalities required by a power. At 5 Moore, 214, Lord Brougham says: "It is said a paper may purport on the face of it to be the will of a feme covert, and that such a party is intestable; therefore, unless a power is alleged, the probate must be refused. Then it is argued that the Court to whom such allegation is made has no choice, but must look to see the paper under which the will is alleged to have been made before it can decide whether that paper is testamentary or not. But there seems no insuperable objection to holding that, on a power being alleged, the probate should be granted, because that really decides nothing; it only saves the point for the Court which can competently deal with the question, and avoids the glaring inconvenience and inconsistency of such a decision as we have already described; a decision which is final, conclusive, and binding, if given one way, and only leaves another Court to determine conclusively if given the other way."

Another argument on behalf of the defendant was that in **[416]** *Barnes* v. *Vincent* the will was signed and sealed, which acts were consistent with an intention to execute the power, and might have been an attempt to do it.

But the decision that the Court of Probate has no authority to inquire whether the power has been duly executed or not is equally applicable where the supposed imperfection consists in the want of witnesses, as in the want of any other part of the formalities required by the power. It seems to me, therefore, that the case of *Barnes* v. *Vincent* is applicable, and that I am bound by it.

As to the power of the testatrix to dispose of the savings, it was contended that she had no power to dispose of her savings out of the allowance made to her by her husband during their separation, for which the case of *Messenger* v. *Clark*, 5 Ex. 388, was cited; but that has no application to savings out of separate property. It was then said that the accumulations were held subject to her disposal of them in pursuance of the power, and that having accepted authority to dispose of them by a will made in execution of the power, she could not do so otherwise, and not having made a will so as to dispose of the corpus, her will could not operate so as to dispose of the savings. But it is clear that the accumulations mentioned in the settlement and made subject to the power are those which were covenanted to be conveyed to the trustees, and which they were to hold subject to the trusts of the settlement, and not to the savings of Mary de Pontigny out of her separate income.

I think, therefore, that the argument for the plaintiffs is well founded, and that the will must be admitted to probate.

METTE *v.* METTE. April 27 and May 4, 1859.—Naturalized British Subject.—Will. Marriage abroad with deceased Wife's Sister.—No Revocation.—A., a native of Marburg, came to England in 1822, aged thirteen, and remained here till his death in 1856, having made occasional visits to Germany. In 1835 he was married in this country to B., a native of Frankfort-on-the-Maine; in 1836 he obtained letters of naturaliza-**[417]**-tion; in 1841 he made a will; in 1844 his wife died, leaving children, and in 1846 he married, at Frankfort, C., who was B.'s sister of the half-blood, and had children by her. On his death his brother took out letters of administration as the uncle and guardian of all the children, none of whom were of age, on the supposition that the will was revoked by the second marriage. The eldest son of the first marriage, on coming of age, called in the letters of administration and set up the will: Held, that the principle laid down in *Brook* v. *Brook*, as to the disability of a native-born English subject to contract such a marriage, applied equally to a naturalized subject; that though,

by the law of Frankfort, C.'s domicil, such a marriage would have been valid, yet the disability of either party to the contract would invalidate the marriage; that the letters of administration must be revoked, and the probate of the will granted.

[S. C. 28 L. J. P. 117; 7 W. R. 543. Explained, *Sottomayor* v. *De Barros*, 1879, 5 P. D. 105. See *Ogden* v. *Ogden*, [1908] P. 46; *Chetti* v. *Chetti*, [1909] P. 67.]

The question raised in this case was argued on act on petition and affidavit.

Bernhard Mette, the deceased in the cause, was a native of Marburg, in the electorate of Hesse Cassel. He came to England in 1822, at the age of thirteen, and from that time until his death in 1856 lived in England, and for many years carried on business as a tailor in Sackville Street, Piccadilly. Occasionally he paid short visits to Marburg, and to other places in Germany. In 1835 he was married at the parish church of Fulham to Anne Christina Schaefer, by whom he had five children, of whom the plaintiff is the eldest. In 1836 he was naturalized by Act of Parliament.

The Act of Naturalization, after reciting the petition of "Bernard Mette (called in the German language Bernhard Mette), enacts that he shall be and he is hereby from henceforth naturalized, and shall be adjudged and taken to all intents and purposes to be naturalized, and as a free-born subject to the said United Kingdom, and he is and shall be from henceforth adjudged, reputed, and taken to be in every condition, respect, and degree, free to all intent, purposes, and constructions, as if he had been born a natural subject within the said United Kingdom. And be it further enacted, that he the said Bernard Mette shall be and is hereby enabled and adjudged able, to all intents, purposes, and constructions whatsoever, to inherit and be inheritable and inherited, and to demand, challenge, ask, take, retain, **[418]** have, keep, and enjoy, all or any manors, lands, tenements, hereditaments, goods, chattels, debts, estates, and all other privileges and immunities, benefits and advantages, in law or in equity, belonging to the liege people and natural-born subjects of the said United Kingdom, and to make his resort or pedigree as heir to his ancestors, linear or collateral, by reason of any descent, remainder, reverter, right, title, conveyance, legacy, or bequest, whatsoever, which hath, may, or shall from henceforth descend, remain, revert, accrue, or grow due unto him: as also from henceforth to ask, take, have, retain, keep, and enjoy, all manors, lands, tenements, and hereditaments, which he may or shall have by way of purchase or gift of any person or persons whomsoever, and to prosecute, pursue, maintain, avow, justify, and defend, all and all manner of actions, suits, and causes, and all other things to do as lawfully, liberally, freely, and surely, as if he, the said Bernard Mette, had been born of parents being natural-born subjects of the said United Kingdom, may lawfully or in anywise do; and he, the said Bernard Mette, in all things and to all intents and purposes, shall be taken to be and shall be a natural liege subject to the said United Kingdom, any law, act, statute, provision, custom, ordinance, or other matter or thing whatsoever, had, made, done, promulgated, proclaimed, or provided, to the contrary thereof in anywise notwithstanding. And be it further enacted, that he, the said Bernard Mette, shall not hereby be enabled to be of the Privy Council, or a member of either House of Parliament, or to take any office or place of trust, either civil or military, or to have any grant of lands, tenements, or hereditaments, from the Crown to himself or any other person or persons in trust for him, anything herein contained to the contrary notwithstanding. And be it further enacted, that he, the said Bernard Mette, shall not hereby obtain, or be entitled to claim, within any foreign country, any of the immunities or indulgencies in trade which are or may be enjoying or claimed therein by natural-born subjects of the said United Kingdom, by virtue of any treaty or otherwise, unless he, the said Bernard Mette, shall have inhabited and resided within the said United Kingdom or the dominions thereunto belonging, for the space of seven **[419]** years subsequent to the first day of this present session of Parliament, and shall not have been absent out of the same for a longer space than two months for any one time during the said seven years, anything herein contained to the contrary notwithstanding."

In 1841 the deceased executed a will according to 1 Vict. c. 26, whereby he gave the whole of his property to his then wife and children. In 1844 his wife died. In 1846 he was married at Frankfort to his wife's sister by the half-blood, which marriage was valid by the law of Frankfort, as well as by the law of Hesse Cassel. After his marriage he returned to this country, and continued to reside and to carry on business here as before. By his second wife he had four children. In April, 1856, he died,

leaving both real and personal property. Soon after his death the defendant, Henry Anton Mette, with the assent of the plaintiff, who was then a minor, among others, treating the will as revoked by the second marriage, applied to Sir J. Dodson, the late Judge of the Prerogative Court of Canterbury, for letters of administration to the deceased, on a statement of the facts above set forth, and on the 7th of August, 1856, that learned Judge decreed that the deceased was dead intestate in law, and directed that letters of administration of his personal estate and effects should be granted to the defendant as the lawful uncle of all the children of the deceased by both his wives, for their use and benefit, and until one of them should attain the age of twenty-one years; the said Anna Maria Mette, the relict of the deceased, having renounced letters of administration, and consented thereto. These letters of administration, having ceased in 1857, by reason of the deceased's eldest child, Elizabeth Mette, having attained twenty-one years, further letters of administration were granted to the defendant as the lawful attorney, and at the instance and for the use and benefit of the said Elizabeth Mette. The plaintiff, being now of age, alleged that he was ignorant of his rights when he consented to the grant of letters of administration, and prayed that they might be recalled, and that probate of the will might be decreed.

Dr. Deane, Q.C., and Mr. W. Field, for the plaintiff.

**[420]** The grant of administration, relied upon by the defendant was originally invalid. And, if originally invalid, the plaintiff's assent to it, assuming it to have been given, would be no bar to his present suit. The grant was made on the assumption that the will of 1842 had been revoked by the second marriage of the deceased. But that marriage having been celebrated between parties within the prohibited degrees of affinity, was by 5 & 6 Wm. IV. c. 54, ipso facto void, and would therefore have no operation on the will. By *Brook* v. *Brook* (3 Sm. & Giff. 510), it is decided that this statute is a personal statute, binding on domiciled English subjects wherever they may contract a marriage, and without reference to what may be the lex loci contractûs. The circumstances of the present case, though in some respects different from those in *Brook* v. *Brook*, are not sufficient to take it out of the rule there laid down. (1) The deceased in this case, though not a natural-born subject, had at the date of his marriage acquired an English domicil, and had moreover been naturalized by Act of Parliament, whereby (with the exceptions mentioned in the Act of Naturalization) he was put in exactly the same state as if he had been born in the Queen's allegiance. (2 Stephens's Commentaries, p. 384.) "If an alien be naturalized by Act of Parliament, he is not accounted alienigena, but indigena." (Co. Litt. 8, a.) And again, "an alien naturalized to all intents and purposes is a natural-born subject." (Ibid. 129, a.) (2) The circumstance that the deceased's second wife was not an English subject, will not render valid the marriage, for the deceased himself was personally incapacitated from contracting it, and it is essential to the validity of a marriage, that both parties should be capable of entering into the contract. (*Conway* v. *Beasley*, 3 Hagg. 639.) Moreover, as England was, at the time of the marriage, the contemplated matrimonial domicil of both the parties, the capacity of the parties to contract it, must be determined by the law of England. (*Brook* v. *Brook*; *Robinson* v. *Bland*, 1 W. Black, 258; *Warrender* v. *Warrender*, 2 Cl. & Fin. 488.) (3) The marriage was incestuous, although the two wives of the deceased were only sisters by the half-blood. (*The Queen* v. *St. Giles*, 11 Q. B. 173; *Horner* v. *Horner*, 1 Consist. 352: Bac. Abr. tit. "Marriage" (A).)

**[421]** Dr. Addams, Q.C., for the defendant: The sole question he should raise was as to the effect of the Act of Naturalization. He submitted, that it only conferred on the deceased some of the privileges of a British subject, and did not make him a British subject to all intents and purposes whatever. The deceased's object in obtaining it was to enable him to hold lands. The second marriage being good, by the law of the domicil of the deceased and of his second wife, and by the lex loci contractûs, was in fact a valid marriage, for it was not in the power of the British legislature to bind an alien, though domiciled here and naturalized, when he was out of the realm. Primâ facie, the provisions of the statute must be taken to be confined to British subjects while resident in the realm. (*Jeffreys* v. *Boosey*, 4 H. L. Cas. 811.) This is not a proceeding inter vivos, and it may be a question whether the Court may not recognize the marriage for the purpose of revoking the will.

*Sir C. Cresswell*: Before 5 & 6 Wm. IV. c. 54, would this marriage have been impeachable inter vivos?

Dr. Addams: As the marriage was valid by the lex loci contractûs, the comitas gentium might have induced the Ecclesiastical Courts not to interfere. The case is not altogether one primæ impressionis. For Sir John Dodson had, after taking two months to consider, made the grant of administration now sought to be revoked.

Dr. Deane, Q.C., in reply, cited *The Queen* v. *Manning*, 2 Car. & K. 877.

May 4.—*Sir C. Cresswell*: This was an act on petition of Bernhard Mette, in which the question raised was touching the validity or invalidity of letters of administration which had been granted of the goods of Bernhard Mette, deceased. There were no facts really in dispute between the parties. It appeared by affidavits filed in support of the petition and answer, that deceased, a native of Marburg, in the electorate of Hesse Cassel, came to England in 1822, being then a minor of the age of thirteen, and from that time till his death **[422]** in April, 1856, lived in England, first as an apprentice, and afterwards carrying on business as a tailor in Sackville Street, Piccadilly, but occasionally paid short visits to Marburg and to other places in Germany. In 1836 he was naturalized by Act of Parliament. In 1835 he was married in the parish church at Fulham, according to the rites and ceremonies of the Church of England, to Anna Christina Schaefer, a native of Frankfort, and by her had five children. She died in June, 1844. In 1841 deceased made and duly executed a will, as required by stat. 1 Vict. c. 26. In 1846 he went to Frankfort, and was then married, according to the rites and ceremonies of the German Protestant Church established at Frankfort, to Emma Maria Schaefer, who had always lived there, a sister by the half-blood to his former wife. By the law of Frankfort, and also by the law of Hesse Cassel, that marriage was valid. Soon after the marriage he returned with his wife to his residence and place of business in England, and continued to reside and carry on business there as before, paying short visits to Germany. By the second wife he had four children. At the time of Bernhard Mette's death his son, the petitioner, was a minor. His uncle, Henry Anton Mette, with the assent of petitioner amongst others, took out letters of administration to the deceased, treating the will before mentioned as revoked by the second maariage. Bernhard Mette, the eldest son by the first marriage, being now of age, alleged that he was ignorant of his rights when he consented to the letters of administration, and prayed that they might be revoked and probate of the will decreed.

On the argument before me it was not disputed by the learned advocate for the administration that the deceased was, when the will was made, and when he contracted the second marriage, domiciled in this country, and so continued until his death; nor was it disputed that the result must be the same, whether the second marriage was with a sister of the former wife by the whole or the half-blood; nor that, if the administration were improperly granted, although by consent, it must now be revoked.

But it was said that the late very learned Judge of the Prerogative Court did not grant administration for a considerable time after the motion for it was made; and therefore, although **[423]** no opposition or argument against it was offered, nor any reasons assigned for the grant, it must be presumed that the subject was maturely considered by that learned person, and that he arrived at the conclusion that the will was revoked by the second marriage.

That question depends upon the applicability of the decision of Stuart, V.C., in *Brook* v. *Brook*, to this case, and the argument was very properly confined to that point. Assuming the law to be as laid down in that case, and in the absence of any appeal from it I think I am bound to do so, had the marriage now in question been solemnized between natural-born British subjects, it would have been void to all intents and purposes, and therefore could not have had the effect of revoking a former will by virtue of 1 Vict. c. 26, s. 18. No question of presumed intention can arise, for the 19th section enacted, that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances, nor indeed would any revocation be of any avail to the second wife and family, unless the marriage is considered valid.

The distinctions between the case of *Brook* v. *Brook* and the present are two: first, that Bernhard Mette was not a natural-born subject of the realm, although domiciled and naturalized by Act of Parliament; secondly, that the wife was a native of Frankfort, and, until her marriage, domiciled there. If Bernhard Mette was incapacitated from contracting such a marriage, this latter distinction cannot have any effect. There could be no valid contract unless each was competent to contract with the

other. The question rests upon the effect of domicil and naturalization. It was said in answer to the petition that Bernhard Mette became naturalized for the sole purpose of holding real property. But the Act 5 & 6 Wm. IV. c. 54, is general in its terms, enacting by sect. 2, "that all marriages which should thereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be absolutely null and void to all intents and purposes whatsoever." It is true that by the law of England a natural-born subject cannot put off his allegiance, but he may take upon himself the duty of allegiance to another State by becoming naturalized there, although he may **[424]** be embarrassed by the conflicting duties of a double allegiance. 1 Hale, P. C. 68. Wheaton, in his "Elements of International Law," 122, says, "The doctrine of publicists is, that whenever a child attains his majority according to the law of his domicil of origin, he becomes free to change his nationality, and to choose another domicil." Whether such a rule is recognised in Marburg or not is immaterial. If Bernhard Mette could not shake off the duty which he owed to his native country, he might renounce the privileges which he enjoyed. By residing and acquiring a domicil here, he made this his country by election as far as in him lay.

Whether he could, by renouncing his rights so acquired in England, and abandoning his English domicil, have regained his former position, so as to be free from the operation of the law, is a question that need not now be considered, for he remained domiciled in this country, and the marriage was with a view to subsequent residence in this country.

It appears to me, therefore, that at the time of the second marriage he, as a natural liege subject, owed obedience to the sect. 5 & 6 Wm. IV. c. 54, and could not contract a marriage in contravention of it. I regret much that I am not in possession of the reasons which induced Sir J. Dodson to grant administration; they might have enabled me to discover that my present opinion is erroneous. But in the absence of any such information, and of any authority or dictum shewing that a person naturalized and domiciled is not in this respect to be treated as a natural-born subject, I feel bound to hold that Bernhard Mette was bound by the stat. 5 & 6 Wm. IV. c. 54; that the marriage solemnized between him and the sister of his former wife was void, and that it had not the effect of revoking his will formerly made. The letters of administration must therefore be revoked, and probate of that will decreed. Costs out of the estate.

**[425]** MACLEAN AND MACLEAN *v.* DAWSON AND OTHERS (in the GOODS OF JOSEPH DAWSON, deceased). May 10 and 18, 1859.—Administration limited to substantiate Proceedings in Chancery.—15 & 16 Vict. c. 86, s. 44.—B. filed a bill in Chancery against C., D., and E., the trustees and executors under a Scotch probate and confirmation of the will of F., deceased, to set aside as fraudulent a purchase of certain shares in a Scotch company made by F. from B.'s wife, then a spinster, in 1839. When the bill was filed no part of the estate of F. was in England. To this bill a demurrer, on the ground that a legal personal representative of F. constituted by an English Court must necessarily be a party to the suit, was allowed and leave given to amend. B. then cited C., D., and E., to take probate or administration, etc., or to show cause why letters of administration limited as the Court might direct should not be granted to his nominee. C., D., and E. refused to take probate or administration, and contested B.'s right to letters of administration under any limitation whatever: Held, that the Court, in accordance with the practice of the Ecclesiastical Courts, will make such grants limited to substantiate proceedings in Chancery on a mere averment of interest, without in any way considering the merits of the case, and that the 15 & 16 Vict. c. 86, s. 44, does not apply to cases where the estate to be represented is the very estate to be administered in the suit.

[For proceedings in Chancery referred to, vide 4 De G. & J. 150.]

In this case a citation had issued on the affidavit of Henry Dundas Maclean, calling upon William Dawson, of Carron, near Falkirk, in Scotland, Henry Dawson, of Liverpool, in the county of Lancaster, and Thomas Dawson, now residing at or near Glasgow, in Scotland, as the trustees, executors, and residuary legatees of Joseph Dawson, late of Carron aforesaid, and a manager of the Carron Company, who died in January, 1850, to bring into the registry the last will and testament of the

deceased, or an authentic copy thereof, to accept or refuse probate thereof, and also letters of administration with the will annexed, or to show cause why letters of administration should not be granted to the nominee of Henry Dundas Maclean and his wife, limited to sustain proceedings in the High Court of Chancery, instituted by Colonel Maclean and his wife against the Dawsons and others with respect to the purchase by the deceased from Mrs. Maclean (then Eleanor Carlisle, spinster) of certain Carron Company shares **[426]**—a demurrer to such bill having been allowed by reason of there being no personal representative of the deceased constituted by the authority of an English Court.

To this citation an appearance was given on behalf of the executors of Joseph Dawson; they declined to take probate of the will in England; and prayed to be heard in act on petition in opposition to any grant of letters of administration being made to Colonel Maclean or his nominee.

The statement in act on petition on behalf of Col. Maclean was as follows:—That the deceased by his will, dated 8th January, 1848, gave to his brothers above named all lands and heritable securities, all his share of stocks in the Carron Company, capital stock of the Bank of England, and all his moveable and personal estate upon the trusts thereinafter mentioned, and appointed his brothers executors and residuary legatees; that such trust disposition or last will was duly proved in Scotland by the said executors; that the deceased died possessed, besides personal property in Scotland, of stock in the Bank of England standing in the joint names of himself and others for his behoof, but that his will had not been proved in England, and that there was no legal personal representative of the deceased acting under any authority of a Court of Probate in England. That in February, 1859, Henry Dundas Maclean and his wife filed a bill in the Court of Chancery of England against the Dawsons and others, praying that the transfer of certain Carron Company shares made by Mrs. Maclean before marriage to the deceased Joseph Dawson, and now transferred to the names of his executors, should be set aside as fraudulently obtained; that a demurrer to the bill had been allowed on the ground that a personal representative of the deceased acting under the authority of an English Court of Probate was a necessary party to such a suit, and leave given to the plaintiffs to amend their bill; that the citation, as above, had been issued, and that the Dawsons had refused to take probate, etc.

The answer on behalf of the Dawsons admitted their character as trustees, executors, and residuary legatees, stated that the whole of the estate of testator, except certain shares of stock of the Carron Company and certain real property belonging to him in Scotland, had been converted into money **[427]** by William and Thomas Dawson (a majority, and, by the law of Scotland, a quorum of the executors), who had from their boyhood resided, and continued to reside, in Scotland; that the trusts of the will, even as regarded legacies, were still unexecuted, owing to existing life-interests, etc.; admitted the purchase in 1839 by the testator, who had been a manager of the company, of ten Carron shares from Eleanor Carlisle, spinster; stated that in December, 1857, at the request of the agents of the plaintiffs, the books of the Carron Company kept at Carron were submitted to the investigation of such agents, who expressed themselves satisfied that the plaintiffs had no claim against the company; that in January, 1859, the agents for the plaintiffs gave notice to the agents for the company of their intention to proceed by summonses of reduction in the Scotch Courts to set aside the purchase of the shares made from the plaintiffs and others; that on the 8th February, 1859, without notice to the defendants, the plaintiffs filed their bill of complaint in the High Court of Chancery in England, praying, amongst other things, that it might be declared that the purchase of the said ten shares by the testator from Eleanor Maclean was obtained fraudulently by him, and that the same ought to be set aside, and that the defendants, or some one of them, might be ordered to transfer ten shares in the said company into the name of the plaintiff; that subsequently the agents of the company were informed by the agents for the plaintiffs that it was their intention, on behalf of several parties other than the plaintiffs, to proceed with summonses of reduction against the defendants in the Court of Session, for the purpose of setting aside other purchases of shares made by the testator; that suits were being duly prosecuted in the Court of Sessions in which the identical questions raised in the Court of Chancery might be raised and determined; that, in particular, one James Balfour had raised a summons of reduction,

count, reckoning, and payment against the defendants as trustees and executors, to set aside the sale of six shares made by him in 1839 to the testator; that the conclusions of the said summonses were founded upon allegations identical in substance with the allegations of the bill in Chancery; that the said James Balfour had attached in the hands of the Carron Company the seventy shares of stock be-**[428]**-longing to the said testator, and other funds and effects, to the amount of £20,000, belonging to the said trustees and executors in the hands of the company—the effect of such attachment being, that neither the defendants nor the company could in any way legally affect the said shares or other property; that the Court of Session is a court of law and equity, with power to issue summonses for documents and citations against persons in any part of the United Kingdom; that William and Thomas Dawson were resident in Scotland within the jurisdiction of the said Court; that Henry Dawson, though resident in England, was subject to the jurisdiction of the said Court of Session in respect of certain property belonging to him in Scotland; that since the filing of the said bill in Chancery, William and Thomas Dawson had raised, as they were entitled by the law of Scotland to do, a process of multiplepoinding and exoneration, in the names of the said trustees and executors, before the Court of Session (in fact, an administration and distribution suit), in which action they had made the plaintiffs, among others, defenders; that in January, 1852, seventy shares of stock standing in the books of the Carron Company in the testator's name were transferred, in certain proportions, to the names of the three defendants as individuals, but that they had no individual right to such shares or any part of them, unless it should appear in the administration of the estate under the process of multiplepoinding that there was a surplus after the payment of debts and legacies; that William and Thomas Dawson, as a majority of the trustees and executors, had raised a summons in the Court of Session against themselves as individuals and against Henry Dawson and the Carron Company, to compel the transfer of the said shares from themselves as individuals to the names of the said trustees and executors; that the total claims against the estate of the testator by the plaintiffs and others were in respect of seventy-five shares of the said Carron Company, and that, if all such claims were sustained, the trust estate of the testator would be insufficient to satisfy the same; that the Bank of England stock standing in the names of trustees for the testator's behalf had been sold by the trustees since his death, and the proceeds remitted by them to the defendants in Scotland, and there were no assets whatever of testator now in England; **[429]** that the bill in Chancery was demurred to by the defendant Henry Dawson, on the ground that there was no legal personal representative of the said testator in England; that he was only one of three Scotch executors, two being a quorum, and entitled to administer the estate irrespective of him; that the will had been proved in Scotland only; that there was no estate in England belonging to the testator; that neither William nor Thomas Dawson had appeared to the suit filed in the Court of Chancery; that by 15 & 16 Vict. c. 86, the Court of Chancery of England has power, if it shall appear in any suit or proceeding before the said Court, that any deceased person who was interested in the matter in question has no legal personal representative, either to proceed in the absence of any person representing the estate of such deceased person, or to appoint some person to represent such estate for all the purposes of the suit or other proceedings.

The reply of the plaintiffs stated that certain important books of the Carron Company were kept at the offices of the company in London and Liverpool; that they had not received full information with respect to the accounts and transactions of the company; that their claim in the Court of Chancery against the executors and residuary legatees of the deceased could not be decided by the proceedings in the Scotch Courts instituted on behalf of parties resident in Scotland; that the demurrer was allowed only on the ground of there being no legal personal representative of the deceased before the Court; that the Master of the Rolls did not consider it a case to which the 15 & 16 Vict. c. 83 applied; that the defendants William and Thomas Dawson had appeared conditionally in the suit in the Court of Chancery, and a motion made on their behalf to discharge the order under which process was served on them had been refused with costs.

On May 10th this case was argued by

Dr. Deane, Q.C., and Mr. Pearson, for the plaintiffs: They relied on the practice of the Prerogative Court of Canterbury to grant administration to substantiate pro-

ceedings in Chancery on the mere statement that the representation was necessary, without going into the question of degree of interest, which would, in fact, amount to the Court of Probate arro-**[430]**-gating to itself the functions of the Court of Chancery. They cited *In the goods of Chanter*, 1 Rob. 273; and *Davis* v. *Chanter*, 2 Phil. 545.

Dr. Phillimore, Q.C., and Mr. Cotton, for the defendants, argued, first, that the class of cases in which the Courts of Probate had been in the habit of making such grants were those in which the Court of Chancery would entertain a suit; but here the whole matter and the parties were fully before a foreign—viz. the Scotch—forum, and the English Court would decline to act; and, secondly, that the 15 & 16 Vict. c. 86, s. 44, gave the Vice-Chancellor power to proceed in the suit, if he thought fit, without the intervention of the Court of Probate.

May 18.—*Sir C. Cresswell*, after stating the substance of the petition, answers, etc., as above, gave the following Judgment:—Two objections were urged against the application: first, that in consequence of the legal proceedings instituted in Scotland, the suit commenced in the Court of Chancery was quite unnecessary, and that the Court therefore ought not to assist the parties in maintaining it; secondly, that if there were a proper case for such a grant as that prayed for, the Master of the Rolls would have named a party to represent the estate of the testator under the power given by 15 and 16 Vict. c. 8, s. 44.

I have looked at the shorthand-writer's notes of the judgment delivered by the Master of the Rolls, and he certainly does not intimate that this is not a case for the appointment of a representative, but that the prayer for relief was so framed that it could not be granted without administering the estate of the deceased; that a representative was therefore necessary, and that the case was not within the 15 & 16 Vict. c. 86, as pointed out by Kindersley, V.C., in *Silver* v. *Stein*, 1 Drew. 295, where that learned Judge says, "The 44th section of the Chancery Practice Amendment Act does not appear to me to apply to cases where the estate to be represented is the very estate which is being administered in the suit; but only to those cases where a certain individual who, when living, was interested in the suit and was made a party, has died; and then the Court may either appoint some person to represent that **[431]** "party, or may proceed without any representative." Neither Kindersley, V.C., nor the Master of the Rolls, has expressed an opinion that this is not a case in which this Court may with propriety constitute a legal personal representative of the deceased, and the objection comes with a peculiarly bad grace from the defendants, who have actually intermeddled with the property of the deceased in this country, and who ought to have taken probate before they did so.

The practice of the Prerogative Court, as appears from a variety of reported cases, was certainly to make such limited grants as that now asked for. In *Davis* v. *Chanter*, 2 Phil. 550, Lord Cottenham explained and vindicated this practice as follows (after reciting the form of the letters of administration in that case): "Of the construction and intent of this authority there can be no question. The grantee was to attend, supply, substantiate, and confirm the proceedings in the cause, and to obey and carry into execution the order and decrees of the Court relating thereto. He was, therefore, in all respects to represent the party of whose estate such letters of administration were granted.

"The only question must be, had the Ecclesiastical Court jurisdiction to grant such an administration? for, if it had, the propriety of its so doing cannot be disputed or discussed in this or in any other Court but a Court of Appeal. It would be the act and decree of a Court of competent jurisdiction, and therefore binding upon all other Courts until reversed. Is there any doubt as to the authority of the Ecclesiastical Court to grant such limited administration? Whatever questions may exist as to the origin of the authority of such Courts over the property of an intestate, it is quite clear that in the earliest times they had the sole right of administering it. The statute 31 Edw. III. c. 11, assumes it in providing that in case of intestacy the ordinary shall depute the nearest and most lawful friend of the deceased to administer his goods; and Blackstone says, that administrators are only officers of the ordinary. The authority vested in the ordinary is, for the purpose of administration, deputed to the administrators in the whole or in part, for, except when regulated by statute or custom, what is to prevent the holder of the unrestricted authority from dele-
**[432]**-gating the part to another? and it is the established practice Administration

is granted, during the absence or incapacity of an executor, until the will be received in England or until it be found, for the mere purpose of transferring funds into the name of the Accountant-General, to receive a particular sum, to assign a trust sum, for putting in an answer, or filing a bill in Chancery, or, which is the present case, of substantiating proceedings in Chancery (*Wooley* v. *Green*, 3 Phil. 215). That this Court will recognize and give effect to such limited administrations appears so clearly from principle that particular authorities could hardly be expected to be found," etc. By sect. 23 of 20 & 21 Vict. c. 77, it was enacted that "The Court of Probate shall be a Court of Record, and such Court shall have the same powers and its grants and orders shall have the same effect throughout all England, and in relation to the personal estate in all parts of England of deceased persons, as the Prerogative Court of the Archbishop of Canterbury and its grants and orders respectively now have in the province of Canterbury . . . and all duties which, by statute or otherwise, are imposed on or should be performed by ordinaries generally, or on or by the said Prerogative Court in respect of probates, administrations, etc., shall be performed by the Court of Probate." If, therefore, the power to make such a grant existed before, it exists now in this Court, and the practice of the Prerogative Court in this respect not having been altered by that statute, or by any rules and orders made in pursuance of it, must be followed according to sect. 29.

It was said by Mr. Cotton, in his ingenious argument, that if this application were granted, the party would, in truth, be made a party to administer the estates of the deceased. If such is its effect, and the defendants are thereby prejudiced, it is their own fault, and they may still protect themselves from any such consequences by now doing their duty and taking probate. With regard to the other answer given to the petition, viz. that the proceedings in Scotland render the suit in Chancery unnecessary, I must leave that point for the decision of the Master of the Rolls. If, in consequence of the Scotch proceedings, the suit in England is improper, his Ho-**[433]**-nour will assuredly deal it with as it deserves. But I should be assuming to deal with a matter out of my province if I refused to grant the prayer of this petition on the ground that the Master of the Rolls ought not to entertain the suit instituted before him. I think, therefore, that a grant must be made, limited in the usual manner.

CHARLTON v. HINDMARSH. May 18, 1859.—Will.—Attestation and Subscription of Witness.—1 Vict. c. 26, s. 9.—A. acknowledged his signature to duplicate wills in the presence of B., who thereupon attested and subscribed the will. A few hours after, C. being also present, B. suggested the propriety of a second witness; A. thereupon acknowledged the testamentary papers and his signatures in the presence of B. and C. B. pointed out his subscription to C., who wrote his own name; B. then on one of the papers completed, by crossing it, the letter F, being the initial letter of one of his Christian names, which cross he had omitted in the morning; he then on both the papers added the date, "the 17th day of December, 1857": Held, not to be a sufficient subscription in attestation of the will.

[S. C. 28 L. J. P. 132; 5 Jur. (N.S.) 581; 7 W. R. 725. Affirmed, 1861, 8 H. L. Cas. 160; 11 E. R. 388 (with note).]

This was a question of law reserved for the decision of the Court of Probate, arising out of facts ascertained on an issue tried before Byles, J., at the Durham spring assizes. The point was, whether there was a sufficient "attestation and subscription" by one of the attesting witnesses under the 9th section of the Wills Act. On the trial a verdict was taken for the defendant, with leave to move, etc.

April 19.—*Sir C. Cresswell*, on the motion of Mr. Atherton, Q.C., directed an order to issue against the defendant to shew cause why the verdict of the jury given for the defendant on the trial of the issues directed by this Court to be tried at the assizes for the county of Durham on the 1st March last should not be set aside, and the verdict entered for the plaintiff, on the ground that, on the evidence given at the trial, it appeared **[434]** that the alleged will of Joseph Hindmarsh, the deceased, in the cause, was not duly attested and subscribed according to the statute 1 Vict. c. 26.

Mr. Manisty, Q.C. (Mr. Heath with him), showed cause.

By the 9th section of the 1 Vict. c. 26, it is enacted "that no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other

person in his presence and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time, and such witnesses shall *attest* and shall *subscribe* the will in the presence of the testator, but no form of attestation shall be necessary." The question for the decision of the Court is whether Mr. Frederick William Napoleon Wilson, one of the attesting witnesses to the deceased's will, attested and subscribed it in accordance with the requirements of the 9th section of the Wills Act. On the morning of the 17th December, 1857, the deceased, in the presence of Mr. Wilson, acknowledged his signature to both parts of a will, which he proposed to execute in duplicate, and Mr. Wilson thereupon wrote at the bottom, "Witness to the above will and testament and signature. Frederick W. Napoleon Wilson." On the afternoon of the same day Dr. White, having called upon the deceased, Mr. Wilson suggested that he should execute the will in the presence of another witness. The deceased then acknowledged his signature to the duplicate wills in the presence of Dr. White and Mr. Wilson; Dr. White signed his name, and Mr. Wilson retouched his name by putting a cross on the F in "Frederick," and added the date. It is submitted that this is a good execution of the will under the above section. Here the two witnesses *attested* the will, as distinguished from *subscribing* it. (*Hudson* v. *Parker*, 1 Rob. 14.) Attesting means bearing witness to the fact which the person attesting has to witness. They also subscribed it. It will be said on the other side that Mr. Wilson did not subscribe it on the second occasion. But subscribing refers, not to the witness writing his own name, but to the **[435]** will. What is the meaning of the words "shall subscribe the will." They do not mean that the witnesses shall subscribe their names. If such had been the intention of the section, they would have been expressly directed to do so, as the attorney present at the execution of a warrant of attorney or cognovit by 1 & 2 Vict. c. 110, s. 9, is; the words of the section are that "he shall *subscribe his name* as a witness to the due execution thereof."

In the present case, the witnesses are merely required to do some act in the nature of subscribing upon the will; they must write upon the will. (*Roberts* v. *Phillips*, 4 Ellis & Blackburn, 450.) Where there is a bonâ fide act, and every intention to comply with the law, every presumption ought to be in favour of the validity of that act. Here there is no question of capacity; all we have to make out is, that the witness Wilson did some act upon the will, that is, in the character of an attesting witness. [*Sir C. Cresswell*: You must make out more than that.] If some one else had written Wilson's name, and if he then had put a cross at the end, that would have been enough. Is there any distinction between putting a cross on a letter, or putting it after the the letter? [*Sir C. Cresswell*: Does a man subscribe, by dotting an i or crossing a t?] Yes; he does an act upon his signature with the intention of perfecting it. [*Sir C. Cresswell*: That raises a question of fact, whether he did it with that intention.] He then adds a date, and does an act that can be pointed out as visible upon the document. The mark of a witness is sufficient, though another person writes his name. (*In the goods of Ashmore*, 3 Curt. 756.) If a witness puts a mark, though he can write, it is a good subscription. (*In the goods of Amiss*, 2 Rob. 116.) So also if he puts his initials. (*In the goods of Christian*, 2 Rob. 110.) [*Sir C. Cresswell*: *In the goods of Trevanion*, 2 Rob. 311, it was held that writing the word "Bristol," was not sufficient proof of attestation. You must face this difficulty; Is it enough to put a dot over an i, which makes that more plain, which was done before?] We say, that if anything had been done, to which the witness can refer, that is enough. [*Sir C. Cresswell*: He must do something which shall stand for his name.] Wilson says, "I thought it necessary to have the name complete. My object **[436]** "was to make the morning signature a complete signature." Thus we see that he did an act with the intention of perfecting his signature. It that is not enough, where are we to draw the line? Our case is distinct from that of *Playne* v. *Scriven*, 1 Rob. 770, where no act was done upon the face of the document. We refer also to *In the goods of Clark*, 2 Curt. 329, *In the goods of Byrd*, 3 Curt. 317; *Moore* v. *King*, 2 Notes of Cases, 45. These cases are distinct, since in them no mark was made on the paper.

Mr. Atherton, Q.C. (Dr. Spinks with him): We admit that initials or a mark resorted to with a given intention will effect a subscription. But whatever form a subscription may assume, it must be a subscription or writing in attestation; it must be made animo attestandi. It is obvious that Mr. Wilson did not cross the F in attestation, but with the intention of repairing the omission of the morning. The

acts of attestation and subscription must be done at the same time. Mr. Wilson made a subscription in attestation in the morning; in the afternoon he did something to make the subscription in attestation more strictly complete; but it still remained the subscription of the morning. The addition of the date is clearly insufficient as a subscription. He did not intend it to be a signature or subscription indicating the individual, but merely to show the date of the attestation. Cur. adv. vult.

May 18.—*Sir C. Cresswell*: The question raised in this case was, whether the will of Joseph Hindmarsh had been duly executed as required by the 1 Vict. 26. An issue as to that question was directed to be tried at the last assizes for the county of Durham, where it came on for trial before Mr. Justice Byles. The attesting witnesses were examined, and it did not appear that there was any fact in dispute; whereupon it was agreed that the legal effect of the evidence should be referred to this Court. The verdict was formally entered for the defendant, and the question was argued on a rule to enter it for the plaintiff.

The evidence was thus reported by the learned Judge:—"Mr. David White, physician, at Newcastle.—December, **[437]** 1857, attended Mr. Hindmarsh. First saw Mr. Wilson; conversed with him as to the state of the patient's health; mentioned to me that a will was written, and they were anxious I should witness it, which I agreed to do. I went immediately into his room. The documents (the two wills) were produced to me in the presence of the testator, brought by the housekeeper—Mr. Wilson in the testator's room with me, testator in his bed. I rather think I gave the papers into the testator's hands. I asked him if that was his signature. He asked to be allowed to put on his spectacles, and he examined them. He put them on, examined the signature, and said, most distinctly, 'This is my handwriting, and that is my will,' in the presence of Wilson and myself. I took the will from his hand, and, to the best of my recollection, signed it in that room. I signed both. I do not remember what occurred after that. I remember Mr. Wilson signing the date, because I requested him to do so; further than that I do not remember. I requested him to put the date.

"Cross-examined.—It is more an inference from the fact that I requested him to do so.

"Re-examined.—I mean that I requested him to put the date; but if I were called on to swear I saw him do it, I should not like to do so."

"Frederick William Napoleon Wilson, surgeon.—In December, 1857, attended Mr. Hindmarsh. I was asked by him to sign his will as a witness, and the will was brought out—both parts. He looked at it, and said that was his will. I wrote at the bottom, 'Witness to the above will and testament, and signature,' and then my name, 'Frederick W. Napoleon Wilson,' on both papers. In the afternoon, Dr. White came into the room; Dr. White examined the patient as to his health. The doctor and I then went into another room, where we had a consultation. I had suggested to Hindmarsh, before we left the room, that he had better have another witness. Dr. White took the will in his hands and went back to the room where Mr. Hindmarsh was. He asked Mr. Hindmarsh if that was his will. I was present. He said, 'Yes, that is my will, and this is my signature,' or something to that effect. At a small table at the head of **[438]** the bed, close to the bed, Dr. White signed his name. After he had signed them I took the papers and went across towards the window, where there was another table, and sat down in an armchair. Dr. White was there; and then, after some conversation about the date being added, I distinctly remember retouching my name by putting a cross on the 'F' on the paper which is uppermost, which is blue; and then I added the date in both wills; and then, I believe, the documents were both given to the housekeeper.

"Cross-examined.—I very often omit to put a cross at all, and where I find it has not been done I always put it. I had noticed the omission of the cross. I had always been in the habit of supplying the omission; this was merely in pursuance of my habit; I thought it better to do so; I did not know there were duplicates, I thought I had done so in both, but I distinctly remember doing it on the paper that was uppermost. I had not detected the omission in the second paper. I thought it was better to complete the name; I thought adding the date was equal to a repetition of the signature. I think I had no other intention; it was by the date I intended to repeat my signature; my sole object was to supply the omission, to make the name complete. I thought it necessary to have the name complete, to make the name com-

plete to the will. I was attesting the will, and I thought it necessary to have a complete signature. My object was to make my morning signature a complete signature.

"Affidavit of defendant and Dr. White referred to, in which it was deposed that witness acknowledged his signature already affixed there, and that Dr. White told him to write the date.

"'I acknowledged my signature to Dr. White by saying my name is there already; that affidavit was sent down ready; I was told, as well as Dr. White, that that affidavit was necessary to prove in the opinion of Dr. Spinks. I do not remember seeing Dr. Bousfield.'

"Mr. Atherton admits that he cannot dispute the fact that the cross was made at the time of the second attestation.

"Mr. Atherton.—An acknowledgment will not do, nor going over with a dry pen."

"Verdict for defendant.

"Plaintiff to have leave to move; the Court, at the sug-**[439]**-gestion and by agreement of both parties, to have power to draw an inference of fact, if it be necessary to confer any such power on the Court, and if the Court see fit to exercise it.

"J. BARNARD BYLES."

Now, the words of the statute 1 Vict. 26, s. 9, are that a will to be valid "shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

On showing cause against the rule, it was contended by Mr. Manisty and Mr. Heath, that the witnesses *attested* the will whether they subscribed it or not, for which they relied on *Hudson* v. *Parker*, 1 Rob. 14; but I doubt much whether, by anything then said by Dr. Lushington, he intended to express an opinion, that attestation could be independent of subscription, the decision there being only that subscription did not necessarily amount to attestation. But it is unnecessary to attempt to explain the precise meaning of the word *attest*, as used in this section; for the question here is, whether both the witnesses subscribed the will after it was acknowledged to them, being present at the same time. A distinction was pointed out between the language of the 1 Vict. c. 26, s. 9, and the stat. 1 Vict. 110, as to warrants of attorney, which requires that the attorney should subscribe his name as a witness, whereas the stat. 1 Vict. c. 26, s. 9, merely requires that the witnesses shall subscribe the will, not prescribing any particular subscription; and it was contended that any act done on the will would suffice as a subscription, although it might not satisfy the literal meaning of that word, for which *Roberts* v. *Phillips*, 4 E. & B. 450, was cited; but that decision related only to the place where the subscription was written, and not to what might deemed a subscription, for the witness had written his name at full length. Other authorities also were cited to show that the names of the attesting witnesses need not be written by them on the will. Thus, *In the goods of Anne Ashmore*, 3 Curt. 756, the attesting witnesses made **[440]** their marks; so also *In the goods of Robert Amiss*, 2 Rob. 116, they only made marks, although able to write, and in both these cases the attestation and subscription were held to be sufficient; and *In the goods of Christian*, 2 Rob. 110, the subscriptions by initials was held to be sufficient; and the cases of *The goods of Byrd*, 3 Curt. 117, and *Moore* v. *King*, 2 N. C., were said to be distinguishable, because in neither was any act done upon the will. That observation is not quite correct as to *The goods of Byrd*, for there the witnesses, after the testator signed, put seals against their names, which they had previously written. *Trevanion's case*, 2 Rob. 311, was also said to be distinguishable, because there the only thing done was adding the word Bristol at the end of the name of the witness. On the other hand it was not contended that the witness must subscribe his name: it was admitted that a subscription by initials, by a cross or a mark of any other shape, would suffice if placed there as a subscription animo attestandi. But it was argued that the evidence in this case showed conclusively that the witness Wilson did not put the mark across the letter F of his Christian name Frederick, for the purpose of making that mark stand for his subscription; he stated that he considered

the addition of the date would make it a new subscription. The date was to give effect to his attestation at that time by making the signature before written equivalent to a repetition of it; the mark across the F was not made for that purpose. And this I take to be the correct view of the case; but the addition of the date could have no greater effect than the addition of the word Bristol in the case of *The goods of Trevanion*, where Sir H. Jenner Fust, in my opinion correctly, held that it was no proof of an attestation to the signature of the testatrix, and that he could not hold it to be an attestation by a witness. And this is consistent with his decision in *The goods of Amiss*, 2 Rob. 116, where he held the marks of attesting witnesses to be sufficient, although they could write, for he there says, "from the affidavit it seems they were made by two of the attesting witnesses for their signatures as attesting the execution." In this case the mark made by Wilson was not made by him for his signature as attesting the execution; at the utmost, it would amount to nothing more than evidence that he adopted and meant to ac-**[441]**-knowledge the signature which he had affixed in the morning, which would not suffice (*Moore* v. *King*, 3 Curt. 243). It has been said in several cases that every presumption should be made in favour of a just will; but there is no ground in this case for presuming any other state of facts than that spoken to by the witnesses, and their evidence does not, in my opinion, prove a due execution of the will. The Court was pressed to consider that this strict construction of the statute will have the effect of setting aside a just and proper will. The will may deserve that character, but the duty of the Court is to endeavour to ascertain the true meaning of the words used by the Legislature, and to give effect to them, whatever may be the consequence. The statute was not made for particular cases, and if the provision now under consideration operates hardly in this instance, it may operate beneficially in a hundred others. For these reasons assigned, I think that the 9th section of the 1 Vict. c. 26, was not complied with, and that the verdict must be entered for the plaintiff. The rule will, therefore, be absolute.

*Note.*—This judgment has been appealed from.

CROOKENDEN v. FULLER.—November 4, 1859.—Will.—Residence Abroad.—Domicil of Origin.—Evidence.—Will in Execution of a Power.—Domicil for the purpose of Succession.—Burden of Proof.—Conversations and declarations, unless accompanying acts, are the lowest species of evidence of a change of domicil; they must not, however, be discarded, but must be duly weighed, together with the rest of the evidence.—For the purposes of succession, where there is an undoubted domicil of origin continued through many years, such domicil will be held to have been retained, unless there is evidence of an intention to abandon it, accompanied by acts sufficient to found the acquisition of a new domicil. The burden of proof is on the party who impugns the domicil of origin.—For the purposes of succession a person can have but one domicil.—Semble, by the law of France, a will made by a domiciled Frenchman during the most temporary residence in a foreign country, would be valid, if executed according to the law of that foreign country.

[S. C. 29 L. J. P. 1; 5 Jur. (N. S.) 1222; 1 L. T. 70; 8 W. R. 49. Approved, *In the goods of Hallyburton*, 1866, L. R. 1 P. & D. 90. Referred to, *In the goods of Huber*, [1896] P. 212; *Murphy* v. *Deichler*, [1909] A. C. 448; *In re Simpson*, [1916] 1 Ch. 506.]

**[442]** In this case the plaintiff had called in probate of the will of Mary Ann Crookenden, widow, deceased, which had been granted in common form, and the executors proceeded to prove it in solemn form. The question was chiefly one of domicil, and the facts are sufficiently stated in the judgment.

July 12 & 14.—Mr. K Macaulay, Q.C., Dr. Addams, Q.C., and Mr. Roupell, appeared for the plaintiff.

The Solicitor-General (Sir H. S. Keating), Mr. Douglas Brown, and Mr. G. Lake Russell, for the defendant. Cur. adv. vult.

November 4.—*Sir C. Cresswell*: In this case, probate of the will of Mary Ann Crookenden, widow, had been granted in common form. The plaintiff, the only son, and one of the next of kin of the testatrix, cited the defendant and William Chamier, since deceased, the executors named in the will, to bring in the probate and show cause why the will should not be declared void.

The executors brought in the probate and propounded the will, declaring that Mary Ann Crookenden, late of Croydon, in the county of Surrey, who died at Montfleury, near Cannes, in France, on January 3, 1858, did on the 4th of November, 1857, make her will, and signed it in the presence of three witnesses, who attested it, etc., and that she was at the time of perfectly sound mind.

The plaintiff pleaded, that at the time of making her will, and thence until her death, the testatrix was domiciled in France, and that the will was not made and executed in conformity with and in manner and form as required for the validity thereof by the laws of the empire of France then and still in force.

Francis Fuller suggested the death of his co-executor, and replied, first, that the testatrix was not domiciled in France, as alleged; secondly, that the will was made in conformity with the law of France; thirdly, that the will, except a certain portion, was made in pursuance of a power contained in the last will and testament of her deceased husband, of which the testatrix was sole executrix, and which was proved by her in the year 1842.

**[443]** The plaintiff joined issue on the first and second, and traversed the third replication.

The cause came on for trial before the Court, without a jury, on the 12th of July, and again on the 14th, when many witnesses were examined. It appeared in evidence, that the husband of the testatrix died in May, 1842, leaving his widow and four children, two sons and two daughters, him surviving. The daughters were married, one to William Chamier (who died after the commencement of this suit), the other to the Rev. George Lowe, incumbent of Upottery, in the county of Devon. The eldest son died in 1843; the other three children survived the testatrix, and she continued to live with them all on terms of great affection during the whole of her life. The testatrix and her husband, until his death, lived on his estate at Bushford, in Suffolk. That was sold in September, 1842, and she then removed to Woodthorpe, near Wakefield, where her son-in-law, W. Chamier, had taken a house. The testatrix, under her husband's will, took his plate and furniture, which she removed to the house at Woodthorpe, and lived there with Mr. and Mrs. Chamier till the spring of 1844. They all then left; the testatrix warehoused her furniture at Wakefield, and sent her plate to Child's bank in London, with whom she kept her only banking account during the remainder of her life, and the bankers held a power of attorney to receive all money accruing due to her. Her property consisted of £900 per annum from an estate in Barbadoes, £800 per annum, the interest of money in the funds, two shares in the Great Western Railway, money at her banker's, plate, and furniture. In 1844 she went abroad with Mr. and Mrs. Chamier, and spent the winter at Frankfort, and part of the next year at some German Baths, and from that time, in consequence of suffering from rheumatism, she always spent her winters abroad at various places, but in general came to England during the summer months. Thus in 1845 she came to England, and remained for some time at Upottery with her daughter, Mrs. Lowe, and she was there again for a considerable time in 1846. In 1845 an additional room was built for her accommodation in Mr. Lowe's house, the expense of which she paid, and that room and one for her maid were always set apart for her use when **[444]** there, and the principal part of the furniture in them was her own, but at other times they were occupied by Mr. Lowe's family. When the testatrix was at Upottery she contributed largely to the expense of the housekeeping. In 1846 her son, the plaintiff, returned from a visit which he had paid to the West Indies, and wished to settle in London as a physician, and the testatrix took the lease of a house in Eaton Square, which she gave up to him; the principal part of her furniture was brought from Wakefield and placed there. She never occupied that house, but when passing through London on various occasions, stayed there as the guest of her son. In the summer of 1847 she again came to England, and spent some time at Upottery; the winter of 1847-1848 she passed at Paris, and in the summer came to London to dispose of the lease of the house in Eaton Square. In 1850 she was in England from June till August; the whole of 1851 she spent at Changins, in Switzerland, at the residence of an intimate friend, the Countess St. George, with whom she spent two or three months of each subsequent year of her life till 1857, and the house of the countess she used to call her Swiss home. Part of 1852 she spent in England, at Upottery, and when there paid all household expenses except servants' wages. During this year she suffered very severely from rheumatism and sciatica. The whole of

1853 she remained on the Continent, and passed the winter of that year at Cannes, in company with the Countess St. George, occupying part of the house of a Mons. Girard. In 1854 she was in England from August to November—part of the time at Upottery—then returned to the Continent with Miss Anna Lowe, and spent the winter at Hyères, in lodgings. Her son, the plaintiff, was also at Hyères, at an inn. In 1855 she came to England with Miss Lowe, remained until November, and then returned to France, and went to reside at Montfleury, at Cannes. In the spring of 1855 the plaintiff had made a contract for the purchase of a property called Montfleury, on which there was a dwelling-house. He had seen the property in the winter of 1853, when his mother was at Cannes, and she admired it, but no contract was then made, as he thought the owner asked too high a price. In making this purchase, he was encouraged by his mother, who **[445]** wrote to him on the subject from Hyères on the 10th and 13th of April.

In the letter of the 10th of April, apparently alluding to some arrangement about the house, she says:—

"As things done cannot be undone, we must make the best of the old lady and her son. For the next year things must remain as they are, and no alterations, new furnishing, or building attempted whilst they are occupants of the house." Suggesting there was some desire to have this property secured, and that there was some difficulty about it:—"By the time they leave it is to be hoped the money will have come in from the West Indies. I wrote on Monday to Child's house, asking if they would advance me on loan £500, and taking my Candle shares as security. If, as I expect, they consent, my Exeter Bonds will enable me to make over the £1,000 at once, or as soon as you may require it; and I promise I will also hand you the second sum of £1,000, as soon as Robertson pays me, requiring no payment of interest; but at my death the capital to be repaid on that event to my executors. I can perfectly well do without a carriage or horses, and walking exercise is good for my health. It is because I have found lodgings particularly disagreeable in the south of France, that I had resolved to have a place to myself, and not to be where I am, almost poisoned by foul air." The rest of the letter I think is not material. The letter of the 13th of April is to this effect. After some congratulations, she says:—"I lost no time in writing to Child, and despatched my letter to them on the 9th, as I shall certainly have a letter in good time to draw on them for £1,000; but I shall hope to see you at Cannes before the time of payment becomes necessary. I will now tell you what are my intentions respecting you. I propose paying you £100 per annum, so long as I continue to occupy the upper part of your house, commencing, if you please, from the 1st of October next And if it will be a convenience to you to have 1,500 francs in advance, I will pay you that sum when I meet you at Cannes, but I would rather have nothing to do with monthly payments of rent," etc. The rest of that letter also, I think, is immaterial.

**[446]** The testatrix lent her son the two sums of £1,000, each mentioned in the letter of the 10th of April, and he gave a promissory note for them. The plaintiff and his wife settled at Montfleury in September, 1855, and the testatrix joined them in November, and occupied the upper part of the house, according to her proposal made in the letter of the 13th of April. The house, when purchased, was partially furnished, and the testatrix bought other articles to make it more complete. She kept a lady's-maid, butler, cook, and scullery-maid. Until February, 1856, she and her son's family took their meals together, but then ceased to do so. In the summer of 1856 she left for Switzerland, taking her lady's-maid with her, but leaving the other servants at Montfleury. Before leaving Montfleury she told her son that she intended bringing back friends with her, and that she should want more room, and arranged with him that she should have the whole house, except one room, and he, in consequence, made an addition to a cottage adjoining to accommodate his own family. During the spring of 1856 the testatrix said that the house was too small, and she had to go up and down stairs too much, and she proposed making additions to it, for which plans were prepared by an architect, but that intention was abandoned, as her friends advised her to build an independent house. Plans were prepared accordingly for a house on her son's property at Montfleury, all on one floor, as she thought that would be best adapted to her increasing years and infirmities. On the 30th of July, 1856, while staying with the Countess St. George at Changins, she addressed a letter to her son, which was given in evidence.

There seems to have been some misunderstanding as to an expression which had been used by her lady's-maid, as if he was guilty of some unreasonable delay in building the house. She says, "I am quite sure you have done all in your power to accelerate the works at Montfleury, but the unfortunate want of water must have retarded them, it cannot be helped. What the unfortunate 'elderly lady's-maid' meant was, that we should never live to occupy the new house; to which observation I replied, 'You give me then but a short time to live; pray speak for yourself.' Only it had no reference to building the **[447]** house, etc. etc. And now for more important matters in which I trust no mistake can arise. Finding that there existed no probability of getting money from old Robertson, and considering it very desirable that Bréquèt should receive his second large instalment, I have sold out my Candle shares, to have it in my power to place £1,000 at your disposal. This sum will so far diminish your debt to Bréquèt as not to deprive you of all your small income, which appeared to be the case with your last payment. You need not send me any acknowledgment for this loan, it will be time enough when we meet." I do not think there is anything else material. It appears that she had been writing before about the new house which was in progress.

The winter of 1856-1857 she passed at Montfleury, occupying, with her friends, the whole of the house, with the exception before mentioned, the plaintiff and his wife occupying the excepted room and the adjoining cottage. In February, 1857, an agreement was entered into between the testatrix and her son, with regard to the new house which had been commenced on part of the estate purchased by him, and was then four or five feet above the ground. By this agreement it appeared that she was to find money for the building; that as to 25,000 francs he was to render no account, but for any further sums required he was to give notes payable, without interest, to her representatives after her death. The house had not been finished at the time of her death, and after that time, nothing further was done to it.

In May, 1857, she received at Montfleury a letter from Mr. Randall, a solicitor in London, whose firm had for many years been her legal advisers.

"May 29, 1857.

"Dear Madam,—You will recollect that in the month of October, 1854, you made your will in the English form. There has recently been a decision of the Privy Council that English persons domiciled (as it is said) abroad, that is, permanently settled abroad without the intention of returning to England, must make their wills according to the laws of the country where they happened to be domiciled, so far as personal estate is concerned, and not according to the laws of England. The time **[448]** of the domicil at the death of the party is the test to be applied to the validity of the will, and not the period when the will was made, and the property being in England makes no difference. This decision has caused a good deal of well-founded concern in the minds of English persons residing abroad.

"I should therefore be much obliged to you to inform me whether you intend to reside permanently abroad, or whether you have any intention of returning to England.

"With reference to your will, I also take the opportunity of inquiring whether you intend it to operate as a power of appointment over the property secured to you by your late husband's will; as, if so, it may be desirable, in consequence of some recent decision of the Courts, to make it refer more specifically to the power of disposal given to you thereby. If not, it will do as it is, supposing you have enough property to answer the legacies given. The power in Mr. Crookenden's will does not enable you to leave the property in which you have a life-interest to others than your children and grandchildren, etc. etc. I remain, etc.,

"Jn°. Randall."

To which she replied:—

"Montfleury, près Cannes, Var.

"Dear Sir,—I am in receipt of your favour of the 29th ult., and learn by it that the late decision of the Privy Council respecting the wills of English persons resident on the Continent must be conformable to the laws of the country in which they reside, the absurdity of which is apparent to the meanest capacity. A will therefore made by a person resident in China must, by the same rule, be amenable to the Chinese laws, or in any other remote part of the earth. I think it would be advisable to have an

interview with you on the subject. My visits to England would probably be annual, as long as health and strength is granted me, but I suppose I must be considered as living in France, spending seven or eight months yearly in that country. Hoping, therefore, to see you as soon as I can make arrangements for leaving this place, which I hope may be early in the next month, and of which I will give you early notice, believe, etc. etc.,

"MARY ANN CROOKENDEN."

**[449]** The testatrix came to England on the 2nd July, and during her stay there in the month of October, Mr. Randall, by her direction, caused a new will to be prepared, which she duly executed, so as to satisfy the statute 1 Vict. c. 26, at the house of her brother, Colonel Fuller, at Croydon, in whose custody it was left, with other papers, amongst which was the promissory note for £2,000. Amongst her papers, after her death, a codicil was found in her own handwriting, signed by her, purporting to be attested by two witnesses.

That codicil is of some importance. It bears date the 26th of October, 1855, and is in effect as follows:—

"I declare this to be a codicil to my last will and testament. I desire that my executors will not claim the arrears of income due to me at the period of my decease, from the West India estates, beyond such a sum as may be necessary to pay the legacies which I may leave. As I have given no directions respecting my funeral in the will I executed on the 24th of October, 1854, I desire now to express my wish to be buried at Upottery, in the same vault, or as near as may be, to my dear son Edward, and every unnecessary expense should be avoided, incurring only those which are consistent with respectability. If a hearse and mourning-coach is necessary, I desire that only one coach should be used; the plainest head-stone, with my name and age, to be put up. In lieu of any tablet to my memory, I desire that an obituary-window should be put up in the west window of Upottery Church, the value of which must not exceed £50," etc. etc. Then she provides for giving certain sums to the members of the Fuller family, and a necklace and other small gifts to different persons. The existence of this codicil was not known until after her death.

When the new will was executed, she destroyed the former will made in 1854. The testatrix, when in England, spent some time, about two months, at Upottery with her daughter, Mrs. Lowe, and expressed a hope that she should be able to come and pay her a longer visit in the next year. She returned to Cannes in November, and died there, January 3rd, 1858. In the summer of 1857 some considerable repairs were done to the house at Montfleury by the **[450]** directions of the testatrix, and were paid for by her executors. During the same summer she caused some of her furniture to be brought from England, and at Montfleury expressed satisfaction at having old favourite things about her. Such were the principal acts done, according to the evidence before me, from which an inference may be drawn as to the domicil of the testatrix.

But, in addition to them, each party gave evidence of conversations and declarations, which, unless accompanying acts, have, I think, been properly described as the lowest species of evidence. They must not however be discarded, but duly weighed, together with the rest of the evidence adduced.

In support of the allegation that her domicil was French, it was proved that in the summer of 1856, when at the house of her friend the Countess St. George at Changins, when speaking of building a new house at Montfleury, she said, "You know I have no home in England;" that to Mrs Crookenden, wife of the plaintiff, she always spoke of Montfleury as her home from her first going there, and as the place where she meant to live all her life. To Mr. Dimes, a gentleman living at Cannes, she said, early in 1857, that she should be glad when the new house was finished, for then she should have a comfortable home of her own; and when about to depart for England, she said she must go there on business, and would then arrange to have her furniture sent over, as English furniture was better than French, and having her old furniture about her would revive agreeable recollections; that when her house was finished she should have room to receive her friends, and that would prevent the necessity of taking long journeys, which she found fatiguing. Another witness, Eliza Williams, stated that she travelled with her to Cannes in October, 1855; that on one occasion afterwards, when going to Nice, she said she was glad that it was arranged for her son and herself to settle at Cannes, for it suited her better than Nice, and she was

glad he had not resolved to settle at Nice; and that she wished to be near him the remainder of her days. Mary Ann Patteson proved that she accompanied the testatrix from England to Cannes in the autumn of 1857, and she was taken very ill on the journey. During the journey she said she hoped always to live at **[451]** Cannes, and said the witness was under a mistake in supposing that she could not live at Cannes as comfortably as in England, and that she intended doing so. Ellen Coleridge proved that when the testatrix was on a visit to her daughter, Mrs. Lowe, at Upottery in 1857, she spoke of the house she was building at Cannes; the witness expressed surprise that she should build at her age; to which she replied, "Oh people always do so abroad, it is so difficult to get houses." The plaintiff deposed that in 1856, in a conversation at Cannes with his mother and others about the mode of disposing of the bodies of the dead, he expressed himself in favour of burning. She observed, "Don't have me burned; I should prefer lying on the hill;" alluding, as he supposed, to a cemetery there. Augustin Borniol, British Vice-consul at Cannes, stated that he became acquainted with testatrix in 1851; that in January, 1856, she told him she had participated in the purchase of Montfleury with the intention of fixing her residence there till the end of her days; that after the decision of the case of *Bremer* v. *Freeman*, she expressed much anxiety about her will, and asked his advice upon the subject, saying that she must be considered as domiciled in France; whereupon he advised her to make one that would be legal both in France and England, and explained how it might be done.

On the other hand, Emilia Fuller (wife of the defendant) proved that the testatrix for many years suffered from rheumatism and sciatica; that she often said that the climate of England was so cold during the winter that she was compelled at that season to reside in the south of France; that when in England in 1857 the testatrix said that one of her reasons for coming to England was to make a new will, for some fresh case made her fear that her property would not be distributed according to English law; that she was very fond of the climate of the south of France, but was also very fond of Upottery, and of being there with her grandchildren, and wished she could reside there with safety to her health. Charlotte Fuller, daughter of defendant, proved that she had frequently accompanied the testatrix abroad for the winter since 1843; that she always spoke of her preference for England over France, and regretted that **[452]** she could not live there; that she went to Cannes in the autumn of 1856, and remained with testatrix till June, 1857; that at Montfleury there had been conversations about the decision of the Privy Council in *Bremer* v. *Freeman*, and in June testatrix said she should go to England and make a new will. In the winter of 1856–1857, testatrix told the witness that she had only taken such things abroad as she wished to leave there, and that the more valuable part of her property remained in England. She mentioned having furniture at the rectory at Chelsea and Upottery, and plate at her banker's, and said that she had taken a very small portion abroad, but took plated articles instead, and sometimes borrowed of her son. The Rev. George Lowe, her son-in-law, stated that when the testatrix was with him in 1855, at Upottery, she expressed a wish to spend the winter at the vicarage, but thought it impossible, on account of her health. She also said that she much wished to be buried in Upottery churchyard, where her son had been buried, and that she would leave directions that it should be done. She pointed out a place where she wished a vault to be made, and her son's body to be removed to it. In July, 1857, when again at Upottery, she said she understood from Mr. Randall that it was necessary to come to England to make her will, so as to meet the French law; that she could not understand what they meant by saying she was domiciled in France; that she was not so, that she merely went abroad on account of her health, and that, according to that law, a person travelling would have to make a will according to the law of the country where he happened to be at the time. When about to leave Upottery for Chelsea in September, 1857, she said that she hoped certainly to return in June, 1858, and observed that the house wanted the outlay of a good deal of money, and added, "We will do that when I return next year." The Rev. Thomas Drosier, who had frequently in former years seen the testatrix at Upottery, met her there in 1857, when she told him she was going to London to consult Mr. Randall about her will, and that if there was any danger of her property being disposed of according to French law, she would never set her foot in France again. Ellen Reeves, who had been governess in the family of testatrix, **[453]** and on intimate terms with her for many years, stated that

she passed several winters with her on the Continent, and in 1856 accompanied her to Cannes, and remained there till May, 1857. During the winter she spoke of the pleasure of being with relations, and said that, as her health improved, she hoped she might be able to try a winter in England. She often spoke of admiring Upottery, and of the pleasure it gave her to be there with her son and his family, and said that if she could choose her residence she should live there entirely. The witness saw her at Croydon in October, 1857, when she said she was obliged to go to a milder climate in consequence of her rheumatic complaints. Fanny Lydiard, a connection of Mrs. Kingsley, the wife of the rector of Chelsea, stated that the testatrix came on a visit to the rectory about October, 1857; that Mrs. Kingsley was absent, and witness had to entertain her; that they conversed intimately about her affairs; that she accompanied her several times to Mr. Randall's, but was not present at their interviews. She told witness that she had been very unhappy about the new law, and was going to alter her will in consequence, before she returned to Cannes for the winter, and added that she would never forsake her country.

Upon the second issue, viz., whether the will of the testatrix was made in conformity with the laws of the empire of France, one witness only was examined, the Chevalier François de Rosay, who had for many years practised as an advocate in Paris. He stated that if a Frenchman, born in France, and who had lived there all his life, were to go to London for a day and there make a will good according to English law, that will would, by French law, be good; and that the same rule would apply to the case of an Englishman born, who had forsaken his domicil of origin, and become domiciled in France. In support of his opinion so expressed the witness referred to Dalloz, Rep. 1843, 1st pt. p. 208, from which he read the following passage:—"In order that a will made by a Frenchman in a foreign country be reputed as made by authentic act, it is sufficient that the formalities used in that country have been observed, though no public officer have been employed, if the intervention of a public officer is not required by the law of that foreign country." And he referred also to the **[454]** report of a case where it had been so held by the Court at Rouen, and the decision affirmed on appeal; and this agrees with the opinion said to have been given by Senard (an advocate of the Cour d'Appel in Paris) in the case of *Bremer* v. *Freeman*, 10 Moore, P. C. 324.

Upon this state of facts three points were urged for the defendant in support of his claim to probate: first, that the testatrix never abandoned her domicil of origin, and was, therefore, at the time of her death at Cannes domiciled in England, and consequently her will made in conformity with the statute 1 Vict. c. 26 was valid; secondly, that according to the evidence of François de Rosay, which was wholly uncontradicted, even assuming the testatrix to have become domiciled in France the will was nevertheless good; and thirdly, that as far as it was an execution of a power given by the will of her deceased husband, the rule that the will must be according to the law of the domicil did not apply, for the rule was founded on the maxim mobilia sequuntur personam, which could not be applicable to an instrument which merely executed a power over certain property given by another person.

It seemed to me at the time that this third point could not be sustained, for that I could only grant probate of that which is a will, and if a will, it must be a will duly executed, and I can only recognize that as a will duly executed which is in conformity with the law of the domicil; and to this opinion I adhere.[1]

In dealing with the first point raised, namely, that the domicil of the testatrix was English, I have only to consider domicil for the purpose of succession. I do not pro-
**[455]** pose to try the question by a reference to any of the definitions of domicil given

[1] In a subsequent case brought before the Court on motion, "In the goods of S. E. Alexander, deceased," Sir C. Cresswell stated that he had ascertained that the opinion above expressed was erroneous, being contrary to that given by the Judicial Committee of the Privy Council in *Tatnall* v. *Hankey*, 2 Moore, P. C. 342. The point is mentioned in the marginal note to Mr. Moore's report of that case, but that is not supported by the judgment as published by him. The opinion of the Judicial Committee was reported to the Crown in these words:—"That the validity of the will of the said H. D., deceased, so far as regards the *appointment* of the residue of the personal estate of the said C. B., deceased, does not depend upon the law of the domicil of the said H. D., at the time of her decease."

by foreign jurists. The very learned and elaborate judgment of Kindersley, V.C., in the case of *Lord* v. *Colvin*, 28 L. J. 361, shows that none of them would be safe guides in this case; and, indeed, they are all disposed of in a very summary manner by Lord Cranworth in *Wicker* v. *Hume*, ib. 396, H. of L. The principles upon which the case depends are clearly stated in the judgment of the Master of the Rolls in *Somerville* v. *Somerville*, 5 Ves. 786: first, that a man can have only one domicil for the purpose of succession; secondly, that the original domicil, or, as it is called, the forum originis, or the domicil of origin, is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil and taking another as his sole domicil; and this rule has been reaffirmed in several modern cases. (*Munro* v. *Munro*, 7 Cl. & F. 842; *Collier* v. *Rivaz*, 2 Curt. 855; and *Hodgson* v. *De Beauschesne*, P. C. December, 1858; 33 L. T. Rep. 36.)

Now in this case there is no doubt that the domicil of origin of testatrix was English, and, according to *Somerville* v. *Somerville*, that must prevail, unless she acquired another, and also manifested and carried into execution an intention to abandon her former domicil. Upon this subject, and upon the nature of the evidence necessary to establish such a case, I think the language of Kindersley, V.C., in *Lord* v. *Colvin*, is well worthy of attention: "In truth, to hold that a man has acquired a domicil in a foreign country is a most serious matter, involving, as it does, the consequence that the validity or invalidity of his testamentary acts, and the disposition of his personal property, are to be governed by the laws of that foreign country. No doubt the evidence may be so strong and conclusive as to render such conclusion unavoidable; but the consequences of such a decision may be, and generally are, so serious and injurious to the welfare of families that it can only be justified by the clearest and most conclusive evidence."

Let us see, then, what evidence there is of the acquisition of a new domicil, or, as Lord Cranworth describes it, "permanent home," by the testatrix. From 1844 till her death **[456]** she had no home in England, and in consequence of rheumatic affections, she always passed the winter abroad, in general returning to England for the summer months, which she spent with different friends, but sometimes she remained abroad throughout the year. From 1844 to 1853 she had no residence abroad which could in any sense be considered as fixed or permanent, and there was no evidence whatever of the acquisition of a foreign domicil. In 1855 she encouraged her son to purchase the property of Montfleury, at Cannes, and assisted him to do so by a loan of £2,000. This was relied on by the plaintiffs as evidence of an intention to fix her residence permanently there, and to relinquish her English domicil; but her letters of the 10th and 13th of April, 1855, furnish arguments to each side. Thus, in the letter of the 10th, she speaks of the arrangements as to alterations, furnishing, etc., to be done at Montfleury, as if it was the concern of both; and further on: "It is because I have found lodgings so particularly disagreeable in the south of France, that I had resolved to have a place to myself, and not to be where I am almost poisoned by foul air;" from which it may be inferred that she intended to establish herself permanently at Montfleury. But, on the other hand, that property was not purchased by her, but by her son, and was conveyed to him. She lent him £2,000 to help him to pay for it; but that was to be repaid by him to her executors, and he gave her a promissory note for it; and with regard to her resolution to have a place to herself, it may well be that she meant it, not as a permanent residence throughout the year, but in substitution for the lodgings which she had been in the habit of taking at various places for the winter months. Again, in the letter of the 13th of April she speaks of the arrangements as to having possession of Montfleury as his business; and then proceeds to state what are her intentions towards him: "I propose paying you £100 per annum as long as I continue to occupy the upper part of *your* house, commencing, if *you* please, from the 1st of October next." She offers to pay a sum in advance, but adds: "I would rather have nothing to do with monthly payments of rent, etc.;" and this was relied on for the defendant as shewing that the testatrix did not mean to make any permanent arrangement, but only to pay as long as she continued at Cannes, contemplating the pro-**[457]**-bability of ceasing to occupy the apartments agreed for. The meaning of these passages in her letters may be doubtful. She may have meant to say that she intended to reside altogether at Montfleury, or that she should always resort there in the winter, instead of passing it sometimes at one place and sometimes at another, as theretofore. But upon the other

branch of the question, viz. whether the testatrix had manifested and carried into execution an intention of abandoning her former domicil and taking Cannes as her sole domicil, the codicil produced is very material evidence. The place where it was made was not proved, but it bears date the 26th of October, 1855, and was therefore probably made just before she commenced her journey to Montfleury to take up her abode there, and tends strongly to shew that she did not, by concurring in that purchase and making arrangements to occupy a part of the château, intend to abandon her domicil of origin; and this codicil is in exact conformity with the conversation spoken to by Mr. Lowe as to her desire to be buried at Upottery, and, by proving his correctness in that particular, tends to confirm his evidence as to her statement that she much wished to pass the winter at Upottery, but could not on account of her health. It is to be remarked that she does not appear at any time to have relinquished her wish to be buried at Upottery, for when the will now in question was made the will of 1854 was destroyed, but this codicil was preserved and found amongst her papers after her death. On the other hand, her son, the plaintiff, spoke of a conversation he had with her in 1856, at Cannes, as expressing a desire to be buried in the cemetery at that place; but it seems to me that very little reliance can be placed upon it. In a casual conversation respecting the various modes of disposing of dead bodies which had been adopted by different nations, Dr. Crookenden expressed an opinion in favour of burning, upon which she said, "Don't have me burnt; I should prefer lying on the hill," where the cemetery was situate. From such an expression, used under such circumstances, I should infer nothing more than that she had rather her corpse should be buried than burnt. Upon this evidence I am of opinion that the plaintiff has failed to establish that, when the testatrix took up her abode at Montfleury in November, 1855, she had either ac-**[458]**-quired a French domicil, or manifested an intention of abandoning her domicil of origin.

Having spent the winter of 1855-56 at Cannes, she left as usual early in summer, and went to Switzerland, and as she wished to have friends with her during the next winter, she arranged with her son for the occupation of the whole of the château, with some rather trifling exception, and several friends spent the winter with her there. During the preceding winter testatrix complained that the accommodation in the château was not sufficient, and that she had to go up and down stairs more than suited her. At one time alterations and additions were proposed, but afterwards she arranged for the construction of a new house all on one floor, on her son's property at Montfleury, and on the 14th of February, 1857, the agreement already stated was made between them. The house had been commenced and was in progress when she received Mr. Randall's letter of the 29th of May. The next point to be ascertained is, whether between the time of her leaving Montfleury for Switzerland in 1856 and the receipt of that letter, she had done anything to change her domicil. The arrangement for occupying nearly the whole of the château, and having her friends during the winter, is in my judgment quite insufficient for that purpose. The agreement with her son to build another house for her use, and to pay a large sum towards it, is certainly evidence of an intention to settle there permanently; but it may have been merely with a view to passing her winters there, and at all events rather refers to some purpose to be executed in future than any present determination to remain there and relinquish all connection with England. Her conversation with Mr. Dimes has that aspect. Mons. Borniol, indeed, said that when the case of *Bremer* v. *Freeman* and the effect which the decision might have upon her will was discussed, she said she must be considered as domiciled in France. But it is difficult to discover what she then meant by the term domiciled. In her answer to Mr. Randall's letter, she uses the word "reside," and in answer to his inquiry whether she meant to reside permanently abroad, she says, "My visits to England will probably be annual as long as health and strength is granted to me; but I suppose I must be considered as living in France, spend-**[459]**-ing seven or eight months yearly in that country;" and probably she meant the same thing by her expression to Mons. Borniol. But had she in this manner and to this extent resided in France, intending to abandon her former domicil and take another (viz. at Montfleury) as her sole domicil? Considering her act in coming to England, and making a will there for the express purpose of preventing the distribution of her property according to French law, although she had been told that her will must be made according to the law of her domicil, her conversation with her son-in-law, Mr. Lowe, when she said, "She could not understand what they

meant by saying she was domiciled abroad, that she was not so, but merely went abroad on account of her health;" her declaration to Mr. Drosier that if there was any danger of her property being disposed of according to French law she would never set her foot in France again; her declaration to Miss Lydiard, who accompanied her to Mr. Randall's office, that she should never forsake her country; I cannot come to the conclusion that she had then abandoned her domicil of origin, or so fixed her residence in France as to render the loss of that domicil a necessary consequence. These declarations were followed by the execution of a will, in which she described herself as of Croydon, late of Camden-town, never mentioning France; and it is impossible to suppose that, if she had not already changed her domicil, she then intended to do so; and her conversation with Ellen Coleridge in August, 1857, and with Mary Ann Patteson during and at the end of her journey back to Cannes, when she expressed her thankfulness at being at home, must be construed with reference to such a home and such a residence there as would be compatible with her retention of her English domicil. The burden of proof of this issue is on the plaintiff, and although he has adduced a good deal of evidence tending to establish the affirmative, that has been met by evidence of such a nature tending to a contrary conclusion that I feel it impossible to say that the testatrix ever animo et facto abandoned her English domicil and acquired another in France.

Upon the first point, therefore, my opinion is, in favour of the defendant.

Upon the second question, viz. whether the will in question **[460]** was made in conformity with the laws of France, the evidence was all on one side. I am bound to deal with the law of France as a question of fact to be ascertained as any other fact in dispute. Now, the Chevalier de Rosay, an experienced French advocate, deposed that, according to the law of France, the will is good, assuming the testatrix to have been domiciled in that country. No conflicting evidence was given, and if the matter had rested there, I should have been bound to act upon the evidence so given. But the Chevalier confirmed his opinion by reference to Dalloz, and a decision expressly in point affirmed on appeal. Upon this question also I must therefore decide in favour of the defendant.

The result is, that the Court pronounces for the will, and orders the probate to be delivered out to the surviving executor.

HAYNES *v.* MATTHEWS, IN THE GOODS OF STEPHEN CLARK (deceased). April 27 and May 4, 1859.—Married Woman sole Next of Kin.—Application of Creditor.—Husband's Right to Administration.—The husband is entitled to take out administration in right of the wife, to her next of kin deceased intestate, and her renunciation in favour of a third person, e.g. a creditor of the deceased, will not deprive the husband of his right:—Semble, a creditor applying for administration has no right to go into the question of the unfitness of the next of kin to administer.

[S. C. 8 W. R. 76.]

In this case, Stephen Clark died on the 18th of October, 1858, a bachelor and intestate, entitled at the time of his death to both real and personal property, leaving his sister, Ann Matthews, the wife of George Matthews, his heiress and sole next of kin. In November a citation was extracted on behalf of Thomas Haynes, claiming as a creditor of the deceased, and served on Mrs. Matthews and her husband. An appearance to this citation was entered for the husband, and the question came before the Court on motion on February the 16th, when, in consequence of the facts disclosed in various affidavits of the parties, the Court refused to make **[461]** any decree, and directed the question to be brought before it by petition. Among the affidavits was one by Mrs. Matthews, expressing her consent, so far as she was able, to administration being granted to Thomas Haynes, whom she believed to be a bonâ fide creditor of the deceased in the sum of £100 and upwards; and counsel on her behalf consented to the grant being made, on which the Court observed that Mrs. Matthews could henceforth be no party to the suit.

Thomas Haynes, in his petition, claimed administration as a creditor in the sum of £100 and upwards, for money lent and advanced to the deceased, and for wages due; he stated the value of the estate to be about £4,000, and that he was willing, at the request of Mrs. Matthews, to take upon himself the administration and to give due security; that Ann Clark and George Matthews were married in July, 1844, and

lived together upwards of nine years at Chipping Norton, carrying on a grocery business; that there were two children, aged eleven and eight years, both now dependent on the mother for their support; that by indenture of 31st July, 1852, Matthews, for the considerations therein mentioned, assigned to Clark, his executors, etc., his household furniture, stock-in-trade, etc., in his business of grocer, and all debts owing, and the goodwill; that Haynes, the petitioner, was engaged by Clark to manage this business, and that since February, 1853, Mrs. Matthews and Clark had together conducted the business down to the present time; that George Matthews was not a proper person to be entrusted with the administration, because he had, since the 1st of October, 1853, deserted his wife and children; that by a certain indenture of the 1st of October, 1853, between George Matthews, of the one part, and Stephen Clark, of the other, Matthews agreed (amongst other things) to live apart from the said Ann Matthews, and to allow her the custody of the children, and that this arrangement was rendered necessary by the misconduct and cruelty of Matthews to his wife; that since October, 1853, Matthews had contributed nothing to the support of his wife and children; that after the separation, Matthews had squandered what money he received from Clark under the indenture of October, 1853, by intemperate and irregular living, and after being an inmate for some weeks of the Union-house at Chipping Norton, en-**[462]**-listed in the army, and was supposed to be now a corporal in second battalion Coldstream Guards. The petition further went into some points supposed to arise out of an indenture of settlement of the 19th of July, 1844, in contemplation of the marriage of Ann Clark and Matthews, and out of other covenants, etc., in the indenture of October, 1853, which did not seem to affect the question now at issue. The answer, on behalf of Matthews, in substance insisted on his beneficial right as husband to the intestate's sister; denied the right of Haynes as a creditor to enter into the question of his (Matthews) fitness or unfitness, and stated that since August, 1855, he had been assistant-schoolmaster in the second battalion Coldstream Guards, and since January, 1856, full corporal thereof.

This petition was argued by Dr. Phillimore, Q.C., for the creditor.

Dr. Spinks, for Matthews, cited *Wenham* v. *Wenham*, 6 N. C. 17.

May 4.—*Sir C. Cresswell.*—This is a petition by Haynes for administration to Stephen Clark, deceased. He claims on two grounds; first, as nominee of the next of kin, Clark's sister, a married woman: and, secondly, as creditor. As regards the first character, according to the ordinary practice, if the wife renounces, the grant is made to the husband, for he has an interest, and the grant must follow the interest; and the wife cannot by renouncing deprive her husband of his right to the grant. In this case, the marriage-settlement and a deed of separation have been referred to, but I am not aware that they affect the present question. As to his claim as a creditor, that can only avail when the next of kin renounce, and the estate is likely to be unadministered. If, indeed, an estate is insolvent, it may be said that the next of kin has no interest, but that is not so here. The husband is the person next entitled after the wife to this grant, and is willing to take it. Lastly, the 73rd section of the Probate Act was invoked, but it is wholly inapplicable to such a case. There is no absence of persons entitled to administration, and **[463]** no insolvency; it would be a mere arbitrary selection on the part of the Court. The husband is entitled to administration, and with costs.

IN THE GOODS OF JOSEPH LEESON (deceased), on Motion. November 16, 1859.—Administration.—Attorney of Next of Kin.—Surety.—Practice.—Administration will be granted to the attorney of the next of kin, such attorney being resident without the jurisdiction of the Court, if the sureties to the bond are resident within the jurisdiction.

[S. C. 29 L. J. P. 19; 5 Jur. (N. S.) 1270.]

In this case the deceased, late a captain in the 42nd Regiment Bengal N. I., died in the East Indies in February, 1848, leaving his widow, who had since died intestate, without taking administration, and five children, him surviving. The deceased left no property in England except a reversionary interest in some trust-funds. The tenant for life died on the 31st of December, 1858. All the deceased's children were resident in India, and one of them, Mrs. Fanshawe, had duly appointed her aunt, Miss Maria Martha Leeson, residing at St. Servan, in France, her attorney, for the purpose of taking out letters of administration of the personal effects of the deceased

for her use and benefit. Miss Leeson had been duly sworn to administer, etc., and had entered into the usual bond with two sureties, who were resident in England. A difficulty was felt in the registry with respect to the party applying as attorney being resident without the jurisdiction of the Court, in consequence of some similar case which had been before the late Judge of the Prerogative Court in chambers. In that case, the principal and the attorney were both resident in Gibraltar.

Dr. Middleton now moved the Court to direct the letters of administration to pass the seal. He cited *In the Goods of John O'Byrne*, 1 Hagg. 316.

*Sir C. Cresswell.*—As in this case the next of kin reside in India, whilst the attorney is only on the other side the Channel, and has executed a bond with two sureties resident in England, the administration may be granted as prayed.

**[464]** IN THE GOODS OF ELEANOR LANCASTER (Spinster, deceased), on Motion. November 16, 1859.—Probate.—General or Limited Grant.—Practice.—A clause revoking all former wills in a will purporting to deal only with certain trust-property, entitles the executor of the will to a general grant of probate.

[S. C. 29 L. J. P. 19; 8 W. R. 134.]

In this case the deceased, Miss Lancaster, left a will in the following words:—"This is the last will and testament of me, Eleanor Lancaster, spinster, whereby I revoke all other wills by me at any time made, and declare this to be my last will and testament; I give and bequeath all personal estate and effects vested in me as trustee (being the only property of which I am possessed, or to which I am entitled), to my brother, Henry Lancaster, his executors, administrators, and assigns, subject nevertheless to the trusts and equities upon which I hold the same, and I appoint the said Henry Lancaster sole trustee and executor of this my will. In witness whereof," etc.

On applying to the registry, a doubt arose whether the probate should be general or limited in terms to the trust-property.

Dr. Swabey moved the Court to grant a general probate to the executor named in the will. The general revocatory clause at the commencement is equivalent to a disposition to the persons designed by the Statute of Distributions, and would entitle the executor to a general probate (*Brenchley* v. *Lynn*, 2 Rob. 488), and the subsequent particular description of the trust-property does not affect this. The appointment of executor is also in general terms.

*Sir C. Cresswell*: I think the executor is entitled to a general grant.

**[465]** O'DWYER *v.* JOHN GEARE AND ANOTHER. IN THE GOODS OF MARY ANN PARKIN (Widow, deceased). December 7, 1859.—Appointment by Married Woman under Power.—Nomination of Executors.—21 & 22 Vict. c. 95, s. 16.—Generally the nomination of executors in a testamentary paper purporting to dispose of real property only entitles the document to probate; but where a married woman, in execution of a power, devises real estate only and names executors "of this my will," she, if she survive her husband without altering, revoking, or republishing such will, is intestate as regards any property not specifically mentioned therein, and such executors take nothing jure repræsentationis.—The next of kin is entitled to administration of the personal estate on oath that the deceased died intestate except as to real estate.

[S. C. 29 L. J. P. 47; 5 Jur. (N. S.) 1366; 1 L. T. 244. Followed, *In the Goods of Barden*, 1867, L. J. 1 P. & D. 326. Referred to, *In the Goods of Jordan*, ibid. 556. Applied, *In the Goods of Tomlinson*, 1881, 6 P. D. 210. Referred to, *Brownrigg* v. *Pike*, 1882, 7 P. D. 63.]

The deceased Mary Ann Parkin died in January, 1858, a widow without a child, having, during the lifetime of her husband George Parkin, by virtue of certain powers under an indenture of settlement, devised certain real property in St. John's Newfoundland, to John Geare and John Ellis, upon certain trusts, and appointed them "executors in trust of this my will;" and Mary Ann Georgina O'Dwyer, her grand-daughter, principal legatee for life. The testatrix survived her husband, and died without having revoked, altered, or republished her said will.

Geare and Ellis had been cited to appear and take probate, or to show cause why administration of the personal estate of the deceased (with the will annexed) should not be granted to Mary Ann Georgina O'Dwyer, the grand-daughter and one of the next of kin of the deceased, and also the principal legatee for life named in the will.

November 23.—Dr. Wambey moved the Court accordingly.—The will purports to dispose of realty only, but where there is an appointment of executors the rule in the registry has been to grant probate on the ground that the appointment of executors saves an intestacy as regards any personal property which the deceased might possess. A difficulty is now felt in consequence of 21 & 22 Vict. c. 95, s. 16: "Whenever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor named in **[466]** a will is cited to take probate and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor." But the intention of this was to clear a non-appearing or renunciant executor for ever out of the way, and there is nothing to affect the construction of the will as to testacy or intestacy arising from the original appointment of executors.

Cur. ad. vult.

December 7.—*Sir C. Cresswell*: In this case I have considered the application made by Dr. Wambey, for administration with the will of Mary Ann Parkin annexed. It appeared to me at the time that the grant could not be made with the will annexed, for that the party died intestate, except as to certain real property devised in execution of a power. Dr. Wambey founded an argument on what he contended to be the true construction of the 21 & 22 Vict. c. 95, s. 16. I doubted whether at the time I clearly understood the drift of the argument, and therefore thought it better to take time to consider it. I apprehend that what he meant was, that the original appointment of executors would operate to prevent an intestacy as to any part of the property of the deceased, and that when they renounced, it did not so operate as to cause an intestacy. I agree to that, but the question turns upon the effect of the appointment of executors, not upon their renunciation. The will professes to deal with nothing but some real property, by virtue of a power of appointment, which was devised to Geare and Ellis, and their heirs, etc., and upon trust, and afterwards they were appointed executors in trust of that her will. In *Tugman* v. *Hopkins*, 4 M. & G. 400, Lord C. J. Tindal, in a well-considered judgment, ruled, that executors so appointed took nothing jure repræsentationis, and that as to property not disposed of under the power, the party died intestate. So here, the executors would take nothing jure repræsentationis. The will operated only on the property disposed of in execution of the power, and the grant now asked for must be without the will annexed. Miss O'Dwyer may swear that the testatrix made no will, except as to real estate.

**[467]** (Before the Full Court.—*Campbell, C.J., Martin, B.*, and the *Judge Ordinary.*)

RATCLIFF *v.* RATCLIFF AND ANDERSON. May 20 & 25, 1859.—Jurisdiction.—Evidence.—Arrangement between Husband and Adulterer.—Costs.—Maintenance of Divorced Wife.—Where the domicil of the parties is English the jurisdiction of the Court is founded, though the marriage and adultery may have taken place abroad.—The duplicate registers of marriage kept in the East Indies and transmitted to this country by the direction of the governing authority there, are admissible in evidence.—Arrangements entered into between the husband and the adulterer, not with a view to the continuance of the adulterous intercourse, but to send the wife home to live under her mother's protection, are no bar to the husband's petition.—Part of such arrangements being that, in any proceedings for a divorce the husband should bear his own costs, the Court condemned the co-respondent in the whole costs, on the ground that he had not carried out a part of the agreement on his side as to leaving the regiment in which both were officers.—On a question of permanent maintenance under section 32 of the Divorce Act, the Court will consider the ability of the husband as well as the conduct and income of the wife, not only as to the amount, but as to whether it shall make any order at all for maintenance.

[S. C. 29 L. J. P. 171; 5 Jur. (N.S.) 714; 7 W. R. 726. Referred to, *Niboyet* v. *Niboyet*, 1878, 4 P. D. 17.]

May 20.—This case was conducted by Dr. Deane, Q.C., and Dr. Spinks for the petitioner; by Dr. Swabey for the respondent; **[468]** by Dr Phillimore, Q.C., and Mr. Addams, for the co-respondent.

No witnesses were called on behalf of the respondent, and the questions that arose depended—first, on a correspondence put in evidence, and arrangements entered into thereby, between the colonel and adjutant of the regiment, Captain Anderson on his own behalf, and Colonel Cotton, acting for Captain Ratcliff. The marriage had taken place in India, at Poona, in November, 1844, and the transactions referred to took place in 1850, at Dugshai, in the East Indies, where the 22nd Regiment, to which both Captain Anderson and Captain Ratcliff were then attached, was quartered. The arrangement entered into was finally expressed in the two following letters:—

"Dugshai, 7th of August, 1850.

"Sir,—I have the honour, in reply to your letter of this morning, and in explanation of mine of yesterday, to inform you that Captain Ratcliff promises that no expense shall be incurred by Captain Anderson in regard to the process of law through which it may be necessary to go in obtaining a divorce, and Captain Ratcliff agrees should he seek for a divorce, that the whole expense of the law process shall fall upon himself; provided, of course, that Captain Anderson leaves the regiment, maintains Mrs. Ratcliff as already proposed by him, and pays her passage to England in the event of her going there.—I have the honour, etc.

"SYDNEY COTTON.

"To Lieutenant-Colonel commanding 22nd Regiment."

"9th of August, 1850.

"Sir,—I have the honour to acknowledge your letter of the 8th inst. and copies of two letters from Lieutenant-colonel Cotton to Colonel Boileau, commanding. I have now to state, for the information of Colonel Boileau, commanding H.M. 22nd Regiment, that I will endeavour, as speedily as possible, to procure an exchange into another regiment; and I add, for the satisfaction of Captain Ratcliff, that I shall now do my **[469]** utmost to hasten the departure of Mrs. Ratcliff for England.—I have the honour, etc.

"D. ANDERSON.

"To the Adjutant H.M. 22nd Regiment.—Dugshai."

Captain Ratcliff pressed for a positive promise from Captain Anderson to quit the regiment, but the colonel commanding expressed himself satisfied with the undertaking as contained in the preceding letter, stating that he could, at a later period, exercise his authority in the matter if necessary. Mrs. Ratcliff was sent to England at Captain Anderson's expense, who also made her an allowance at the rate of £100 per annum. Mrs. Ratcliff was received by her mother, to whom Captain Ratcliff had written, expressing his wish that such should be the case.

In October of the same year Captain Anderson wrote to the adjutant to say that he had applied to ten regiments, but had been unable to meet with an even exchange, and that the expense he had incurred by paying Mrs. R.'s passage to England, and the further liability of her allowance, prevented his paying for an exchange; that to sell out would ruin his professional prospects, and calling upon the colonel commanding to release him from his undertaking to leave the regiment.

Colonel Boileau, upon this, wrote to General Sir Charles Napier, and, in consequence of a reply from him, Colonel Boileau informed Captain Anderson that he considered him released from his promise to exchange. Eventually Captain Ratcliff left the regiment, and became paymaster of a cavalry regiment till September, 1858, when he went on half-pay.

The question of the jurisdiction of the Court with respect to the locality of the marriage and the subsequent transactions was also mooted, and the admissibility of duplicate registers of marriage kept in that country and transmitted to the India-house by the authority of the East India Company was discussed.

Cur. adv. vult.

May 25.—*Lord Campbell, C.J.*, gave judgment: A preliminary objection is made on the part of the co-respondent that this Court has no jurisdiction to entertain the suit, as the marriage, the alleged adultery, and all the material facts relied upon by **[470]** the petitioner took place in the East Indies. The Court for Divorce and Matrimonial Causes certainly has no jurisdiction beyond that which it derives from statute 20 & 21 Vict. c. 85, by which it was constituted. But in construing this statue, we can only look to its enactments as they appear in the statute-book, without regard to anything to be found in any other Bill upon the same subject introduced either into the House of Lords or the House of Commons, and not passed into a law,

or to any proposal or opinion said to have been propounded by any member of either House while this Bill was passing through Parliament. The preamble having recited that it was "expedient to amend the law relating to divorce, and to constitute a Court with exclusive jurisdiction in England," section 27 enacts that "it shall be lawful for any husband to present a petition to the said Court, praying that his marriage may be dissolved on the ground that his wife has, since the celebration thereof, been guilty of adultery." It is not necessary at present to define the extreme limits of the jurisdiction of the Court; but I am clearly of opinion that we have jurisdiction over this case upon which we are required to adjudicate. The parties are British subjects. At the time when the matters set forth in the petition arose, the parties were domiciled in England, and they were still domiciled in England when the suit began. Under such circumstances it cannot be necessary that the marriage should have been celebrated in England; nor would the Court have been ousted of its jurisdiction if the adultery had been alleged to have taken place in France or in Scotland. We were told of a decision in the House of Lords to the contrary, in *Sandwith* v. *Sandwith*; but, upon examination, this turns out only to have been an exercise of the legislative power of Parliament to pass a divorce Bill since 20 & 31 Vict. c. 85, constituting the Court for Divorce. That statute, of course, could not limit the legislative power of Parliament, nor can the construction of that statute be influenced by a marriage being thus legislatively dissolved.

The next objection made on the part of the respondent was, that the petitioner had not given sufficient evidence of the celebration of his marriage; and this depends upon the admissibility of the entry in the book produced before us from **[471]** the archives of the East India Company. The clerk who produced this book said: "It is the return of marriages celebrated in India, made under the authority of the East India Company;" from which I understood that the original register in India, and the authenticated copy transmitted to the secretary of the company in London, were made under the authority of the company. And it appears from Hubback on Successions, that under the authority of the East India Company there has been for many years a quarterly return to the Court of Directors in London from each of the presidencies, of Bengal, Madras, and Bombay, of marriages celebrated in the preceding quarter in each presidency. This professes to be an authenticated copy of a public register of marriages kept by authority in each presidency. Such a copy has been regularly transmitted to the secretary of the East India Company in London, and being bound in a book, is deposited in the secretary's office, and is kept among the archives of the East India Company. The petitioner's marriage in 1844 having been anterior to 14 & 15 Vict. c. 40, "An Act for Marriages in India," the proof of it is not affected by any of the enactments of this Act. But, irrespective of any enactment upon the subject by the British Parliament, I am of opinion that the entries in this book are admissible evidence to prove the celebration of marriage in India. The East India Company, under the sovereignty of the Crown, possessed supreme power over the possessions of the Company in the East Indies, and had authority to order a register of marriages to be kept in each presidency, and an authentic copy of this register to be made by the servants of the Company in India, and to be transmitted to the office of the secretary of the Company in London, and there kept among the archives of the Company for general information. Under such authority such a register has been kept, and such a copy has been transmitted. I am therefore of opinion that the book in question is admissible. Although called a copy, it is the original document made in obedience to the law of the country by the officers of the Government. The rule upon this subject seems to me to be well laid down and explained in Greenleaf on Evidence, part 3, ch. 4, sec. 483: "The next class of public writings to be considered, consists of official registers, or books kept by persons **[472]** in public offices, in which they are required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties and under their personal observation. These documents, as well as all others of a public nature, are generally admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth, the obligation of an oath and the power of cross-examining the persons on whose authority the truth of the documents depends. The extraordinary degree of confidence which is reposed in such documents is founded principally upon the circumstance that they have been made by authorized and accredited agents appointed for the purpose, but partly also

on the publicity of their subject-matter. Where the particular facts are inquired into and recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials are, in fact, the agents of all the individuals who compose the state, and every member of the community may be supposed to be privy to the investigation. These books therefore are recognized by law, because they are required by law to be kept: because the entries in them are of public interest and notoriety, and because they are made under the sanction of an oath of office, or at least under that of official duty." The books kept among the archives of the East India Company, professing to contain authenticated copies of the register of marriages celebrated in India, may be considered as duplicate originals, and they seem clearly to come within the category of public documents above described. Accordingly they have been admitted in the House of Lords as evidence of the celebration of marriage in peerage cases and in divorce cases, in which the Lords profess to be guided by the rules of evidence observed in the Courts of common law; and the clerk who produced the book in question to us stated that he had produced similar books in the Court of Common Pleas, and in other Courts, where they were admitted in evidence without objection. The petitioner's marriage therefore appears to me to be proved.

The adultery is likewise clearly proved; indeed it is not denied by Captain Anderson; and Mrs. Ratcliff's counsel on this part of the case only tried to raise an unfounded doubt **[473]** as to the identity between her and the Mrs Ratcliff who eloped with Captain Anderson from Dugshai and lived with him as his mistress at Kussowlie. We have therefore to consider whether anything appears to prevent the petitioner from obtaining the remedy to which he makes out a primâ facie claim. Cruelty is alleged as a bar, but of this there is no evidence; and, whether the petitioner may or may not always have acted as a prudent and affectionate husband, there is no ground for imputing to him that he had consciously done anything which could have contributed to his dishonour. The plea of condonation entirely fails, as the doctrine on this subject is now settled; for whatever Christian forgiveness the petitioner may have been ready to extend to his wife after her fall, it is clear that he never intended, nor gave her or any one else reason to believe that he intended, to live with her again as his wife.

It is urged, however, that without condonation the divorce ought to be withheld on account of the arrangement between the parties, by which Captain Anderson was to be at the expense of sending Mrs. Ratclliff to England, and was to allow her £100 per annum, which he has continued to pay regularly down to the present time. Had this arrangement been made with a view to a continuation of the adulterous intercourse between Captain Anderson and Mrs. Ratcliff, I should have considered it a bar to the divorce; but the object in view was, that she should return to England as speedily as possible, and live there respectably with her mother, which she did accordingly. The petitioner appears from poverty to have been unable to bear this expense, and without the provision made for her under the arrangement she might have become an outcast on society. The remaining objection is unreasonable delay; but this likewise is answered by the petitioner's pecuniary circumstances, for upon Captain Anderson refusing to perform his promise to exchange from the 22nd regiment, the petitioner was obliged to leave it, and was not in a position to bear the expense of bringing an action for criminal conversation, of instituting a suit in the Ecclesiastical Court for a divorce à mensâ et thoro, and to carry a Bill through Parliament for a dissolution of the marriage. If there had been no agreement between the parties, or if Captain Anderson had fully per-**[474]**-formed the agreement on his part, I should have been inclined to think that costs ought not to be awarded against him; for there seems no reason to suppose that he acted the part of a seducer, and if he really had left the regiment in fulfilment of his promise, he would have done all that a man of honour could do in his unfortunate situation to repair the unpremeditated error into which he had fallen; but after an anxious consideration of the correspondence given in evidence before us, I am of opinion that the breach of his promise to leave the regiment was wholly indefeasible. It is quite clear that he had given the promise, and that neither Colonel Boileau nor General Napier had any power to release him from it. Captain Ratcliff and Captain Anderson, after what had happened, could not possibly sit down together at the same mess, and Captain Anderson's withdrawal was the basis of the agreement between them. Captain Ratcliff always

reserved to himself the power of suing for a divorce. Being allowed to remain in the twenty-second regiment, he was to take the necessary proceedings for it at his own expense; but being obliged to leave the regiment, he appears to have been ruined in his profession, and afterwards going on half-pay, to have been disabled from bearing the expense. Therefore no ground remains for the immunity claimed, and I am of opinion that the Court is bound to pronounce for the divorce, all costs to be paid by the co-respondent.

Dr. Swabey applied to the Court for some order for maintenance for the respondent under 32nd section of the Divorce Act. The allowance paid by Captain Anderson was entirely precarious; Mrs. Ratcliff had led a retired and proper life since she came to England in December, 1850, and though Captain Ratcliff's half-pay was small, he would probably be in active service again, and the order might direct him to pay the respondent a certain proportion of his income, in no case to exceed a moderate sum, to be fixed by the order.

But the Court, admitting that Mrs. Ratcliff's conduct since 1850 had been, under the circumstances, such as not to disentitle her to a maintenance, yet, adverting to the very limited income of Captain Ratcliff, and all the circumstances of the case, refused to make any order.

**[475]** (Before the Full Court.—*Lord Campbell, C.J., Pollock, C.B.,* and the *Judge Ordinary.*)

CUNNINGTON *v.* CUNNINGTON AND NOBLE. June 16, 1859.—Petition for Dissolution by Husband.—Neglect or Misconduct conducing to the Adultery.—20 & 21 Vict. c. 85, s. 31.—A., being a clerk in the Post-office, married in September, 1849; in November, 1850, he was apprehended and convicted of feloniously opening a letter, etc., and imprisoned. The wife was maintained by her relations, but an affectionate correspondence subsisted between herself and A. In 1853 she, however, formed a connection with the co-respondent, and a child was born in March, 1854, of which she did not inform her husband till March, 1855. He was soon after liberated, and upon the passing of the Divorce Act brought the present suit for dissolution of the marriage.—Held (dubitante Pollock, C.B.) that, although the adultery would in all probability never have taken place but for the absence of the husband, it was not, under 20 & 21 Vict. c. 85, s. 31, such wilful neglect or misconduct as had conduced to the adultery so as to raise a case for the discretion of the Court; that such neglect or misconduct, to come within the meaning of the section, must be neglect of or misconduct towards the other spouse on the part of the petitioner.

[S. C. 28 L. J. P. 101; 8 W. R. 3.]

This petition was argued in the sittings of the full Court in May, 1859. A question arose as to whether the circumstances raised a case for the discretion of the Court under sect. 31 of the Divorce Act, which provides, that though the petitioner's case may have been proved, the Court shall not be bound to pronounce its decree, "if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall in the opinion of the Court have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery."

May 24.—Mr. J. H. Hodgson appeared for the petitioner.

The facts are sufficiently stated in the judgment of Lord Campbell, C.J.

Cur. adv. vult.

**[476]** On a subsequent day (June 16) the following judgments were delivered by Lord Campbell, C.J., and the Judge Ordinary. Pollock, C.B., gave his reasons for dissenting from the view taken by the majority of the Court.

*Campbell Lord, C.J.*: I am of opinion that in this case the Court ought to pronounce for the divorce. The only doubt raised is, whether the petitioner had or had not been guilty of such wilful neglect or misconduct as had conduced to the adultery. At the time of his marriage, in September, 1849, he was a clerk in the General Post-office at a salary of £80 a year; his wife and he were much attached to each other, and lived very happily together till November in the following year, when he was apprehended on a charge of having feloniously opened a letter in the Post-office and

taken a shilling from it. Upon this charge he was tried at the Central Criminal Court, and, being found guilty, was sentenced to ten years' transportation; his wife who was a woman of good education and very respectable connections, still continued much attached to him, and strove to obtain a pardon for him or a mitigation of his sentence. After being confined in several prisons he was sent to the convict establishment at Dartmoor. He had no means of making any pecuniary provision for his wife; but during more than two years he kept up a constant and affectionate correspondence with her by letter, and they expressed a hope of again living happily together when he should be liberated. Her family supplied her with the means of decent subsistence, and she led a very reputable life till the summer of the year 1853; she then boarded and lodged under the name of Mrs. Ashton with a respectable lady at Roydon, in Essex. In the same house lodged and boarded Richard Noble, the co-respondent, who was bailiff to a gentleman of a large estate in the neighbourhood. A criminal intimacy then arose between Mrs. Cunnington and Richard Noble; in March, 1854, she was delivered of a child, of which he was the father, and she has since lived with him in concubinage. Although she continued to write to her husband, she concealed this illicit intercourse from him till March, 1855, when she wrote a letter to him confessing it, and entreating him to go to Australia and not to annoy her. He was much distressed on receiving **[477]** this letter; being soon after discharged from prison, he entered into business as a commission agent in London, and on the passing of 20 & 21 Vict. c. 85, he commenced this suit.

The adultery probably never would have happened if he had not been guilty of the misconduct for which he was prosecuted; but I do not think that this misconduct "conduced to the adultery" within the meaning of the 31st section of the Act—although a sine quâ non, it was neither directly nor indirectly a causa causans.

According to the received meaning of the word "conduce," I think that what has conduced to an effect must in some sense have caused it or contributed to it, and the conducing cause must be such as, if not directly, at least indirectly, might at the time of the misconduct be contemplated by the husband as likely somehow to contribute to his dishonour; but when the petititioner in this case stole the shilling he was still a loving and attentive husband, and so he continued for several years after, until he heard with anguish that his wife had been unfaithful to him. Suppose that an officer in the army is sentenced to imprisonment for sending a challenge or for fighting a duel, and that, while he is imprisoned for the misdemeanour or the felony, his wife, being thus separated from him, falls a victim to seduction, shall it be said that the injured husband has disentitled himself to all remedy because his misconduct in sending the challenge or fighting the duel conduced to the adultery? Yet it may be truly said, that without this misconduct the adultery never would have taken place. The neglect or misconduct specified in the 31st section following—"Cruelty, desertion, and wilful separation without reasonable excuse"—must, I think, be neglect or misconduct by the husband ejusdem generis, viz. in his marital capacity, and must be a breach of some marital duty. Although there be a change of expression between the 29th and 31st sections, I do not think that a man can be guilty of "neglect or misconduct," within the meaning of the latter, unless he has been "in some manner accessory to the adultery," within the meaning of the former. The laudable policy of the Legislature seems to have been to deprive the husband of a remedy by divorce, if he has misconducted himself as a husband, and has contributed to his own dishonour; but I discover no in-**[478]**-tention in the statute to punish neglect or misconduct, unconnected with the relation of husband and wife, by the new punishment of rendering indissoluble a marriage which has become a disgrace and a curse; nor can it easily be supposed that it was the object of the Legislature to confer impunity upon a married woman where the seducer has availed himself of the absence of a husband who has anxiously performed all his marital duties, but who may have committed some offence for which he has been for a season justly deprived of his liberty.

I feel most sensibly the importance of the duty imposed upon this Court of guarding against laxity in granting divorces; but if we were to refuse the divorce prayed for in the present case, I think we should be contravening the intentions of the Legislature, and doing injustice to a man whose conduct as a husband has ever been irreproachable.

*Pollock, C.B.*: When the case stood over, I was not prepared to pronounce, without

hesitation, either for or against the divorce, and even at this moment I do not carry my acquiescence in the judgment of the Court beyond the point of not dissenting from it. I think it right to state openly the grounds on which I doubted at that time, and to say that my doubts, if they do not induce me to dissent from the conclusion of the Court, are not altogether removed. The marriage and the adultery of the wife are fully established, and, if that were all to be inquired into, the petitioner would appear to be entitled to the remedy prayed. There is no evidence of any of those matters, the absence of which is made, as it were, a condition precedent to the right of having a divorce. There is no evidence that the petitioner has been accessory to or conniving at the adultery, nor that he has condoned it. There is, indeed, abundant evidence to the contrary. Nor is there any evidence that the petition was presented by collusion with either of the respondents. Although in all probability the respondents were more anxious for a divorce than the petitioner himself, there is no evidence to justify the Court in treating the case as one of collusion. The petitioner, therefore, has an apparent title to a decree of divorce, and the only ground on which it can be denied is, **[479]** that the Court is not bound to pronounce a decree, for some of the reasons stated in the proviso to the 31st section of the 20 & 21 Vict. c. 85. The only reasons therein contained to which it is now necessary to allude, are the *desertion* of the wife by the husband, and his *wilful neglect or misconduct*. The present status of the petitioner is that of a convicted felon, who has been sentenced to transportation for a period which has not yet expired. He is at large by virtue of a ticket-of leave, given him by the Secretary of State for the Home Department, and it may reasonably be doubted whether those who framed the law we have to administer ever contemplated a petition for a divorce by a person in such a social position. But the only material question is, whether the petitioner had been guilty of misconduct which conduced to the adultery or had deserted his wife. There is no doubt that within a year of the marriage he committed a felony for which he was sentenced to ten years' transportation, not yet expired. In point of fact he has never been actually sent out of the kingdom, but was detained in various prisons for several years. During this time he did not support his wife,—he had indeed no means of doing so,—and he did not give her any of the social benefits of marriage, especially that of protection and guardianship, which might have prevented her from going astray. The crime of the husband, in my opinion, in point of fact, led to the vice of the wife. She was apparently a well-educated, affectionate, well-disposed woman, and if any one asked the cause of her fall, the answer of every one acquainted with the circumstances, and speaking the English language, would be, in my opinion, that it was owing to the crime and the punishment of the husband, which has not merely conduced to it, but has been one of the circumstances without which it would not,—perhaps could not have happened. It is, however, said that the statute must be construed according to the rules applied to the construction of all other statutes, and the misconduct alleged as conducing to the adultery must be some act tending directly, not remotely, to produce such a result. There is great weight in that observation. I own I am inclined to believe that if this sort of case had been distinctly presented to the Legislature, they would not have given the husband a right to a divorce; and I feel very confident **[480]** that under the old system, if it deserved the name of a system, the House of Lords would not have passed a bill for his relief. But neither of these considerations ought to prevail in the decision of this case; and although the statute contains much that is anomalous and new to the judicial mind, and from the peculiar nature of the subject might lead to special considerations, I am not prepared to adopt any other course in construing the statute than that which belongs to other statutes, and I cannot carry my doubt, as to what was really meant, so far as to differ from the opinion of the rest of the Court. The other question, Whether the petitioner had deserted his wife? if it is to be decided in the negative, is one to which the attention of the Legislature ought to be called. The protection given by the 21st section to a wife deserted by her husband was considered, during the progress of the measure through Parliament, to be one of of its most salutary provisions. The object was to protect a wife maintaining herself by her industry or her property against the legal rights of the husband who has deserted her. If that section does not apply to the wife of a felon transported or sentenced to penal servitude, then a large class of women obviously within the scope and object of the section are without the remedy

and protection which I find it impossible, in my own mind, to doubt the Legislature meant to give them. In construing the Act with reference to that point, it may be remarked that in the 31st section the word "wilfully" is put before the words "separated himself or herself from the other party," etc., but not before "deserted;" from which it may be inferred that "wilfully" is not put before "deserted," because desertion could not but be wilful, and therefore it would be surplusage. If the wife of a convict sentenced to a long period of transportation is not deserted and entitled to relief and protection, the husband may, by a power of attorney, claim her earnings, and he or his creditors may seize her property, and there is a casus omissus scarcely to be credited with reference to a statute, which attracted so much attention and underwent so much discussion as did the Divorce Act. My doubt as to the true construction of the statute on that point is not wholly removed, but it must be admitted that, according to the ordinary meaning of language, a man who is transported for a **[481]** crime does not desert his wife, but is forced away from her against his will, and although I have no doubt as to the general intention of the Legislature, that intention cannot be carried into effect beyond the plain meaning of language to be found in the statute. For these reasons I do not dissent from the judgment of the rest of the Court; but I think it right to express my doubts, and to call public attention to the state of the law, in order that if there is any mistake or error, it may be corrected.

*The Judge Ordinary*: I agree with Lord Campbell as to the meaning of the last branch of the 31st section of 20 & 21 Vict. c. 85.

Several instances are specified in which the Court shall not be bound to pronounce a decree dissolving a marriage, although the case of the petitioner has been proved and the Court does not find that the petitioner has been accessory to the adultery or guilty of connivance, or has condoned it, or that the petition has been presented or prosecuted in collusion with the respondent. All those instances relate to a violation of marital duty on the part of the petitioner, adultery, unreasonable delay in presenting the petition, cruelty, desertion, or wilful separation without reasonable excuse. Then follow the general words, "such wilful neglect or misconduct as has conduced to the adultery."

According to the ordinary rule of construction general words following particular are taken to be applicable to things ejusdem generis, and if so, the "wilful neglect or misconduct" intended must be taken to be neglect of the other party or misconduct towards the other party. If neglect is construed in its larger sense, so as to include any neglect that has conduced to the adultery, it would apply to neglect of business, which causes poverty, or neglect of official duty, which causes dismissal and loss of station, and so causes poverty, in consequence of which the wife falls into temptation; but it seems to me that the Legislature could not have intended to include such neglect; if the neglect intended was neglect of the wife, it seems to follow that the misconduct intended must be misconduct towards the wife. A man may be guilty of misconduct in society (wholly apart from any treatment of his wife), which would **[482]** cause her to feel contempt for him, and so render her liable to compare him unfavourably with another, and that may conduce to adultery.

In a case like the present, suppose the husband's guilt in stealing the letter having become known to the wife, she, in order to save him from the penal consequences of the act, prevailed upon him to absent himself for two or three years, and during that time yielded to temptation; his misconduct would be precisely the same as that which we are now considering, and it would conduce to the adultery in the same manner, viz. by causing his absence. His absence in this case is not the misconduct relied on, for it was involuntary. The theft was the misconduct; and if the theft in this case is to be deemed within the meaning of the statute, it must also in the case which I have put. I cannot suppose that any such thing was intended; in reality it was not the misconduct of the husband, but the consequence of that misconduct which conduced to the adultery.

For these reasons I think that we have not an option as to pronouncing a decree for dissolution of the marriage between these parties.

(Before the *Judge Ordinary.*)

SELLER *v.* SELLER (on demurrer).—June 1 & 15, 1859.—Judicial Separation—Adultery of Petitioner Condoned no bar.—A wife petitioned for judicial separation by reason of her husband's adultery, setting forth in the petition a sentence

of divorce à mensâ et thoro obtained by the husband in 1833 by reason of her adultery, after which the parties were reconciled and cohabited together. On demurrer to this petition: Held, that the adultery of the petitioner having been condoned was no bar to her present suit.

[S. C. 28 L. J. P. 99; 5 Jur. (N. S.) 686; 8 W. R. 5. Referred to, *Gooch* v. *Gooch*, [1893] P. 106; *Everett* v. *Everett*, [1919] P. 308.]

This was a petition for judicial separation at the suit of the wife by reason of the husband's adultery. The petition stated the marriage in 1826; that the parties cohabited till 1831, when the husband was alleged to have deserted the wife; that **[483]** in 1833 the husband obtained a sentence of divorce à mensâ et thoro in the diocesan Court of Chester, by reason of the alleged adultery of the wife; that in 1850, at the request of the husband, the parties became reconciled and returned to cohabitation, which lasted about three months, when the husband again deserted the wife: that since that time the husband had cohabited with one Harriet Day, with whom he had bigamously intermarried in 1834. This petition was demurred to, on the ground that it appeared on the face of it that the petitioner had herself been guilty of adultery, and that the husband had obtained a sentence of divorce à mensâ et thoro in a competent Court on proof thereof.

Dr. Spinks argued in support of the demurrer: It will be contended on the other side, that by the condonation the wife was restored to her former condition; but that, according to Lord Stowell's view of the matter in *Beeby* v. *Beeby*, would not make her recta in curiâ, and entitle her to put in force the process of the Court.

Dr. Phillimore, Q.C., contrà, relied on the case of *Anichini* v. *Anichini*, as, in substance, deciding the point which, though raised by Lord Stowell in *Beeby* v. *Beeby*, he did not then feel himself called upon to decide. Cur. adv. vult.

June 15.—*The Judge Ordinary*: The only question argued in this case was, whether a wife, having been guilty of adultery, and having been condoned by her husband, could maintain a suit for judicial separation on the ground of adultery subsequently committed by him. It was treated on both sides as a new question that had never received a judicial decision. The authorities relied on were a dictum of Lord Stowell's in *Beeby* v. *Beeby*, 1 Hagg. 789, and the decision of the Court in *Hope* v. *Hope*, 1 Swab & Tris. 94, on the one side; and the opinion expressed by Dr. Lushington in *Anichini* v. *Anichini*, 2 Curt. 210, on the other. In *Beeby* v. *Beeby* Lord Stowell certainly intimated an opinion that a husband or wife having been guilty of adultery would not by condonation be so released from imputation as to be enabled to maintain a suit for adultery committed by the other party; but the point was not decided. **[484]** In *Hope* v. *Hope* a distinction was taken between the effect of condonation and of mutual guilt or compensatio criminum; neither did that case, therefore, decide the question now raised. But it seems to me that in *Anichini* v. *Anichini* the identical question was raised and decided. The wife sued for restitution of conjugal rights; the husband pleaded her adultery, and prayed a divorce; the wife recriminated; the husband replied condonation of his guilt; and the learned Judge decided that the adultery of the husband having been condoned was no bar to his prayer for divorce on account of the adultery of the wife, which was accordingly decreed. That is a direct authority for saying that the adultery of one party having been condoned is not a bar to a suit for divorce on account of the adultery afterwards committed by the other. I am unable to find any distinction between the two cases, and even if I differed in opinion with the learned Judge (which I do not) I should consider myself bound by his decision. I must therefore overrule the demurrer. The respondent may answer the petition.

WARD *v.* WARD.—April 27 & May 26, 1859.—Judicial Separation.—Practice.—Alimony pendente lite.—Husband without Means.—Taxation of Wife's Costs ordered.—Attachment for Non-payment of Alimony refused.—Leave for a fieri facias to issue granted.—The Court will make an order for the taxation and payment of the wife's costs in a matrimonial suit against the husband, notwithstanding his apparent inability to pay them.—Semble, it will not grant an attachment for disobedience to such order, if satisfied of the husband's inability, through poverty, to comply with it.—The Court refused to allow an attachment to issue against a common workman, dependent upon his weekly earnings of 24s. a week, and whose sole property consisted of furniture of the value of £4, for

non-payment of £2, 4s. arrears of alimony pendente lite, but gave the wife leave to sue out a fi. fa. for the sum due.

[S. C. 29 L. J. P. 17.]

This was a suit for judicial separation brought by the wife **[485]** against the husband on the ground of cruelty. The present application was for an allotment of alimony pendente lite, and for an order that the wife's costs in the suit should be taxed and paid by the husband.

On the question of costs affidavits had been filed by both parties.

It appeared by the husband's answer to the petition for alimony pendente lite, and from the affidavits filed on the question of costs, that he was a bricklayer and plasterer, and that when in work his wages averaged 24s. a week, but that he was sometimes out of employment, and that his only property consisted of some household furniture of the value of £4. It further appeared that the wife, out of a sum of money entrusted by the husband to her custody shortly before the commencement of this suit, had given £16 to her solicitor towards the expenses of the suit.

Dr. Spinks appeared for the petitioner in support of the application.

Dr. Tristram, for the respondent: On the question of costs, he submitted that the Court should, under the circumstances of the case, make no order. In the Ecclesiastical Courts, when it was shown that a husband was unable to pay his wife's costs, they were not taxed against him. In *Walker* v. *Walker*, 1 Curt. 560, Dr. Lushington, under similar circumstances, refused to order the wife's costs to be taxed against the husband, and said, "It is unquestionably the general practice that the husband must pay the costs incurred by the wife, but that rule is liable to some modifications; where, for instance, the wife has a separate income. In the present case the wife is not shown to be possessed of any property, and the husband, it appears, during the proceedings, has been discharged from prison by an order of the Insolvent Court, by which whatever property he possessed became vested in the assignee of that Court. . . . I apprehend that, if I proceed to the length of taxing this bill, I must direct a monition for the payment of it, and proceed, if the costs are not paid, to pronounce Mr. Walker in contempt, and to decree a significavit to issue; the result of which would **[486]** be, that he would be committed to prison, and could not be released unless he paid these costs, or again obtain his discharge under the Insolvent Debtors Act." Here the husband has no means wherewith to pay the costs; and if the order were made, could only free himself by going through the Insolvent Court. The wife's solicitor has already received £16 of the husband's money for the expenses of the suit. See *Wilson* v. *Wilson*, 2 Consist. 204.

Dr. Spinks, in reply: If the order for costs is to be withheld on the ground of the small means of the husband, the wives of working men will be precluded from suing in this Court.

*The Judge Ordinary*: I feel great difficulty in applying rules, which arose under a different system, to cases where the husband and wife have scarcely a penny between them.

Dr. Spinks: There is a distinction between *Walker* v. *Walker* and this case. There the husband had been just discharged under the Insolvent Debtors Act, which is not Mr. Ward's case.

*The Judge Ordinary*: I allot alimony at 4s. per week. As *Walker* v. *Walker* is the only reported case that has been cited in which the Court has refused to order the taxation of the wife's costs, I think I should be hardly justified in deviating from the ordinary practice of making the order for the husband to pay the wife's costs. The £16, however, which her solicitor has already received must be deducted. If hereafter it should be satisfactorily shown that the husband is unable to pay the costs, I should be indisposed to grant an attachment for disobedience of the order. Let the costs be taxed up to the present time, and let the Registrar fix a sum to be deposited to meet the costs of the hearing.

May 26.—Dr. Spinks moved for an attachment against the husband for the non-payment of £2, 4s., arrears of alimony pendente lite.

*The Judge Ordinary*: What are the circumstances of the **[487]** husband? He has no property, and he is a labourer earning 24s. a week. The case against him is not that he will not, but that he cannot pay. I am in this difficulty, that if I were to order an attachment to issue against him, he would be shut up in prison, and I should thereby deprive him of the only chance of paying, and the wife of her only chance

of obtaining alimony. I am most reluctant to do this, and shall therefore decline to grant an attachment. But I have no objection to give you leave to sue out a writ of fieri facias, which will enable you to take any property he may have.

Attachment refused; fi. fa. granted.

ROWLEY *v.* ROWLEY.—July 20, 1859.—Petition for Dissolution of Marriage.—Amendment of Petition by the addition of a fresh Charge.—Affidavit.—A wife petitioned for a dissolution of her marriage on the ground of her husband's adultery, coupled with desertion. The husband filed no answer. She applied for leave to amend her petition, by adding a charge of cruelty, alleged to have been committed and to have been known to her before she filed her petition. The Court required her to bring in an affidavit of the acts of cruelty upon which she relied, and of the motives which had induced her to suppress them in her petition: Held, that the wife might amend her petition by adding a new ground for the dissolution of her marriage, the Court being satisfied that this new charge was not brought forward vexatiously.

[S. C. 29 L. J. P. 15; 7 W. R. 653.]

On the 17th of July, 1858, Mrs. Rowley filed a petition for a dissolution of her marriage on the ground of her husband's adultery coupled with desertion without reasonable excuse, for two years and upwards. The petition stated that on the 10th day of February, 1852, Theresa C. Rowley was married to her husband, H. Rowley; that on the 24th of May, 1856, Mr. Rowley deserted his wife without reasonable cause, and did not return to her, having formed an adulterous connection with C. Green. The respondent had not put in an answer.

June 8.—Mr. Macqueen moved the Court that the petitioner might **[488]** be at liberty to amend her petition by the addition of charges of cruelty.

Dr. Wambey, contrà: The motion was unusual. The facts sought to be adduced were not noviter perventa, and would not have been admitted to proof at this period of the suit by the practice of the Ecclesiastical Courts.

*Sir C. Cresswell*: Before granting this application, I shall require an affidavit as to the nature of the acts sought to be charged. The petitioner ought to have known her own case; still I shall not receive the objection from a party who has not come in to answer at all.

July 20.—Mr. Macqueen renewed his former application, upon an affidavit giving minute details of various acts of cruelty alleged to have been committed upon her by the respondent, and which she had, from motives of delicacy, up to that time suppressed.

Dr. Wambey, contrà: The affidavit of Mrs. Rowley does not disclose sufficient grounds to entitle her to amend the petition. The acts charged not being noviter perventa, she would not have been allowed to introduce them in additional articles by the practice of the Ecclesiastical Courts. The husband is not cited to appear to the charge of cruelty, but only for adultery and desertion.

*The Judge Ordinary*: I think that this application must be granted. When it was made before, I was not furnished with an affidavit of the circumstances which had led to the omission of this new charge, or of any particulars of the charge now sought to be made.

The principle upon which amendments are allowed at common law, is that justice may be done between the parties. The Common Law Procedure Acts allow amendments to be made even at the trial, for the purpose of determining the real question in controversy. But these statutes are not applicable to the present case, for cruelty has up to this time formed no part of the case. By the old practice at common law, it was **[489]** not unusual for a party to ask leave to add a fresh count to his declaration, even though it included a new cause of action, and his request would be granted upon such terms as would prevent the other party from being placed in a worse position than he was in before. Thus time to answer the fresh count would be always allowed.

In the present case, the petitioner seeks to add to her petition a new ground for the dissolution of her marriage; she asks for leave to proceed no longer on the original charges of adultery and desertion, but upon adultery and cruelty. If the respondent had pleaded in answer to the original charges, care would of course have been taken to ascertain whether the petitioner's proceeding was bonâ fide, and not

for the purpose of harassing him, and the Court would have placed the respondent in as good a position as he was in before.

But here there is nothing of this kind. The only question is, whether the Court is satisfied that the new charge is not brought forward for vexatious purposes? It was to ascertain this that I required an affidavit from the petitioner. I think she has assigned reasonable grounds for her delay in charging cruelty; and though I cannot decide upon the facts, it would be unjust to refuse her application. The cause will not be begun de novo, but the respondent will be served with a copy of the amended petition. Perhaps, when the costs of the suit are taxed against him, the Court may be of opinion in dealing with them that he ought not to be put to any further expense on account of what has occurred; but I reserve the consideration of these costs. Motion granted.

SUGGATE *v.* SUGGATE.—January 24, 1859.—Practice.—Pleading.—Insufficient Averment of Cruelty.—Cruelty to Children in presence of Wife.—Permanent Custody of Children.—Evidence.—In a petition asking for relief on the ground of cruelty, acts sufficient to establish legal cruelty should be alleged; all pleadings should be **[490]** as short as is consistent with alleging a legal ground for the prayer. The respondent may apply for further specification if necessary.—Acts of cruelty towards children in the presence of the mother may be alleged as cruelty towards her; but the Court will not receive evidence as to misconduct to children generally for the purposes of a future application for their permanent custody in a suit for separation, etc.; for, until it is in a position to decree the separation, it has no jurisdiction as to permanent custody of children.—If necessary, the misconduct towards children may be proved after the main petition has been heard.

[S. C. 5 Jur. (N. S.) 127.]

These were questions arising on a petition for judicial separation at the suit of the wife, by reason of cruelty, which also concluded with a prayer for an order for the custody of the children. The third and fourth paragraphs of the petition, as originally filed, were as follows:—

Thirdly, that, on the 26th day of July, 1848, and other days between that day and the 24th day of July, 1858, the said Alfred Suggate, at Lowestoft, in the county of Suffolk, was guilty of cruelty to your petitioner.

Fourthly, that, in the months of April and July, 1858, the said Alfred Suggate was on divers occasions guilty of cruelty to your petitioner's children.

Dr. Spinks, for the respondent, moved the Court to direct some specification of the cruelty towards the petitioner alleged in the third paragraph, and to strike out the fourth paragraph, on the ground that acts of cruelty to the children were not necessarily cruelty to the wife.

Mr. Macqueen for the petitioner, had no objection to specify the acts of cruelty alleged in the third paragraph, but defended the fourth paragraph, as affording a ground for the prayer for the custody of the children.

*The Judge Ordinary*: There certainly should be some further specification as regards the third paragraph. A petition on the ground of cruelty ought to state certain acts which, if proved, would show legal cruelty to have been committed. There can be no doubt about the meaning of adultery, when stated as the ground of a petition; but cruelty in ordinary language is an ambiguous term. Precision as to details is to **[491]** be avoided. All pleadings should be as concise as is consistent with showing a legal ground for the proceeding instituted, and the other party may apply for further specification, if it be necessary for conducting the defence. With respect to the question of custody of children, and whether the prayer for that should form part of the petition for separation, or, where ill-treatment of them is alleged, be a separate proceeding, I must take time to consider. Cur. adv. vult.

*The Judge Ordinary*: It must be borne in mind that the only power this Court has to make a permanent decree as regards custody of children is upon a decree for judicial separation, &c.: (sect. 35 Divorce Act). Unless it is in a position to make such a decree, it has no jurisdiction whatever as regards the children, and it seems to me that great inconvenience might arise from going into the question of the respondent's conduct towards the children before a decision is come to as regards his conduct towards the petitioner; for, if she is not entitled to a decree, nothing can be

done about the children. If issues are raised for a jury they might find a verdict negativing the allegation of cruelty to the wife, and affirming misconduct towards the children; but it would be useless. But at the same time, as cruelty to the children in the presence of the mother has been held to be cruelty towards her, the petitioner is at liberty to allege cruelty to her children under such circumstances, and the fourth article may stand if it be reformed by alleging that acts of cruelty towards the children were committed in the presence of the mother; but I should refuse, at the hearing of the petition, to go into evidence as to general misconduct towards the children.

In most cases, what is proved as to the misconduct of the husband towards the wife would be sufficient to enable the Court to decide upon any prayer for the custody of children; but, if it were not, I should allow the petitioner to produce further proof on affidavit as to particular misconduct towards the children.

**[492]** SUGGATE *v.* SUGGATE.—July 25, 1859.—Judicial Separation.—Cruelty.—Condonation not pleaded but appearing in evidence.—Custody of Children.—When, on an issue before a jury of cruelty or not cruelty, condonation, by cohabitation continued after the last act of cruelty laid, appears on the evidence, the Court would probably refuse to pronounce a decree on a verdict finding cruelty. But if, under such circumstances, it would notice condonation, though not pleaded, it would also admit evidence of acts of cruelty subsequent to the condonation, though not pleaded.—Semble, regard being had to the maintenance of the children, the wife, when she succeeds in her suit, has a primâ facie right to the custody of the children under fourteen years of age; for she is not to buy the relief to which she is entitled owing to her husband's misconduct at the price of being deprived of the society of the children.

[S. C. 29 L. J. P. 167; 8 W. R. 26. Applied, *Chetwynd* v. *Chetwynd*, 1865, 4. Sw. & Tr. 151.]

This was a petition for judicial separation, at the suit of the wife, by reason of the husband's cruelty. Mr. Suggate was a seller and teacher of music at Lowestoft. The petition stated the marriage of the parties in 1848; cohabitation principally at Lowestoft, and the birth of four children, three boys and a girl. It then set forth certain specific acts of cruelty, which, however, did not extend down to July, 1858, at which time, as it appeared in evidence at the trial, the parties were living together, and when, in consequence of a squabble and dispute about a bank-book and deposit-notes, and some copies of letters in Mr. Suggate's handwriting addressed to a female, Mrs. Suggate ultimately left her husband's house. The petition also set forth certain acts of violence towards the children in the presence of the mother (see p. 490), and concluded with a prayer for the custody of the children, as well as for a judicial separation. The answer of Mr. Suggate simply denied the cruelty alleged, and that issue was tried before the Judge Ordinary and a common jury on 3rd, 4th, and 6th of June.

Mr. O'Malley, Q.C., Mr. Macqueen, and Mr. Couch, for the petitioner.

Mr. Power, Q.C., Dr. Spinks, and Mr. Keane, for the respondent.

**[493]** The jury found a verdict for the petitioner.

On the 29th of June, Mr. Macqueen moved for a decree on the above verdict, and prayed for an order giving Mrs. Suggate the custody, maintenance, and education of the children. Affidavits as to the parents and their respective conduct to the children were before the Court. He submitted that the rule laid down in "Bishop on Marriage and Divorce," s. 643, would apply to the present case:—"Upon principle, therefore, the rule would seem to be that, primâ facie, after separation, the father is entitled to the custody of the children, unless there is a divorce for his fault, in which case the mother is entitled; yet that the primâ facie right must always be subject to superior claims, that is, the good of the children." This last point was much considered in the French courts. In the present case, Mrs. Suggate's character was preferable, and her mother would make arrangements for the support and education of the children. He cited *Talbot* v. *The Earl of Shrewsbury*, 4 Myl. & Cr. 673; *Re Tomlinson*, 3 De G. & Sm. 371.

Dr. Spinks, contrà, contended that the Court was not in a position to make the decree prayed. The only point in issue before the jury was cruelty, and though on that their verdict was in favour of the petitioner, yet a Matrimonial Court was

bound to notice condonation when it clearly appeared on the evidence, as it did in this case, by the proof of continued cohabitation after the last act of cruelty charged in the petition. Cur. adv. vult.

*The Judge Ordinary*: This was a suit of judicial separation, instituted by Sarah R. L. Suggate against her husband, Alfred Suggate, on the ground of cruelty.

Several specific acts of cruelty were alleged in the petition. The respondent, by his answer, denied the cruelty alleged, and that issue was tried before me by a jury, who found that the respondent had been guilty of cruelty as alleged. In the course of the trial, it appeared that the petitioner had continued to cohabit with her husband after the acts specified in the petition; but it also appeared that, on a subsequent occa-**[494]**-sion, when a dispute arose about some banker's deposit-notes and some copies of letters, he was guilty of great violence towards her, and she then quitted his house and went to her mother's, where she still remains. Upon this state of facts, Dr. Spinks, relying upon the dictum of Lord Stowell, in *Beeby* v. *Beeby*—that condonation, although not pleaded, if clearly proved, might be sufficient to deprive the complainant of a remedy—prayed the Court not to pronounce a decree for judicial separation, on account of the cruelty proved, the evidence showing that it had been condoned. I am far from saying that, if there had been nothing else in the case but a verdict finding cruelty and clear evidence of condonation, I should not have acted upon the dictum of Lord Stowell, and have refused a decree; but if I am to notice condonation, although not pleaded, it would be quite contrary to justice if I were not also to notice evidence of subsequent acts by the husband, which sufficed to revive the cruelty condoned; I therefore feel bound to reject Dr. Spinks' prayer and to found a decree on the verdict of the jury.

I have next to consider the application made by Mrs. Suggate, that she may have the custody of her children the issue of the marriage. There are four,—three sons of the ages respectively of nine, six, and two, and one daughter aged four years. This application was not rested entirely on the ground that the misconduct of the husband had obliged her to seek a judicial separation for her own protection; it was contended also that his conduct was immoral as well as cruel, and that his habits and conversation was such as to render it improper that he should be entrusted with the care of his children. On the other hand, some attempts were made to show that the petitioner was herself in the habit of using intemperate language, was extremely dirty in her habits and careless, and was not qualified to bring up her children well. I will not go through these affidavits in detail; suffice it to say that I have examined them carefully, and have come to the conclusion that they do not establish any case against Mrs. Suggate.

On the other hand, I do not find reason to impute to Mr. Suggate any want of affection to his children, although I believe he has occasionally done acts towards them of a very objectionable nature for the purpose of annoying his wife. **[495]** With regard to his morality, that was seriously impeached by the copies of letters in his own handwriting which were given in evidence, and which purported to have been addressed by him to some young female, whose identity was not established. Mr. Suggate gave a very ingenious, but not very credible, answer to this charge, viz. that his wife having frequently remained away from his house with her own parents, in order to excite her jealousy, and induce her to remain at home, he composed these letters, intending that she should find and read them. The letters contain very strong internal evidence that they were not written for any such innocent purpose. In one of them, dated when he was in London, he says, "I shall be down tomorrow, thank God; but what do I say? to be near my beloved I must be nearer one I cannot love, and that is torture to me till she goes away again." In another. "Her mother goes today if she can get a conveyance, and the two boys with her." At the conclusion, "Her mother does not go till tomorrow; I wish the whole lot were going." And the Court is invited to believe that these letters were written by a fond husband and father, in order to induce his wife to remain at home, and not to take her children to her mother's. But we have his own account of these papers, differing essentially from that which he now pretends to be the truth. In addition to this, there is his own affidavit, filed in the month of June, giving such a picture of his wife's habits and conduct, that, if it be true, it was hardly possible that he could wish her to remain at home. I cannot believe both that affidavit and the statement made by him in court of the purpose for which the letters were written. I am sorry

to say that I do not believe either. The affidavit is contradicted by the other evidence in the cause, and his evidence by the contents of his letters, and by his own assertion that they were written for no other eye than his own.[1] If his present account **[496]** of the letters were true, he would still remain subject to the imputation of having done a grievous injury, not to his wife, but to some innocent female. There is enough in them to direct suspicion against some individual not named. Probably few, if any, in the neighbourhood, would entertain much doubt as to the party to whom he pretended to address them, and few would believe that the intercourse between them was innocent. If he had not in truth corrupted the mind of a female pupil, he was quite willing, for the sake of his own domestic advantage, to let the world suppose he had done so. A man capable of so much heartless baseness is not the person on whose veracity much reliance can be placed.

The conclusion at which I have arrived is, that the wife, as an injured party, had good ground for seeking a judicial separation, and that she ought not to obtain it at the expense of losing the society of her children; that I am not satisfied that her habits or conduct are such as to render her in any way unfit to have charge of them; that with respect to the respondent, if he is deprived of the society of his children, that is the consequence of his own misconduct; and in addition to his ill-treatment of his wife, I have but too much reason to think that they would not be brought up as carefully and morally by him as by their mother, and therefore, as an act of justice towards the petitioner, and for the advantage of the children, I order that they be kept in her custody until they respectively attain the age of fourteen years; the father to be kept informed from time to time of the place or places where **[497]** the children are residing, and to have access to them once a week for two hours, between 10 a.m. and 4 p.m., in the presence of some person to be appointed for that purpose by the petitioner. The Court has been informed (somewhat irregularly indeed) that the mother of the petitioner will provide funds for their education, and I hope such will be the case, but if not, the Court will probably, ere long, be in a position to vary its decree as to the custody of children from time to time, as circumstances may require.[1*]

(Before the *Judge Ordinary*, on motion.)

SUGGATE *v.* SUGGATE. August 3, 1859.—Practice.—Taxed Costs against Husband.—Number of Counsel.—Expenses of Local Attorney.—The general principles of taxing costs against a husband in matrimonial cases are the same as in other causes. The rule of the Ecclesiastical Courts not to allow more than two counsel on taxation is not applicable where the evidence is oral in open court. Where a London attorney conducts the suit, no expenses of a local attorney will be allowed on taxation against the husband.

This was a question on the taxation of the wife's costs in the last-mentioned suit, who had obtained a verdict and decree in a petition for judicial separation, by reason

---

[1] "Lowestoft, July 24th, 1858.

"My dear Wife,—A bill for your conveyance was sent here, 10s.; I can only say if you continue to do this, I will sell your dresses and all your things to pay such bills, and insist upon having two children away with me. But you surely would not wish to injure me in my business by endeavouring to use those papers against me—papers that were written for no *other eye than mine*—papers which I am sure you took; now think well before you drive me to desperation, you will thus only make things worse; with love to my dear children,—I remain yours,

"ALFRED."

On the 28th of July she wrote to him to send some of her and the children's clothes, to which he replied:—

"Lowestoft, July 29th, 1858.

"Dear Wife,—I will not undertake to send anything till you return me those papers, nor shall anything be taken away. I will quite excuse your denial of them; but they were my own private property, and nothing else will satisfy me. I am sure you took them.—Yours very truly,

"A. A. SUGGATE."

[1*] This power is now given by 22 & 23 Vict. c. 61, s. 4.

of cruelty, as against the husband. The bill presented for taxation was £361, 4s, 10d.; the registrar had reduced it to £265, 16s. 7d.

This taxation was objected to on both sides.

Dr. Spinks, on behalf of the husband, objected to the following items allowed:—£7, 7s. for instructions for brief, on behalf of the petitioner, in support of application for decree of judicial separation, and for the custody of the children; £8, 10s. for drawing the said brief; the charges for attending on and employing three counsel on behalf of the petitioner, and the consequent expenses of three copies, briefs, etc., [498] throughout the cause; the expenses attendant on the postponement of the cause on 16th May, inasmuch as neither the respondent nor his proctors received notice of the cause having been appointed to be heard till the morning of that day; certain refresher fees paid to counsel on two occasions. With respect to three counsel, this is a matter generally within the discretion of the registrar; but not so in the Divorce Court in cases for judicial separation, where it will follow, unless there is good reason to the contrary, the rules of the Ecclesiastical Courts, where more than two counsel would not have been allowed in taxing against the husband, who must generally pay the costs of both sides. Only five witnesses were examined for the wife.

Mr. Macqueen, on behalf of the plaintiff, objected to the registrar's having disallowed the following items:—Two journeys to London and expenses of the managing clerk of the solicitors at Beccles, for the purpose of attending the trial—all items in the bill for close copies of the proceedings sent to the said solicitors; the expenses of one of the petitioner's witnesses in town, as not a necessary witness.

*The Judge Ordinary*: I am of opinion that the registrar is right throughout; it may bear hard on the husband, who has to pay the costs on both sides, but it is inevitable. I have endeavoured to ascertain the principle on which the wife's proctor's costs used to be taxed; I find that it is the same as in other cases, and that no distinction was made because the husband has to pay the costs on both sides. It is true that, under the old practice, two counsel only would have been allowed; but where the evidence is given orally in open court this principle is inapplicable: there are not only a party's own witnesses to be examined, but the witnesses on the other side to be cross-examined. As to this particular case, it lasted half Friday, all Saturday, and till late on Monday. On the other hand, I quite approve of disallowing the items for the close copies and expenses of the attorneys' clerk attending the trial. It would be very hard if throwing open the Court to the profession generally were to compel the husband to pay for the double expenses of a London and country attorney.

**[499]** (Before the *Judge Ordinary.*)

MATTHEWS *v.* MATTHEWS. August 3, 1859.—Deed of Separation.—Petition for Judicial Separation.—Lapse of Time.—A. married in 1844, and lived in the same house with her husband till 1853, when a deed of separation, reciting mutual differences, etc., was executed, and the cohabitation ceased. In 1856 A. petitioned for judicial separation, and proved certain acts of cruelty. The Court dismissed the petition.—Lapse of time is not an absolute bar to such a suit, but in connection with other matters, such as a deed of separation, will be taken into consideration.

[S. C. 29 L. J. P. 118. Affirmed, 1860, 3 Sw. & Tr. 161. Distinguished, *Green* v. *Green*, 1873, 3 P. & D. 125. Referred to, *Besant* v. *Besant*, 1879, 12 Ch. D. 615.]

This was a petition for judicial separation at the suit of the wife, alleging desertion and cruelty. The petition stated the marriage of the parties in July 1844, and cohabitation till the month of November, 1852, at Chipping Norton, where the husband carried on the business of a grocer; that for two or three years previously to November, 1852, the petitioner had not regularly slept in the same bedroom with her husband, and that from November, 1852, till the 1st October, 1853, though resident in the same house, the husband and wife occupied different apartments; that there were two children of the marriage, of the respective ages of eleven and eight years; that since the 1st of October, 1853, Matthews had deserted the petitioner and his children, from which time she had maintained herself. The petition further set forth that in the year 1847 Matthews commenced to ill-treat the petitioner, and specified several acts of violence down to the time of his leaving her in October, 1853.

The answer of the husband simply denied the desertion and cruelty.

It appeared at the hearing that in 1848 Matthews bought the house and shop at Chipping Norton, where he carried on his business, and borrowed on mortgage £1000 belonging to the trustees of his wife's marriage-settlement. There was no **[500]** doubt that the husband and wife had been on bad terms; that he had been given to drink and neglected his business, and evidence was given of certain acts of violence on his part towards her.

As regards the alleged desertion, it appeared that in July, 1853, Matthews sold to his brother-in-law, Clark, the house and business; that an indenture, dated the 1st of October, 1853, between George Matthews of the one part, and Stephen Clark of the other, recited (among other things) that differences had arisen between Matthews and his wife, and that they were mutually desirous to live separate; that it had been agreed between Matthews and Clark, as the brother and on behalf of the said Ann Matthews, that Clark should indemnify Matthews against all liability to the debts of his wife, and that Matthews, in consideration of such undertaking, and of certain advances made by Clark and of the advantage which Matthews had for some time past derived from having lived with his wife and children in the house and at the expense of Clark, assigned to Clark upon certain trusts, a policy of assurance and his reversionary life-interest under his marriage-settlement; and that so long as Clark observed his covenants, etc., therein, Matthews would permit his wife to live apart as if she were a feme sole, and have the entire custody and control over their children, and would not take up his permanent abode within twenty miles of Chipping Norton without Clark's consent in writing.

Dr. Phillimore, Q.C., and Mr. Prentice, for the petitioner.

Dr. Spinks and Mr. Field, for the respondent.

Cur. adv. vult.

*The Judge Ordinary*: The parties in this suit married in 1844; the husband was then a grocer. Bad habits on his part began in 1847, and so matters went on till a deed of separation was executed in 1853. [The learned Judge Ordinary here stated the substance of the above indenture.] In consequence Matthews gave up his shop and assigned the policy of insurance; he relinquished his right in remainder to **[501]** the money settled, and went away and never attempted to violate the covenants of the deed.

The wife now petitions on the ground of cruelty, and she gave evidence of cruelty, which, if taken according to the letter, would have been sufficient to call for the interposition of the Court if the suit had been then instituted; but my confidence in the accuracy of the statements is much diminished by the evidence of the apothecary and shop apprentice. It is not improbable that the wife, reflecting on the conduct of a husband for whom her regard was extinguished, has drawn to herself an exaggerated picture of the evils which she had to endure. If she had then good grounds for applying for a divorce à mensâ et thoro, I cannot understand why it was not done, unless she preferred the private arrangement as a whole. She is therefore now in this dilemma—either there were not sufficient grounds for such a proceeding, or she advisedly abstained from it, preferring the remedy of a separation by deed.

The case of *Walker* v. *Walker*, 2 Phil. 153, was cited as an authority for dismissing the petition. It was not exactly in point, but I think the principle is applicable. The ground on which the Ecclesiastical Court in such cases interposed was to protect the person of the wife from injury; in fact, the wife in this case is in no danger; she elected her own remedy when the transactions were recent, and cannot, I think, now call upon the Court to act as if they had just preceded the petition.

I do not mean to put the lapse of time as an absolute bar, but I think that, taken in connection with the deed of separation, it shews that this is not a bonâ fide application made for the protection of the wife, but for some collateral purpose, and that the Court ought not to grant the prayer of the petition. It must therefore be dismissed.

**[502]** (Before the Full Court.—*The Judge Ordinary*, *Williams*, *J.*, and *Bramwell*, *B.*). HASWELL *v.* HASWELL AND SANDERSON. November 19, 1859.—Petition for Dissolution.—Separation before Adultery charged.—20 & 21 Vict. c. 85, s. 31.—When the petitioner has proved the allegations of his petition, there must be affirmative evidence of "desertion, wilful separation," etc., to enable the Court

to exercise the discretion given it by sect. 31 of Divorce Act, of refusing to pronounce a decree.—Quære, whether petitioner's counsel has a right to examine him to disprove the existence of such circumstances as, if established, would raise a case for the discretion of the Court. If the Court, to satisfy doubts raised by the petitioner's witnesses, examine the petitioner under the 43rd section, his counsel will be at liberty to suggest any question tending to explain facts which may have been elicited by the examination of the Court.

[S. C. 29 L. J. P. 21; 8 W. R. 76. Referred to, *Harriman* v. *Harriman*, [1909] P. 144; *Davis* v. *Davis*, [1918] P. 86; *Wickins* v. *Wickins*, [1918] P. 271.]

This was a petition for dissolution of marriage, at the suit of the husband, by reason of the wife's adultery. No appearance was given for the wife. The marriage took place in May, 1852; the petitioner was described as an artist, and was about twenty-one years of age at the time of the marriage. The respondent was then living with her mother, a Mrs. Gilbert, who kept an eating-house in Eastcheap. The petitioner's father lived in the neighbourhood, and he and his family had some acquaintance with Miss Gilbert. The marriage took place without the knowledge of the parents of either party, apparently because the petitioner had no means of commencing housekeeping. He visited his wife from time to time at her mother's till about November, 1852, when, in consequence of alleged misconduct on her part, he refused to see her any more. Subsequently to this, the petitioner seems to have passed a good deal of his time in Scotland, coming backwards and forwards to London, where he sometimes stayed at his father's house; sometimes in chambers in Lyon's Inn. At some period after the cohabitation had ceased, and while the petitioner was absent in Scotland, his father found a letter in his desk in the handwriting of the respondent, and signed Mary **[503]** Jane H. Mr. Haswell, sen., sent for her, and she acknowledged that it was her letter, and that they had been married. Mr. Haswell and his family seem to have been inclined to receive her kindly; but on representation by letter from the son of her misconduct, and of his reasons for discontinuing cohabitation, they saw no more of her, or she ceased to call on them.

Subsequently there was no doubt that she had cohabited with Sanderson.

Mr. Bayley, who had known both the parties, and had married a cousin of the respondent, said, that he had talked with the respondent about a quarrel with her husband; that Mrs. Haswell had said that her husband had caught her with Holmes. "John came in one day in a hurry, and came into the front room, and caught me with Holmes, and that was the beginning of the quarrel."

Dr. Phillimore, Q.C. (Dr. Spinks with him), conducted the petitioner's case, and submitted that if under the 31st section of the Divorce Act, the Court suspected the petitioner of "wilfully separating himself without reasonable excuse," it would, under the power given by 43rd section, allow the petitioner to be examined. This has been done in several cases.

*The Judge Ordinary*: In those cases the petitioner was examined hostilely by the Court. I apprehend that under the 43rd section the party may be called by the other side or the Court, but not to prove his own case.

*The Judge Ordinary* (after consultation): We have considered this point, and as regards the discretionary power of the Court under the 31st section, it appears to us that when the petitioner has established his petition, alleging adultery against the wife, a case for the exercise of the discretion of the Court does not arise, unless it is made out affirmatively that the husband deserted or wilfully separated himself without reasonable excuse, etc. As the case at present stands, you have established your allegation of adultery; the fact, that the husband withdrew himself without reasonable excuse is not **[504]** affirmatively established. The Court are not prepared to accede to your argument on the 43rd section; they would be glad to have the point regularly argued by counsel for the respondent as well as for the petitioner. But the Court think that they may properly put the petitioner in the witness-box to satisfy their own minds whether a case arises in which they would be called upon to exercise their discretion under the 31st section.

The petitioner was then sworn and examined by the Court. He said, that the quarrel which led to his abandoning his wife took place some time before the Duke of Wellington's funeral; that he found his wife in a room upstairs with Mr. Holmes, his hand in her bosom, and one arm round her waist—she was sitting quietly by

him on the sofa; that he took some hours to consider what he should do, and then determined to have nothing more to do with her, and never went to her mother's house again; he then went to lodge in Lyon's Inn, where his wife came to him once to ask him to return letters, etc. This he did, and the letter which his father afterwards found he supposed was then inadvertently kept back. He had no particular recollection of that letter; it was probably written when he was living at Kingsland, where he had intended to provide a house for his wife.

[The Court remarked to counsel that they were at liberty to suggest any question that might serve to explain anything that the Court might have elicited, which seemed adverse to the petitioner.]

*The Judge Ordinary*: The Court has felt some difficulty in putting a construction on this latter branch of the 31st section. We are satisfied that the petitioner's case is proved, and there is no proof of any of the matters in the first part of the section mentioned which would bar the Court from granting a dissolution. So far, then, the Court is bound to pronounce a decree. But now comes the proviso, "That the Court shall not be bound to pronounce such decree if it shall find that the petitioner has, during the marriage, been guilty of adultery, or if the petitioner shall, in the opinion of the Court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty to-[505]-wards the other party to the marriage (none of these have any application to the present case), or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without any reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery." It is, perhaps, not very clear what the word deserted here means; it may be equivalent to "leaving her destitute." If "desert" stood alone in this clause it might signify simply "to abandon;" but it is followed by the term "wilful separation," which is limited by "without reasonable excuse," which applies equally to all the preceding words. Now, there is evidence of the husband going away in consequence of a quarrel about Holmes. According to Bayley's evidence, the wife herself assigned this to him as the cause of the quarrel. The Court cannot say that this was not a reasonable excuse. It is not necessary to prove all the precise circumstances; the expression "caught me with Holmes" is equivocal; but on examination of the party he said that he had found his wife submitting to indecent liberties, and on that ground he did not again return to her mother's house, where she resided. It is not necessary for the Court to say that this would have justified him in turning her out of his house; that it would have enabled him to resist an action of debt for necessaries supplied her; or would have been a sufficient answer in a suit for restitution of conjugal rights. But the question is, whether we are in a position to exercise a discretionary power. The adultery has been fully proved, and we cannot say that the petitioner comes within the description of a person "wilfully separating himself without reasonable excuse." The discretionary power therefore does not exist. The petitioner is entitled to a decree.

Decree, dissolution of the marriage.

**[506]** IN THE GOODS OF HARRIET S. L. WEIR (Widow, deceased), on Motion. March 9, 1859.—Administration.—Further Duty payable.—Sureties.—Amount of Bond.—55 Geo. III. c. 184, ss. 41, 42.—20 & 21 Vict. c. 70, ss. 81, 82.—Administration was taken out under £20,000, and the usual bond in a penalty of double that sum entered into. The administratrix subsequently received a sum of money from a bankrupt estate indebted to the deceased, which made it necessary to reswear the amount under £25,000. The Court, under the 82nd section of 20 & 21 Vict. c. 77, directed the registrars of the principal registry to receive a separate bond in the penalty of £10,000, which, together with the original bond, would be double the amount of the sum under which the estate was to be resworn.

[S. C. 28 L. J. P. 111.]

In this case the administration of the personal estate of Mrs. Weir had been granted on the 25th February 1858, to Eliza Maxwell, a sister and one of the next of kin of the deceased, and the usual administration bond with two sureties in the penalty of £40,000, being double the amount under which the estate was sworn, had been executed. After the administration a sum of £425 had been received by the

administratrix from the estate of a bankrupt who was indebted to the deceased, which raised the value of the deceased's estate above £20,000, and it was now necessary to reswear the same as under £25,000, and to pay a further duty on the administration; (55 Geo. III. c. 184, ss. 41, 42). The latter section provides, [507] "That in cases of letters of administration on which too little stamp duty shall have been paid at first, the Commissioners of Stamps shall not cause the same to be duly stamped in the manner aforesaid until the administrator shall have given such security to the Ecclesiastical Court or Ordinary by whom the letters of administration shall have been granted as ought by law to have been given on the granting thereof, in case the full value of the estate and effects of the deceased had been then ascertained."

The administratrix, with the same two sureties, had duly executed a bond in the penalty of £10,000, which, with the former bond, would be double the amount under which the effects of the deceased were now sworn; but the registrars of the principal registry of the Court refused to receive this bond without an order of the Court, on the ground that they had no power to take several bonds; they required a fresh bond, with two sureties in the penalty of £50,000. By the practice of the registry the original bond would be retained, and the sureties would thus be liable to the amount of £90,000.

Mr. Aspland now moved the Court, under the above circumstances, to order that on payment of the further duty on the letters of administration, the administration-bond might be taken in the penalty of £10,000 instead of £50,000. The sections of the Probate Act, 20 & 21 Vict. c. 77, applicable, are the 81st and 82nd. The former enacts that "every person to whom any grant of administration shall be committed shall give bond to the Judge of the Court of Probate, to enure for the benefit of the judge for the time being; and if the Court of Probate, or (in the case of a grant from the district registry) the district registrar shall require, with one or more surety or sureties, conditioned, etc., which bond shall be in such form as the judge shall from time to time by any general or special order direct," etc. The 82nd provides that "such bond shall be in a penalty of double the amount under which the estate and effects of the deceased shall be sworn, unless the Court or district registrar, as the case may be, shall in any case think fit to direct the same to be reduced, in which case it shall be lawful for the Court or district registrar so to do, and the Court or district re-[508]-gistrar may also direct that more bonds than one shall be given, so as to limit the liability of any surety to such amount as the Court or district registrar shall think reasonable." These sections appear to give no power to the registrars of the principal registry, but it seems a fit case for the Court to act upon, and not to oblige a further bond in the penalty of £50,000 to be given.

*Sir C. Creswell* granted the motion as prayed.

IN THE GOODS OF ANN ALMOSNINO (Widow, deceased), on Motion. April 27 and May 4, 1859.—Executed and unexecuted Testamentary Papers.—Reference.—Parol Evidence.—B. produced a sealed envelope, on which was written, "I confirm the contents written in the enclosed document in the presence of," etc. This was signed by her, and attested by two witnesses. On her death, two days subsequently, the envelope, still sealed with the same seal, was found on her table directed to J. A., her nephew; on being opened, it was found to contain a testamentary disposition in the form of a letter addressed to her nephew. The Court admitted parol evidence of the identity of the enclosed paper so found after her death with the document referred to by the executed memorandum, and granted probate of the envelope and contents to J. A., as executor according to the tenor.

[S. C. 29 L. J. P. 46; 6 Jur. (N. S.) 302; 8 W.R. 29.]

In this case the testatrix died on the 31st of December, 1858. On a table in her room was found an envelope, which had been sealed, but the seal was broken, directed to Mr. Azuelos, No. 62, Bishopsgate Street Without. Within this was another envelope, sealed and directed "For Mr. Azuelos, No. 62, Bishopsgate Street Without. I wish him to open this letter immediately I am dead, or, if he should not be in London at the time of my death, it must be delivered to Mr. S. Almosnino, No. 11, Bevis Marks, City."

On the inner envelope was also written, "I confirm the contents written in the

enclosed document, in the presence of **[509]** Richard Morse and Sarah Praeger, this 29th day of December, 1858.

"A. ALMOSNINO.
"RICHARD MORSE, 8, Charing Cross.
"SARAH PRAEGER, 25, Esher Street,
"Upper Kennington Lane."

Inside this envelope, when opened, was found a paper in the deceased's handwriting, commencing thus:—

"My dear Nephew,—You will be doing me a charity if you will comply with my last wishes; I always found you very kind, and I hope you will not refuse my last request," etc. The paper proceeded to give directions as to her funeral, and the disposition of her property; it was signed by her, but not attested; and mentioned no executor. From the affidavit of Judah Azuelos, it appeared that he was nephew of deceased's husband, and was in the habit of visiting the deceased, who had frequently mentioned to him a paper containing instructions to be attended to after her death, and addressed to him; that on the 29th of December, 1858, he told her that such a paper ought to be signed by two witnesses, when the deceased sent for Morse, and signed the memorandum of confirmation written by Morse on the inside envelope; that the paper writing and the addresses on the envelopes were in the deceased's handwriting; that the seal on the inner envelope remained unbroken when the memorandum was written (the deceased objecting to have it opened), and that the same seal was found unbroken after her death when the inner envelope was cut open.

Richard Morse, at whose house the deceased lodged, deposed that he went into her room on the 29th of December, 1858, at Mr. Azuelos' request, and wrote the memorandum on the inner envelope, which was signed by the deceased in his presence, and that of Sarah Praeger, and that they then attested it; he gave the same account of the condition of the envelopes and seals as Azuelos did, which was confirmed by S. Almosnino, who, after deceased's death, had cut open the inner envelope.

April 27.—Mr. Dowdeswell moved the Court to decree probate of the paper writing and of the inner envelope, as together containing the will of the deceased, to Judah Azuelos, as executor ac-**[510]**-cording to the tenor. Parol evidence is admissible for the purpose of shewing that the paper writing was the document referred to by the memorandum.

*Sir C. Cresswell*: Is there any case in which a paper has been held to be incorporated, by reference, with one duly signed and attested, where there was no description whatever of the paper supposed to be referred to? It seems to me to differ from most of the cases cited in *Allen* v. *Maddock* (11 Moore, P.C. 427); the deceased does not call it a will or testamentary paper, or in any way describe it; the words are simply, "I confirm the contents written in the enclosed document."

Cur. adv. vult.

May 4.—*Sir C. Cresswell*: In this case application was made for probate of a paper under rather singular circumstances. The deceased wrote a paper giving directions for the disposition of her property after her decease, and apparently not wishing any one to know the contents, she enclosed it in an envelope on the outside of which, in consequence of a suggestion that any paper to be acted upon after her death ought to be signed by two witnesses, was written, "I confirm the contents written in the enclosed document," etc.; this was duly signed by the deceased and attested by two witnesses. The question is, whether parol evidence can be received to identify the document purported to be confirmed, and, if so, whether the evidence of identity is sufficient? Where a duly executed paper contains a reference to another testamentary paper the Court is at liberty, by parol evidence, to ascertain all the circumstances of the case, so as to place itself, as far as possible, in the situation of the testator, the meaning of whose language it is called upon to declare; for on such occasions the Court of Probate is, to some extent, a Court of construction; but parol evidence is inadmissible to prove intention. In *Allen* v. *Maddock*, 11 Moore, P.C. 427, all the cases on this point were elaborately reviewed. Here the fact to be proved is the identity of the instrument now produced with the document referred to in the memorandum indorsed on the inner envelope. The parol evidence shows that the envelope was sealed in a **[511]** particular manner, and that it was found so

sealed after the testatrix's death, without any appearance of the seal having been broken. The memorandum refers to only one paper, and one only was found in the envelope when opened. I have no doubt that the document referred to by the deceased was the paper found in the envelope after her death, and shall decree probate as prayed.

Probate granted.

IN THE GOODS OF LUIS BIANCHI (deceased), on Motion. June 1, 1859.—Administration.—Practice.—Administration of the Effects in England of a domiciled Brazilian granted to an Attorney for that purpose duly appointed.—A. died domiciled in Brazil, intestate, leaving a widow and several children (all minors), and some personal property in England. The Judge of Orphans, a functionary in Brazil charged with the administration of estates belonging to minors, having appointed B. guardian of the children of the deceased, who appointed C., the Brazilian minister at Turin, his attorney in the matter, with power of substitution, issued letters of request to the judicial authorities in England to collect and deliver the property of the deceased to C. or his representative. C. appointed D., resident in England, his substitute.—Authenticated copies of the proceedings before the Judge of Orphans, and of the power of attorney to C., the original power of attorney to D., with affidavits of the facts of the case, and of the law of Brazil, having been filed, the Court granted administration to D.

[S. C. 28 L. J. P. 139.

Luis Bianchi, late of the city of Bahia in Brazil, died at Teneriffe in August, 1856, intestate, being then on his way to Europe for a temporary visit, leaving a widow, Angelique Bianchi, now the wife of Eliziario de Morais, and seven children, who are still minors.

The deceased, who was a Sardinian by birth, at an early age abandoned his domicil of origin, and acquired a domicil at Bahia in Brazil, where he amassed a considerable fortune. Upon his decease his widow returned to Bahia, and the succession to his estate, which by the law of Brazil devolved to his children in equal shares, was opened before the Judge of Orphans, the lawfully constituted authority in cases of minority to superintend the collection and administration of the [512] estate; for which purpose he is required to make inventories of all property in which the minors are interested, and to make partition thereof as between such minors and the widow, who is required to bring to such partition all the property that remained at the death of the husband, and who cannot alienate or appropriate to herself any portion of the estate prior to such partition.

The widow, who was in the first instance appointed by the Judge of Orphans the tutrix or guardian of the minor children, was, upon her subsequent marriage with her second husband also a Brazilian subject, *ipso facto* by the law of Brazil, deprived of the guardianship of the children; and the Judge of Orphans, as required by the law of Brazil, appointed another guardian in her stead, viz. Lieut.-Col. Lourenço de Souza Marques, who is now the guardian of the minor children. The deceased at the time of his death had the sum of about £4,000 in the hands of Messrs. Heath and Co., of London.

On the 12th of July, 1858, the Judge of Orphans of Bahia, who, if the property is out of his jurisdiction, is required by the law of Brazil to apply to the competent authorities of the place where such property is situate to recover such property, with a view to the due administration thereof, issued letters of request to the Judge of Orphans, or other judicial authorities in England, to collect and deliver the property of the deceased to the Brazilian minister at Turin, Cesar Sauran Vianna de Lima, the attorney, with power of substitution, of Lourenço de Souza Marques, in order that the same might be remitted to Bahia, and enter into the future distribution of the property. Under this power of attorney, the Commander C. S. Vianna de Lima executed a power of attorney, appointing Mr. W. H. Clerk his substituted attorney in London, for the purpose of receiving the personal estate of the deceased, and expressly authorizing him to obtain letters of administration of the personal effects of the deceased in England.

Proceedings had been also instituted before the Judge of Orphans at Bahia, in respect to the domicil of the deceased, and on the 2nd of April, 1859, sentence was

given to the following effect, viz. :—" Having seen the depositions of the witnesses, I adjudge that the deceased Bianchi constantly **[513]** declared that he had abandoned for ever his primitive domicil at Genoa, establishing it definitely in the city of Bahia."

An affidavit by Mr. W. H. Clerk had been filed in support of the foregoing statement, to which was annexed the original letters of request from the Judge of Orphans : authenticated copies of the proceedings had before him with reference to the deceased's domicil, and of the power of attorney from the guardian of the minors to Cesar Sauran Vianna de Lima ; also the original power of attorney from the latter to Mr Clerk.

An affidavit by a Doctor of Laws and Advocate of the Court of Justice of the city of Penedo, in the Brazils, as to the law of Brazil in reference to the matters above referred to, was also filed.

Dr. Spinks moved the Court to decree letters of administration of the personal estate and effects of the deceased in England to be granted and committed to William Henry Clerk, as the attorney of Cesar Sauran Vianna de Lima, the attorney, with power of substitution, of Lourenço de Souza Marques, the guardian of the minor children of the deceased, under the usual security.

*Sir C. Cresswell*: I am satisfied. The grant will be made to Mr. Clerk, the Attorney of the Brazilian minister at Turin.

Motion granted.

IN THE GOODS OF MARIA WORMAN (deceased), on Motion. June 15, 1859.—Desertion of Husband.—Protection Order.—Administration granted to the Wife's Next of Kin of such Property as had been acquired by her after the Desertion.—M. W. having been deserted by her husband, obtained a protection order, under 20 & 21 Vict. c. 85, s. 21, by reason of his desertion. On her death, in the life of her husband, intestate, the Court decreed letters of administration, limited to such personal property as she had **[514]** acquired or become possessed of since the desertion, without specifying of what that property consisted, to be granted to one of her next of kin.

[S. C. 29 L. J. P. 164 ; 5 Jur. (N. S.) 687.]

Maria Worman, the deceased in this case, was married in 1847 to John Worman. On her marriage she was possessed (amongst other things) of certain leasehold property, and of £100 in a bank, which were then secured to her separate use. On the 13th of April, 1858, she was deserted by her husband. Shortly afterwards she received from him a letter, dated April 21, 1858, in which he enclosed the joint promissory note of W. C. Morris and J. Morris for £50, payable to himself John Worman or bearer, and told her to take it up whenever she required it, and to sell any of the furniture he had left in the house which she did not want for her immediate use. On the 25th of July, 1858, she obtained a protection order, under 20 & 21 Vict. c. 85, s. 21, by reason of her husband's desertion. The order was signed by two Justices of the Peace in Petty Sessions held for the district of Neath, in the county of Glamorgan, and was subsequently entered with the registrar of the county court at Neath, within the jurisdiction of which she then resided.

She died on the 8th of February, 1859, without child or parent, leaving her husband, five brothers and three sisters, her surviving, and property, consisting of the said note for £50 with interest due thereon, of £50 in a bank at Merthyr, of a note of hand for £35 payable to herself, of a small sum due to her for the sale of some furniture, and some wearing apparel.

Dr. Wambey moved for letters of administration of the personal estate and effects of the deceased, whereof she became possessed after the desertion of her husband, on the 13th day of April, 1858, to be granted to Wm. Davies, her natural and lawful brother and one of her next of kin, under the sum of £200. He submitted that the probate would include the promissory note for £50, which had been sent to the wife by the husband after his desertion, as well as the other property she had left.

*Sir C. Cresswell* : I can make no order as to the promis-**[515]**-sory note. The Divorce Act (1857), sect. 21, enacts "that a wife who has obtained a protection order by reason of her husband having deserted her, shall during the continuance thereof be and be deemed to have been during such desertion of her, in like position in all respects with regard to property as she would be if she had obtained a decree of judicial separation."

And by the 25th section, referring to property acquired by the wife from the date of the sentence of judicial separation, it is provided that "such property may be disposed of by her in all respects as a feme sole, and on her decease the same shall, in case she shall die intestate, go as the same would have gone, if her husband had been then dead." I will grant administration, limited to such property as the deceased acquired since her husband's desertion. I cannot direct the grant to specify of what that property consists. I must leave that to be decided by another Court.

IN THE GOODS OF SAMUEL RICHARDSON (deceased), on Motion. November 16, 1859.—Renunciation of Executors and Residuary Legatee in Trust.—Administration de Bonis Non.—Practice.—Where A., B., and C., executors and residuary legatees in trust, had renounced probate or administration, and administration with the will annexed had been granted to the residuary legatee for life, who died, leaving the estate unadministered, the Court refused to allow one of the residuary legatees in trust to retract his renunciation in that character, for the purpose of taking administration with the will annexed of the unadministered estate.

[S. C. 1 L. T. 448; 6 Jur. (N. S.) 326. Referred to, *In the Estate of Toscani*, [1912] P. 3.]

In this case the deceased died in April, 1847, leaving a will and codicil, in which he appointed William Hunter, John Bingley, and the Rev. John Richardson Major, executors and residuary legatees in trust. These gentlemen all renounced probate of the will and codicil, and letters of administration with the will and codicil annexed. In June, 1847, administration, with the will and codicil annexed, was granted by the Prerogative Court of Canterbury to Mary Richardson, as the **[516]** relict of the deceased, and residuary legatee for life. She died in August, 1859. Of her two daughters, who were substituted residuary legatees, one died unmarried in September, 1859, and the other, a Mrs Kynvett, died in New Zealand in the lifetime of Mrs. Richardson, leaving several children resident in New Zealand, the only persons beneficially entitled under the trusts of the will upon the death of Mrs. Richardson and her unmarried daughter.

Dr. Swabey now moved the Court to allow Dr. Major to retract his renunciation as residuary legatee in trust, and in that character to take administration, with the will and codicil annexed, of the unadministered estate of the deceased. As executor, Dr. Major could not retract his renunciation after a grant of administration made to a legatee. In support of the motion for a grant to Dr. Major as residuary legatee in trust, he cited *In the Goods of Rebecca Bullock*, 4 N.C. 645.

Cur. adv. vult.

On a subsequent day, *Sir C. Cresswell* said: You have produced no sufficient authority to induce me now to make the grant as prayed; the grandchildren in New Zealand must be cited.

Motion rejected.

IN THE GOODS OF ELIZABETH DARKE (deceased), on Motion. December 21, 1859.—Administration with the Will annexed.—Executors.—Corporation aggregate.—Appointment of Syndic.—Practice.—When a corporation aggregate have been appointed executors of a will, the Court will, on motion, grant letters of administration, with the said will annexed, to a syndic who has been duly appointed by such corporation to take the grant.—The grant will not be made until the appointment of syndic is before the Court.

[S. C. 29 L. J. P. 71; 8 W. R. 273. Referred to, *In the Estate of Rankine*, [1918] P. 139.]

Elizabeth Darke, late of Exeter, spinster, deceased, died on the 27th of August, 1859, leaving a will and codicil, whereof **[517]** she had appointed the Bishop of Exeter and the Dean and Chapter of Exeter executors. She devised and bequeathed the bulk of her property for the purpose of building and endowing a church in Exeter.

The Bishop of Exeter had renounced his right to probate, and the Dean and Chapter of Exeter were anxious that the Court should grant letters of administration, with the will annexed, to R. Barnes, their chapter clerk.

Dr. Tristram moved accordingly. It was stated in 1 Wms. on Executors, 199,

5th Ed., that it had been doubted whether corporations aggregate could be executors, on the ground that they could not take the oath for the due execution of the office; but that it was now settled that, on their being so named, they may appoint persons styled syndics to receive administration with the will annexed, who are to be sworn like other administrators.

*Sir C. Cresswell*: Have the dean and chapter appointed Mr. Barnes as their syndic?

Dr. Tristram: They have not done so formally, but if the Court is disposed to grant the motion, they will make the appointment.

*Sir C. Cresswell*: I cannot grant the motion until the appointment is before me.

December 21.—Dr. Tristram renewed the application. The dean and chapter had now, by an instrument under their seal, appointed Mr. Barnes their syndic for the purpose of taking this grant.

*Sir C. Cresswell* granted the motion.

**[518]** ROBINS AND PAXTON *v.* DOLPHIN. January 13, 1860.—Practice.—Costs out of Estate.—Where in opposition to a will the defendant relies upon difficult points of law, he will, though unsuccessful, be generally entitled to his costs out of the estate.

[S. C. 29 L. J. P. 138; 1 L. T. 306; 8 W. R. 177.]

This case was originally before the Court on points of law raised on the admission of an allegation responsive to one propounding the last will and a codicil, dated the 11th of April, 1854, of Mary Ann Dolphin (*ante*, p. 37). From the decision of Sir C. Cresswell rejecting the responsive allegation an appeal was carried to the House of Lords. After the points taken in the Court below had been argued, their Lordships directed a second argument as to whether on all the facts of the case the husband had not so conducted himself as to entitle Mrs. Dolphin to acquire a separate domicil. Ultimately they dismissed the appeal without costs (7 H.L. Cas. 390). The case now came before the Court for a formal decree of probate of the will of 1854, and on the question of costs.

Dr. Deane, Q.C. (Dr. Twiss, Q.C., with him), prayed that the defendant (the husband) might be allowed his costs out of the estate, on the ground that the whole litigation was caused by the act of the testatrix in making the revocatory codicil. The matter was so difficult of decision that the House of Lords heard a second argument on some points.

Dr. Spinks (Dr. Wambey with him) contrà: The most the Court can do is not to condemn the husband in costs. The litigation was not merely caused by the act of the testatrix in respect to her testamentary papers; the point, that under such circumstances a Scotch divorce could not dissolve a marriage celebrated in England between English subjects, has been ruled over and over again.

*Sir C. Cresswell*: As to the litigation being caused by the act of the testatrix, it was not so in the sense that by any particular act of her own she led her husband into this controversy; but the circumstances were peculiar. I shall treat **[519]** it as a case in the old Court; it was commenced there and transferred here, and was a case raising difficult points of law. I understand from the registrar that, when a will was propounded and resisted on a point of law, the costs of the opponents would generally come out of the estate. If it had been simply a question whether a Scotch divorce could dissolve the bond of marriage, it might have been useless to contend for the affirmative; but another point, as far as I know primæ impressionis, which is discussed in Fergusson on Divorce, was mooted before me, viz. whether a Scotch divorce would be equivalent to a divorce à mensâ et thoro. I held that it was not, and therefore could not enable the wife to acquire a domicil for herself. There was also another question raised in the House of Lords, whether the husband had not throughout the history of the parties so conducted himself as to enable the wife to acquire a new domicil. It cannot be said that the husband was not justified in raising these questions, as the House of Lords found it so difficult to decide them that they ordered a second argument. I think the defendant's costs should come out of the estate.

CHARLTON *v.* HINDMARSH.—January 25, 1860. Administrator pendente lite.—Security.—Passing Accounts.—Payment of Debts.—An administrator pendente

lite of personal estate was appointed, on his giving security to the amount of one year's income of the property; his administration to be under the direction of the Court. The Court directed that he should not discharge claims on the deceased's estate, until they had passed before the registrar.

[S. C. 8 W. R. 259.]

This was a question arising in a cause in which the validity of the will of the late Joseph Hindmarsh was disputed, on the ground that it had not been executed according to the provisions of 1 Vict. c. 27.

May 18.—*Sir C. Cresswell* pronounced against the will, and from this sentence the plaintiff appealed to the House of Lords.

July 20.—*Sir C. Cresswell* appointed G. W. Cram, administrator **[520]** pendente lite of the personal estate of the deceased, upon his giving security to the amount of one year's income of the property in question: such administrator to be subject to the immediate control and under the direction of the Court. (See 20 & 21 Vict. c. 77, s. 70.)

December 7.—Letters of administration, pending the said suit, issued under the seal of the Court to the said G. W. Cram.

The personal property of the deceased consisted of £1,700, which was out on mortgage, bearing interest at five per cent., and of £4,786, 10s., deposited in Messrs. Lambton & Co.'s bank at Newcastle, on the security of a promissory note, bearing interest at one and a half per cent. only. His debts amounted to £282, 13s. 5d., but one of those for £19, 6s. 6d. was disputed. The administrator (Mr. Cram), in an affidavit, stated that he considered it would be for the benefit of the estate to withdraw a portion of the £4,786, 10s. from the bank, and to apply the same towards the payment of the deceased's funeral expenses and debts, except the one disputed.

January 25.—Mr. Hannen, upon the above state of facts, moved the Court, on behalf of the said George William Cram, the administrator pendente lite, for directions as to the withdrawal of the sum of £4,786, 10s. from Messrs. Lambton and Co.'s bank, part thereof to be applied in payment of such of the claims in respect of the deceased's funeral and testamentary expenses as have been already sent in and deemed correct, and the residue to be invested in the Three per Cent. Consolidated Bank Annuities, or such other stocks or funds of Great Britain, or such other security as the Court shall think fit.

Dr. Spinks appeared for the plaintiff.

*Sir C. Cresswell*: I think that the debts should not be paid until they have been passed by the registrar. The administrator pendente lite is, according to the terms of the decree appointing him, to administer the estate under the directions of the Court. Subject to this alteration, I will grant the motion.

**[521]** DUNN *v.* DUNN. January 25, 1860.—Where, in a probate cause, the county court has jurisdiction, the Court may, though application be made in behalf of all the parties to the cause for it to be tried at the assizes, still, in its discretion, direct it to be tried in the County Court.

[S. C. 30 L. J. P. 40; 8 W. R. 259.]

The deceased in this case died in Yorkshire, leaving real and personal estate under £300 and a will, the validity of which was contested on the ground—first, that it was not the will of the deceased; secondly, that it was not duly executed; and thirdly, that the deceased was not of sound mind at the time of its execution.

All the parties to the suit resided in Yorkshire, and the witnesses in the cause were also resident in Yorkshire or at Barnard Castle.

Dr. Tristram moved the Court to direct an issue to be tried at the next York assizes to determine the validity of the will.

*Sir C. Cresswell*: The personal property may not amount to more than £200. If so, the cause would properly come under the jurisdiction of the County Court.

Dr. Tristram: The power given to the Court to direct a cause to be tried in the County Court is discretionary. All the parties consent to this cause being tried at the York assizes. He submitted that the Court would not direct the cause to be tried in the County Court against the wish of all the parties.

*Sir C. Cresswell*: Although the parties may apply for a cause to be tried at the assizes, I may still consider it a proper one to send to the County Court. Before I make any order, an affidavit must be brought in, showing the amount of the deceased's personal property.

An affidavit having been subsequently brought in, from which it appeared that the personal property of the deceased amounted to £290, the Court directed the cause to be tried by an issue at the York assizes.

**[522]** CRISPIN *v.* DOGLIONE, on opposed Motion. February 8, 1860.—Security for Costs.—Plaintiff Foreigner.—*Tambisco* v. *Pacifico*, 7 Ex. Rep. 816.—The Court will not order the plaintiff to find security for costs when, though a foreigner, he is staying in England at the time of the application, and there is nothing to lead to the supposition that he is on the point of leaving the country. His affidavit in opposition to such an application need not state an intention of permanent residence.

[S. C. 29 L. J. P. 130; 6 Jur. (N. S.) 303; 1 L. T. 446. Discussed, *In the Goods of Twomey : O'Leary* v. *Stack*, [1900] 2 Ir. R. 560.]

In this case letters of administration of the estate of Henry Crispin, deceased, were, on the 6th of July, 1859, on an ex parte motion, granted to Francisco Jose Cortes Crispin (the plaintiff in this suit), as the natural and lawful son and sole person beneficially entitled to the estate of the deceased, limited to substantiate proceedings in Chancery in a bill filed by the said F. J. C. Crispin against Donna Maria Doglione and others. The issue of the said grant was stayed by the proceedings in the suit.

February 1.—Dr. Spinks, for the defendant, moved the Court to order the plaintiff to give security for costs. The plaintiff, on his own showing, is a foreigner living in Portugal, and is in this country merely for the purpose of carrying on this suit. (*Oliva* v. *Johnson*, 5 B. & Ald. 908; *Ainslie* v. *Sims*, 17 Beav. 57.)

Dr. Phillimore, Q.C., contrà: Crispin in his affidavit states that he came to England in May, 1859, to institute a suit in Chancery against the defendant in respect of the personal estate in this country of Henry Crispin, deceased; that he was advised that a personal representative of the deceased would be a necessary party to such suit, and that his application to this Court for that purpose gave rise to the present proceedings. He further swears that he is a necessary witness in both suits, and intends to remain in this country till they have been respectively determined. Under such circumstances *Tambisco* v. *Pacifico*, 7 Ex. Rep. 816, is an authority for rejecting the present application. It is there said, "It is requisite the plaintiff should state in his affidavit that he is resident in this country, to prevent a stay of proceedings until he shall give a **[523]** security for costs; the plaintiff's affidavit does state that; it is suggested that he ought to go further, and to state that he intends to take up his permanent residence here, but such a statement would be of very little avail, for he might change the intention the moment judgment was given. The fact of his being actually here is the true criterion by which the question is to be settled."

Cur. adv. vult.

February 8.—*Sir C. Cresswell*: This was a question as to security for costs. The case in the Exchequer which was cited, and in which all the former cases were reviewed, comes to this, that where the party is in England, and there is no reason to suppose that he is on the point of going away, no order will be made for security for costs; and this seems to be recognized in the Queen's Bench. If he does go abroad you may stop the proceedings till security is given.

Motion rejected.

IN THE GOODS OF JANE PARKER (deceased), on Motion. February 8, 1860.—Will.—Death of Devisee before Testator.—Child or other Issue.—1 Vict. c. 26, s. 33.—To prevent the lapse of a legacy to a legatee, being a child or other issue, who may die in the lifetime of the testator, it is not necessary that the issue of the legatee who is alive at the death of the testator should be the same issue who was alive at the death of the legatee; it is sufficient that any issue—e.g. a grandchild of the legatee—should be in existence at the death of the testator. Such a legacy is a vested interest in the legatee, and passes to the representatives or

under his will, as the case may be, and not to the issue, whose existence prevents the lapse.

[S. C. 31 L. J. P. 8; 1 L. T. 447; 6 Jur. (N.S.) 354. Considered, *In re Scott*, [1900] 1 Q.B. 382: affirmed, [1901] 1 K. B. 228.]

Jane Parker, widow, by her will, dated the 4th of December, 1851, left all the real and personal property to which she might be entitled at the time of her death to her daughter, Jane Mary Head, to her separate use, free from marital control, and appointed her sole executrix. Mrs. Head, the sole legatee and executrix named in the above will, died on the 25th of February, 1855, a widow and intestate, and **[524]** in the testatrix's lifetime. She left surviving her an only child, Augusta, who married a Mr. Imeson, and died on the 7th of June, 1859, in the testatrix's lifetime, leaving her husband and an only child, Emily Augusta, her surviving. Jane Parker, the testatrix, died the 24th of December 1859. On the 11th of January, 1860, administration of the effects of Augusta Imeson was granted to her husband, who subsequently took administration of the effects of Jane Mary Head. Emily Augusta Imeson was an infant under one year of age, and the question now was whether Mr. Imeson was entitled to the administration with the will annexed of Jane Parker, as the representative of the beneficial legatee in the will, or as guardian to his infant daughter, the next of kin of Jane Parker at the time of her death. The difficulty felt in the registry was on the 33rd section of 1 Vict. c. 26, by which it is enacted that "where any person, being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

Dr. Phillimore, Q.C., submitted that the words of the section were sufficient to extend to grandchildren and great-grandchildren, that the legacy had not lapsed, and that Mr. Imeson was entitled as the representative of the beneficial legatee.

*Sir C. Cresswell*: I agree with you on that construction of the section; it is consistent with the case of *Johnson* v. *Johnson*, 3 Hare, 157, decided by Wigram, V.C. A doubt might be raised on the words, "leaving issue, and any such issue of such person shall be living at the time of the death of the testator." In this case the issue of the legatee who was alive at the time of the death of the testator is not the same issue who was in existence when the legatee died; but I think it a fair presumption that the intention of **[525]** the Act was to preserve the legacy whenever there might be any issue of the legatee alive at the death of the testator; and I see nothing in the wording of the section to exclude this construction. In another case on this section (*Winter* v. *Winter*, 5 Hare, 312-13) there are some remarks of Wigram, V.C., which seem to warrant a liberal construction of this remedial provision of the statute. *Johnson* v. *Johnson* also decided that the section of the Wills Act to which you have referred does not substitute for the predeceased devisee or legatee the issue whose existence is the event or condition which excludes the lapse, but renders the subject of the gift the absolute property of the predeceased devisee or legatee. I am of opinion that the words do extend to all issue, so as to exclude a lapse, but the property remains in the beneficial legatee. Mr. Imeson is therefore entitled as his wife's representative, and not as guardian to his infant child, to the grant prayed.

Motion granted.

IN THE GOODS OF THOMAS HENRY OLIPHANT (deceased), on Motion. February 15, 1860.—Universal Legatee.—Administration or Probate.—20 & 21 Vict. c. 77, s. 39.—The universal legatee of a testamentary paper is entitled to administration with the will annexed, but not to probate. No trace of any different practice can be found in the registry.—Semble: the 29th sect. of 20 & 21 Vict. c. 77, relates to the procedure of the Court, not to the principles on which it is to act.

[S. C. 30 L. J. P. 82; 6 Jur. (N. S.) 256; 1 L. T. 446. Referred to, *In re Pryse*, [1904] P. 301.]

In this case the deceased left a will in the following terms:—"This the last will and testament of me, Thos. Henry Oliphant, of No. 23, Marine Parade, Dover, Kent,

made the 27th day of April, 1853. I leave all the property and effects possessed by me at the time of my decease, to my dear wife."

February 1.—Dr. Spinks moved the Court to decree probate of the above paper to Mrs. Oliphant, as executrix according to the tenor. The practice of the registry undoubtedly has been in such **[526]** cases to grant administration, with the will annexed, to the person beneficially entitled as universal legatee; but if, on considering the principle of such grants, and the authority of text writers, the Court should be of opinion that the practice is wrong, it will not feel itself bound by it. A testament in the old books signified a will in which executors were appointed, and dying intestate meant dying without appointment of executors; but the appointment may be express or implied: see Williams on Executors, p. 196, 4th edit., the passages of Swinburne and Godolphin there referred to, and *Androvin* v. *Poilblanc*, 3 Atk. 301, where Lord Hardwicke said that a person named "universal heir" in a will would have a right to go to the Ecclesiastical Court for the probate. Mrs. Oliphant is in effect constituted universal heir by the will. She must take with all the rights and liabilities of an executor.

*Sir C. Cresswell*: The 29th section of the Probate Act directs "that the practice of the Court of Probate shall, except where otherwise provided by this Act, or by the rules or orders to be from time to time made under this Act, be, so far as the circumstances of the case will admit, according to the present practice in the Prerogative Court." I think this applies to procedure only. If it is applied to principles, it would be conclusive against your application, for you admit that the practice in the registry is against you. However, I must take time to consider the matter, and will direct the cases in the registry to be looked up, to ascertain the antiquity of the present practice. Cur. adv. vult.

February 15.—*Sir C. Cresswell*: In this case I was asked to overthrow the practice which has prevailed for a long time in the registry, and so admitted by counsel. I have caused inquiry to be made, and no trace can be found of any time when the practice was otherwise. If I could have found that within any reasonable time the practice had been different, and no solid reason for the change, I should have been willing to revert to the older practice. I have looked at the case in 3 Atk., and I think Lord Hardwicke proceeded there on grounds not applicable to the circumstances of the present case. There the contest was between persons designated as **[527]** universal heirs, and an executor appointed with respect to a lapsed legacy; and Lord Hardwicke held that "universal heir" was the proper term for persons intended to represent the testator, observing that the word "executor" is a barbarous word of modern law. He thought, therefore, that the term "universal heir" would entitle the parties to probate. In the present case Mrs. Oliphant is universal legatee, and must take administration with the will annexed in that character.

PEGG *v.* CHAMBERLAIN AND OTHERS. February 15, 1860.—Administration.—Practice.—Limited Grants to Cestuis que trusts.—Consent.—The Court will grant letters of administration to a cestui que trust of a trust-fund, limited to that fund, when the trustee in whose name the fund stands is dead and is without a personal representative, the parties entitled to represent the deceased trustee having been first cited. When there are several parties interested in the fund, the grant will be limited to the interest of the cestui que trust making the application, unless the other cestuis que trusts assent to the grant extending to their respective interests.

[S. C. 2 L. T. 25; 8 W. R. 273. Followed, *In the Goods of Ratcliffe*, [1899] P. 110.]

Margaret Pegg died in 1839, leaving a will, whereof she appointed Henry Pegg (her son) and Mary Chamberlain executors, and whereby she bequeathed £400 to her said executors upon trust, to pay the dividends thereof to Mrs. Hollidge for life, and after her death she gave the said principal sum to be divided equally between her three grandchildren, Mary West, Joseph Pegg, and Henry Pegg. The will was proved by both the executors, and the £400 was afterwards invested in their names in £396, 18s. 5d. Three per Cents.

Mary Chamberlain, having survived her co-executor, died in 1849, a widow and intestate, leaving her surviving five children her sole next of kin, and the only persons

entitled in distribution in case of her intestacy. Letters of administration had not been taken out to the effects of Mary Chamberlain.

Dr. Tristram moved for a grant of letters of administration **[528]** to the personal estate of Mary Chamberlain, limited to the said sum of £396, 18s. 5d. New Three per Cents., and to the dividends due thereon, to Henry Pegg, the grandson, as a party entitled to one-third of the said fund. The five next of kin of Mary Chamberlain had been duly cited.

*Sir C. Cresswell*: It does not appear that you have the assent of the other parties who are entitled to the fund. You should get the consent of the other cestuis que trusts to the grant. If you do not, according to the practice, as I am informed, of the Prerogative Court, the grant should be limited to Henry Pegg's share of the fund.

MARSH AND OTHERS *v.* MARSH AND OTHERS. February 15, 1860.—Will.—Codicils.—Presumption as to what Papers form part of a duly executed Will.—General revocatory Clause of all former Wills.—Effect of Annexation of Codicil to former Wills revoked.—1 Vict. c. 26, s. 22.—Costs.—Omission from Probate of opprobrious Terms.—When several sheets of paper, constituting a connected but not in all points a consistent disposal of the property, are found together, the last sheet being duly executed, the presumption, in the absence of direct proof, is, that they all formed the will of the deceased at the time of execution. A general revocatory clause of "all former wills" leads to the inference that the deceased at that time intended to leave a subsisting will.—The physical annexation (by a piece of tape, e.g.) of a duly executed codicil of later date to testamentary papers, duly executed but revoked, is no ground for inferring the "intention to revive," required by 1 Vict. c. 26, s. 22.—Semble: Such intention can only be shown by the contents of the codicil itself.

[S. C. 30 L. J. P. 77; 1 L. T. 523; 6 Jur. (N. S.) 380. Referred to, *In the Estate of Robert White*, [1914] P. 153.]

In this case, the testator, James Stamford Caldwell, died a bachelor on the 17th of November, 1858. He had had three sisters, married respectively to W. S. Roscoe, Esq., A. C. Marsh, Esq., and Sir Henry Holland. Mrs. Roscoe and Lady Holland died before the testator; Mrs. Marsh, who had several **[529]** daughters but no son, survived him, and as coheir was one of the defendants.

Twenty-seven executed wills and codicils were found after Mr. Caldwell's death, besides a large number of incomplete testamentary papers; Eliza Louisa Marsh, Georgiana Amelia Marsh, and Rosamond Jane Marsh, as executrixes, propounded a will bearing date the 19th of May, 1856; a codicil of the 18th of June, 1856; and a codicil of the 29th of April, 1858.

The will of 1856 consisted of seventeen pages, and was written on paper of three different sizes, loosely tied together. The first three pages and the last two concluding sheets were in the testator's handwriting; ten of the intermediate pages were parts of a will prepared in duplicate by the testator's solicitor in 1854; and the three remaining sheets were part of a draft will prepared by another solicitor, under the testator's instructions, in 1856. Of this document the two last sheets were executed and attested, being dated respectively the 22nd of March and the 19th of May, 1856. The last sheet contained a general revocation of all former wills. The codicil of 1856 is sufficiently noticed in the judgment. The codicil of the 29th of April, 1858, was wholly in the testator's handwriting; it was found, as more particularly described in the judgment, annexed by a tape to a will of 1851 and a codicil of 1852; and the only important point in respect thereof raised and determined was the effect of the annexation, in reviving the testamentary papers to which it was found annexed.

Dr. Dean, Q.C., and Mr. Dowdeswell, for the plaintiffs.

Mr. Serjt. Pigott and Dr. Wambey; Dr. Spinks, Mr. Hannen, and Mr. Osler; Dr. Phillimore, Q.C., Mr. A. Hobhouse, and Mr. J. D. Coleridge, for defendants and parties cited.

*Sir C. Cresswell*: After stating the nature of the suit, said, several parties pleaded separately, and in the result the following issues were raised: Whether the writings propounded were and contained the last will and codicils of the deceased; whether they were duly executed; whether the sheets other than the

last sheet of the will, dated the 19th of May, 1856, were annexed to or formed, together with that sheet, the last will of deceased **[530]** at the time of the execution of such last sheet. Similar questions as to the codicils. Whether the last sheet was duly executed, and intended by itself to be a will, or codicil, or testamentary paper revocatory; whether the word "her" was written "his" at the time of the execution of the second codicil; whether the interlineation "situated in the counties of Stafford and Chester," in the same codicil, was written before execution; whether a paper writing, bearing date the 1st of March, 1851, was executed as a last will of the deceased, and a paper writing of the 31st of January, 1852, was executed as a codicil thereto; whether deceased by the codicil of the 29th of April, 1858, intended to revive the will of the 1st of March, 1851, and the codicil of the 31st January, 1852. First, the plaintiffs proved that in 1856 the testator executed a paper as a will—it was indeed twice executed, on 22nd of March, and again on the 19th of May; the forms required by the statute were complied with on each occasion; the very paper signed and attested was therefore a will. The next question to be considered is, secondly, what did that will so signed consist of? Take the case as it would have stood on the first execution. Where a will is found written on several sheets, and the last only is signed and attested, although the witnesses did not observe the others, the primâ facie presumption is, that they were in the room, and formed part of the will at the time of the execution: (*Gregory* v. *Queen's Proctor*, 4 N. C. 620). Is there anything to confirm or rebut that presumption? The last page of the will as originally executed on the 22nd of March, 1856, which was written on the second page of a half-sheet of paper, began with these words "aforesaid trust, or in relation thereto," which were manifestly the conclusion of the sentence which had been commenced on the preceding page; it then proceeded: "And lastly, I do hereby nominate and appoint my nieces Eliza Louisa Marsh, Georgiana Amelia Marsh, and Rosamond Jane Marsh, executrixes of this my last will and testament, and I do hereby revoke all former and other wills and codicils by me at any time heretofore made, and declare this to be my last will and testament: in witness," etc. The last page therefore of the will, as executed on the first occasion, began with a few words which completed a sentence commenced on the preceding page, and which must have been **[531]** there at the time, being on the same sheet; but that and the eight preceding pages were part of a will prepared for the testator by his solicitor, Mr. Keary, in 1854, and no one page could be separated from the others without leaving the sense imperfect; it is therefore reasonable to infer that the whole were there, so as to make sense. The last page of the will as re-executed began with the same words as before, completing a sentence, and was a copy of the last page as it stood when executed for the first time, except the omission of one of the executrixes; there can be no reasonable doubt, therefore, that the last page of the will as before executed was there; if so, the preceding page must have been there; and if the nine preceding pages were there when it was executed the first time, what reason is there for supposing that any of them were afterwards disannexed? Continuing the execution of the contents of the will backwards, it is found that these clauses prepared by Mr. Keary are preceded by some clauses relating to personal property contained in three pages, which had been prepared at the request of the deceased by a solicitor, Mr. Ward. Mr. Ward sent them to him on the 21st of March, 1856; the will was executed for the first time on the 22nd; the first presumption is therefore fortified by the probability that Mr. Caldwell, desiring to make a new will, waited until he received those clauses, and when he had received them added them to the will before it was executed on the 22nd of March. If those clauses were annexed to those prepared by Mr. Keary before the execution on the 22nd of March, there is nothing to raise a presumption that they were afterwards disannexed. The remainder of the will consisted of three sheets, all in the handwriting of the testator, containing the disposition of his real estates, and those three sheets have manifestly been prepared at one and the same time. The will then consists of three portions: first, the formal commencement and disposition of real property; secondly, the special clauses as to personal property; thirdly, several provisions and trusts relating to the real and personal estate. It is true that some provisions in the third part are inconsistent with the first, but any one or two of the parts without the rest would be so manifestly imperfect, and the reasons for supposing that the whole were there are so much stronger than any contrary presumption **[532]** arising out of the inconsistency of

some parts, that I have arrived at the conclusion of fact, that all the sheets now forming part of the will of the 19th of May, 1856, did so at that time. Dr. Spinks likened it to the case of alterations; but that differs from the present, for there the Court has evidence before it that the will was originally in a different form from that produced. The argument that the last sheet on which the execution on the 19th of May was written was intended to be a perfect instrument by itself, simply revoking all wills, is, I think, disposed of not only by the reasons already given, but by the appointment of executors, which would have been useless had he intended simply to revoke all wills; and by the expression, "revoke all former wills and all codicils thereto," which imports that the instrument then about to be executed was to have operation as a testamentary disposition of his property, and not merely as causing him to die intestate. Thus far, I think, two points are established; that on the 19th of May a will was executed by deceased consisting of the several sheets of paper found attached together after his decease, and that all former wills were by that instrument revoked. After that a codicil was executed on the 18th of June, which was only assailed by the argument that the codicil of the 29th of April, 1858, revived a will of the 1st of March, 1851, and had the effect of revoking all other testamentary papers. It seems to recognize the will of 1856 by referring to the revocatory clause. The deceased had made a will in 1854, and a codicil in 1855, by which he devised a cottage at Wood-lane to Mary Beardmore for life; that was revoked by the will of May, 1856; the codicil in June excepts "from the revocation of my former will or codicil thereto, all mention of a cottage and garden to my housekeeper, Mary Beardmore, which is to have full force and effect;" this codicil again appointed his three nieces, Eliza Louisa, Georgiana Amelia, and Rosamond Jane Marsh, his executrixes, one of whom had been omitted when the will of 1856 was re-executed on the 19th of May. The next instrument propounded by the executrixes is a codicil bearing date April 29th, 1858, which was found attached by a piece of tape to a will made in 1851. The execution of the codicil, as required by the statute 1 Vict. c. 27, was proved, and there was not any evidence to rebut the primâ facie presumption that the whole of **[533]** it was there at the time; on the contrary, the evidence of the attesting witnesses, although not very clear and precise, supported and confirmed that presumption. The important question remains, as to the effect and operation of this codicil, under the following circumstances. After the testator's death, at his residence, Linley Wood, a search was made for his will, and in a cupboard in his dressing-room was found a leather case, not locked, but tied round with tape. It contained a great many testamentary papers, and, amongst others, the will of 1856, the codicil of 1856, the codicil of 1852, and the will of 1851, with the last codicil of the 29th of April, 1858, attached to it by a piece of tape at the upper corner on the left hand; other testamentary papers were found in the cupboard. It was argued that the testator, by attaching the codicil to the will of 1851, revived it; this depends on the construction of the statute, 1 Vict. c. 26, s. 22: "And be it further enacted that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by a re-execution thereof, or by a codicil executed in manner hereinafter required, and shewing an intention to revive the same." The codicil, therefore, must shew the intention to revive. It may be assumed that a codicil to a will shews an intention that some will should be operative, and, primâ facie, the last existing will, especially if that revoked all others, must be taken to be the will intended. If the testator had made only one, and had torn it animo cancellandi, a codicil "to his will" might revive it, but still it would be the contents of the new will which would shew the intention. But can any act dehors the instrument be resorted to for the purpose of establishing the intention? I apprehend not; it would be such act, and not the codicil, then that shewed it. It appears to have been the object of the legislature to put an end equally to implied revocations and implied revivals. The words of the section are plain, and I must act upon them. Again, if the annexation is to have any effect, when did it take place? There is no ground for presuming that it was before the codicil was executed; there was no natural connection between them, independently of the contents, to raise the presumption. If an act dehors the codicil may affect the question, must it not be done before or at the time? If it may be done after, why should **[534]** he not be allowed to shift it from one to another, and to make the codicil revive, first one will and then another, according to the fancy of the moment? That cannot be the meaning of

the section. But counsel, feeling the great difficulty of contending that the act of annexation would affect the question, endeavoured to maintain that the contents of the codicil shewed an intention to revive the will of 1851. In order to ascertain the value of that argument, let us see what were the provisions of the several wills to which it applies. By the will of 1856 all landed and real property was at the commencement given to trustees, to pay all rents, etc., to the use of Ann Marsh for life, and remainder to her daughters, etc. And it contained a direction that Ann Marsh, and every person under the will becoming entitled to Linley Wood and other real property by the will devised, shall assume the name of Caldwell. The property in and near Derby was afterwards given to his nephew, W. C. Roscoe, for life, etc. By the codicil of 1858 the person possessed of Linley Wood was to have the interest of his personal property, after the investment of £8,000 in land, which was "to be settled expressly to follow the same directions and provisions as to any landed and real property devised by my last will." What will does he mean? Any will theretofore made, or any will thereafter to be made, or any disposition by the codicil made? The codicil contained the following disposition of the real property:—"I will and direct that Linley Wood, with its appurtenances, and all real estate and property, mines, lands, houses [situated in the counties of Stafford and Chester[1]] shall upon my death go to my sister Ann Marsh for the term of her natural life, or so long as she shall remain unmarried, and in case of her death or marriage, then I will and declare that all such real estate in the counties of Stafford and Chester respectively shall go to such nieces as shall be unmarried at the time of my death, so long as such nieces shall continue unmarried (I mean the daughters of my sister Ann Marsh), and in case of the marriage of any such nieces, then to the survivors or survivor who may remain unmarried." This disposition by the codicil would, if read without the interlineations give all realty to Ann Marsh for life, remainder as to land in Stafford and Chester to his nieces. The land in Derby **[535]** is not mentioned. On the death of Mrs. Marsh, therefore, the property would be divided; if the codicil is read with the interlineation it would be divided immediately. By the will of 1851 all real property in Stafford, Derby, or elsewhere is given to Ann Marsh for life, remainder all to nieces in succession, etc. By this will all would be left together. But it was argued that the codicil directing £8,000 to be invested in land, to be settled in the same manner as any landed real property devised by his will, could only be applicable to a will directing all his land to go in one channel; but the codicil in the disposition of the real estate is quite inconsistent with the will of 1851; is the will of 1851 to supersede the codicil as to real estate for the purpose of avoiding the difficulty as to the investment of the £8,000? Again, in the will of 1856 is a direction to invest £6,000 in land to be conveyed to the same uses as the real estates thereby devised. Now part of estates, viz. the land in and near Derby, was thereby devised to Roscoe for life. The same difficulty existed in that will as to the investment of the £6,000, as in that will and the last codicil taken together as to the investment of £8,000; and I cannot from the alleged inconsistency, or rather from the difficulty, of saying how the land to be purchased must be settled, infer that he could not intend the codicil to apply to that will. It looks to me like a recognition of the direction in that will to invest money in land, and only increasing the sum from £6,000 to £8,000, and I cannot find in the codicil any intention to revive the will of 1851. Upon the whole, then, I am of opinion that the will of the 19th of May, 1856, and the codicils of June, 1856, and April, 1858, were duly executed; that they contained the last will and codicils of the deceased, and that the devise to Mary Beardmore in a codicil of the 3rd of July, 1855, revoked by the will of 1856, was revived by the codicil of 1856; that all the sheets forming the will as propounded formed, together with the last sheet, the will of the deceased at the time when it was executed; that the last sheet of the will of 1856 was not intended to be a testamentary paper by itself revoking all wills; that the word appearing "her" in the ninth line of the twelth page of the codicil of 1858 was written "his" at the time when that codicil was executed; that the interlineation "situate in the counties of Stafford and Chester" was not made before the **[536]** codicil was executed; that the paper writing bearing date the 1st of March, 1851, was executed as the last will of the deceased, and that the paper writing of the 31st of May, 1852, was executed as a

[1] These words appeared as an interlineation in the original.

codicil thereto; that the deceased did not by the codicil of the 29th of April, 1858, intend to revive the will of the 1st of March, 1851, and codicil of the 31st of May, 1852. Costs of all parties out of the estate.

Mr. Serjt. Pigott prayed the Court to except from probate certain expressions in the last codicil derogatory to the Roscoe family.

The Court expressed a doubt whether the words were of such a character as to warrant the application, and suggested that it might lead to inconvenience as a precedent; but, on consent of counsel for the plaintiffs, made the order as prayed.

IN THE GOODS OF HENRY HARRIS (deceased), on Motion. March 14, 1860.—Will. —Appointment of Executor.—Unexecuted Obliteration and Substitution.—No Revocation.—Where an appointment of an executor is made in a duly executed will, and the testator, having expressed his intention of so doing, obliterates the original name and substitutes another, such obliteration and substitution being unexecuted, the Court will direct the original name to be restored in the probate, if it is satisfied by evidence aliunde what the original name was.

[S. C. 29 L. J. P. 79; 2 L. T. 118; 8 W. R. 367. Applied, *In the Goods of M'Cabe*, 1873, L. R. 3 P. & D. 96.]

The testator in this case died on the 15th of January, 1860, leaving a will, dated the 11th of September, 1854, in which his wife was appointed residuary legatee for life. The will, when examined after the testator's death, contained an appointment of executor in the following words:—"I appoint my *brother*, *Edwin Harris*, of *Prospect Villa*, in the said *county* of Gloucester, sole executor of this my will." The words in italics being substituted for others erased and illegible on the face of the will. From the affidavits of the solicitor who prepared the will, and of his clerk, who were also the attesting witnesses, it appeared that, as drawn and executed, **[537]** the appointment of executor was in the following words:—"I appoint my friend, Joseph Moss, of Hampden Place, in the said city of Gloucester, builder, sole executor of this my will."

The widow deposed that she was aware that her husband had made his will, and appointed Joseph Moss, of Hampden Place, in the city of Gloucester, executor thereof; that about two years before testator's death, his brother, Edwin Harris, came to reside near Gloucester, and that soon afterwards the testator expressed his intention of appointing his brother, E. Harris, executor of his will instead of Moss, and said that he should strike out the name of Moss, and substitute that of his brother, as he supposed he might do so, and it would make no difference to his will; that the testator shortly afterwards told her that he had done so. The deponent also spoke to the words (above) in italics as being in the handwriting of the testator.

Dr. Swabey now moved the Court to treat the obliteration of the words appointing Moss executor as a revocation under the 21st section of the Wills Act. The case seems hardly distinguishable from that of *In the Goods of Thomas Parr, deceased*, 6 Jur. (N. S.) 56, moved a few weeks since by Dr. Spinks, and in which the Court, on the authority of the Judicial Committee of the Privy Council in *Brooke* v. *Kent*, 3 Moore, 347, directed the obliterated names to be restored. In *Brooke* v. *Kent*, however, the words erased and substituted respectively indicated the amount of a legacy. Here the question was of the appointment and revocation of an executor; and *In the Goods of John Bedford, deceased*, 5 N. C. 188, Sir H. Jenner Fust, after the decision in *Brooke* v. *Kent* had been called to his notice, treated such an obliteration of an executor's name as a revocation. This case, it is believed, was not before the Court when the case of Thomas Parr was moved. In *Short d. Gastrell* v. *Smith*, 4 East, 419, on a special case arising out of an action for ejectment, it appears that the testator devised and bequeathed, etc., to John Spillman and Edward Aldridge in trust, etc.; he afterwards obliterated the name of John Spillman, and inserted two other names with that of Aldridge, such alteration not being **[538]** executed according to the Statute of Frauds. It was agreed that the revocation was effectual; and that the devise to one was so different a matter from the original devise to two, as to amount to a revocation of the will in favour of the heir-at-law; but Lord Ellenborough delivered the opinion of the Court to the effect that there was no intention to revoke the devise to Spillman, except with the view to substitute the other devisees, which failing, the case was to be governed by *Onions* v. *Tyrer*, 1 P. Wms. 343, and the name of the original devisee

restored. If the Court considered the obliteration in the present case equivalent to a revocation, it would grant administration with the will annexed to the widow as residuary legatee for life.

*Sir C. Cresswell*: I hardly understand the grounds of Sir H. Jenner Fust's decision *In the Goods of Bedford*, but I think I am bound by the decision of the Judicial Committee, and must reject the present motion.

On the 4th of April, on the renunciation of Moss as executor, the Court granted administration with the will annexed to Mary Harris, as the relict and residuary legatee for life, restoring in the probate the obliterated words, and omitting the words substituted.

IN THE GOODS OF WILLIAM WATTS (deceased), on Motion. March 14, 1860.—Administration de bonis non with Will annexed.—Substituted Legatee.—Limited Grant refused.—An application for a grant of administration de bonis non (with the will annexed) to a substituted universal legatee, limited to £750 stock, in which she was solely interested, on an affidavit that the parties entitled to a general grant were more than nine in number, that their residences were widely apart, and that their service with a citation would be attended with great difficulty and expense, refused.—Held, that the Court will not give a limited grant, except upon strong reason shown.

[S. C. 29 L. J. P. 108; 8 W. R. 340. Followed, *In the Goods of Somerset*, 1867, L. R. 1 P. & D. 351. Cf. *In the Goods of Baldwin*, [1903] P. 61.]

William Watts, by his will, bearing date on the 2nd of No[539]vember, 1846, gave and bequeathed to William Stevenson Humberstone and Thomas Thorold all his money in the stocks or public funds, in trust to pay the annual produce thereof to his wife, Mary Watts, for her life, and after her decease to transfer the principal and the dividends then due thereon to his niece, Mary Watts Burton, her executors, administrators, and assigns; and he appointed the said Mary Watts, William Stevenson Humberstone, and Thomas Thorold, executors of his said will. The will, after his death, was proved in the Prerogative Court of Canterbury by the three executors. At his decease there was standing in his name in the books of the Bank of England, £750 Three per Cent. Reduced Annuities. The probate of his will was duly registered at the Bank of England, and the names of the three executors placed on the said stock. Mary Watts having survived her co-executors, died a widow and intestate, leaving the said Mary Watts Burton (who was her own niece), the party who upon her death was entitled under the will to the said stock, her surviving. The will contained no bequest of the residue. There was an affidavit filed of these facts, wherein it was also stated that the next of kin of the testator, being his nephews and nieces, who were the parties entitled to a general grant, were more than nine in number; that their residences were widely dispersed; that it would be attended with great difficulty and expense to serve them with a citation; and that they had no interest in the fund in question.

March 7.—Dr. Waddilove moved the Court to decree a grant of letters of administration de bonis non, with the will annexed, of the said testator, limited to the said sum of £750 stock, to Mary Watts Burton, the substituted legatee named therein. He cited *In the Goods of Martha Steadman*, 2 Hagg. 59, and 1 Williams on Executors, 5th Ed. 455.

*Sir C. Cresswell*: If you were to cite the next of kin, and they were not to appear, you would be entitled to a general de bonis grant. It is very inconvenient having divers representatives for different parts of the property.

Dr. Waddilove cited *In the Goods of Jenny Watson*, *ante*, [540] 110, where the Court had made a limited grant to a legatee without requiring the next of kin to be cited.

Cur. adv. vult.

*Sir C. Cresswell*: In this case Dr. Waddilove moved for a limited grant to a substituted legatee named in the will, the residue being undisposed of by the will. The next of kin of the testator are entitled to a general grant; and if they were cited and were not to take it, the substituted legatee would not be entitled to it. It is perfectly true that *In the Goods of Jenny Watson* I directed the party making the application to cite the next of kin, or take the grant limited to the property disposed of by the will. But in that case, if I recollect rightly, the party was miserably poor. Upon inquiry,

I find that in Mr. Coote's "Common Form Practice of the Court of Probate," only two cases are mentioned in which my predecessors have made similar grants. These grants are entirely exceptional, and should not be made unless some very strong reason be given. After consultation with the Registrar, I am of opinion that there is no sufficient cause why I should in this case depart from the general rule; and I therefore reject the motion.

Motion rejected.

RE CHARLES AXFORD (deceased), on Motion. March 14, 1860.—Will.—Blind Testator.—Proof of Knowledge of Contents of Will.—Limited Grant to Executor of the Party beneficially interested.—A. when blind made his will, having no property of his own, but being surviving trustee of a fund consisting of £1,105. 5s. stock, solely for the purpose of enabling B., to whom the reversion in the said trust-fund had been assigned, to receive the same. By the will he appointed B., his executors administrators and assigns, his sole executor. B. died in A.'s life-time, having made a will whereof C., one of his executors, had taken probate. The Court being satisfied that A. knew and approved of the contents of his will when he executed it, granted probate of it to C., limited to the said trust-fund.

[S. C. 8 W. R. 340.]

Charles Axford, the deceased in this case, died on the 15th **[541]** of October, 1859. He left no property of his own, but he had, as surviving trustee and executor under his father's will, a sum of £1,105, 5s. stock, which, subject to his life-interest therein, was limited to his children absolutely. They had in 1851 assigned their interest in the said fund to Mr. John Elworthy. The deceased had left a will, made when he was blind, dated the 16th of June, 1851, wherein he declared that, as he did not possess any property whatever to bequeath, the only cause of his making a will was to constitute John Elworthy to be his sole executor, in conformity to an undertaking made by himself and contained in a certain indenture, made between himself and others of his family and the said John Elworthy, and he thereby constituted the said John Elworthy his sole executor, in order to enable him to carry into effect the orders and directions (still remaining to be done) contained in the will of his (the testator's) father, John Axford, deceased. The testator, in order that the said John Elworthy might be able to receive for his own use, after his (the testator's) death, the said sum of £1,105, 5s., did thereby appoint and constitute him, the said John Elworthy, his executors administrators and assigns, irrevocably his entire and sole executor.

The said John Elworthy died in the lifetime of the said testator, having by his will appointed Emily Coisi and William Cutcliffe his executrix and executor. Probate of his will had been granted by the Prerogative Court of Canterbury, in 1851, to the said Emily Coisi, power being reserved to make the like grant to the other executor.

Affidavits of these facts having been brought in,

Dr. Tristram moved the Court to decree probate of the will of Charles Axford, deceased, to the said Emily Coisi. As the testator was blind when he executed the will, it was incumbent upon him to satisfy the Court that, at the time of the execution, he was aware of its contents. This was established by the affidavit of one of the attesting witnesses. It therefore only remained for the Court to determine to whom the grant should be made. He submitted that the words of the will were sufficient to entitle Mrs. Coisi to the grant. There was no reported case precisely in point.

**[542]** *Sir C. Cresswell*: I have inquired of the Registrar, and understand that such grants have been made. In this case the grant may go to Mrs. Coisi, limited to the £1,105, 5s., the trust-fund in question.

Motion granted.

IN THE GOODS OF PETER MARSDEN (deceased), on Motion. March 21, 1860.—Paper not Testamentary on the face of it.—Evidence of Testamentary Intention.—B. having been informed that he could not recover from the illness he then laboured under, expressed a wish that his wife should be in a position to receive, at his death, certain sums of money in two savings-banks, and signed, in the presence of witnesses, two orders on a savings-bank, to pay to his wife, at any time she might apply for the same, any money deposited. B. died on the follow-

ing day.—The Court granted administration, with the two orders as together containing the will of B. annexed, to his widow.

[S. C. 6 Jur. (N. S.) 405; 2 L. T. 87. Applied, *In the Goods of English*, 1864, 3 Sw. & Tr. 586.]

The deceased in this case was a gardener at Market Weighton, in Yorkshire. He died on the 19th of October, 1857, after an illness of some weeks. The day before his death, he was told by his medical attendant, Mr. Jefferson, that he could not recover, whereupon he informed Mr. Jefferson that he had some money in two banks, which he wished his wife to be in a position to receive at his death, and requested Mr. J. to draw up a document giving the money to his wife. Mr. Jefferson wrote out two documents upon separate pieces of paper, and read the contents over to the deceased, who thoroughly understood and approved thereof. The deceased executed them by putting his mark to them in the presence of two witnesses. The deceased knew at the time that he could not recover, and it was his intention that the papers should operate as his last will. The documents were in the following terms, upon which the question arose, whether they were testamentary in their nature:—

"I request that any money I may have deposited in the Bakewell Savings-Bank may be paid to my wife, Catherine **[543]** Marsden, at any time she may apply for the same. Witness my hand this 18th day of October, 1857.

"The mark of X PETER MARSDEN.

"Signed in the presence of

"Richard Jefferson.

"The X mark of Dinah Lambert.

"It is my wish that any sum of money I may have deposited in the York Union Bank may be given up to my wife, Catherine Marsden, at any time she may apply for the same. "Witness my hand (as before)."

Dr. Middleton now moved the Court to grant administration with these papers annexed, as containing the last will and testament of the deceased. In *Jones* v. *Nicolay*, 2 Rob. 288, the following paper was propounded as a codicil:—

"To Messrs. Cox and Co., London.

"Mhow, 24th June, 1844.

"Gentlemen,—At twelve days' sight please to pay to Messrs. Edmonds and Co., of Bombay, on account of Maria Lucretia Jones, the sum of four thousand pounds sterling.

"I remain, gentlemen, your obedient servant,

"EDMUND NICOLAY, late Captain H. M.'s 29th Regt.

"£4,000.

Witnesses { "J. G. Scott, Lieut. 22nd Regt., N.I.
"W. S. Jones, Lieut. 22nd Regt., N.I."

The allegation propounding this paper pleaded, amongst other things, the illness of the deceased at the time the paper was written, that he was aware his life was despaired of, and dictated to W. S. Jones, the executor of his will, the above paper. He died on the following day. The admission of the allegation was opposed on behalf of the next of kin, but admitted by Sir H. Jenner Fust. The report of that case concludes with these words:—"Lady Nicolay was assigned to give in her answers." Nothing further was done in the suit. He submitted that this was a sufficient authority to warrant the present motion.

*Sir C. Cresswell*: I cannot distinguish the circumstances **[544]** of this case from the one cited. The widow is entitled to the grant as prayed.

Motion granted.

PRESANT AND PRESANT *v.* GOODWIN. March 21, 1860.—Will.—Residuary Clause.—Failure of Mode of Application intended.—Construction.—Costs.—B. made his will in 1830, directing, after payment of debts, etc., and legacies, "all my remaining property to be placed in proper securities and appropriated to the education of my sister C.'s children, as shall seem most meet and beneficial to them, by the executors of this my will, recommending to them that the boys receive a classical education to fit them for the learned professions, and the girls to fit them for the purpose of teaching in respectable private families, or in schools of the first respectability." B. died in 1859, having survived his executors, leaving a brother and three sisters his only next of kin, and children of his sister C., all grown up,

surviving him.—On a question as to administration with the will annexed, the Court held that C.'s children were entitled as beneficial residuary legatees, but gave the defendant, one of the next of kin, costs out of the estate.

[S. C. 29 L. J. P. 115; 6 Jur. (N. S.) 404.]

This was a question whether, on the construction of the will of John Gogill Leath, the plantiffs were entitled to the administration with the will annexed as residuary legatees, under the following circumstances:—

The will, in the deceased's handwriting, bore date the 2nd of July, 1830, and was in the following words:—

"By the grace of God, being at the present time in sound intellect and judgment, I do hereby make this my last will and testament, in manner and form following; that is to say, first, it is my desire that all my just debts be settled and paid; secondly, that my funeral be conducted with decency and economy, according to the usual customs observed on such occasions; thirdly, that my just debts and demands against me being paid and duly settled, it is my will and desire that all my remaining property, after the **[545]** hereinafter mentioned legacies, be placed in proper securities and appropriated to the education of my sister Juliana, the wife of Charles Presant's, children, as shall seem most meet and beneficial to them, by the executor and executrix of this my will, recommending to them that the boys receive a classical education to fit them for the learned professions, and the girls to fit them for the purpose of teaching in respectable private families, or in schools of the first respectability; fourthly, I give to my dear and beloved wife, Harriet, the sum of three hundred pounds sterling for her immediate use, besides what she is entitled to by our marriage-settlement and other legal claims, and I give to her for her sole use and benefit, all my plate, books, and all other articles of furniture, jewels, and effects of which I die possessed, and at her the said Harriet my beloved wife's death, I give £5,000, now standing in the Three per Cent. Consols in the names of Sir James Cockburn, Bart., and Thomas Amyott, joint trustees of the above sum, as per our marriage-settlement, to my sister Juliana, the wife of Charles Presant, to be secured in the hands of trustees appointed by my executor and executrix, for her sole use and benefit during the term of her natural life, the interest to be paid to her quarterly, and to be at her own disposal, uninfluenced by her husband, and at her decease to be divided amongst her children after they arrive at the age of twenty-five, with the exception that one thousand out of the above sum in the Three per Cent. Consols is to be at the disposal by will of my dear and beloved wife, Harriet, who, if she may require it sooner for her own use and benefit, may appropriate it, by selling out of the above £5,000 in the Three per Cent. Consol Funds; and I entreat her, as I am assured she will, to give her friendly advice and assistance to my said sister Juliana and her children, as she deems fit for them; fifthly I appoint my said dearly beloved wife and John Leath, Esq., of Surrey Square, and Thomas Amyott, Esq., of the Colonial Register Office, executrix and executors of this my last will and testament.

"JOHN GOGILL LEATH.

"July 2, 1830, at the time principal medical officer at Honduras."

**[546]** By a codicil dated July 3, 1830, he left £400 additional to be paid to his wife as soon as possible after his decease.

The testator survived his wife and the other executors named in the will, and died at Notting Hill Square on the 21st of October, 1859. An ex parte application to the Court for a grant of administration, with the will annexed, to Charles and Elizabeth Presant, as two of the residuary legatees named in the will, was made and rejected in November last, unless the consent of all the parties interested in the residue, if undisposed of by the will, could be produced and filed in the registry. The next of kin of the testator were his brother and three sisters, of whom Juliana Presant was one. Mrs. Goodwin, another of the sisters, refused her consent to the above grant.

The facts as above stated were in substance admitted by the declaration and plea, or by counsel at the hearing, when it was also admitted that the children of Juliana Presant, two sons and three daughters, were grown up and beyond the age of what is ordinarily understood by education.

The question of construction, as to the residuary clause, was argued by

March 14.—Dr. Spinks and Mr. Martindale for the plaintiffs, who contended that the words amounted to a gift of the residue, and a continuing gift of the residue, to take effect, notwithstanding the parties had grown to manhood before the testator's

death, and the particular purpose for which he had intended the benefit had failed. They cited 1 Roper on Legacies, 646, 4th edit.; *Barlow* v. *Grant*, 1 Vern. 255; *Nevill* v. *Nevill*, 2 Vern. 431; *Barton* v. *Cooke*, 5 Ves. 462; *Leighton* v. *Bailey*, 3 Myl. & K. 267; *Hammond* v. *Neane*, 1 Swan. 35; *Leech* v. *Kilmorey*, 1 Turn. & Russ. 207; *Webb* v. *Kelly*, 9 Sim. 469; *Lockhart* v. *Hardy*, 9 Beav. 349; *Younghusband* v. *Gisborne*, 1 Coll. 400; *Gough* v. *Bult*, 16 Sim. 45; *Lewes* v. *Lewes*, 16 Sim. 266; *Lord Lonsdale* v. *Countess of Berchtolet*, 3 Kay & J. 185.

Dr. Swabey and Mr. G. L. Russell, for the defendant, one of the next of kin, contended that there was no gift of the residue to any persons named, but only a direction to the **[547]** executors as to its mode of application, and that only for a limited time. The cases cited, with the exception of *Leighton* v. *Bailey*, were cases in which specific legacies were dealt with by the testator. In the only case which was a direct authority as to a residuary clause, viz. *Leighton* v. *Bailey*, there was a direct gift in these words: "I think there will be something left, after all funeral expenses, etc., being paid, to give to Willie Bailey, now at school, towards equipping him to any profession he may hereafter be appointed to." They cited *Cowper* v. *Mantell*, 22 Beav. 231.

Cur. adv. vult.

March 21.—*Sir C. Cresswell*: In this case two questions were raised, viz.: whether John Gogill Leath, deceased, by his will disposed of the residue of his personal estate; and whether the plaintiffs were two of the residuary legatees. The clause of the testator's will on which these questions depend is in these words: "That my just debts and demands against me having been paid and duly settled, it is my will and desire that all my remaining property, after the hereinafter mentioned legacies, be placed in proper securities, and appropriated to the education of my sister, Juliana, the wife of Charles Presant's, children, as shall seem most beneficial to them, by the executor and executrix of this my will, recommending to them that the boys receive a classical education to fit them for the learned professions, and the girls to fit them for the purpose of teaching in respectable families or in schools of the first respectability." In the course of learned argument, the attention of the Court was directed to a long series of decisions, which I have examined, and they appear to me to establish both the points contended for by the plaintiffs. By the words, "all my remaining property," it is manifest that the testator intended to deal in some manner with the whole of his residuary estate; he directs it to be placed in proper securities and appropriated to the education of his sister's children; not that a sufficient portion, or so much as the executors should think necessary, should be so appropriated, but "all his remaining property." It was argued for the defendant, that the words of recommendation show that the gift was only during minority. But there are many difficulties in the way of such a construction. Is the gift to **[548]** last during minority, although the education of the child may have ceased before; or is it to expire at the age of twenty-one, although the education be not then finished? I cannot read the words of recommendation as at all limiting and narrowing the operation of the preceding words. Another argument for the defendant was, that the gift in this will is not to the children of the testator's sister, but to the executors, to be appropriated by them. Many of the cases cited were of that description, and no such distinction appears to have been thought of. In *Barton* v. *Cooke*, 5 Ves. 461, the executors were to pay £100 for the board and education of James Barton, and a further sum of £100 with him as an apprentice fee: and the Master of the Rolls considered that it was governed by *Barlow* v. *Grant*, 1 Vern. 255, where the gift was to the child. *Lewes* v. *Lewes*, 16 Sim. 266, and *Noel* v. *Jones*, ib. 309, were cases of the same description. Those arguments failing, the case rests upon the general rule, too firmly established by a series of decisions to be now drawn in question, that if a legacy is given for the benefit of an infant in one way, and it cannot be so applied, it may be applied for his benefit in another way. According to Shadwell, V.C., in *Lewes* v. *Lewes*, the words, "for the maintenance, clothing, and education," were, in that case, equivalent to "for the benefit of the children." In this case I cannot, notwithstanding Mr. Russell's ingenious argument, founded on Dr. Johnson's definition of the word "educate," put upon the words of this will a narrower construction. In *Rex* v. *Hall*, 1 B. & C. 136, Lord Tenterden, commenting upon the word "householder," for the meaning of which he had been referred to Johnson, said, "Now the meaning of particular words in Acts of Parliament, as well as other instruments, is to be found, not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or

occasion on which they are used, and the object that is intended to be attained." I think the whole residue was given, and the whole was to be appropriated for the benefit of Mrs. Presant's children; the plaintiffs are, therefore, two of the residuary legatees, and entitled to administration with the will annexed.

Dr. Swabey asked for defendant's costs to be paid out of **[549]** the estate. The Court refused to make this grant on motion, and it was a point of law arising out of the terms of the will itself.

*Sir C. Cresswell*: My rejection of the original motion merely gave your party an opportunity of opposing the grant if she should be so advised; however, the costs cannot be large, and I think in this case they may be paid out of the estate.

**[550]** (Before the Full Court,—*Lord Campbell, C.J., Wightman J.*, and the *Judge Ordinary.*)

M'KECHNIE *v.* M'KECHNIE. January 8, 1859.—Dissolution of Marriage.—Practice.—Proof of a Scotch Marriage by Affidavit.—20 & 21 Vict. c. 85, s. 46.—In a suit for the dissolution of a marriage which had been celebrated in Scotland, where the parties who could prove it resided, the Court made an order that the petitioner should be allowed to prove it at the hearing by affidavit. No appearance had been entered by the respondent or co-respondent.

This was a suit for the dissolution of a marriage, which had been celebrated in 1842 at Maybole, in the county of Ayr, in Scotland, promoted by the husband by reason of his wife's adultery. No appearance had been entered by the respondent or co-respondent. The Judge Ordinary had directed that the petition should be proved by oral evidence.

Mr. Macqueen now moved the Court, under section 46 of 20 & 21 Vict. c. 85, to order that the petitioner should be at liberty to prove the marriage by affidavits of the minister who solemnized it, and of the father and brother of the petitioner, who were present at its solemnization. They were all resident in Scotland. By section 46 of the Divorce Act, the Court had a discretionary power to allow cases to be proved **[551]** by affidavit. The marriage being merely a formal part of the petitioner's case, it would be a proper exercise of the Court's discretion to allow it in this instance to be so proved. The petitioner was a poor man, and the expense of bringing the witnesses from Scotland would fall heavily upon him. The adultery would be proved by oral evidence.

*Lord Campbell, C.J.*: Is the application opposed?

Mr. Macqueen: No; neither the respondent nor co-respondent have entered an appearance.

*Lord Campbell, C.J.*: As there is no opposition, you may take the order.

(Before the Full Court,—*Wightman, J.*, and *Williams, J.*; and the *Judge Ordinary.*)

PALMER *v.* PALMER. July 5, 1859.—Suit for Dissolution.—Previous Sentence in Foreign Court.—Marriage and Cohabitation subsequent to such Sentence.—B. and C., being domiciled English subjects, intermarried in 1848; in 1850, B., the husband, went to the United States, North America; in 1852, C. joined him in Philadelphia; in 1856, C. obtained a decree of divorce à vinculo there by reason of B.'s adultery; B. subsequently married and lived with the woman with whom that adultery was charged. C. returned to England in 1856, and petitioned for dissolution on the ground of B.'s adultery and cruelty. The only evidence of adultery given being proof of B.'s cohabitation, after the decree in Philadelphia, with the woman whom he married, the Court dismissed the petition.

[S. C. 29 L. J. P. 26, 124; 8 W. R. 504.]

This was a petition at the suit of the wife for dissolution of marriage by reason of adultery and cruelty, and bigamy and adultery.

No appearance was given for the respondent.

Dr. Spinks for the petitioner.

It appeared in evidence that the parties were married in **[552]** England in November, 1848; Mr. Palmer was then assistant to a surgeon at Congleton. After the marriage, they resided at Lake, in Staffordshire; in April, 1850, Mr. Palmer went to North America, his wife joined him there in 1852. In 1854, they were residing in the house of a Mr. Haslam at Philadelphia, from whose evidence, taken by com-

mission, and from that of his daughter, who was examined in Court, it appeared that Mr. Palmer treated his wife very brutally, and gave way to drink. At that time he was assistant to a wholesale druggist. In September, 1856, the marriage was dissolved at the suit of the wife by decree of the Court of Common Pleas in Philadelphia, by reason of Mr. Palmer's adultery with a Miss Grubb, whom he afterwards married, and with whom cohabitation, subsequent to such marriage, was proved. There was no evidence before the Court of acts of adultery previous to the decree of the Court of Philadelphia. Mrs. Palmer had returned to, and remained in, England since the end of 1856.

By the Court: Are the parties domiciled in England or America now? You produce a decree of divorce à vinculo made in Philadelphia; apparently the parties were domiciled there at that time. Suppose the Court should be of opinion that he went to America with the view of obtaining a new domicil. Again, can a party who has obtained a sentence of divorce à vinculo in a foreign Court, come here and ask for a dissolution of marriage in consequence of what followed that sentence, namely, marriage and cohabitation? The lady instituted a suit for divorce in America, by which she caused her husband to be placed in the position of a single man; did she not connive at and encourage the second marriage?

Dr. Spinks: There is no proof of the domicil of origin having been abandoned; the presumption is in favour of its continuance; the domicilium fori in America would not be conclusive on that point. The sentence of a foreign Court would be inoperative to dissolve an English marriage; the subsequent cohabitation was therefore adulterous.

Cur. adv. vult.

*Wightman, J.*, gave judgment: In this case, the husband **[553]** in 1850 went to America, and obtained a situation, and intended, as far as we can see, to remain there. In 1852, the petitioner went to Philadelphia, and renewed cohabitation with her husband. She alleged that while there he treated her with such cruelty as, coupled with adultery, would entitle her to a decree of dissolution. It appeared, however, that she instituted proceedings against him in an American Court, and obtained a decree of divorce à vinculo, and the respondent subsequently married another woman, with whom he still lives in America.

The adultery on which we are asked to found our decree in this case is the cohabitation of the respondent with that woman as his wife after the decree of the American Court.

The Court are, however, of opinion, that the petitioner is not entitled to treat the cohabitation with the woman whom he married, after the American decree, as adultery for the purpose of obtaining a sentence of dissolution of the marriage, and that, consequently, there was no proof of the adultery alleged. The petitioner is in this dilemma: either the American decree of divorce is valid, in which case the parties were at full liberty to marry again, and the respondent has not committed adultery by living with the woman he married; or the American decree cannot be recognized in this Court as valid; but, as it was obtained at her instance, she has no right to complain of the consequences which might naturally be expected to follow it. It might be said that she connived at the adultery of her husband; the petition must therefore be dismissed.

(Before the Full Court,—*Wightman* and *Williams, JJ.*, and the *Judge Ordinary.*)

PELLEW *v.* PELLEW AND BERKELEY. July 8, 1859.—Petition for Dissolution.—Lapse of Time.—F. married in 1851. In 1853, he took the command of the squadron in China, but returned to Europe in the summer of 1854. In October his wife eloped with B. from Paris, with whom she had continued to **[554]** live near Brussels. F. obtained a sentence of divorce à mensâ et thora, and steps were also taken to obtain a divorce bill, but discontinued, in consequence of F. being unable to bring an action for crim. con. against B., who remained abroad. F. now petitioned for a dissolution of the marriage.—Held, that there had been no such "unreasonable delay" in presenting the petition, as to raise a case for the discretion of the Court, under the 31st section of the Divorce Act.

[S. C. 29 L. J. P. 44.]

This was a petition for dissolution of marriage, at the suit of the husband, Sir Fleetwood Pellew.

No appearance was given for the respondent or co-respondent.

The marriage took place at Brussels in 1851, and Sir Fleetwood and Lady Pellew lived together in England and abroad till 1853, when Sir Fleetwood was appointed to the command on the China station. Lady Pellew remained with her mother at Brussels. He returned in 1854, and rejoined his wife, but in October of that year she went off with the co-respondent from Paris, and wrote to her husband to the effect that her passion for Captain Berkeley was unconquerable and that she could no longer contribute to his (Sir Fleetwood's) happiness, by remaining with him as his wife. In December, 1854, Sir F. Pellew obtained a sentence of divorce à mensâ et thoro, and it appeared that the respondent and co-respondent had since lived together near Brussels, and had two sons, the issue of their cohabitation. Steps were subsequently taken to obtain a Divorce Bill, but as Captain Berkeley remained abroad, and no action for crim. con. could be brought, it was not thought prudent to continue those proceedings. The present suit was called for by the position of the Exmouth peerage.

Dr. Deane, Q.C., and Dr. Swabey, conducted the petitioner's case.

*Wightman, J.*: The Court are of opinion that the petitioner is entitled to the relief prayed. The only consideration that suggested itself was, whether there had been unreasonable delay. So far as proceedings in this Court are concerned, there certainly has been no unreasonable delay. It appears that in 1854 Sir Fleetwood did take steps with a view to the introduction of a Bill in the House of Lords, that he obtained **[555]** a divorce à mensâ et thoro, and served Captain Berkeley with a writ in an action for crim. con., but that as he did not enter an appearance and could not in consequence of his remaining abroad be compelled to appear, a difficulty was felt about proceeding in the House of Lords, without a verdict in the crim. con. action.

We think that the "delay" intended by the 31st section of the Divorce Act must be that sort of delay which would show the petitioner to have been insensible to the loss of his wife, and might almost be said to be equivalent to condonation. Whatever delay there has been in this case is accounted for, and we therefore dissolve the marriage.

Marriage dissolved.

(Before the Full Court,—*Wightman, J.*, *Williams, J.*, and the *Judge Ordinary.*)

DU TERREAUX *v.* DU TERREAUX. July 8, 1859. — Dissolution. — Clandestine Marriage.—Reasonable Excuse for Separation.—20 & 21 Vict. c. 85, s. 31.—A., being only sixteen years of age, was privately married to B., aged thirty-six, without the consent of her family. On its being discovered that B. was an unsuitable husband for her, A. was removed to the Continent, and never saw him again. He made no attempts to procure cohabitation with her; and subsequently contracted a bigamous marriage. — The Court held, that there had been a reasonable excuse for the separation, and dissolved the marriage, on the ground of B.'s bigamy and adultery.

[S. C. 28 L. J. P. 95.]

This was a suit for dissolution of marriage, promoted by Jane Catherine du Terreaux, on the ground of the bigamy and adultery of her husband, Thomas Webb du Terreaux.

In the petition it was alleged that the marriage was solemnized on the 15th of October, 1853; that the petitioner had never cohabited with the respondent; that on the 24th of April, 1858, he contracted a bigamous marriage with Ann Butcher, with whom he had since lived in adultery.

The respondent did not appear.

The petition was heard on oral evidence.

**[556]** Dr. Phillimore, Q.C., and Mr. Welsby appeared for the petitioner.

The petitioner, formerly a Miss Kennerley, was the daughter of a gentleman of property, who died in 1844. His widow subsequently married Dr. Brown, a physician.

The respondent, who had no acquaintance with the petitioner's family, was in 1853 a teacher of French, residing at Aberystwith, where the petitioner, with Dr. and Mrs. Brown (her mother) were then staying.

At seven o'clock of the morning of the 15th day of October, 1853, the petitioner, who was then only in her seventeenth year, went out, as it was supposed, to take her usual morning walk, and, without the knowledge of her family, was married to the respondent by licence, at the parish church of Llanbadern Faur, distant a mile from

Aberystwith. In the register, which they both signed, the age of the respondent was stated to be thirty-six, and that of the petitioner to be twenty-one. She returned home between nine and ten a.m., when she cried very much, and informed her mother of the marriage. Inquiries were made respecting her husband, and it being ascertained that he was not a suitable husband for her, and her friends considering that she had been entrapped into the marriage sent her to the Continent, where she remained for two or three years. From the time of the ceremony of the marriage up to the present time she had never seen or had any communication with the respondent.

He had, on the 24th of April, 1848, married Ann Butcher, with whom he had since lived in adultery.

In answer to a question from Wightman, J.:

Dr. Phillimore stated that the affidavit, on which the licence was obtained, was not in Court. It was invariably required by the Marriage Act of George IV.

*The Judge Ordinary* regretted that it had not been produced in Court, although no doubt existed as to the party who made it.

*Wightman, J.*: In this case, the Court is of opinion that the petitioner is entitled to the relief she prays. The bigamy and adultery of the respondent have been proved.

**[557]** It seems that at the age of sixteen the petitioner married a man who was at that time thirty-six. There is no doubt that immediately after the marriage, by the interference of her family, she was separated from her husband, and that she had never since cohabited with or seen him. He has never since attempted to procure cohabitation with her.

This is a case where the Court has a discretionary power vested in itself, whether it will or will not decree the relief prayed, according to 20 & 21 Vict. c. 85, s. 31, where it is provided "that the Court shall not be bound to pronounce such decree, if it shall find that the petitioner has, during the marriage, been guilty of adultery, or if the petitioner shall, in the opinion of the Court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wifully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse." Here the ground for separation seems to have been reasonable; for the petitioner must, from the circumstances of the case, have been entrapped into the marriage, and this would be a reasonable excuse for the separation. It would have been very desirable to have had the affidavit before us, that we might know who made the oath upon which the licence was obtained. Perhaps it was the petitioner herself who made it; but this may have been done under the influence of the respondent. Upon the whole, however, this is one of those cases in which we think we may, in the exercise of the discretion given us by the statute, decree the dissolution of the marriage.

Marriage dissolved.

(Before a Special Jury on the issue of Scotch or English domicil, and before the Full Court (*Wightman, J.*, *Williams, J.*, and the *Judge Ordinary*), on proof and hearing of the undisputed facts of the petition.)

TOLLEMACHE *v.* TOLLEMACHE. July 9, 1859.—Petition for Dissolution.—Previous Sentence in Scotland. — Lapse of Time. — Practice. — Costs. — B., a domiciled Englishman, intermarried with C., a Scotchwoman, at **[558]** Gretna Green, and at St. George's, Hanover Square, in August, 1837. B. and C. cohabited together in Wales, England, and Scotland, but principally in the latter, till March, 1841, soon after which date C. eloped with P., whereupon B. obtained a sentence of divorce in the Court of Session in Scotland, on the 3rd of July, 1841. On the 26th of July, 1841, C. intermarried with P. at Glasgow, and lived with him till his death in June, 1855. B. at first supposed the sentence of the Scotch Court to be of universal operation, and that supposition was confirmed by opinion of counsel in 1846. In 1854, he obtained the opinions of two counsel to the effect that the Scotch sentence would have no validity in England; in consequence of which he presented a petition for leave to bring into the House of Lords a Bill declaring his marriage with C. absolutely void since the 3rd of July, 1841, which petition was rejected. In 1858, B. petitioned the Court for dissolution of marriage, by reason of C.'s adultery in April, 1841, and at other times.—Held, that there was no such lapse of time as to constitute unreasonable delay under the 31st

section of the Divorce Act.—By the answer to the above petition, the only issue raised was that of domicil, which was decided by the verdict of a jury in favour of the petitioner. The petition afterwards came before the full Court on proof of the facts not in issue, when the Court refused to allow the respondent's counsel to cross-examine the petitioner's witnesses, or to contest facts admitted on the pleas, but permitted him, after the proof of the facts of the petition, to argue, rebus sic stantibus, against the decree of dissolution, and, under the circumstances, to examine the petitioner.—The Court made a decree, dissolving the petitioner's marriage, but refused to make any order for payment of the wife's costs.

[S. C. 30 L. J. P. 113; 2 L. T. 87. Referred to, *Le Sueur* v. *Le Sueur*, 1876, 1 P. D. 143; *Niboyet* v. *Niboyet*, 1878, 4 P. D. 17; *Green* v. *Green*, [1893] P. 92; *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 528.]

In this case the husband's petition for dissolution, after asserting an English domicil of origin, which he averred he had always retained, stated his marriage with A. M. Louisa Sinclair at Gretna Green, in Scotland, on the 6th of August, 1837, and also at the parish church of St. George's, Hanover Square, in the county of Middlesex, on the 12th of the same month; cohabitation in Wales, England, and Scotland, but principally in Scotland, and the birth of a child at Rothesay, in North Britain, in July, 1838; a charge of adultery against his wife at Glasgow, in the month of April, 1841, with a man, to the petitioner wholly unknown, but then passing by the name of Williams; a similar charge in Edinburgh; a marriage between the said A. M. Louisa Tollemache, on the 26th of July, 1841, with a man then passing by the name of John Power, at Glasgow, with whom she lived as **[559]** his wife till his death in June, 1855; that on or about the 1st of August, 1841, and on other days in the said year, at Edinburgh, Mrs. Tollemache committed adultery with the said John Power; that on the 3rd of July, 1841, a sentence of divorce between the petitioner and respondent was decreed by the Court of Session in Scotland.

The respondent's answer alleged her domicil of origin as Scotch, and the marriage at Gretna Green; that from the 6th of August, 1837, till the month of April, 1841, the said H. B. Tollemache and A. M. Louisa Power, then Tollemache, cohabited together in Scotland, with the exception of occasional visits in England and Wales; that in the year 1837, Mr. Tollemache acquired a legal Scotch domicil, and was legally domiciled in Scotland till the 3rd of July, 1841, the date of the Scotch decree of divorce; that the said A. M. Louisa Power is not now the wife of the said H. B. Tollemache. The answer then prayed that their Lordships would pronounce a decree, declaring the marriage with the petitioner to be dissolved.

April 23.—A verdict on the issue of domicil, raised by the above petition and answer, was found by a special jury on the 23rd of April, 1859, in favour of the petitioner.

July 9.—The petition came on for further proof and hearing before the Full Court, —*Williams, J.*, *Martin, B.*, and *The Judge Ordinary.*

The Queen's Advocate (Sir J. D. Harding), and Mr. Mundell for the petitioner.

Mr. Edwin James, Q.C., Dr. Deane, Q.C., Mr. Kinnear, and Mr. J. A. Russell, for the respondent.

On the examination of certain witnesses in proof of adultery,

Dr. Deane, Q.C., objected to questions put by petitioner's counsel.

*By the Court.*: What locus standi have you? Do you think that you have a right to dispute any fact which, as far as your client is concerned, is admitted on the record? It is very desirable to understand this question. If a party leaves **[560]** matters of fact undisputed on the record, and then claims a right to come forward and controvert facts before the Court, it may be a surprise and hardship on the other party, and might necessitate his calling witnesses with whom he is not prepared. The Court is of opinion that it is not competent to you to cross-examine the petitioner's witnesses, or to appear to contest facts which have been admitted by your party on record.

The case for the petitioner was then proceeded with. When Mrs. Tollemache eloped, she was staying with her parents in Edinburgh, and Mr. Tollemache was in England. On receiving the information he went to London, and, in consequence of advice he there received, determined on instituting the suit in Scotland.

W. Connell, parliamentary agent, was examined, with a view of explaining the delay in taking proceedings in England in this case. He said:—I first saw Mr. Tollemache as a client in the end of June, 1855, at the recommendation of Mr.

Campbell of Edinburgh; he wished to be advised as to his position under the Scotch divorce. I advised him to take Dr. Addam's opinion, which was done in July, 1855, and in December of the same year the Queen's Advocate's opinion was taken on a similar case. As they agreed in considering an application for an Act to dissolve the marriage the only safe course, a further case was laid before Mr. Rolt, and by his advice leave was sought to bring in a Bill to dissolve and make void his marriage as from the 3rd of July, 1841; but on the 3rd of August, 1857, a select committee of the House of Lords reported against permitting such a Bill to be introduced. It also appeared, that in 1846 Mr. Tollemache entertained notions of a second marriage, and in consequence of doubts then expressed, took the opinion of counsel, which was in favour of the universal operation of the Scotch sentence: the intended marriage went off on other grounds, but Mr. Tollemache, till 1854, was under the impression that the Scotch divorce held good.

*Williams, J.*, addressing the respondent's counsel, said: We expressed our opinion that you were not at liberty to **[561]** controvert facts admitted by the answer of your client; but the Court is of opinion that it is competent for you, on the assumption that the facts admitted are proved to the satisfaction of the Court, to controvert the propriety of a decree for dissolution rebus sic stantibus. We are also of opinion that Dr. Deane should be at liberty to examine Mr. Tollemache if he thinks proper.

Dr. Deane refused to examine Mr. Tollemache, but argued against the prayer of the petition.

*Martin, B.*: What harm will be done to your client if we make the decree of dissolution as prayed? The decree of this Court cannot alter the effect of what has taken place; if the children of Power are legitimate, the decree of this Court cannot bastardize them.

*By the Court*: The Court is of opinion that the petitioner is entitled to the decree of dissolution.

The first question which arises on the proceedings is, whether the Court has jurisdiction to entertain the petition? If a valid divorce has already been had by the proceedings in Scotland, it would be idle and unfounded to come to the Court for a further remedy; but without going into the question of the effect of the divorce in Scotland in respect of the second marriage there contracted, and the children of that marriage, sitting here as an English Matrimonial Court we cannot recognize that divorce as putting an end to the marriage-bond of a domiciled Englishman. Secondly, the petitioner has proved his case in respect of the adultery charged. Thirdly, has there been, in the opinion of the Court, unreasonable delay in presenting the petition? It is a very long period of time since the petitioner first took advice on this matter in England, and, if unexplained, might fall under the head of unreasonable delay. Immediately after the adultery, a divorce was obtained in Scotland in July, 1841. Till 1855 he is quiescent. The word "delay" in the 31st section must be understood to be culpable delay, somewhat in the nature of connivance or acquiescence; but there is no reason to impute delay in that sense. As to his not proceeding for damages, **[562]** we can well understand the petitioner being satisfied with the earlier opinion taken, that the divorce in Scotland was equivalent to a full dissolution of marriage. In 1855, his doubts on this point were again raised, and he then does what he can to get relief by a Bill in Parliament, and failing that, institutes a suit in this Court no long time after its establishment.

Dr. Deane applied for the respondent's costs: Sitting here as an English Court, the petitioner and respondent should be looked upon as husband and wife, and if he had proceeded earlier, he would have had to pay her costs in the House of Lords. She had no means. Till the decision this moment given, we did not know whether she was a wife or not. Secondly, this is not like cases where the husband comes for relief ordinarily: he comes here, in fact, to ascertain his status, and there is no reason why she, after such a lapse of time, should be put to expense on that account.

The Queen's Advocate contrà.

*By the Court*: We are of opinion that we ought not to allow costs.

Marriage dissolved.

(Before the Full Court,—*The Judge Ordinary, Williams, J.*, and *Bramwell, B.*)

BOYD *v.* BOYD AND COLLINS. November 18, 1859.—Co-respondent.—Costs.—Order on Respondent to deliver up Child.—Where the wife's conduct has been profligate,

and that to the husband's knowledge, before the adultery committed with the co-respondent, the latter will not be liable to costs.—On a sentence of dissolution by reason of the wife's adultery, the Court will make an order on her to deliver up the custody of the children, rather than leave the husband to the expense of establishing his right, as father, at common law.

[S. C. 29 L. J. P. 79; 1 L. T. 244; 8 W. R. 160.]

This was an undefended petition for a dissolution of marriage by reason of the wife's adultery.

**[563]** Mr. Brandt, for the petitioner, after the case was proved, asked for costs against the co-respondent.

*By the Court*: We consider this is not a case for costs. It appears that the respondent was an exceedingly profligate woman; profligate before she had to do with Collins, and that with her husband's knowledge, and he seemed disposed to put up with a good deal. If the co-respondent had the aspect of a seducer in the first instance, the costs would generally be imposed upon him.

Mr. Brandt then asked for an order on the respondent to deliver up a child who was in her custody; if she refuse, attachment is an easier process than habeas corpus. An interim order in favour of the father was made in *Spratt* v. *Spratt*, ante, 215.

*By the Court*: We think there are reasonable grounds for the Court to make the order you ask for. The order is part of the judgment of the Court on the decree for dissolution. If we refuse the order, you would have to establish your case before another Court; and though we have no doubt you would prove the petitioner's right there, as father, to the custody of the child, yet there might be a discussion there and expense incurred.

Order on the respondent to deliver up the child within a week.

(Before the Full Court,—*The Judge Ordinary*, *Wightman*, *J.*, and *Byles*, *J.*)

WILTON *v.* WILTON AND CHAMBERLAIN. November 22, 1859. — Petition for Dissolution.—Previous Adultery of Wife condoned.—Absence of Husband.—Costs.—B. received back his wife, after adultery by her committed, in May, 1856. In June, 1857, he left England for Australia, to ascertain his prospects in settling, leaving his wife in business in Devonport, close **[564]** to her own mother. The wife, during his absence, committed adultery with the co-respondent, and sold off the stock-in-trade. The Court dissolved the marriage, and condemned the co-respondent in the costs.

[S. C. 1 L. T. 243; 8 W. R. 160.]

This was an undefended petition for dissolution of marriage by reason of the wife's adultery.

Mr. Collier, Q.C. (Mr. Turner with him), for the petitioner.

Counsel, in opening the case, stated that in May, 1856, Mr. Wilton, who was a confectioner at Devonport, had received back his wife after adultery committed by her, on her expression of deep contrition. It appeared in evidence, that in June, 1857, Mr. Wilton went to Australia, two of Mrs. Wilton's brothers going in the same ship, to ascertain what prospects he might have of establishing himself in business there, with the intention of removing his wife from Devonport, which he thought better after what had happened. He left his wife to superintend the business in Devonport during his absence, her mother living close to her. Mrs. Wilton, however, contracted an intimacy with Chamberlain, who went constantly to the house and slept with her there, and in May, 1858, before her husband's return, Mrs. Wilton sold off his stock-in-trade. In August, 1858, a child was born.

*By the Court*: The Court is satisfied that the case is established. It was necessary to inquire into the circumstances under which the husband left her for Australia, especially after the statement of counsel as to her previous misconduct; but it is proved that his motives were kind and well-intentioned towards her. We decree the dissolution of the marriage, and condemn the co-respondent, who invaded the house of the husband, in costs.

**[565]** (Before the Full Court,—*The Judge Ordinary*, *Watson B.*, *Hill*, *J.*, and a Special Jury.)

BELL *v.* BELL AND MARQUIS OF ANGLESLEY. December 6, 1859.—Petition for Dissolution.—Damages.—Marriage Settlements.—20 & 21 Vict. c. 85, s. 33.—

22 & 23 Vict. c. 61, s. 5.—Quære, whether the Court has power to deal with marriage-settlements on a decree for dissolution of marriage, under 22 & 23 Vict. c. 61, s. 5, unless there be children of the marriage.—Semble, the position of the husband, as regards the marriage-settlements, may properly be submitted to the jury for their consideration in the assessment of damages.

[S. C. 29 L. J. P. 159; 1 L. T. 243; 8 W. R. 178.]

The only point worth noting in this case was the ground on which the counsel for Mr. Bell, Mr. M. Chambers, Q.C. (Dr. Deane, Q.C., and Mr. Cleasby, with him), asked for damages. After the evidence in proof of the petition had been given:

Mr. M. Chambers stated: The reason why Mr. Bell asks to have damages assessed is, that £5,000 being settled to Mrs. Bell's separate use during her life, the Court has power given it by 22 & 23 Vict. c. 61, s. 5, to deal with marriage-settlements, under certain circumstances. That section is as follows: "The Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of contemplated or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage, or of their respective parents, as to the Court shall seem fit." But on the wording of this section it seems very doubtful whether the Court could make any order with respect to settled property, where, as in the present case, there is no issue of the marriage. Mr. Bell, therefore, thinks himself justified in asking the jury, by their assessment of damages, to indemnify him for the £5,000 so settled to Mrs. Bell's separate use.

Mr. Edwin James, Q.C. (Mr. Gordon Allan with him), for the co-respondent.

**[566]** *The Judge Ordinary* (to the jury): This is a very simple case; of the adultery, I imagine, you can have no doubt. When the Act of Parliament which constituted this Court was under discussion, great objection was taken to the old action for criminal conversation; there was considerable difference of opinion about it, and by section 59 of the Divorce Act it was abolished. If, however, in section 33, which enables the husband to apply for damages in this Court, you substitute the word "declaration" for "petition," the result is, that the Act has made no difference in the state of the law in this particular. To deal with this case, then, as if it were an action at common law, I must remark, that I have never heard any question of settlements introduced as a ground for giving damages. It has always been considered that the only question was, of the loss to the husband of the society of the wife.

Mr. M. Chambers suggested that in *Dr. Lardner's* case, the question of the marriage settlement formed part of the matter submitted to the consideration of the jury in assessing damages. See also Buller's Nisi Prius, p. 27, edit. 1772.

Mr. Edwin James, as regards *Landner's* case, admitted that this was so.

*The Judge Ordinary*: On that precedent I will not withdraw the statement of the learned counsel as to settlements from the consideration of the jury. That must, however, have been an exceptional case, and I think there must have been some other circumstances in it with which we are not acquainted. You have then to consider the position of the parties, the terms on which husband and wife lived together before her adultery broke off cohabitation, the circumstances under which the adulterer was introduced, and the means he has to pay the damages you may assess. In this case, there was not much evidence of the married life of the parties laid before you. The solicitor who was examined said generally he did not consider it a happy marriage. The butler talked of complaints, on the husband's part, of too much company. How the marquis became acquainted with the wife was not explained. It does not appear that the husband was guilty of **[567]** inattention, or of exposing his wife to undue temptation. There was no proof of any previous familiarities to arouse his suspicion; on the other hand, you have the marquis taking advantage perhaps of the prestige of his rank, in making a vain woman false to her duty to her husband.

The jury found a verdict for the petitioner, and gave £10,000 damages.

(Before the Full Court,—*The Judge Ordinary*, *Wightman*, and *Byles*, *JJ.*)

LLOYD *v.* LLOYD AND CHICHESTER. November 25 and 26, 1859.—Adultery proved.—Collusive Prosecution of Petition.—20 & 21 Vict. c. 85, ss. 29, 30.—Though the Court may be satisfied that the adultery is proved and that the petitioner was neither accessory to nor conniving at it, it will, under the 30th section of the

Divorce Act, dismiss the petition, if it appears that the parties, or their agents with their knowledge, were acting in concert with each other as to the conduct and prosecution of the suit.

[S. C. 30 L. T. P. 97 ; 1 L. T. 335. Referred to, *Todd* v. *Todd*, 1866, L. R. 1 P. & D. 124. Applied, *Churchward* v. *Churchward*, [1895] P. 27.]

This was a petition for dissolution of the marriage, at the suit of the husband, by reason of the wife's adultery. The marriage took place in 1853. The petitioner was a captain in the militia ; his father, Mr. Eyre Lloyd, was a gentleman of some property in Ireland ; Mrs. Lloyd's maiden name was Cheese ; two children had been born of the marriage. In 1856 Captain Lloyd was in prison in the Queen's Bench for debt ; whilst he was there Mrs. Lloyd formed a connection with the co-respondent, on discovering which Captain Lloyd refused to return to cohabitation. In 1857-58 Captain Lloyd was again in the Queen's Bench. In January, 1859, the petition and citation were served on Mrs. Lloyd and Chichester at Paris. A woman named Morgan, who had been in the service of Mr. Cheese, the respondent's father, and was again in his service when the petition was heard, but who was with Mrs. Lloyd and Chichester in Paris when the citation was served, was one of the witnesses. In answer to questions from the Court, Morgan said **[568]** that she had seen a Mr. Isaacson in London, and that he had been to Paris.

Mr. H. James conducted the petitioner's case.

No counsel appeared for the respondent or co-respondent.

*The Judge Ordinary* inquired whether Mr. Isaacson was in Court? He was then sworn and examined by the Court. He stated that he was an agent, and had been employed to go to Paris to serve the citation on Mr. Chichester and Mrs. Lloyd ; that he had previously communicated with Captain Lloyd about the suit, but he did not know that he instituted it at the instance of Mr. Cheese ; that he knew Mr. Cheese and Captain Lloyd, having been confined with the latter in the Queen's Bench ; that Mr. Cheese did not undertake to pay the expenses of the suit if Lloyd would institute it ; that he never heard that Lloyd stipulated to receive money from Cheese before he would sign the petition ; that he (Isaacson) was selected to serve the citation because he had known Chichester intimately for many years ; that he stayed in Paris nearly three weeks ; did not see Chichester for five or six days ; after that saw him almost every day ; dined with him and Mrs. Lloyd several times ; when at a restaurant's witness paid for the dinners ; when at Chichester's lodgings he paid. Witness agreed to advance Chichester £50 payable on Mrs. Lloyd's order ; of this Chichester handed £25 to witness. He let witness have it out of kindness. Witness's charge for the journey to Paris to serve the citation and to collect evidence was £100.

*The Judge Ordinary* read an item from a bill of costs, which had been taxed by Mr. Strutt, the attorney originally employed against Captain Lloyd—"To Mr. Isaacson for proceeding to Paris for the purpose of obtaining the necessary evidence, according to the instructions of Mr. Cheese, Mr. Cooke, and Mr. Strutt, he having also advanced a sum of money to enable him to effect a certain arrangement by which the chain of evidence might be completed"—and asked the witness whether he had advanced money to Chichester **[569]** for that purpose, who admitted he had advanced money to enable Chichester to come from Dieppe to Paris.

Mr. H. James then said that Mr. Cooke wished to give his account on oath of the transaction so far as he had to do with it.

By the Court : We must consider whether we can allow that. Is Mr. Strutt in Court?

On this being answered in the negative, the case was adjourned in order to examine Mr. Strutt, who had in the outset acted as Captain Lloyd's attorney, but had ceased to do so, and the taxation of whose bill had brought circumstances to the knowledge of the Court which led to the present inquiry.

On the 26th November Mr. Strutt was in attendance and was sworn and examined by the Court :—I was the attorney employed by Captain Lloyd in this suit some time in November, 1858 : I had been introduced to Captain Lloyd on other matters previous to the suit ; no one requested me to go to Captain Lloyd as to this suit ; he was then in the Queen's Bench prison. I conducted the suit for some time and then would not go on with Captain Lloyd's affairs ; there was a change of attorneys ; the bill I offered to be taxed as against Captain Lloyd was a true statement of the matters contained therein, to the best of my belief. Early in November I had a communication with Captain Lloyd as to the expense of the suit ; he proposed that,

as a sum of money was coming to him from his father-in-law Mr. Cheese, he should be at liberty to appropriate some of that money to the expenses of the divorce, to the payment of creditors, and other private purposes; it was some reversionary interest. I then saw Mr. Cheese and tried to arrange that he should pay the money to Captain Lloyd for the purposes stated; but Mr. Cheese had nothing to do with the mode of the application of the money; there was no arrangement with Mr. Cheese as to costs or damages against Mr. Chichester. Captain Lloyd left the matter in my hands as a mutual friend; he swore positively he would have nothing to do one way or other with this unless Mr. Cheese paid over the money; otherwise he said he did not believe he should get the money. He wanted to stipulate not to sign the pe-[570]-tition till £600 or £700 had been paid him by Mr. Cheese. Mr. Cheese appeared anxious for the divorce. When Captain Lloyd signed the petition I handed him £10 from Mr. Cheese; that and other moneys he received afterwards through Mr. Cooke were part of the money he was to have under the reversionary interest. I cannot say whether it was or was not a consideration for signing the petition. It was suggested by me at a conference with Mr. Cooke that Isaacson should serve the citations at Paris, because he was acquainted with Chichester. I told Lloyd that Cheese wished Isaacson to go to Paris as an intimate friend; I gave instructions to Isaacson to go. I supplied him with money, £50, which I received from Cooke—Captain Lloyd had no money.

Mr. H. James asked to be allowed to cross-examine the witness.

By the Court: We think it reasonable that you should do so.

Mr. Strutt was accordingly cross-examined at some length, but without shaking his evidence as to the above facts.

Mr. H. James then offered Captain Lloyd, Mr. Cheese, and Mr. Cooke to be examined, and the Court heard Mr. Cooke's statement on oath to the following effect:—I have known Mr. Cheese's family for many years. In 1856 I was requested by Mrs. Lloyd to endeavour to reconcile her father and husband; the former had never approved the marriage, and had refused to receive his son-in-law; I did not succeed. When Captain Lloyd came out of prison on a letter of leave from his creditors, and refused to renew cohabitation with his wife, alleging that she had been guilty of adultery, I found it impossible to bring the young people together. Mrs. Lloyd's father asked me as a mutual friend to carry out family arrangements for a separation, and for certain releases of the family property. In 1858 I was instructed by Mr. Strutt, of the Temple, as Captain Lloyd's solicitor, to draw a petition for dissolution; he was then in prison, and there was a difficulty about swearing the affidavit. I had seen Lloyd's brother; he made known to me that Mrs. Lloyd was living with Chichester in Paris, and [571] supposed I knew it, from my acquaintance with the family. Mr. Cheese had hitherto opposed the divorce, because he said the charge was untrue. Mr. Cheese now came to me and admitted that his daughter was living with Chichester. I said he ought no longer to resist the divorce, that his son-in-law was entitled to it. I thought, if facilities of evidence were given by Mr. Cheese the adultery could be established. We entered on the subject of purchasing Lloyd's reversionary interest in Cheese's and Mrs. Lloyd's property. Lloyd had assigned his interest to his father. Isaacson called on Cheese the next morning and took him to Strutt. Cheese came to me and asked if I would see Strutt; he said that Strutt was employed by Lloyd's father to arrange all his affairs. Strutt, Isaacson, and Cheese came to my chambers; I received Strutt as Lloyd's solicitor. Strutt wanted Cheese to advance money for Lloyd's immediate benefit. Cheese refused to advance a shilling, and I expressed an opinion that a suit of this sort ought not to cost above £50. I intimated that I should write to Lloyd that I thought under the circumstances the suit ought to be prosecuted. I expressed a hope that Mrs. Lloyd would not be insulted by any offensive manner of serving the citation, upon which Strutt suggested that Isaacson, who knew Chichester, should serve it. Strutt mentioned that Lloyd was in great distress. Cheese at first refused to give anything, but consented at my instance to give £10, certainly on no condition. Mr. Strutt sent me instructions as to facts to settle citation. In December Strutt told me Isaacson could not go to Paris in this matter without money. I gave him £50. Mr. Cheese repaid me the money. £50 was advanced by Isaacson to Chichester on an order from Mrs. Lloyd to her father to pay her next quarterly payment. In January Isaacson waited on me to say his journey to and stay in Paris cost £150. I had an interview with Strutt on the subject, and then wrote to Eyre Lloyd in Ireland, and asked him to come over. When

he came I ascertained that Strutt had no authority from the Irish branch of the family, and was altogether a stranger to them. The reversionary interest alluded to is in some funded property of Mr. Cheese, I think secured to Lloyd for life contingently on his surviving his wife. Lloyd was anxious to have from Cheese the value, as he thought, of that reversion.

**[572]** Mr. H. James proposed to examine the petitioner, but the Court would not allow it; he then stated that Mr. Cheese was present, if the Court wished to examine him.

*The Judge Ordinary*: You may call him if you please, but the Court does not require that he should be examined. In this case the Court is of opinion that there can be no doubt of the adultery committed by the respondent and co-respondent; but it is one of those cases in which the Court felt it to be its duty to give effect to the 29th section of the statute: "Upon any such petition for the dissolution of a marriage it shall be the duty of the Court to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same; and also shall inquire into any counter-charge which may be made against the petitioner." Now the Court does not find that the petitioner has been accessory to or has connived at the adultery; but the 30th section provides, "that if the Court shall find that the petition is presented or prosecuted in collusion with either of the respondents, then the Court shall dismiss the said petition." The case presented some curious features during the examination of the witnesses yesterday, and we felt it our duty to call Isaacson; he told us he was selected by Lloyd to serve the citations because he was on intimate terms with Chichester; and it appeared that, having gone to Paris for that purpose and to get up evidence, he was living there familiarly with Chichester and Mrs. Lloyd, dining with them and they with him; and to such an extent was this carried that he had an opportunity of seeing them in bed together. I asked him whether he advanced money to Chichester. He said, "Mrs. Lloyd drew a cheque on her father for £50, on which he advanced £50 to Chichester, of which Chichester gave him £25. I asked him whether he advanced money for enabling Chichester to complete the chain of evidence. He could not deny it. Lloyd might have satisfied the Court that this was only an error of his agent; but it appears that there was a communication, not denied by Mr. Cooke, and affirmed by an entry of Strutt's in this bill, in which Strutt expressed himself anxious **[573]** that the suit should go on, and Lloyd protested he would take no step in the matter till he had received a payment for the reversionary interest, because he thought, if the marriage were dissolved, the reversionary interest would be lost; whether this would in fact have been the case is immaterial. Did he or did he not bargain for £10 on signing the petition? There can be no doubt he did. Then we have Mr. Cooke's remark to Cheese that he might as well give the parties some facilities in the way of evidence. Without entering into further particulars, the case seems of the same character as *Chisim's* case, reported in Mr. Macqueen's Practice of the H. of L., p. 582, in the following words: "The solicitor for the petitioner was called in, and being sworn, produced and proved an office copy of the judgment of the Court of Common Pleas against Mr. William Greaves for criminal conversation with Mrs. Chisim. Being asked what Mr. Chisim and Mr. Greaves were, he said Mr. Chisim was a drysalter and Mr. Greaves a man of property. Being asked if he had received the costs of the suit in Common Pleas, he said he had not, nor had he taken out execution. Being asked if he thought the plaintiff meant to take out an execution, he answered, if the plaintiff were not paid he thought he would. Being asked why the plaintiff had not demanded them before, he answered that he believed it was owing to his (witness's) delay in taxing his costs. Being asked who was to pay him his bill and all expenses, he said a near relation of Mrs. Chisim's, whose name was Roberts; that the said Mr. Roberts was nearly related to Mrs. Chisim, and lived upon his fortune at Bexhill, in Sussex. Being asked what relation the said Mr. Roberts was to Mrs. Chisim, said he was her father. Then the witness was asked if any defence was made by Mrs. Chisim in the Ecclesiastical Court; he answered that counsel attended for both parties, but witnesses were produced on the part of Mr. Chisim only. The adultery was clearly proved, but the appearances of collusion were too gross and papable to admit of being overlooked or explained, and the bill was rejected." Acting upon that principle, we say the evidence of collusion in this case is too gross and palpable to be overlooked, and dismiss the petition.

(Before the *Judge Ordinary.*)

**[574]** YELVERTON *v.* YELVERTON. December 7, 1859.—Suit for Restitution of Conjugal Rights.—Power of Wife to acquire a separate Domicil.—Domicil to found Jurisdiction of Court.—Domicil of an Irishman after enlisting in the Army.—Ireland and Scotland.—Jurisdiction.—*Tenducci's* case, 1775.—The domicil of the husband is the domicil of the wife, and even where he has been guilty of such misconduct as would furnish her with a defence to a suit by him for restitution of conjugal rights, she cannot on that ground acquire a separate domicil for herself.—The word domicil has many meanings, according as it is used with reference to succession and other purposes. A person may have retained a foreign domicil for many purposes, and yet may be domiciled in England so as to give jurisdiction to the Court for Divorce and Matrimonial Causes; but if he has never resided in England, except temporarily, and is not here at the time of the commencement of the suit, he is not subject to its jurisdiction.—A domiciled Irishman, by enlisting in a regiment in Her Majesty's service, the head-quarters of which are in England, does not thereby acquire an English domicil.—For the purposes of the question of the jurisdiction of the Court, Ireland and Scotland are to be deemed foreign countries. Circumstances of the case of *Tenducci* v. *Tenducci*, 1775.—A. intermarried with B., a major in H. M. Royal Artillery, at Edinburgh, in April, 1857, and in August, 1857, the marriage was celebrated in Ireland according to the rites of the Romish Church. In April, 1858, B. deserted A. at Bordeaux, and had since that time been stationed with his regiment at Edinburgh. B.'s domicil of origin was in Ireland, and he had never acquired a domicil in England. A. petitioned for restitution of conjugal rights, and described herself as resident in England. B. appeared under protest to the jurisdiction.—Held, that, as there was no proof of B. having acquired an English domicil, and A.'s domicil was that of her husband, the Court had no jurisdiction to entertain the suit.

[S. C. 29 L. J. P. 34; 6 Jur. (N. S.) 24; 1 L. T. 194; 8 W. R. 134. Considered, *Burton* v. *Burton*, 1873, 21 W. R. 649; *Le Sueur* v. *Le Sueur*, 1876, 1 P. D. 143; *Niboyet* v. *Niboyet*, 1878, 4 P. D. 16; *Firebrace* v. *Firebrace*, 1878, 4 P. D. 66; *In re Mitchell, ex parte Cunningham*, 1884, 13 Q. B. D. 418. Held no longer law, *Rayment* v. *Rayment*, [1910] P. 284. Referred to, *Countess de Gasquet James* v. *Duke of Mecklenburg-Schwerin*, [1914] P. 67; *Perrin* v. *Perrin*, [1914] P. 137.]

This was a suit for restitution of conjugal rights, promoted by Maria Theresa Yelverton, described in the petition as of Maida Hill, in the county of Surrey (*sic*), against William Charles Yelverton. The petition alleged: (1) That on the 13th day of April, 1857, the petitioner was lawfully married under her **[575]** then name of Maria Theresa Longworth, spinster, to William Charles Yelverton, then and now a major in Her Majesty's Royal Regiment of Artillery, at Edinburgh. (2) That the aforesaid marriage was and is a good and valid marriage according to the law of Scotland. (3) That the petitioner was afterwards, on the 15th day August, 1857, lawfully married to the said William Charles Yelverton at Killowen, in Ireland, according to the rites of the Roman Catholic Church. (4) That the aforesaid marriage was and is a good and valid marriage according to the law of Ireland. (5) That she subsequently lived and cohabited with her said husband at divers places, and amongst others in Ireland, Edinburgh, Hull, and France, until the month of April, 1858, and that there has been no issue of such marriage. (6) That the said William Charles Yelverton had, ever since the month of June, 1858, without any just cause refused, and still refuses, both to permit her to cohabit with him, and also to render her conjugal rights. The petition concluded with a prayer that the Judge Ordinary would be pleased to declare that she was lawfully married to the said William Charles Yelverton, and to order that the said William Charles Yelverton take her home and receive her as his wife, and render her conjugal rights, etc.

The citation and a copy of the petition were served on the respondent at Edinburgh. The respondent appeared under protest, and having obtained leave from the Judge Ordinary to plead to the jurisdiction of the Court, pleaded as follows:—That he the said W. C. Yelverton was at the time of the commencement of the suit, and still is, a major in the British army and a captain in Her Majesty's Royal Artillery stationed at Leith Fort, Edinburgh, in the kingdom of Scotland; and that he was at the time of the commencement of this suit, and hath since continued to be, and still is, resident at Edinburgh aforesaid, and that his domicil of origin is in the kingdom of Ireland,

and that he has never abandoned such domicil or acquired any domicil elsewhere. Wherefore the said William Charles Yelverton insists that he ought not to be compelled to make any answer to the petition filed in this suit, and that this Court ought not to take further cognizance thereof.

The petitioner filed a replication to the effect, that before and at the time of the commencement of this suit the petitioner and **[576]** the respondent were respectively subjects of our lady the Queen, and that the petitioner before and at the time of the commencement of this suit was, and still is, resident in England, to wit, at No. 12 Randolph Road, Maida Hill, in the county of Middlesex, and that the respondent before and at the time of the commencement of the suit was, and still is, on full pay of Her Majesty's Royal Regiment of Artillery, the head-quarters of which were and are at Woolwich, in the county of Kent, and within the jurisdiction of this Honourable Court, and by reason thereof the said respondent, at the time of the commencement of this suit, was, and still is, domiciled at Woolwich aforesaid, and within the jurisdiction of this Honourable Court. Wherefore the petitioner insists that this Honourable Court ought to take cognizance of the matters contained in her said petition, and that the respondent ought to be compelled to make answer to the said petition.

The cause came on for hearing on the 30th of July, 1859, before the Judge Ordinary.

Dr. Phillimore, Q.C., and Mr. G. Honyman, for the petitioner.

Mr. James Anderson, Q.C., and Mr. W. A. Clark, for the respondent.

The counsel for the respondent began; and at the close of their arguments, on the application of Dr. Phillimore, leave was granted to amend the replication on payment of the costs of the day.

The following replications were then filed by the petitioner: (1) That before and at the time of the commencement of this suit, the petitioner and the respondent were respectively subjects of our lady the Queen. (2) That in February, 1840, the respondent, being of the age of fourteen years, left the house of his father at Belleisle, near Portumna, in the county of Galway (*sic*), in Ireland, where he was then residing, and came to England and entered the Royal Academy at Woolwich, in the county of Kent, as a cadet, and there continued until the 11th of January, 1843, when he obtained a commission as Lieutenant in Her Majesty's Royal Regiment of Artillery. (3) that the respondent has thenceforth continued on full pay **[577]** of the said Royal Regiment of Artillery, the head-quarters of which, before and at the time of the commencement of this suit, were at Woolwich aforesaid, within the jurisdiction of the Court. (4) That when the respondent left Ireland as aforesaid, he did so with the intention of not returning thither, and that he had not since resided in Ireland, except for the purpose of visiting his father at Belleisle aforesaid, and except on the occasion mentioned in the third paragraph of the petition, when he went thither for the sole purpose of being there married to the petitioner. (5) That the respondent is not, and never was, seised or possessed of any house or land or any property whatsoever situate in Ireland. (6) That the respondent, on the 8th of June, 1859, in the Court of Session in Scotland, instituted against the petitioner a suit of Declaratory of marriage and putting to silence. (7) And that at the time of the commencement of the said suit he was domiciled in Scotland.

Second replication. (8) That after the marriage at Edinburgh, and after the marriage in Ireland, the petitioner and the respondent lived and cohabited together as man and wife in Ireland, at Edinburgh, at Hull, in England, and at Bordeaux, in the empire of France. (9) That in April, 1858, the respondent deserted her at Bordeaux aforesaid, and went to Edinburgh. (10) That the respondent has always since refused to live and cohabit with her as his wife, though requested by her so to do, and has thenceforth continued to live separate and apart from her. (11) That on the 26th of June, 1858, the respondent, at Trinity Chapel, North Leith, in the kingdom of Scotland, did unlawfully, but in fact, marry Emily Marianne Forbes, a widow, with whom he has thenceforth lived and cohabited at Edinburgh, and by whom he has had issue. (12) That at the time of the commencement of this suit she was, and still is, domiciled within the jurisdiction of this Court, to wit, at No. 12 Randolph Road, Maida Hill, in the county of Middlesex.

Rejoinder. (1) With reference to the second paragraph of the said replication, that between February, 1840, and the 11th of January, 1843, the respondent was frequently at his father's residence at Belleisle, in the county of Tipperary, in

Ireland; and that he went there whenever an opportunity **[578]** offered itself, as it did during the times of vacation in summer and winter of each year, for the period of seven weeks each, or thereabouts. (2) With reference to the third paragraph, that after obtaining his commission he became and continued, down to the commencement of the present suit, the officer in command of the 1st company of the 9th battalion of Her Majesty's Royal Artillery, and for two years and upwards prior to such commencement he was with the said company stationed at Leith, near Edinburgh, in Scotland; that a general order of His Royal Highness the General Commanding-in-Chief, relating to the Royal Artillery, dated the 1st of April, 1859, after stating that Her Majesty's Government, on the recommendation of His Royal Highness, had decided that the head-quarters of the Royal Artillery should remain as theretofore at Woolwich, but that the staff of the battalions should be distributed to the several districts and garrisons at home and abroad; for that purpose directed, amongst other things, that the then terms "battalion" and 'troop" should be superseded by those of "brigade" and "battery"; that the regimental staff of the then existing battalions should form brigades, bearing corresponding numbers, and be distributed as therein mentioned; and then proceeded to allot the head-quarters of each of the fifteen brigades of the Royal Artillery, and fixed the head-quarters of the 9th brigade Field Artillery at Ballincolig, in Ireland; that in pursuance of the said general order the said company of the 9th battalion of the Royal Artillery has become the 7th battery of the 9th brigade of Field Artillery; and since the said change was effected, the said William Charles Yelverton has been and is now the commanding officer of the 7th battery; that the head-quarters of the 9th brigade, which by the said general order were directed to be at Ballincolig, were by a subsequent general order, dated the 17th of May, 1859, transferred to Dublin, where they now are. (3) With reference to the fourth paragraph, that he denied it to be true that when he left Ireland he did so with the intention of not returning thither; for, on the contrary, he left it with the intention of preparing himself for entering into Her Majesty's service, and, subject to the orders he should receive as to his being stationed at other places, he intended to retain the domicil and abode of his father; and that besides spending **[579]** his vacations while at Woolwich as before mentioned, he obtained several periods of leave of absence from his company, and on each of these occasions resorted to his father's residence in Ireland, and remained there until the term of his leave expired. (4) With reference to the fifth paragraph, that, subject to the prior estates of his father, Viscount Avonmore, and his elder brother, the Hon. G. F. W. Yelverton, and the estate in tail male, limited to the sons of such brother, the family mansion and estates of Belleisle and Derry Island, in the county of Tipperary, and the family estates in the county of Mayo, in Ireland, are settled upon him for life, with remainder to his first and other sons in tail male; and the said Hon. G. F. W. Yelverton was married in 1855 to his present wife, and has had no issue; and that the respondent is not, and never was possessed of any lands or houses, or of any interest in any lands or houses, nor has he any property of any description situate in England. (5) With reference to the sixth paragraph, that the suit which he instituted in the Court of Session in Scotland against the petitioner was in the nature of a suit of jactitation of marriage, and the summons therein concluded or prayed that it should be declared that the said William Charles Yelverton was free of any marriage with the petitioner, and that she ought to be put to perpetual silence thereanent in all times coming; that previous to this suit having been commenced, that is to say, on the 7th of August, 1858, the petitioner instituted a suit in the said Court of Session against him, the summons in which concluded or prayed that it should be declared that the petitioner and he were lawfully married persons, and that this last-mentioned suit continued to be, and at the time when he instituted his said suit on the 8th of June, 1859, was in dependence.

Mr. Anderson, Q.C. (Mr. W. A. Clark with him), for the respondent, in support of the plea to the jurisdiction.

The facts alleged in the pleadings are not sufficient to give this Court jurisdiction over the respondent. He is not, and never has been a domiciled Englishman. His domicil of origin is Irish, the locus contractûs of his marriage was Scotland, and his present residence is in Scotland.

This Court has by the Divorce Act (20 & 21 Vict. c. 85, s. 6) **[580]** the same jurisdiction as to suits for restitution of conjugal rights as the Ecclesiastical Courts

had, and their jurisdiction was, it is submitted, limited to persons domiciled in England. [The Judge Ordinary: Suppose the marriage had been celebrated in England?] That would not have been of itself sufficient to found the jurisdiction of the English Court. In Shelford on Marriage and Divorce (p. 486), it is said, "in matrimonial causes the power of the Court is in personam, and depends on the locality of the person cited. Although a defendant may usually reside out of the kingdom, yet if he is served with a citation within the jurisdiction of an Ecclesiastical Court in England, as that of the Consistory Court of London, in a suit for nullity of marriage, that Court has jurisdiction to try the validity of the marriage, wherever it may have been contracted. (*Morse* v. *Morse*, 2 Hagg. Eccl. 610; *Donegal* v. *Donegal*, 3 Phill. 599; *Harford* v. *Morris*, 2 Cox, 425.)" [The Judge Ordinary: By the 42nd section of the Divorce Act the Court has authority to serve its process anywhere out of its jurisdiction.] That section of the Divorce Act assumes that the party to be served is subject to the jurisdiction of the Court; it does not confer jurisdiction. It may be contended that the respondent acquired an English domicil by entering into and continuing in the Royal Artillery. But our military service is British, and not English; and if a Scotchman or Irishman enters into the army, his former domicil is not changed either actually or constructively; he is still considered to be domiciled in the subdivision of the empire where he was domiciled when he entered the service. (Phillimore on Domicil, p. 76.) The Court would have no means of enforcing the decree prayed against the respondents. (*Morse* v. *Morse*, 2 Hagg. Eccl. 610; *Barlee* v. *Barlee*, 1 Add. 305.) As to the second part of the replication, alleging the wilful separation of the respondent from the petitioner and his subsequent bigamous marriage, these facts are not sufficient to give her a domicil distinct from that of her husband. (*Dolphin* v. *Robins*, 6 House of Lords Cas. p. 390.) But even if she had acquired an English domicil, if Major Yelverton is not domiciled also in England, the maxim Actor sequitur forum rei applies, and the Court would therefore have no jurisdiction over him. [The Judge Ordinary: Has the **[581]** husband the power of depriving his wife of an English domicil by going abroad and leaving her? Suppose the husband of an English married woman, who had a right to dispose of certain property, notwithstanding her coverture, went to France and left her, which law would govern her will and the succession to this property?] They also cited *Chichester* v. *Donegal*, 6 Madd. 375, S. C. 1 Add. 5; *Hawkes* v. *Hawkes*, 1 Hagg. Eccl. 608; *Whitcomb* v. *Whitcomb*, 2 Curt. 357; Story's Conflict of Laws, ss. 537-538, 540-546; *Forbes* v. *Forbes*, 1 Kay, 341; *Bruce* v. *Bruce*, 2 Bos. & P. 229, n.; *Somerville* v. *Somerville*, 5 Ves. jun. 750; *Sir C. Douglas's* case, ib. 757; *Dalhousie* v. *M'Douall*, 7 Cl. & F. 817; *Brown* v. *Smith*, 15 Beav. 444; *Kennedy* v. *Cassalis*, 2 Swanst. 313; *Warrender* v. *Warrender*, 9 Bligh, 89, S. C. 2 Cl. & F. 488; *Grant* v. *Perrin*, 1 Wils. & Shaw, 716: *Tenducci's* case, referred to 3 Phill. 595, and 3 Curt. 732; *Mostyn* v. *Fabrigas*, Cowp. 161: *Carden* v. *Carden*, 1 Curt. 558; *A. B.* v. *C. D.*, 2 Anderson's Court of Session Cases, 556; *Moncombe* v. *M'Leon*, Fergusson's Reports, 264.

Dr. Phillimore, Q.C. (Mr. Honyman with him), for the petitioner: Facts which would be sufficient to constitute a domicil to found jurisdiction might not be sufficient to constitute a domicil for the purpose of succession. (*Croker* v. *Harford*, 4 Moore P. C. C. 366.) A man may have for different purposes several domicils at the same time. A temporary residence in a country is sufficient to found jurisdiction; although it will not confer a domicil for all purposes. Technically this is a suit for restitution of conjugal rights; but in this as in most cases of the same description, the real object is to obtain a declaration of the validity of the marriage. The respondent is a British subject, and even if the Court should come to the conclusion that he has no English domicil, nevertheless his conduct to his wife has been such as to give her the right of resorting to this Court, she having in fact a domicil by residence in this country; he has put her in the position of a feme sole ad hanc litem. When the wife is proceeded against by the husband he may assume that his domicil is hers, but can any case be shewn where the wife proceeding has been held to have been barred of her **[582]** remedy because her domicil is inseparable from his? Again, does not the title which constitutes this Court give it wider jurisdiction than the Ecclesiastical Courts had? By the 6th section of the Divorce Act, a Court of Record is established; now in an inferior Court we admit that the pars petens must shew that the jurisdiction is founded; but in a superior Court the party objecting to the jurisdiction must prove the absence of it. It is sufficient primâ facie if they are British subjects.

They also cited *Odwin* v. *Forbes*, quoted in the Appendix to Phillimore on Domicil; Fergusson's Consistory Reports; *Herbert* v. *Herbert*, 2 Consist. 271; *Carden* v. *Carden*, 1 Curt. 558; *Whitcomb* v. *Whitcomb*, 2 Curt. 351; *Collett* v. *Collett*, 3 Curt. 726, and the case of Tenducci there cited; *Dasent* v. *Dasent*, 1 Rob. 800; *Harteau* v. *Harteau*, 14 Pickering (American R.); *Mostyn* v. *Fabrigas*, Cowp. 161.

Cur. adv. vult.

December 7.—*The Judge Ordinary*: This was a petition by Maria Theresa Yelverton, praying for restitution of conjugal rights.

The material facts alleged in the pleadings were in substance as follow:—The petitioner alleged that on or about the 13th of April, 1857, she was lawfully married to William Charles Yelverton (then and now a major in Her Majesty's Royal Regiment of Artillery) at Edinburgh, in the kingdom of Scotland; that the marriage was valid according to the law of Scotland; that on the 15th of August, 1857, the petitioner was lawfully married to the said W. C. Yelverton, in the kingdom of Ireland, according to the rites of the Roman Catholic Church; that the petitioner afterwards lived and cohabited with her said husband in various places in Ireland, Edinburgh, Hull, and France, until April, 1858; that ever since June, 1858, W. C. Yelverton had, without just cause, refused to allow the petitioner to live or cohabit with him. The petition and citation were served in Edinburgh.

The respondent appeared under protest, and pleaded that he was at the commencement of the suit a major in the British army, and a captain in Her Majesty's Royal Artillery stationed at Leith Fort, Edinburgh, in the kingdom of Scotland, and has since continued to be and still is resident at Edinburgh aforesaid, and that his domicil of origin is in the king-**[583]**-dom of Ireland, and he has never abandoned such domicil or acquired any domicil elsewhere.

The petitioner replied, first, that before and at the commencement of the suit, both petitioner and respondent were subjects of the Queen; that in 1840 respondent, being fourteen years of age, left his father's house in Ireland and entered the Royal Academy at Woolwich as a cadet, and continued there till 1843, when he obtained a commission; that he has thenceforth continued on full pay, and that the head-quarters of the regiment were and are at Woolwich, within the jurisdiction of this Court; that when respondent so left Ireland, he did so with the intention of not returning thither, and that he has not since resided in Ireland except for the purpose of visiting his father at his residence, and except when he went there for the sole purpose of being married to petitioner; that he had no land in Ireland; that on the 8th of June, 1859, he instituted a suit in the Court of Session against petitioner, and therein alleged that he was domiciled in Scotland.

Petitioner replied, secondly, that after her marriage to respondent they lived and cohabited together in Ireland, Edinburgh, Hull, and Bordeaux in the empire of France; that in April, 1858, respondent deserted her at Bordeaux and went to Edinburgh, and has ever since refused to live and cohabit with her as his wife; that at the time of the commencement of this suit she was and still is domiciled within the jurisdiction of this Court, to wit, at Maida Hill, in Middlesex.

The respondent rejoined, alleging that he did not leave Ireland in 1840 without any intention to return, but returned frequently and spent his vacations at his father's house there, and after he obtained his commission on several occasions had leave of absence from his company, and spent the time allowed him at his father's; that for two years before the commencement of this suit he was stationed at Leith near Edinburgh, with his company, which is now the 7th battery of the 9th brigade; that the head-quarters of the brigade are at Dublin.

No answer to this rejoinder was brought in.

Upon these pleadings it appears that the fact of the respondent leaving Ireland without the intention to return is asserted on the one side and denied on the other, but no affidavit has **[584]** been brought in by either party as to that fact; and if it were material to the determination of the real question raised, it would be necessary that the truth or falsehood of that allegation should be ascertained. But it seems to me quite immaterial to consider whether a boy of the age of fourteen, coming over to this country for the purpose of receiving a military education, did or did not intend to return to Ireland.

The material facts established, then, appear to be these:—The respondent was born in Ireland of Irish parents, and when a minor received a military education in

England, obtained a commission in the Royal Artillery, and was afterwards stationed at or near Edinburgh. When there he married in Scotland the petitioner, Maria Theresa, who is said to have been born at Chetwode, in Lancashire. The parties then went to Ireland, were remarried there according to the rites of the Roman Catholic Church, returned to Scotland, cohabited as man and wife there, at Hull, and afterwards at Bordeaux in France. That in April, 1858, respondent quitted petitioner at Bordeaux and returned to Edinburgh, where he has remained with his company ever since, and has constantly refused again to live or cohabit with petitioner. The head-quarters of the Regiment of Artillery have always been at Woolwich; the head-quarters of the different battalions—or, as they are now called, brigades—of the regiment were by general order of the 1st of April, 1859, removed from Woolwich and established at various places. The head-quarters of the brigade to which respondent has been attached have not since that time been in England.

The petitioner has asserted in her replication, that at the time of the commencement of the suit she was and still is domiciled in England, viz. in Middlesex. No affidavit has been brought in to support the allegation, but it has not been denied; if therefore she could by law be domiciled there, it may for the purpose of this question be taken as true.

With regard to this last point of domicil, it seems to me that the petitioner, who claims to be the wife of Major Yelverton, and who does not pretend that his domicil is in England on any other ground than that the head-quarters of the Regiment of Artillery are at Woolwich, cannot have acquired a domicil for herself different from his.

The domicil of the **[585]** husband is the domicil of the wife; and even supposing him to have been guilty of such misconduct as would furnish her with a defence to a suit by him for restitution of conjugal rights, she could not on that ground acquire another domicil for herself, as was recently held by the House of Lords in *Dolphin* v. *Robins* (6 H. of L. Cas. 390). I must therefore treat the case as if that assertion had not been made, or rather I must ascribe to it the only meaning which is consistent with the law, viz. that she was resident at Maida Hill.

On the argument before me a great deal of learning on the doctrine of domicil was displayed, and many cases were cited involving the consideration of it, and it was truly stated that the word domicil has many meanings, according as it is used with reference to succession or for determining rights of belligerents, or ascertaining trading privileges. The case now to be decided is certainly of much importance, and from the scope of the argument appeared to be involved in considerable difficulty. But upon reflection the point to be determined appears simple and easy of solution. It is unnecessary to consider the question of domicil for any of the purposes above mentioned, for Major Yelverton may have retained his domicil of origin for many purposes, and yet may have been domiciled in England, so as to give jurisdiction to this Court. Was he domiciled in England for the purpose of founding jurisdiction? He was not born in England—he was here for some time as a student when a minor; he afterwards passed some time (probably a very short time, for its duration is not mentioned) at Hull, removed thence to Bordeaux, and thence to Edinburgh, where he has remained ever since; he therefore cannot be said to have ever dwelt or had a residence in England since he obtained his commission, and the case as to domicil must rest upon the alleged legal fiction that he is supposed to be present at the head-quarters of the Regiment of Artillery in which he has a company. No decision or dictum was cited to support that position, nor can I find any authority for it. If that ground fails, upon what other grounds can the petitioner's right to sue in this Court be sustained? It was established by an Act entitled "An Act to amend the law relating to Divorce and Matrimonial Causes in England"; it combines in **[586]** itself "all jurisdiction previously vested in, or exercisable by, any Ecclesiastical Court or person in England in respect of divorces à mensâ et thoro, suits of nullity of marriage, suits for restitution of conjugal rights," etc. It is a Court for England, not for the United Kingdom, or for Great Britain; and for the purposes of this question of jurisdiction Ireland and Scotland are to be deemed foreign countries equally with France or Spain. If this be so, this is a suit against a foreigner, who is not, and was not at the commencement of the suit, within the kingdom of England, who never had any residence in England, who never owed obedience to the laws of England, except during the period of his temporary sojourn here, and who is not said to have done anything in England contrary to those laws. Story, in his Conflict of Laws, chapter

on jurisdiction and remedies, sect. 539, says: "Considered in an international point of view" (and so I think I must consider this case), "jurisdiction to be rightly exercised must be founded either upon the person being within the territory, or upon the thing being within the territory, for otherwise there can be no sovereignty exerted upon the known maxim, extra territorium jus dicenti impune non paretur." Boullenois puts this rule among his general principles: "The laws of a sovereign rightfully extend over persons who are domiciled within his territory and over property which is there situate." Again in *Warrender* v. *Warrender*, 9 Bligh, 144, Lord Lyndhurst says: "The first point is the question of domicil; unless these parties were domiciled in Scotland, the Court had no jurisdiction." Unless some ground can be discovered for saying that Major Yelverton was domiciled in England, according to the law as laid down by Lord Lyndhurst, by Boullenois, and by Story, he was not subject to the jurisdiction of this Court. It was said, indeed, that jurisdiction was given by the 47th section of the Act, by the authority of which the Court exists, viz.: "Every such petition shall be served on the party affected thereby, either within or without Her Majesty's dominions, in such manner as the Court shall direct." That section certainly relieves the Court from all difficulty as to serving process on the party accused; but assumes, as I apprehend, that the party to be served is subject to the jurisdiction of the Court. Of all the **[587]** cases cited at the bar, three only bear any such resemblance to the present as make it necessary to notice them: *Tenducci's* case, in 1775; *Collett* v. *Collett*, 3 Curt.; and *Dasent* v. *Dasent*, 1 Robert.

*Tenducci's* case is in many respects very remarkable. Dr. Lushington has on two occasions mentioned it as having been decided in the Arches, and therefore of great authority. (See *Collett* v. *Collett*, 3 Curt. 731; and *Dasent* v. *Dasent*, 1 Robert. 802.) Dr. Twiss has kindly had the original papers looked up, and from them I find that the cause was in the Consistory Court; no trace of any appeal or other proceeding in the Arches can be found. The first citation issued on the 15th of January, 1774, to cite Fernando Tenducci, of the parish of St. Martin's-in-the-Fields, in the county of Middlesex, and our diocese of London, etc., etc., to answer to Dorothea Kingsman, wife of W. L. Kingsman, Esq., in the parish of St. James's, Westminster, in the county of Middlesex, in a certain cause of nullity of marriage by reason of impotency, etc. This citation was returned into Court on the 20th of January, with the certificate of the officer, "that on the 18th and 20th of January he went to the dwelling-house of Nicoll and Miller, No. 7, corner of Suffolk Street, in the parish of St. Martin's-in-the-Fields, in the county of Middlesex, where the within-named F. Tenducci usually lodged when in England, and which was his last known place of abode, and was there informed that the said F. Tenducci had left his said lodging about eighteen months ago, and was gone out of the kingdom, and was supposed to be residing at that time in some part of Italy." Nothing further was done upon that citation, but on the 18th of June another citation issued against Tenducci (described as before) to answer Dorothea Kingsman, the wife of W. L. Kingsman, formerly Maunsell, falsely called Tenducci, in a certain cause of nullity of marriage by reason of impotency; the only difference being in the descriptions of the party complaining. The return of the officer was as follows:—I went three times to the Theatre Coffee-House, situate in the Haymarket, in the parish of St. Martin's-in-the-Fields, county of Middlesex, and also to the dwelling-house of Messrs. Nicoll and Miller, No. 7, same street, parish, and county, which was the last known usual place of abode of F. Tenducci, as I was informed; and that **[588]** I went to such places at the before-mentioned times in order to have served him personally with this citation, but could not find him; and then I was informed at the said Theatre Coffee-House by several persons that the said F. Tenducci was at this time in Italy, as they believed, but at what particular place they could not tell; and I was also informed at the house of Nicoll and Miller that the said F. Tenducci was at Florence, and when he would return to England they knew not." The difference in the two returns is remarkable. The first says, that Tenducci usually lodged at Nicoll and Miller's when in England, and that it was his last known place of abode. The return to the second describes Nicoll and Miller's as his last known usual place of abode, and omits "when in England." The first return proceeds to state that he had left his lodgings eighteen months ago, and gone out of England; the second, that he could not be found at Nicoll and Miller's, and was said to be then in Florence, and that it was not known when he would return. Now I cannot help suspecting that the return to the first citation shewed too much, and therefore a

second citation was issued, the return to which merely shewed that the last known usual place of abode of Tenducci was at Nicoll and Miller's, and that he was, when service was attempted, said to be at Florence, and that it was not known when he would return; from which it would be implied that he was expected to return to his usual place of abode. On the 28th of June a decree issued for citing Tenducci by ways and means, which was executed in the usual manner, and a copy was delivered to him personally, at Naples, on the 24th of September in the same year. A libel was given in on the 24th of May, 1775, the 15th article of which was in these words: "Item. That the last place of residence of the said F. Tenducci, party in this cause, when in England, was within the parish of St. Martin's-in-the-Fields, in the county of Middlesex and diocese of London, and by reason thereof he was, and is, subject to the jurisdiction of the Court," etc. It appears, then, that the attempt to serve him was at his last known and usual place of abode; that he was in Florence when that attempt was made, and that it was not known when he would return; and the jurisdiction was pleaded in the terms just mentioned. Tenducci never ap-**[589]**-peared to gainsay any part of this, or to controvert the jurisdiction.

In *Carden* v. *Carden*, 1 Curt. 558, Dr. Lushington explained the ground upon which the Ecclesiastical Court proceeded in exercising jurisdiction under such circumstances. He there says: "There is nothing here to shew that the party proceeded against ever had any residence in the diocese; if you fix his residence before the citation issues, the Court will presume a continuance until the contrary be shewn. Upon an affidavit being brought in that the party had his residence in London before the service of the citation, the Court may proceed with the cause."

Again, in *Collett* v. *Collett*, 3 Curt. 726, another case relied on by the petitioner, it appeared that the party cited not only had a residence in London, which he still retained, but that he did not quit it until after the citation issued; and that the only question in that case was whether the Court could proceed, the citation having been served personally on the party at Malines, and not by ways and means; but there is a passage in this judgment worthy of notice as applicable to the question of residence: "The Court always looks, on a question of jurisdiction, to the statute of Henry VIII., which was passed in affirmance of the common law, and by which this Court, among others, had local limits assigned to it. That statute is the document by which this Court must be governed in these proceedings; it was passed for the purpose of preventing abuses which took place by reason of the process to appear in the Arches and other Ecclesiastical Courts being served on a party far from and out of the diocese where the party cited dwelt (these words are of some importance)—not where the party might happen to be at the period of issuing the citation, but out of the diocese where he dwelt. No doubt the word 'dwell' means a permanent dwelling. In no other part of the statute are there any words to give a different meaning to the words I have cited; and in the enactment the words are, 'that no manner of person shall be cited or called to appear out of the diocese wherein he shall be inhabiting at the time of the awarding or going forth of the citation.' Undoubtedly the word 'inhabit' is here used in precisely the same sense as the word 'dwell' in the prior part of the statute."

**[590]** It remains for me to notice the case of *Dasent* v. *Dasent*, 1 Rob. 800, mentioned to the Court by Dr. Phillimore after the argument. It approaches more nearly than any other that has been found to the present case. A citation was issued by the wife against the husband, describing him as of the parish of St. James's, Westminster. The officer certified that he had attended at 11 Pall Mall, in the parish of St. James's, Westminster, the last known place of residence of Mr. Dasent, for the purpose of serving the citation on him personally; that he was informed that he had left his residence, and that it was not known there where he was at that time, but it was reported that he had left England and was in the West Indies. A decree by ways and means was then issued and executed in the usual manner, and on the 21st of April, 1849, the citation was brought in personally served on Mr. Dasent at Kingston, in the island of St. Vincent, on the 5th of February preceding. The wife made an affidavit as to the misconduct of her husband, shewing gross ill-treatment in England, but in which, amongst other things, it was stated that in March, 1847, he left England and went to the island of St. Vincent, and had resided there ever since. Upon that affidavit an application was made to the Court to pronounce the husband in contempt, for the purpose of proceeding in order to put upon the record proof of

the cruelty and adultery; and subsequently, on sentence being prayed, the report is in these words: "The Court observed that the only obstacle in the way was the matter of the jurisdiction, but said, I have fully considered that question, and I think it right I should pronounce for a divorce."

The ground upon which that very learned person held that the Court had jurisdiction is not explained. Had he stated any rule or legal principle which would have been applicable to this case, I should certainly have held myself bound by it; but the report not throwing any such light upon the case, I can only take it as an authority where the circumstances are precisely similar: which cannot be said of the case now before the Court. Major Yelverton is not an Englishman, he never had a residence in England, nor was he ever guilty of any misconduct towards the plaintiff in England; and from the passage which I have read from the report of *Carden* v. *Carden*, 1 Curt., I infer that Dr. Lushington would have held that **[591]** there was no jurisdiction, unless evidence had been given of some residence in England. That foundation was laid in every case that was cited, and I cannot treat any one of them as an authority for overruling Major Yelverton's protest.

One other point was made for the plaintiff, viz. that she before and at the time when the citation issued was domiciled in England. I have already stated that in my opinion she could not, as a married woman, acquire a domicil recognized by the law other than that of her husband. But she may actually reside in a different country, and construing her replication as an assertion that she was living in England, I presume it was introduced for the purpose of bringing before the Court the American decision in *Harteau* v. *Harteau*, 14 Pick. American Reports, cited in Bishop on Marriage and Divorce, where it was held that a wife who was resident in one of the United States might sue there for a divorce although her husband was resident in a different State. The subject is pretty fully discussed in Bishop on Marriage and Divorce, and the privilege there allowed the wife appears to have been founded on principles quite inapplicable to this case, viz. that the party suing (whether husband or wife) must, before suit, reside for a certain time in the State where it is instituted; and therefore if a wife were bound to follow her husband to sue him where he resides, he could always defeat her suit by changing his residence before she could commence it. Another ground was, that the wife then contended that by her husband's delinquency she had a right to be released from the marriage tie; whereas here she is seeking to enforce it. There is nothing, then, in this American decision to get rid of the maxim relied on by the counsel for the respondent, Actor sequitur forum rei. I must therefore sustain the protest and dismiss Major Yelverton.

(Before the *Judge Ordinary.*)

WHITE *v.* WHITE. December 7, 1859.—Judicial Separation.—Cruelty of the Wife. —The husband will be entitled to the protection of the Court, where the **[592]** wife's passions, from whatever cause, are so little under control that she is in the habit of using personal violence to the husband, from which habit he may be in danger of bodily injury, though no actual serious injury has been inflicted.

[S. C. 6 Jur. (N. S.) 28; 1 L. T. 197. Overruled, *Prichard* v. *Prichard*, 1864, 3 Sw. & Tr. 523. Referred to, *Goodden* v. *Goodden*, [1891] P. 399. Affirmed, [1892] P. 1.]

This was a petition for judicial separation, at the suit of the husband, by reason of the wife's cruelty. It appeared that she was easily excited by drink, and in that condition had frequently used personal violence towards her husband. She had also, at times, been in confinement as insane.

The case was argued, in the sittings after Trinity Term, by

Dr. Spinks (Mr. Pritchard with him) for the petitioner.

Mr. Mundell (Mr. G. H. Cooper with him) for the respondent.

Cur. adv. vult.

December 7.—*The Judge Ordinary* gave judgment: I have had considerable difficulty in satisfying my mind as to the decree which should be pronounced in this case.

The principles upon which the Court should proceed are plain enough. They were distinctly stated by Lord Stowell in *Evans* v. *Evans*, where the wife was petitioner; and again in *Kirkman* v. *Kirkman*, 1 Cons. 409, where the husband sought the protection of the Court. In that case Lord Stowell observed: "The persons of both parties must be protected from violence; and I cannot accede to what has been said in argument, that the Court should not interfere till there has been actual violence of

such a nature as to endanger life. It is not to pause till a tragical event has taken place; . . . it is perfectly clear that there have been words of menace with acts of violence accompanying them. It is said that they were caused by jealousy. All the evidence tends to establish that there was no foundation in the conduct of the husband for feelings of that nature. If such feelings were entertained, with or without reason, jealousy is a passion producing effects as violent as any other passion, and there will be the same necessity to provide for the safety and comfort of the individual. If that safety is endangered by violent and disorderly affections of the mind, it is the same in its effects as if it proceeded from malignity alone; it cannot be necessary that, in order to obtain the protection of the Court, it should be made to appear to proceed from malignity."

[593] In the case now before the Court it appeared that on many occasions the husband had been assaulted by his wife, and had resorted with success to a magistrate for protection: the extent of the injury done to him was not fully explained; but on one or two occasions the assaults appeared to be of a somewhat serious character. Her demeanour was shewn to have been very violent on many occasions, but that violence sometimes expended itself in the destruction of her husband's property rather than in injury to his person. The unhappy woman had been several times in confinement as an insane person, and I have found it no easy task to judge how much of her violence towards her husband was to be ascribed to disease of the mind. Her own account of the manner in which the disputes between her and her husband arose was apparently very candid, and perhaps the safest on which the Court can act. According to her evidence she was in the habit of going out and drinking spirits, not in large quantities, but sufficient to act upon a very excitable temperament. Then she and her husband began to dispute about trifles; she became gradually more and more excited until she lost her self-control, and then committed the violent acts complained of. These quarrels, which occurred frequently, appear in several instances to have preceded an attack of insanity, under which, as already observed, the unfortunate woman has several times laboured.

As far as I can judge from the evidence given, I suppose those attacks to have been the consequence, and not the cause, of her intemperance and the quarrels with her husband. The assaults committed upon him were not proved to have been productive of any serious bodily injury; but where a woman, either from the effects of drinking or any other cause, is entirely without the power of controlling her passion, and in such a state of mind is in the habit of assaulting her husband, it is impossible to say that he is not in such danger of bodily injury as entitles him to the protection of the Court. I therefore feel bound to pronounce a decree of judicial separation.

Mr. Mundell then prayed the Court to make some provision for the wife by an order for permanent alimony. There were but two cases reported in which a divorce à mensâ et thoro had been pronounced at the suit of the husband for cruelty, so [594] that there could not be said to be any precedent against what was now asked. It was clear that the considerations which might have founded the rule of the Ecclesiastical Courts to make no order for alimony when the divorce was granted by reason of the wife's adultery, did not apply to such cases as the present.

But the Court, in absence of any precedent in support of the application, refused to make any order.

(Before the *Judge Ordinary.*)

ANTHONY *v.* ANTHONY. January 11, 1860.—Judicial Separation.—Cruelty.—Jealousy.—On the wife's petition for judicial separation by reason of her husband's cruelty towards her, certain acts of violence on his part being admitted which took place in disputes between the parties arising at least in part out of the wife's jealousy of a maid-servant, the Court took into consideration the position in which the wife was placed in the family by reason of any authority or control exercised over her by the servants by the direction of the husband, and the state of the wife's feelings arising from reasonable suspicion of undue familiarity between the husband and a maid-servant.

[S. C. 30 L. J. P. 208; 1 L. T. 413.]

This was a petition for a judicial separation, at the suit of the wife, by reason of the husband's cruelty. Some of the circumstances are peculiar, but are sufficiently

set out in the judgment. The petition also prayed that the custody of the youngest child should be given to the mother.

The case was heard before the Judge Ordinary on the 19th and 20th of December.

Dr. Spinks and Mr. D. Keane, for the petitioner.

Dr. Deane, Q.C., and Dr. Swabey, for the respondent. Cur. adv. vult.

On the 11th of January *The Judge Ordinary* gave judgment: The petitioner in this case asked for a decree of judicial separation on the ground that her husband had been [595] guilty of cruelty. The respondent denied the cruelty alleged. The case was heard without a jury.

It appeared in evidence that the parties were married in 1846, and had three children, born in 1849, 1851, and 1853. Until 1851 they appeared to have lived happily together. In that year a young woman, named Emma Bennett, came into their service, and not long afterwards disputes arose about domestic matters between the petitioner and her husband. It is very difficult, and in this case not very important, to decide which was in fault—probably both were; but the decree of the Court will not be founded on such disputes. Before the youngest child was born the respondent had ceased to occupy habitually the same bedroom with his wife, and slept in an apartment adjoining Emma Bennett's, of whom the petitioner became very jealous, which the respondent perfectly well knew. Thus in the spring of 1853, not long after her confinement, she saw, or fancied she saw, Emma Bennett sitting on her husband's knee, and immediately accused them of it. Emma Bennett denied here that she had done so. The respondent was not asked the question, and said nothing about it. On another occasion the petitioner hearing some noise in her husband's room, which was over hers, went upstairs, and, as she alleged, saw him coming out of Emma Bennett's room. Both Emma Bennett and the respondent denied that he had been there, but the respondent stated that he was not in his own bedroom, but had gone into his own dressing-room on the opposite side of the passage. I am not convinced that he had been in Emma Bennett's room, but certainly the petitioner had under the circumstances reasonable ground for suspicion, of which the respondent must have been conscious, and he should have been careful not to treat Emma Bennett in a manner to excite and injure her feelings.

Such being the state of feeling between them, a dispute arose which led to an act of violence on his part of a very serious character, and which he did not deny. The accounts given of it vary, and it may be worth while to examine them all, as they tend to show the spirit of partisanship in which some of the evidence was certainly given before me. It was not probable that harmony would be restored to that house, espe-[596]-cially if Emma Bennett remained in it; but the respondent refused to discharge her. Another person, Lucy Bayliss, was hired in 1853 to act as nurse. The respondent, an artist by profession, was sometimes absent from home for a time, and afterwards complained that wine and other things had been consumed or sent away during his absence: the petitioner said the servants must have taken them. They, on the contrary, accused her of having taken or sent them to her relations, and the respondent appeared to place most confidence in the statements of his servants, which kept up in the petitioner a very excited state of feeling. In the course of the spring of 1855 this increased to such a degree, that it was necessary to consult a medical man, Dr. Norton, who deposed that he found her in a very excited state, insomuch that he thought she could not safely be left alone, and upon questioning her as to the cause, she ascribed it to the treatment which she met with from the servants by her husband's directions. The respondent then said it was occasioned by intemperance, to which Dr. Norton replied, "Certainly not; it evidently arose from trouble of mind." In August of the same year, 1855, another instance of actual violence, not denied by the respondent, occurred. The dispute commenced about a trifle, viz. the number of towels that he had used in his studio. The petitioner mentioned a certain number; he appealed to Emma Bennett to know whether it was true. The petitioner complained of his trying to make her appear a liar to his own servants; whereupon he threw a jug of cold water over her, filled it again, and again emptied it upon her; she struggled to take the jug from him; it was broken, and her finger cut, and in the end he struck her a violent blow with his fist; she said it nearly stunned her. He admitted that it might be a blow upon the head. He then stated that he never struck her afterwards; she says that he did, and as he had, by his own confession, been guilty of two such acts of violence it

seems not improbable that he might again lose his self-control, when we consider the temper that he manifested towards her in the autumn of 1855. At the close of 1855 the other servant, Lucy Bayliss, was discharged, she says because the petitioner stated that she would take care of the children. The real nature of the transaction appears from [597] the letters that passed after the petitioner left her home, but it is not very material. The petitioner says that early in 1856 the respondent struck her with a maulstick for asking him to part with Emma Bennett; he denied it.

Whatever may be the truth, there can be no doubt that it was very galling to petitioner to be left in the house with Emma Bennett, whom she knew to be in many respects preferred to her. The respondent indeed said, that from January to October, 1856, he and his wife were on good terms, but I cannot reconcile that statement with what he asserted with reference to the transaction which was the immediate cause of her leaving the house. In September and October, 1856, he was absent for several weeks, occupied in professional pursuits at Burnham; during that time the petitioner found that Emma Bennett took possession of her letters, and assuming that her husband had authorised her to do so, felt so much the degradation of her position that she took her two younger children and went with them to her husband's sister, Mrs. Lewis, and thence to lodgings at Kentish Town. The respondent's mother went to her there, and afterwards took her son there, and endeavoured to effect a reconciliation; the petitioner insisted on Emma Bennett's dismissal before she returned; the respondent promised to dismiss her when she had returned, and not before; the petitioner would not trust to that. The letters that passed shew that, with regard to the manner in which Emma Bennett had been instructed to treat her, the respondent was not sincere; they are at variance with that which he stated in Court on his oath; the petitioner was therefore right in supposing that Emma Bennett took her letters by his orders, and bearing in mind that on two occasions at least disputes had arisen out of her jealousy of Emma Bennett, which terminated in her being severely beaten, no one can be surprised that she refused to return home again to live in the same house with that person; what could be more probable than that other disputes would arise and produce similar consequences? After this the respondent took away the eldest of the two children by force, and asked a police-constable to take his wife into custody on a charge of having stolen certain articles which she took from his house with her; the police-constable, of course, refused to [598] take such a charge, but in making it the respondent shewed anything but a disposition to treat his wife with gentleness and forbearance. Proceedings were commenced by her in the Old Court, dropped on some proposed arrangement which was never completed, but an allowance had been made her up to this time.

What answer then is given to the petitioner's case? Condonation is not pleaded, nor proved; the evidence negatived it, for the respondent stated that from 1855 he had refused to recognize her as a wife, and that he would adhere to that resolution. Nothing satisfies the Court that the real ground of this proceeding is other than that which is alleged in the petition. I pronounce for the separation. As to the custody of the child, I cannot now finally dispose of that question, but she will remain with the mother till further order.

(Before the Full Court,—*The Judge Ordinary*, *Hill*, *J.*, and *Keating*, *J.*)

Y——— *v.* Y———. January 20, 1860.—Petition for Dissolution.—Application to intervene.—Practice.—Y. petitioned for a dissolution of her marriage on the ground of her husband's desertion and adultery; he did not appear to the citation. D., having no legal private interest, prayed to be allowed to prove at the hearing that Y. had herself been guilty of adultery. The Court held, that neither the Divorce Act, nor the rules and orders made under its provisions, gave the Court any authority to admit such intervention, but refused to direct the affidavits on which the motion was founded to be removed from the file, or to give the costs of appearing to shew cause in the first instance.

[S. C. 29 L. J. P. 55; 1 L. T. 414; 6 Jur. (N. S.) 348; 8 W. R. 273.]

Dr. Phillimore, Q.C., moved the Court: In this case a wife has instituted a suit for dissolution of marriage against her husband, on the ground of his desertion and adultery; the husband has entered no appearance, so that, as matters now stand, the petition will be determined merely on the evidence adduced by the wife. I now apply to your Lordships on be-[599]-half of D., who has no private interest of a legal

character, but prays that at the hearing he may be allowed to adduce evidence that the wife is suppressing the fact that she is an adulteress. Assuming the truth of D.'s statement, unless this intervention is allowed, there will be a material fact unknown, which, if before the Court, might influence its decision. In civil suits in the Ecclesiastical Court no doubt third parties were only allowed to intervene pro interesse suo; but these matrimonial causes are of such general interest that it might be a question whether a third party ought not to be admitted pro interesse publico. A decree of the Court obtained by fraud and collusion would be liable to be set aside (*Duchess of Kingston's* case, Smith's L. C.) The Court hears suggestions made by counsel as amicus curiæ. [Hill, J.: Can you mention any case in which an amicus curiæ has been allowed to suggest a fact not raised by the issues to be tried?] I cannot. The party for whom I apply offers a guarantee for costs, if he fails to prove his allegations.

Mr. M. Chambers, Q.C. (Dr. Waddilove with him), contrà, was not called on.

*The Judge Ordinary*: The Court is of opinion that the application cannot be granted.

As far as proceedings for a judicial separation are concerned, the Court is directed to follow the principles of the Ecclesiastical Courts. This is not a case of that description; and if it were, it was admitted by counsel that no third party was allowed to intervene unless pro interesse suo. But the authority of the Court in a petition for dissolution is new, and depends on the words of the Act by which it is constituted; under that Act certain rules have been drawn up which make no provision whatever for such a proceeding. The forms provided are for the petitioner, respondent, and co-respondent; we have no authority under these to allow such an intervention. The 29th section directs the Court to satisfy itself not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same; and to inquire into any countercharge which may be made against the petitioner. **[600]** There may be some difficulty in ascertaining the meaning of the last part of the section; it may, however, relate to the matters mentioned in the second branch of the 31st section as raising a case for the discretion of the Court in granting or refusing a decree of dissolution; certain matters may be pleaded in bar under the 30th section, but the countercharge of cruelty or adultery, *e.g.*, would raise a case for the discretion of the Court. There is no direction in the 29th section to inquire into collusion, but the 30th section says, if the Court shall find that the petition is presented or prosecuted in collusion with either of the respondents, then it shall dismiss the petition; not a word having been said before as to any inquiry into collusion.

In these sections we find no authority to do what we are now asked, and, if we thought we had the power, it is one we should be very reluctant to exercise. To allow third persons to intervene as a matter of right, and say that one of the original parties is guilty of conduct not imputed by the other, might lead to most dangerous consequences; false charges might be made from various interested motives, or, as a blind to the Court, a charge might be brought on purpose to fail on the evidence. If the suspicions of the Court are aroused in the progress of a cause, it has jurisdiction to summon parties before it and examine them. It did so lately in the case of *Lloyd* v. *Lloyd and Chichester* (ante, p. 567); but there the Court's attention was directed to information which the officer of the Court became possessed of in the ordinary discharge of the business of the Court.

Mr. M. Chambers prayed the Court to direct that the petition of D., and the affidavits in support of it, should be taken off the files of the Court; he also asked for costs of appearing to shew cause.

The Court refused to make either order, observing, as to costs, that they were never given on an application rejected when cause was shewn in the first instance.

**[601]** (Before the Full Court and a Common Jury.)

PEARMAN *v.* PEARMAN AND BURGESS. January 20, 1860.—Adultery of the Wife. —Cruelty of the Husband.—20 & 21 Vict. c. 85, s. 31.—On the petition of the husband, the wife's adultery and his cruelty being in issue, the jury by their verdict affirmed both the adultery and cruelty; but as it appeared in evidence that the wife's drunken habits were the probable cause of the husband's violence, the Court exercised the discretion given it by the 31st section of the Divorce Act, by dissolving the marriage. The drunken violence of the wife would only justify such force on the part of the husband as might be necessary for her restraint.

[S. C. 29 L. J. P. 54; 1 L. T. 415; 8 W. R. 274. Discussed, *Parry* v. *Parry*, [1896] P. 37. Referred to, *Symons* v. *Symons*, [1897] P. 167; *Pryor* v. *Pryor*, [1900] P. 157; *Wickins* v. *Wickins*, [1918] P. 271.]

This was a petition for dissolution of marriage at suit of the husband, by reason of the wife's adultery with the co-respondent, his apprentice. The respondent and co-respondent denied the adultery, and the respondent alleged cruelty as against the husband, and prayed for a judicial separation. The issues of adultery and cruelty were now tried by a common jury.

Mr. Huddleston, Q.C., and Mr. Pulling for the petitioner.

Mr. Serjeant Pigott and Dr. Wambey for the respondent.

Mr. Garth for the co-respondent.

In the course of the evidence it was clearly proved that Mrs. Pearman, who was the wife of a druggist at Stourbridge, had given way to drink to a considerable extent; there was also direct evidence of considerable violence used by the husband towards the wife.

*The Judge Ordinary*, in summing up to the jury, observed: If a woman gets drunk and loses her self-possession, and makes use of personal violence towards her husband, or destroys his property, he may use some force or violence if he cannot otherwise restrain her; if she comes drunk into his shop, he may take her by the shoulders and turn her out, but **[602]** to follow after her and beat her is inexcusable: there is no law authorizing a man to beat his drunken wife.

The jury, after deliberating for upwards of an hour, found a verdict of adultery against the wife and of cruelty against the husband.

*The Judge Ordinary*: As the jury have found that the petitioner has proved his charge of adultery, and also that he has been guilty of cruelty, the Court has now to exercise the discretion given it by the 31st section. If there were reason to believe that the misconduct of the wife had been caused by the misconduct of the husband, it would have exercised that discretion by refusing a decree for dissolution of marriage; but it rather appears that the wife's drunken habits were the cause of the cruelty of which the jury have found the husband guilty. We think, under these circumstances, that we ought to make a decree for dissolution of the marriage, and with costs against the co-respondent.

(Before the *Judge Ordinary*, on Motion.)

HOOPER *v.* HOOPER. January 25, 1860.—Petition of Wife on ground of Cruelty.—Record withdrawn by consent.—Motion to set Cause down again for Trial.—Before the trial of certain issues arising out of a wife's petition for judicial separation by reason of her husband's cruelty, an arrangement was entered into and a memorandum signed by the counsel of both parties before the jury were sworn, enabling a referee to settle the terms of a separation by deed, with full power over the question of income. Subsequently the wife moved to re-enter the record and set the case down for hearing. The Court refused the motion, holding the wife bound by the agreement that the proceedings should be stayed, and the suit not moved, so long as she could shew no breach of the terms of the agreement by the other party.

[S. C. 29 L. J. P. 59; 1 L. T. 522; 8 W. R. 319.]

This was originally a petition by the wife for a judicial separation by reason of her husband's cruelty. The case came **[603]** on for hearing before the Judge Ordinary and a special jury on the 16th of June, 1859. Before the jury were sworn, counsel on either side stated that they had advised their respective clients that the differences between them had better be made the subject of private arrangement, and that Mr. and Mrs. Hooper had agreed to this suggestion. Accordingly the jury were dismissed, and the following memorandum of agreement was drawn up:—

"In the Divorce Court, *Hooper* v. *Hooper*: record withdrawn, proceedings to be stayed, and the suit not moved; Mr. Hooper paying the present alimony of £250 per annum ordered by the Court, and agreeing to add thereto £50 per annum. Mr. Brabant to be requested to settle the terms of a separation by deed, with full power over the question of income. "(Signed) K. MACAULAY,

"MONTAGUE SMITH."

There was some delay in bringing the matter before Mr. Brabant. In the course of December the agents of both parties met before him, when Mrs. Hooper's solicitor

seems to have expected Mr. Brabant to go into the question of cruelty, alleging that the intention of the reference was to substitute Mr. Brabant for the Court, and that the question of cruelty or no cruelty might have a bearing upon the amount of income. He also urged that Mr. Hooper should pay Mrs. Hooper's costs as between solicitor and client. Mr. Hooper's proctor urged, on the contrary, that Mr. Brabant's duty was to arrange the terms of a separation, without going into the previous conduct of the parties. Mr. Brabant apparently took this view of his authority, and, under the circumstances, considered that he could proceed no further in the matter, and so informed them.

Mr. Wilde, Q.C., now moved the Court for leave to re-enter the record, and have the cause set down for trial. He relied on *Hayward* v. *Hayward*, ante, 333.

Mr. M. Smith, Q.C., contrà.

*The Judge Ordinary*: I think there is a distinction be-**[604]**-tween the present case and that of *Hayward* v. *Hayward*. Here the parties have agreed that the record should be withdrawn, proceedings stayed, and the suit not further moved; there the case was adjourned on the representation of counsel that an agreement out of Court had been, or would be, arranged. One of the parties refused to abide by that agreement, and the cause simply remained on the books, as it was before, unheard; here the cause remains on the books subject to an agreement made in Court that the suit should not be moved any further. I am of opinion that I ought not to grant the application. I have been referring to the statute to see whether the party will have an opportunity of appealing, otherwise I might have taken further time to consider the course I should pursue; but I find Mrs. Hooper may appeal, if she is so advised.

I think it is of the last importance that parties who come before the Court with their eyes open, and agree to pursue a particular course of action, that course being confirmed by an order of the Court, should not be permitted to treat the Court with contempt by afterwards refusing to perform it. Parties make their agreement by the advice of counsel at the time; afterwards, because perhaps someone suggests that they might have made a better bargain, they endeavour to get rid of their agreement.

It is impossible to read the statements of the parties in this matter without seeing that there has been an attempt to bring before Mr. Brabant matters which were never intended to be submitted to him, in order to get rid of the agreement which was made in this Court. Mrs. Hooper undertook at the time, as to this suit, that it should not be moved; that suit was not referred to Mr. Brabant, there was not a syllable as to the suit or all matters in difference being referred to Mr. Brabant; no term of that kind was used: neither was there anything like a stipulation that the costs as between solicitor and client should be paid by Mr. Hooper; and that appears to have been one of the matters most strenuously contended for by Mr. Clarke in his endeavours to get the whole matter heard by Mr. Brabant; therefore I think that the lady, having consented that the suit should be no further prosecuted (for that is the meaning of these terms), and not alleging that the **[605]** other party has attempted to deprive her of the benefit of anything he undertook to give at that time, I ought not to allow this cause to be set down again for hearing.

I consider it a very important point, and shall be very glad to have it finally settled by the full Court, in order that I may know hereafter whether agreements proposed and entered into deliberately and advisedly are afterwards to be treated as a nullity, and all the expense to be thrown away, the unfortunate husband, when his wife is the contending party on the other side, being burthened with the costs of the whole proceedings. Motion rejected.

(Before the Full Court,—*The Judge Ordinary*, *Williams*, *J.*, and *Bramwell*, *B.*)

H——— (falsely called C———) *v.* C———. February 2, 1865.—Petition for Nullity of Marriage by reason of the Husband's alleged Impotence.—Lapse of Time and other Circumstances.—Practice.—B. and C. intermarried in 1834 and lived together till 1838, but the marriage was never consummated. About ten months after marriage the wife accused the husband of want of confidence in not having told her that he was unable to consummate the marriage. He subsequently consulted a medical man, as also did the wife three weeks later, but without any change in his condition. In 1838 her father and mother spoke to him on the subject, upon which he left the house and refused to live with her again. From

the year 1838 to 1854 the wife maintained herself by her own exertions. In November, 1838, she attempted to effect a reconcilation: and between that date and 1854 she frequently importuned the husband to take her back to live with him. In 1849 she was obliged to take medical advice, and the remedies employed were such as to destroy the usual marks of virginity. This medical man's account of her then condition was the only evidence of that nature offered at the hearing. In 1854 she being ill was unable to maintain herself; her husband, on being applied to, refused to give her any assistance, and she thereupon by the advice of her solicitor contracted debts, and caused him to be sued as her husband for payment of them; these proceedings ended in his allowing her £80 per annum. In 1858 this was reduced, and soon after the petition for nullity was **[606]** filed; the respondent did not appear, and no monition on him to submit to personal medical inspection was extracted.—Held, by the Judge Ordinary, and Williams, J. (dissentiente Bramwell, B.), that the lapse of time and other circumstances of the case disentitled the petitioner to a decree of nullity of marriage.—The Court has no power to hear any case with closed doors.—Semble, there is no reported case of any authority in the Ecclesiastical Courts where such a decree has been made, without a monition on the other party to submit to personal inspection having been at least extracted.

[S. C. 29 L. J. P. 81; 6 Jur. (N. S.) 348; 1 L. T. 489. Affirmed, 1861, nomine *Castleden* v. *Castleden*, 9 H. L. Cas. 187; 11 E. R. 701 (with note). Followed and approved, *Scott* v. *Scott*, [1913] A. C. 417.]

This was a petition for a decree of nullity of marriage by reason of the husband's impotency. The citation had been personally served on the respondent, but no appearance had been given for him, and the case now came on for proof of the petition.

November 14 and 15, 1859.—Dr. Deane, Q.C. (Dr. Spinks with him), for the petitioner, asked the Court to hear the evidence in this case in camerâ.

*The Judge Ordinary*: My own impression on the point I have already had occasion to mention, viz. that we have no power to hear any case otherwise than in open Court; but, as I now have the advantage of the assistance of my learned brothers, I will confer with them.

Williams, J., and Bramwell, B., after consultation with the Judge Ordinary, gave their opinions to the effect that the Court had no power to sit otherwise than with open doors.

The Court then inquired of counsel whether there was any case in the Ecclesiastical Courts where such a suit had been maintained without a monition upon the party proceeded against to submit to personal medical inspection.

Dr. Deane admitted that there was no case to that extent, but such a decree had been pronounced when the service of the monition had been evaded or compliance with it refused. The Court would act on the best evidence which the nature of the case admitted, and that would be proof of the virginity of the woman at the time when the cohabitation ceased. In the present case the cohabitation of the parties had ceased **[607]** in 1838, and however the Court might have been assisted by the report of medical men after an inspection of the husband's person then, it could be of little consequence now. Again, the rule of the Ecclesiastical Courts sprang up before the parties to a suit could give evidence. At the utmost it is a mode of proof which the wife may take advantage of or waive at her discretion.

Cur. adv. vult.

On November 15, Dr. Deane referred to the case of *G*——— v. *R*———, decided in the Commissary Court of Surrey, 1854, where, so far as appeared from the minutes of the proceedings, the monition on the husband was decreed, but not extracted, and consequently not served.

By the Court: We think the proper course to be taken is this, that we should hear your case on the evidence with which you are now prepared. Then two questions will arise: first, whether your case is satisfactorily established in itself, without reference to any rule derived from the practice of the Ecclesiastical Courts? And if so, secondly, whether we are at liberty to act on such evidence, you not having complied with that which, as far as we can find, was an invariable rule.

The following facts were then established by the evidence of the petitioner and other witnesses examined on her behalf:—The marriage took place in December,

1834, at Woburn, where Mr. C. was living with his father and acting as agent for the Duke of Bedford; the petitioner was then between eighteen and nineteen years of age, Mr. C. about twenty-eight. According to her evidence the marriage was never consummated. On the night after the marriage the parties slept at Aylesbury, and the next morning, on entering the breakfast room, he said, "My poor virgin wife!" About ten months after marriage she, having discovered what consummation should be, spoke to Mr. C. and charged him with want of confidence in not having told her. He said he was not able to perform the part of a husband. About fifteen months after marriage Mr. C. expressed a desire to consult a medical man, and saw a Dr. Crucifix, since dead. There was no change in Mr. C.'s condition after that, and the petitioner at her own desire saw the same medical man about three weeks later. **[608]** The parties cohabited till October, 1838, living amicably and sleeping in the same bed. In October, 1838, the petitioner's father and mother were staying with them, and she inadvertently used some expression which led the mother to suspect that something was wrong; she insisted on knowing particulars, and then spoke to Mr. C., who upon that went away from home, and wrote to the petitioner saying that they should never meet till the day of judgment. The petitioner then went home with her father and mother. In the latter end of November she, however, went down to Woburn unexpectedly to Mr. C., for the purpose of reconcilement if possible. Mr. C. and his father persuaded her to return to London, his father saying that he thought his son might get his employment changed to London, and so avoid the scandal of the petitioner returning to Woburn. She accordingly returned to London with the intention of rejoining Mr. C. if he got a situation there; this never happened, and after 1838 the petitioner supported herself as a governess in several families. In the years 1851-2 she was connected with a servants' provident society in Marlborough Street, and in 1853 again became a governess. In 1849 she was suffering from some uterine disorder, and was attended by Dr. Henry Bennett, and the treatment to which he found it necessary to subject her entirely destroyed the usual signs of virginity. Dr. Bennett in his deposition, which had been taken before the registrar in consequence of his expected absence from the country, also stated that he had a distinct recollection that he had so much difficulty in making the examination that he was induced to ask Mrs. C. whether it was possible that the marriage had been consummated, and he believed she replied that to the best of her knowledge it had not; that he recollected that the condition of the parts was such as to warrant the inference that the marriage had not been consummated; and that there was no imperfection on her part which would render consummation impossible.

The petitioner had seen Mr. C. once since 1838, on an occasion when he was persuaded to come to town to sign his name, which was needed for the receipt of a legacy to which she was entitled.

In answer to questions put by the Court, the petitioner said **[609]** that she was still in a situation as a governess; that motives of delicacy and expense had been in part the reason of the delay in instituting the suit; that the expense was less now, and she was earning about £80 per annum; that she had wished for some years, and as late as 1854, that Mr. C. would get over the scandal he was afraid of and consent to their living together; that towards the end of 1858 she had been informed that an allowance made by Mr. C. (since 1854) would be diminished; that that was partly the reason of the suit; she felt sure then he never intended reconciliation; that she should be happier in mind if free; that her position had been a source of great unhappiness to her, and she felt much worn; that no other situation or prospect in life was influencing her; that Mr. C. did attempt twice to consummate their marriage on the return from their wedding trip, but not before or after; that their separation had caused conversation at Woburn, and Mr. C. seemed afraid of the talk of the place if his wife returned; that as to her wish to return originally, she was very young, very unhappy, and thrown on the world.

A gentleman at Woburn, in whose family Mrs. C. had acted as daily governess while cohabiting with Mr. C., deposed that he had seen Mr. C., and spoken to him on the subject of some differences which he understood existed between Mr. and Mrs. C.; that he had understood that Mr. C. had charged her with some impropriety or levity of conduct; that the instances specified by Mr. C. were wholly frivolous, and the witness pointed this out and urged Mr. C. to be reconciled. He became excited, and in speaking of the early part of their marriage, said, "her conduct had been noble

and forbearing"; that in answer to a remark of the witness, that the supposed difficulty might arise from nervousness or some temporary and curable cause, Mr. C. said, "Impossible."

Mr. Ford, the petitioner's solicitor, deposed that he became acquainted with the petitioner in connection with the Servants' Provident Society in Great Marlborough Street; that he had been frequently consulted by her about her position, but never took any legal step in the matter till 1854, when she was ill and unable to maintain herself. He then applied to Mr. C. for relief during her illness. Mr. C. refused; she then incurred debts for necessaries, and proceedings were taken against Mr. **[610]** C. for payment of the bills. This resulted in a correspondence, and Mr. C. called on Mr. Ford in reference to the matter. Mr. Ford suggested that Mr. C. should receive his wife again, which was still her desire, but contrary to Ford's opinion. C. expressed a distaste for the revival of scandal in Woburn, and said it was out of the question. Ford said, "You ought to assist your wife, because you have inflicted on her the greatest injury a man can on a woman; you know you ought never to have married her." That Mr. C. did not deny anything, did not say much, but his demeanour was mournful and shamefaced. Subsequently an arrangement was made to pay £20 per quarter, which was observed till October, 1858, when a letter from Mr. C.'s solicitor stated that in consequence of his own reduced income he could in future only allow the petitioner £45 per annum.

Cur. adv. vult.

February 2, 1860.—*The Judge Ordinary* delivered the following as the judgment of himself and *Williams, J.*, in this case:

This was a petition praying a decree of nullity of marriage.

The petition alleged that on the 16th of December, 1834, the petitioner, a spinster, then eighteen, was married in fact, but not in law, to Geo. Castleden, of about thirty years of age; that from the 16th of December, 1834, till July, 1838, the petitioner cohabited with Geo. Castleden, occupied the same bed with him, and was willing to receive his conjugal embraces, but that nevertheless Geo. Castleden never consummated the pretended marriage; that at the time of the celebration of the pretended marriage Geo. Castleden was, by reason of his frigidity, or impotency, or malformation, legally incompetent to enter into the contract of marriage.

Geo. Castleden was served with a citation and a copy of the petition on the 30th of November, 1858, but did not appear.

The case, therefore, as far as the respondent was concerned, was undefended; but this Court is not at liberty to treat causes of this nature merely as questions between party and party. It has an important duty to discharge towards the public also, and must take care not to make a decree unless sanctioned by the principles which guided the discretion of the Ecclesiastical Courts in similar cases.

**[611]** The petitioner gave evidence on her own behalf, and proved the marriage and cohabitation as alleged in the petition; and as to the non-consummation, stated that she and Geo. Castleden passed the first night after their marriage at Aylesbury, and that when she entered the breakfast-room next morning, he exclaimed, "My poor virgin wife!" That on two occasions afterwards he attempted to consummate the marriage, but did not succeed, and that the attempt was never repeated; that about ten months afterwards she had discovered what consummation should be, and reproached him with his want of confidence in not telling her this; that he said he was not able to perform the part of a husband; that about fifteen months after the marriage he expressed a wish to consult a medical man, Dr. Crucifix, and afterwards said he had done so; that she soon afterwards saw and conversed with Dr. Crucifix, who is now dead; that they continued to live amicably together till the 10th of October, 1838, but she found no change in his condition; that in October, 1838, her father and mother came on a visit to her and Geo. Castleden at Woburn, where they resided; that she then made a communication to her mother, which her father and mother repeated to him, whereupon he left his house, and wrote, saying that he would never meet her again, and she left the house with her father and mother and went with them to London; that at the end of November she returned to his house at Woburn, and asked him to be reconciled, but he refused; that she continued to express to him a desire to be reconciled, and to live with him, down to the spring of 1854. In the meantime she had maintained herself as a governess, but then being ill, applied to G. C. for assistance, which was not granted; and afterwards, by advice

of Mr. Ford, an attorney, contracted debts for necessaries, and he, by arrangement with her and the parties, took legal proceedings and compelled Castleden, as her husband, to pay them. If the marriage was void ab initio, she then knew it to be so, and the person whom she caused to be charged as her husband was not her husband. The course which she then took could only be justified by the supposition that he was her husband, and is in the nature of an admission (to put it no higher) that such was the fact. (See the observations of Lord Stowell in *Guest* v. *Guest*, 2 Consist. R. 321.)

**[612]** Mr. Ford proved that in December, 1854, he had an interview with G. Castleden, and pressed him to receive the petitioner, which he refused, expressing a distaste for the revival of the scandal which would arise in so small a place as Woburn. Afterwards an arrangement was made by Mr. Ford with Castleden, through the intervention of his solicitor, Mr. Lawrence, that he should pay her £20 quarterly. Those payments were made regularly till October, 1858, when Mr. Lawrence wrote, saying that his client's pecuniary circumstances were altered; that he could not continue to allow her more than £45 per annum. Mr. Ford then advised an application to this Court, and the petition was thereupon filed. The petitioner, as to this part of the case, stated: "The reduction of the allowance was partly the reason of these proceedings, and I felt sure he never intended to be reconciled. I thought I should be happier in my mind if I were free. I felt much wronged. I was not influenced by having in mind any other situation in life." In addition to her own statement, the petitioner gave evidence of two conversations between third persons and the respondent, from which it might be inferred that he meant to admit that he was not able to consummate his marriage, but he did not admit it directly. The petitioner has not resorted to the almost invariable practice of issuing a monition ordering the respondent to submit to the inspection of medical men in order that the Court might have their report on his condition. To prove her own condition the petitioner gave in evidence the examination of Dr. Bennett (now abroad), taken before a registrar under an order of the Court. In *Pollard* v. *Wybourn*, 1 Hagg. 727, Dr. Lushington says, "This Court always requires a certificate of medical persons as to the state and condition of the woman." In such a case as the present she should be shewn to be virgo intacta and apta viro. Dr. Bennett's evidence was in these terms:—That he had a distinct recollection that he had so much difficulty in making the examination, that he was induced to ask Mrs. C. whether it was possible that the marriage had been consummated, and he believed she replied that to the best of her knowledge it had not; that he recollected that the condition of the parts was such as to warrant the inference that the marriage had not been consummated.

**[613]** Now, upon this it must be remarked that the examination by Dr. Bennett was not made for the purpose of the cause, nor with a view to giving the Court exact information on the subject. It was made ten years ago, and the doctor now speaks from recollection, and not from minutes made at the time. He does not say that she was virgo intacta, or that her state was such that consummation could not have taken place; and as to her evidence, of course it must be assumed that she cannot be more positive now than then. Again, as to her being apta viro, the Doctor says, "There was no imperfection on her part to render consummation impossible," which I take to be a very equivocal description of her state; and then he assigns a reason why any further examination would now be useless.

Upon this state of facts the first remarkable thing to be attended to is the length of time which has elapsed since the alleged discovery of the incompetency of the respondent to enter into a contract of marriage and the filing of the petition, which is much greater than has existed in any recorded case. The alleged incompetency, if it exists now, existed and was known to exist at the time of the separation in 1838, full twenty years before the petition was filed. It has been held that lapse of time alone is not a bar to such a proceeding; but it has often been treated as a circumstance of great importance. In *Guest* v. *Guest*, 2 Consist. R. 323, Lord Stowell said: "But the length of time which has elapsed is in itself almost a bar, for I do not remember any instance in which such a suit has been allowed to be instituted after such an interval; that a period of seven years should have been allowed to elapse in a case where even a very short cohabitation would have sufficed for the discovery, is not allowed by any principle of law with which I am acquainted." In *Briggs* v. *Morgan*, 2 Consist. R. 330, the same learned judge said that a delay of sixteen months was

not easily accounted for, it being a case of alleged actual malformation in the woman. Other learned judges have said that time alone would not be a bar to such a suit. The subject appears to have been much considered by the Judicial Committee of the Privy Council in *B*——— v. *B*———, 1 Eccl. & Adm. 248, at p. 260. Dr. Lushington, expressing the opinion of the committee, says: "It is obvious **[614]** for these reasons (which he had before assigned) that time, though not in itself under ordinary circumstances a bar, yet, especially when the lapse of time has been very considerable, is not an unimportant matter in suits of this description, and more particularly as concerns the wife."

But I apprehend that the principle upon which the Court is to proceed must be the same whichever party complains. Time, then, not being an absolute bar to such a suit, let us see what are the principles upon which the Court is to proceed; they are clearly stated in the same case, p. 260. "In other respects too, as relates to the right of the husband to prosecute a suit of this description, time with other facts deserves great consideration. The law affords a remedy to those who are really aggrieved and sensible of the grievance, and then only vigilantibus non dormientibus. The remedy is given on account of the loss sustained and the evil felt, not to promote or assist other purposes having no relation to it. If the husband is silent for so long a period unaccounted for that the presumption would naturally arise that he acquiesced in the consequences which such an unfortunate connection entailed upon him, he could hardly be entitled to say, 'Give me a remedy for a grievance I have not felt,' and that to the detriment of another." Now this passage is wholly without reference to any doubt as to the existence of the state of things complained of, and it is applicable to the present case, except only that, if the prayer is granted, the detriment to the respondent would probably be confined to the annoyance which the agitation of such a question must inflict. Dr. Lushington proceeds: "Their Lordships are all of opinion that cases might occur where long acquiescence, with knowledge, would operate as a bar to the prosecution of such a suit, and more especially if the circumstances shewed that the suit was brought not on account of the evils resulting from the imperfection, but for other and different reasons."

In the present case the petitioner, with full knowledge of the respondent's condition, for sixteen years after the separation continued to press him to receive her back to cohabitation; after that contracted debts, and procured the creditors to enforce payment from him as her husband—a proceeding wholly inconsistent with the present, and a sort of moral **[615]** estoppel against a subsequent allegation by her that he was not her husband; after that negotiated for an allowance, which she received for three or four years, and upon an intimation that it must be reduced, by the advice of her attorney, and no doubt principally for that reason, although some others were mentioned by her, instituted this suit. Under such circumstances it seems to me impossible to say she is suing on account of the evils arising from the respondent's imperfections, but for other and different reasons. These observations apply to the conduct of the petitioner; but there are other considerations which must not be lost sight of.

The petitioner has not given the medical testimony always called for, that she was and is virgo intacta, and was apta viro; for that she has substituted Dr. Bennett's deposition, which, in my opinion, is a very unsatisfactory statement, and leaves me in some doubt as to each of the matters to be established. It may be said that she cannot now give better testimony; true, but had the suit been instituted in reasonable time, she might have done so. Again, no attempt has been made to procure an examination of the respondent. If he did not consummate the marriage, it is reasonable to presume that he could not; but the reason of his inability is left in doubt; it may have arisen from malformation on his part; it may have arisen from some constitutional defect on his part, combined with some difficulty on the part of petitioner; it may have been the case of a man frigidus versus hanc; if the latter was the case, it may have been much to his detriment that the suit was not commenced many years ago.

I do not say that such a suit cannot be sustained without a monition to undergo inspection, for in a very singular case about a century ago (*Tenducci's* case) I do not find that any such process issued, and the suit was sustained; but that case was so singular in all its features, that it can hardly be deemed a precedent for any other; and it seems to me that the omission of any of the means usually taken for procuring information for the Court, is a circumstance not to be forgotten.

Adopting the language of the Judicial Committee, and founding my judgment upon the whole of the case, and not any one part; considering the length of time that has elapsed since the marriage and the separation, the knowledge which the peti-[616]-tioner then had of her husband's imperfection, her request repeated continually for sixteen years afterwards to be received back by him, and her arrangement with creditors to sue him as her husband for the debts contracted by her, her negotiation for, and the receipt of, an allowance for several years, and the institution of this suit on an intimation that the allowance would be reduced; considering also the imperfect nature of the medical testimony adduced, and that much more precise and certain testimony might have been had, if the suit had been commenced within a reasonable period, I am of opinion that the petitioner is not entitled to a decree pronouncing this marriage void ab initio.

*Bramwell, B.*, delivered the following judgment on the case: In this case I think the impotency of the husband is established.

First, there is the oath of the petitioner, whom I, acting as judge of fact, believe to be a credible witness, and consequently to be trusted, unless her story is highly improbable or contradicted by surrounding circumstances or other credible witnesses. Now she swears that the marriage has never been consummated; that no attempt to do so was made on the night of the marriage, nor until after she and her husband returned home; then two unavailing attempts. She says she continued to live with him for four years, when, in consequence of something she said to her mother, her father and mother made inquiries, discovered the truth, and reproached her husband, who was so displeased that he parted with her, and has since refused to live with her; a period of twenty-one years having elapsed since then. The witness, Mr. Green, proves that at the time when this took place, in 1838, the respondent owned that the petitioner's conduct at first was "noble and forbearing"; that the fault was on his side, and that it was incurable. The witness Ford proves that in the year 1851, on his reproaching the respondent with having done the petitioner the greatest injury that could be done to a woman, the respondent made no answer but hung his head and looked mournful. Then there is the affidavit of Dr. Bennett; he says that ten or twelve years since, certainly since 1843, he examined the petitioner, and that the condition of [617] her genital organs was such as to warrant the inference that the marriage had not been consummated; he also states that he asked her if it was so, and "believes she replied, to the best of her knowledge it had not been." If that means he was in doubt whether she said it had or had not, it would be strange, as it would be inconsistent with his recollection of the condition of the parts; but it means what it says, viz. that he recollects her answer to have been that she did not know, but she believed not; to my mind a very likely answer for a modest woman to give where there had been an attempt at consummation; but an answer which could not honestly have been given had there been connection frequently, or even to the small extent which would preclude doubt.

The respondent does not appear to deny the complaint; Dr. Bennett also says, that from his treatment inspection of the petitioner would now be useless. I do not think that the petitioner's living with her husband for four years, or being willing, as she has been, at any time to return and live with him, are insuperable difficulties in the way of believing her story. I can understand the sexual passion, perhaps naturally weak, lying dormant in a modest woman till roused by fruition; I can understand that regard for her husband, a feeling of shame, the expense of proceedings, may together have prevented the complaining till compelled to do so. But if a doubt is to be entertained of her story, what is supposed to be the truth? It cannot be that connection has taken place habitually or frequently, and that the quarrel was on some other ground. To believe that would be to disbelieve the petitioner and all her witnesses. There is no suggestion of any other cause of quarrel. It is impossible to suppose that there is any collusion between her and her husband, with whom she has not communicated for twenty years. Collusion means some fraudulent agreement to present to the Court a falsity, or keep back a truth. When was such agreement made—twenty years ago? What falsity can be suggested to be presented, what truth withheld? It must be that the separation of these parties has arisen from sexual intercourse not having taken place between them; and if this is not from his impotency, to what is it to be attributed? Is it her fault? Dr. Bennett says there was no imperfection on her part to render consummation im-[618]-possible. It is

suggested that the husband may have been a nervous man, not impotent, but unable to overcome an extraordinary difficulty; but a decent woman could not discriminate between such cases; if desirous of parting with him on the supposition of impotency, she would be equally so on the supposition that the condition of things was such as I mentioned, and consequently as much, and no more, likely in the one case as in the other to wish to continue to live with him. Besides, the evidence is the other way. He owns it his fault, not hers; he calls her conduct noble; he admits he has wronged her; he does not send her to a medical man, but goes himself, to see if the difficulty can be removed. Further, the petitioner swears no effort was made on the night of the marriage, and that on the morning after he called her "My poor virgin wife."

I attach no value to her not monishing him. The most unfavourable result to her of his submitting to an examination would be that his organs of generation should appear to be perfect; but that would be no impediment to her having a decree. (See *N*——— v. *M*———, 2 Robert. E. R. 625, where the report of the surgeons is, that the parts appear perfect; but, from the wife being virgo intacta, they infer that he was unable to use them, and conclude him to be impotent, and decree in conformity is pronounced.) He does not defend, if he did he might complain, as the opportunity for submitting to inspection was not given. As it is, the proceeding would be a form which he might disregard.

Nor do I think it of any moment that she allowed him to be sued for debts contracted by her. It is said to be an admission by her; that is assuming her to have a considerable knowledge of the common law and the law ecclesiastical; but I doubt if it is anything but an admission of the truth—viz. that he was her husband de facto. I strongly incline to think that the marriage exists at common law until annulled by decree. I cannot think that this petitioner could marry again now without incurring the penalties of bigamy. Besides, taken as an admission, what is it worth?—an admission of what? Of his capacity? But we know the facts, and are at least as competent to judge as the petitioner. What fact is she supposed to admit inconsistent with those we know? That **[619]** he has had intercourse with her? Impossible. That it was her fault he had not? Impossible. If, then, her supposed admission supplies no new or different fact, it is, at most, the admission of a conclusion, which conclusion I think erroneous. Under these circumstances, I am satisfied the marriage has not been consummated; that the cause of the non-consummation is respondent's inability; and that having continued from 1834 to 1838, continuing (as confessed) in 1851, confessed by his conduct in not taking his wife back to continue till now, not denied in this suit, I am also satisfied he was impotent at the time of the marriage, has continued so hitherto, and is incurably so. I think this conclusion justified by the cases of *Pollard* v. *Wybourn*, 1 Hagg. 728; *A*———, falsely called *B*———, v. *B*———, 1 Eccl. & Adm. 12. So far, the question is one of fact.

It remains to consider whether the petitioner is entitled to the sentence she prays. As to that I wish to be understood as expressing myself with the greatest distrust of my correctness. It is a question on a part of the law with which I am wholly unacquainted. I understand the law or practice to be this, that the decree is not a matter of right, but is discretionary with the Court, and will not be pronounced unless the petitioner is seeking to get rid of a grievance occasioned by her having gone through the form of marriage with an impotent person. Then here it is suggested that the petitioner lived with the respondent four years; endeavoured to get him to take her back; has always been willing to go back, and only sues now because he refuses to maintain her; that she is in truth not complaining of the marriage and seeking to get rid of it because it is a grievance to her, but complaining because her husband will not maintain her. I think that is not so; I think these circumstances only shew that she would not complain of the marriage if he would live with her or maintain her, but that, as he will not, she does not only in form but in substance complain of it, and seek to get rid of what is to her a grievance. It is as though a person took possession of my land, and I forbore to complain as long as he gave me a compensation; when he ceases to do so, I make my true complaint. It seems to me it may be shewn in this way: she surely has a cause of complaint against the respondent. What? Not that he won't maintain her; not that he won't live with her; she cannot truthfully **[620]** say he is her real husband and bound to do so. Whether she could maintain a suit for restitution of conjugal rights is doubtful.

Such a suit may be converted into a suit for nullity by a defence which would be a ground of nullity. (*Swift* v. *Swift*, 4 Hagg. 153.) There seems, however, doubt whether a man can set up his own impotency as a ground of nullity (*Seton* v. *Seton*, 3 Phill. 147). Be this as it may, it seems difficult to believe that, after a voluntary separation for this cause for twenty-one years, restitution could be enforced. But whether it could or could not, it would be an unjust remedy; unjust to him, to which the petitioner knows she is not entitled, and which, therefore, she ought not to be driven to resort to. I say she knows she is not entitled, because she knows a decree for it would be, in part at least, nugatory. Nor can she be bound to resort to the precarious remedy, such as it is, of getting persons to supply her, and then sue him. Moreover, with this fetter on her, she could not, as a decent person, permit herself to form a new engagement, or even allow herself to entertain an affection for a man, when the result might be bigamy or other criminality. It would be different, indeed, if by these proceedings she were endeavouring to terrify or shame him into some arrangement—but that is not so. It is not doubted that she is honestly and *bonâ fide* trying to get rid of the cruel state of things under which she has suffered for twenty-five years, with such palliatives as her own youth and strength and her husband's assistance afforded; and that those failing, she now prefers her complaint of the original wrong, and seeks relief from it.

Of course I do not think these opinions inconsistent with *B*——— v. *B*———, 1 Eccl. & Adm. 248, 259; if they are, they are wrong as being opposed to the highest authority. In that case the husband was the petitioner; the wife laboured under a malformation which made impregnation impossible; the parties had lived together many years, sexual intercourse had taken place, and, according to the evidence, the respondent was not a virgin. They had lived together so long, and the malformation was such, that the husband must have known that there was something abnormal. He took no steps to see if it could be remedied; they separated, not on account of this, but because they disagreed, and it was not until after five **[621]** years the suit was instituted; the only ground for not complaining till then was, that he did not know the defect was incurable—the answer to which is, that he knew of the defect, and did not know, or trouble himself to inquire, if it was curable. In giving judgment, Dr. Lushington says: "In other respects, too, as relates to the right of the husband to prosecute a suit of this description, time, with other facts, claims great consideration. The remedy is given on account of the loss sustained and the evil felt, not to promote or assist other purposes having no relation to it. If the husband is silent for so long a period unaccounted for that then the presumption would naturally arise that he acquiesced in the consequences which such an unfortunate connection entailed on him, he could hardly be entitled to say, 'Give me a remedy for a grievance I have not felt,' and that to the detriment of another.—Long acquiescence with knowledge might operate as a bar, especially if the circumstances shewed the suit was brought, not on account of the evils resulting from such imperfection, but for other and different reasons.—Then *Briggs* v. *Morgan* is referred to as shewing that lapse of time is proof of insincerity. Delay unaccounted for might, with other circumstances, constitute a bar. The inquiry, therefore, is, whether the lapse of time is accompanied with other facts which prove the insincerity of the suit; in other words, that whatever may be the defect of the wife, it was not a grievance to the husband, or the real cause why the suit was brought." He then proceeds to shew that the unfitness of the wife never was a grievance, and that a separation took place on the ground of disagreement, without the slightest reference to the subject-matter of the suit. Now it is obvious that that case is wholly different from this. There the defect in the woman was not the grievance; the husband had not complained of it; they had not parted on that account; they would have done so had it not existed. Moreover, the wife there resisted; she was no longer a virgin. So many years had gone by that her situation was entirely altered, and it would have been grievously to her detriment to separate them. Here it is quite otherwise. What is the petitioner's grievance here? Not merely that she cannot have sexual intercourse, but that owing to the man's frigidity she **[622]** cannot have even the consortium vitæ with him, cannot have conjugal rights. He makes no objection, no complaint of her proceedings, and obviously the decree sought will not be to his "detriment." It is true, it might have been better for him if she had brought it sooner, but that does not shew that it is not good for him now; it is really to fancy an objection for a man who will not

come to make it for himself. Surely there is nothing in this case which "shews the suit is brought not on account of the evils resulting from such imperfection, but for other and different reasons." Here, indeed, "time" has elapsed, but what "other facts" are to be taken into consideration with it? The wife's "silence for so long a period is not unaccounted for"; the "presumption of acquiescence" does not arise therefore from that only; what else is there? While she lived with him she was ignorant of her rights; what has she acquiesced in since?—the practical decree of nullity which she now seeks according to law. Her sincerity is, I think, not doubtful. The defect of the husband is a grievance to the wife, and the real cause why the suit is brought. On these grounds I cannot help thinking the petitioner entitled to the decree she prays. There seems some uncertainty whether such marriages are absolutely null or only voidable. Dr. Lushington in both reports of *B*——— v. *B*——— is express they are null; some older writers seem to say that they are only voidable by decree of nullity; the difference may be this, that they are valid at common law unless avoided—null by the law ecclesiastical. If so, and the judgment of the Privy Council is express to that effect, I think the petitioner's case the stronger; because in that case mere consent could not make the marriage valid—it would always continue what it originally was, "null." Then as the sentence of nullity would only affirm truth, a reason would be required why it should not be pronounced, not why it should. The burden should be shifted from the petitioner. I can see no such reason, while I see many the other way. In short, the case may be put thus: in causes of this description I understand three questions may arise.

Whether I am right in this respect I entertain the greatest distrust; but it seems to me there may be three questions. Is the impotency established? Is marriage to an impotent **[623]** person the grievance sought to be got rid of? Is there any injustice to the respondent in a decree to that effect at the time and under the circumstances stated? I think these questions ought to be separately considered, and if each is answered in favour of the petitioner, she ought to have a decree. I think it is wrong in this or any other case to accumulate all the doubts that bear on each question, and act on a general indefinite objection to the case. I think that appears by our system of pleading and issue at common law. I cannot doubt that if there were two issues here for a jury,—one, whether the respondent is impotent; the other, whether the petitioner is sincerely complaining of the grievance she would get rid of by the decree she seeks,—they would find for her. As to the remaining question, it is impossible to suppose that any injustice would be done to the respondent, of whose conduct in marrying her, and since, and in now not assisting her to get rid of him, as he does not appear, I forbear to say what I think, but who, one would hope, would rejoice at the partial reparation of the wrong he had done her.

Petition dismissed.

# REPORTS of CASES decided in the COURT of PROBATE and in the COURT for DIVORCE and MATRIMONIAL CAUSES. By M. C. MERTTINS SWABEY, D.C.L., Advocate in Doctors' Commons, and of Gray's Inn, Barrister-at-Law, and THOMAS HUTCHINSON TRISTRAM, D.C.L., Advocate in Doctors' Commons, and of the Inner Temple. Volume II. From Easter Term 1860 to Michaelmas Term 1862. London, 1863.

[1] REPORTS OF CASES DECIDED IN THE COURT OF PROBATE AND IN THE COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

SKIPPER AND SKIPPER *v.* BODKIN AND OTHERS. March 28, 1860.—Special Jury.—Judge's Certificate for Costs.—Time for Application.—20 & 21 Vict. c. 77, s. 36.—6 Geo. IV. c. 50, s. 34.—An application for a certificate of the costs of a special jury ought to be made immediately after the verdict has been given. An application made on a subsequent day is too late.

[S. C. 29 L. J. P. 133; 2 L. T. (N. S.) 636; 8 W. R. 589.]

This was an application for a certificate for the costs of a special jury in a cause of proving in solemn form of law the last will and testament of the late Rev. John William Smyth, of Cringleford, in the county of Norfolk, clerk, deceased.

The will was propounded by the plaintiffs, who were the executors named therein, and probate of it was opposed by the heir-at-law and the next of kin of the deceased, on the ground first, that at the time of its execution the testator had not testamentary capacity; and, secondly, that its execution was procured by the undue influence of the plaintiffs and others.

The plaintiffs, on moving for directions as to the mode of trial, applied for the cause to be tried before the judge himself [2] without a jury, when the defendants asked that it should be tried before the judge and a special jury.

The application of the defendants was granted, and the cause came on for hearing before the Judge of the Court of Probate and a special jury on the 6th, 8th, and 9th of December, 1859. At half-past five P.M. of the 9th of December the jury retired to consider their verdict, and returned about seven P.M., when they found by their verdict: first, that the testator at the time of the execution of the will propounded was of perfect sound mind, memory, and understanding; and, secondly, that the will was made and executed under undue influence. Upon the delivery of the verdict, in consequence of the absence of the defendants' counsel, no application was made on behalf of the defendants to the Judge to certify that the case was a proper one to be tried by a special jury. The plaintiffs subsequently obtained a rule nisi for a new trial, on the ground that the verdict of the jury on the second issue was against the evidence.

The defendants shewed cause against the rule being made absolute before Sir C.

Cresswell, assisted by Erle, C.J., and Williams, J., who, after hearing counsel on both sides, were of opinion that there ought to be a new trial.

Sir C. Cresswell thereupon, by an order of Court dated March 7, 1860, directed that the question of fact arising out of the pleadings in the cause should be tried anew upon payment of costs.

March 21.—Dr. Phillimore, Q.C., moved the Judge to certify for the costs of the special jury.

Dr. Tristram, for the plaintiffs, was instructed not to oppose, but not to assent to the application. He left it in the hands of the Court.

*Sir C. Cresswell*: It was a very proper case to be tried **[3]** by a special jury. But I incline to think that, according to the authorities, the application ought to have been made immediately after the verdict, and that you are now too late. In *Wagget* v. *Shaw*, 3 Camp. 316, an application on the day after the trial was considered too late; and in *Grace* v. *Clinch*, 4 Q. B. 606, where the certificate was verbally granted immediately after the verdict, and indorsed on the record, but not signed by the Judge till the costs were undergoing taxation, it was held too late. If you can find any authority in favour of the application, I will grant it. Let the case stand over.

March 28.—Dr. Phillimore, Q.C., renewed the motion. He had been unable to find any authority in support of it. It would seem at first sight as if by s. 36 of the Probate Act (20 & 21 Vict. c. 77) the parties were remitted to 6 Geo. IV. c. 50, s. 34, but he submitted the powers of this Court were not so limited in respect of costs as that of the courts of common law. In many points on the question of costs the practice in the Prerogative Court was followed, although it was at variance with that of the courts of common law.

*Sir C. Cresswell*: When there is a question of fact to be determined by a jury, I am, according to the latter part of the 36th section of the Probate Act, "to have the same jurisdiction, powers, and authority in all respects as belong to any superior court of common law." I think that by these words it is implied, that where the powers exercised by the Judges of the courts of common law are applicable, and a special or larger power is not conferred on me by the statute, I ought to exercise the same powers as are exercisable by the courts of common law.

Dr. Phillimore submitted that, although the Court might not feel itself at liberty to certify for costs, it might still direct the Registrar to allow the costs on taxation.

**[4]** *Sir C. Cresswell*: I am bound to follow the practice of the Prerogative Court where it is applicable and has not been altered by the Probate Act or the rules made under it. In the present case it is not applicable; and I think that I ought to follow the provisions of 6 Geo. IV. c. 50, in certifying for costs. The Legislature, by the 34th section of this Act, appears to have thought that it was necessary to confine the power of the Court in certifying for the costs of a special jury to a particular time, in order that it might determine whether it was a proper case for costs or not, when the facts were fresh in its mind and it was undisturbed by matters subsequent. I must reject the motion.

Motion rejected.

Cherill, Proctor for the plaintiffs.

Ayrton and Ibbetson, Proctors for the defendants.

GOODBURN *v.* BAINBRIDGE AND OTHERS. April 4, 1860.—Citation.—Indorsement of Certificate of Service.—When a citation has been served, a certificate of service should be indorsed on the citation.

[S. C. 29 L. J. P. 163; 2 L. T. (N. S.) 439; 8 W. R. 504.]

This was an application for administration of the effects of the deceased to be granted to the plaintiff as a creditor. The parties entitled in distribution had been duly cited, but had not entered an appearance.

Dr. Wambey moved for letters of administration to be granted to the plaintiff.

*Sir C. Cresswell*: In this case the usual certificate of service of the citation has been omitted to be indorsed on the **[5]** citation. There is no rule requiring this to be done; but it is a very useful practice, particularly in uncontested cases. It will be better to observe this practice in future.

IN THE GOODS OF JOHN MORNEY POTTS (deceased), on Motion. April 4, 1860.—Practice in respect of Certificates for the Irish Probate Court on Letters of

Administration originally granted in England, and the security required to be given.—20 & 21 Vict. c. 79, s. 94.—22 & 23 Vict. c. 31, s. 25.

[S. C. 6 Jur. (N. S.) 486; 2 L. T. (N. S.) 255; 8 W. R. 454.]

In this case, J. M. Potts, of Old Oak Villa, Shepherd's Bush, in the county of Middlesex, died on the 23rd of February, 1860. He left a will in which no executor was appointed, but of which Elizabeth Rattey, spinster and a minor, was the residuary legatee: her mother renounced the guardianship, and the minor had elected William Mortimer as her curator or guardian; he took administration with the will annexed on the 20th of March, and swore the property under £2000 in England, and gave the usual bond in a penalty of double that amount. There was also property in Ireland under the value of £60,000.

By 20 & 21 Vict. c. 79 (Probates and Letters of Administration, Ireland), sect. 94, it is enacted that "From and after the period at which this Act shall come into operation, when any probate or letters of administration to be granted by the Court of Probate in England shall be produced to and a copy thereof deposited with the registrars of the Court of Probate in Ireland, such probate or letters of administration shall be sealed with the seal of the said last-mentioned court, and being duly stamped, shall be of like force and effect, and have the same operation in Ireland as if it had been originally granted by the Court of Probate in Ireland."

**[6]** By the 22 & 23 Vict. c. 31, s. 25, it is enacted that "Letters of administration, granted by the Court of Probate in England, shall not be resealed, under sect. 94 of 20 & 21 Vict. c. 79, until a certificate has been filed under the hand of a registrar of the Court of Probate in England, that a bond has been given to the Judge of the Court of Probate in England in a sum sufficient to cover the property in Ireland as well as in England, in respect of which such administration is required to be resealed."

In consequence of a difficulty felt in the registry as to the proper course to be adopted under these enactments in respect to the circumstances of the above case,

Dr. Middleton now moved the Court "to order that, upon an additional bond being given in to the registry either for double the amount of the English and Irish property, or of the Irish property alone, as the Court might think fit, one of the registrars do issue a certificate pursuant to 22 & 23 Vict. c. 31, s. 25, and that a note of further security given be made upon the grant, but that the grant be not otherwise altered, and that no ad valorem fees be charged in respect of the amount of the Irish property." He submitted that an additional bond to cover the property in Ireland was admissible, in which case the ad valorem fees to be taken in the registry [1] would not, he apprehended, be due on the amount under which the Irish property was sworn. Such fees would certainly be due in Ireland, and the property ought not to have to pay them twice.

*Sir C. Cresswell* made no order in court, but subsequently **[7]** a minute to the following effect was taken down by the registrar:—

Ordered, that on a bond being given by the said W. Mortimer with his sureties in the penal sum of £120,000 for the faithful administration of the personal estate and effects of the said John Morney Potts, deceased, it be noted on the letters of administration already granted to the said William Mortimer, that the personal estate in Ireland of the said deceased had since been sworn under £60,000, and security given accordingly, and that a certificate do issue under the hand of one of the registrars of the registry of the Court that a bond has been given to the judge of the Court of Probate in England, in a sum sufficient in amount to cover the property in Ireland as well as in England.

LAINSON *v.* NAYLOR. May 2, 1860.—Service of citation.—Minor.—Practice.—Where a minor of the age of seventeen was living in service at a distance from her mother, her natural guardian, the Court dispensed with the ordinary rule, which requires service of a citation upon a minor to be effected upon her in the presence of her

[1] See fees to be taken in the principal Registry of the Court of Probate in non-contentious business. Rules and fees of 1857. The Court disclaimed any power of interfering in respect of these fees, but it is apprehended that the effect of allowing a separate bond in respect of the Irish property would be that the fees would be payable in Ireland only.

natural or legal guardian, or of some person upon whom her custody for the time being properly devolved.

[S. C. 29 L. J. P. 126; 2 L. T. (N. S.) 391; 8 W. R. 451.]

H. J. Naylor, the deceased in this case, died in September, 1859, intestate, leaving his widow and four children (all of whom were minors) his sole next of kin, and the only persons entitled in distribution, him surviving.

Henry Lainson, a creditor of the deceased, had caused a citation to be issued and served on the widow and children, calling upon them to shew cause why administration of the effects of the deceased should not be granted to him as a creditor.

**[8]** Dr. Tristram moved for administration to be granted to Henry Lainson as a creditor. It appeared on affidavit that the citation had been duly served on the widow and on three of the minor children at Poplar, Middlesex, in her presence, according to the practice of the Court. (*Cooper* v. *Green*, 2 Add. 454.) The other minor (Eliza Ann Naylor), who was of the age of seventeen, was residing in Dorsetshire, in service. The plaintiff had therefore been unable to serve the citation upon her in the presence of her mother or of any one who could be said to have the care or custody of her; a copy of it had been sent to her by post, and she had acknowledged the receipt of it by letter. He submitted that, under these circumstances, the service upon her was sufficient.

*Sir C. Cresswell*: I think it is sufficient.

Motion granted.

IN THE GOODS OF HENRY DRUMMOND (deceased), on Motion. May 16, 1860.—Will.—Incorporation.—Reference.—Probate.—H. D. made a testamentary disposition on the first page of a sheet of note-paper, which was signed by himself, and attested by one witness only. He shortly afterwards duly executed a testamentary disposition (but which contained no reference to the former disposition) on the third side of the same sheet. At the time of the execution he did not mention to the attesting witnesses the writing on the first page, and one of them believed that he asked them to attest his will.—Held, that the disposition on the first page was not incorporated in the document executed on the third page, and was therefore inoperative. That, as the disposition on the third page related exclusively to real property, it was not entitled to probate.

[S. C. 2 L. T. (N. S.) 391; 8 W. R. 476. Followed, *In the Goods of Bootle*, 1874, L. R. 3 P. & D. 179; *In the Goods of Tovey*, 1878, 47 L. T. P. 64.]

Henry Drummond, Esq., late of Albury Park, in the county of Surrey, died on the 20th February, 1860, a widower, leaving behind him two daughters, namely, Louisa, the wife **[9]** of Lord Lovaine, and Adelaide, the wife of Sir Thomas R. Gage, Bart., his only children, and the only persons entitled in distribution.

The only documents he had left of a testamentary nature were comprised in a sheet of note-paper, enclosed in a sealed envelope, which he had deposited at his bankers, Messrs. Drummond, of Charing Cross, on the 4th of August, 1857. Upon the outside of the envelope was written, in the handwriting of the deceased, "Codicil to the will of Henry Drummond. Lord Lovaine, executor."

The following are the contents of the sheet of note-paper:—

"Albury Park, 17th November, 1854.

"I leave to my daughter Adelaide anything she pleases to select as a mark of my affection for her, whether piece of plate, picture, furniture, or any other thing, for her sole use during her life, and then to revert to Lord Lovaine; and I leave all my personal property, of every kind whatsoever, pictures, books, plate, cattle, horses, carriages, etc., to Lord Lovaine, and I appoint him my sole executor and residuary legatee. "HENRY DRUMMOND.

"Witness to the signature of Henry Drummond,
"HENRY SMITH."

This filled up the first page.

Upon the second page was written: "I leave also to my daughter Adelaide, Weston House, to her for the term of her natural life." To this there was no witness.

Upon the third page of the same sheet, beginning at the top, was written: "Lest there should be any doubt or difficulty respecting any land or houses or other real property that I may have acquired, built, or in any other manner become possessed

of, I hereby leave and bequeath all such property to go in the same way as my other landed and real property is settled. "HENRY DRUMMOND.

[10] "Witnesses to the signature of H. Drummond,
"HENRY SMITH,
"HENRY GOULBURN,
"Nov. 24, 1854. "HENRY MARION DURAND."

Dr. Phillimore, Q.C., was instructed to move the Court to decree probate of the paper writings bearing date the 17th and 24th of November, 1854, as containing together the will of the deceased, to be granted to Lord Lovaine, as sole executor therein named.

*Sir C. Cresswell*: It is clear that the first bequest relating to the personal property is by itself invalid, not being properly attested. Is there anything to connect it with what is written upon the third page of the sheet? That is the material part of the case, and I do not see that the affidavits filed touch it.

Dr. Phillimore: There are no words of reference in the third page of the sheet: but the question is, whether the fact of both clauses being written on the same piece of paper, together with the circumstances attending the execution of the last clause, is not sufficient to justify the Court in inferring that the execution of the last clause would give effect to the first. One of the three attesting witnesses, the Right Honourable Henry Goulburn, is dead. Smith, the attesting witness to the first and last clause, states that he was not aware, when he signed either of the papers, that they were of a testamentary nature. And Mr. Durand, the other surviving attesting witness, after speaking to the due execution of the will, states in his affidavit as follows: "Although I cannot state positively that the testator said the paper he asked us to attest was a will, yet I believe that such was the fact, because I well remember that I myself proposed or adverted to the expediency of having three witnesses, I having myself when in [11] India executed a will attested by three witnesses, which number, although not actually required by law, I thought it expedient to have in case of the death of either of them. And I well remember, that on this suggestion being made, the witness Henry Smith, who was the deceased's butler, was called into the room, where the deceased Mr. Goulburn and myself were present. I have no recollection whatever of having upon this occasion observed the said writing contained upon the first sheet." Lady Gage, the only party interested, has filed a consent to the motion.

*Sir C. Cresswell*: The cases are, I think, against you. There is a case very near it (*Doe d. Williams* v. *Evans*, 1 Cr. & Mee. 42), where a codicil was written on the same sheet and same side of the sheet on which an unexecuted will had been written, and Bayley, B., says, "If the codicil had not referred to the will, I should have thought that it did not set up that instrument." (See also *In the Goods of Stephen Francis Phelps*, 6 N. C. 695; and *Haynes* v. *Hill*, 7 N. C. 256.) I must reject the motion.

Dr. Phillimore asked for administration with the will on the third page of the sheet annexed to be granted to Lord Lovaine.

*Sir C. Cresswell*: I cannot grant administration with a will annexed which relates only to real property.

[12] TROTT AND TROTT *v.* SKIDMORE AND OTHERS. June 12 and 21, 1860.—Will.—Position of Testator's Signature.—Death of Subscribed Witnesses.—In 1832 B. wrote a will, of which the last sentence concluded with his name. After his death in 1859 the will was produced, with the words, "Witness, C. D. Witness, E. F. April 11, 1838," written below the signature. On proof of the deaths of C. D. and E. F., and of their handwriting, the Court admitted the will to probate as of the date of April 11, 1838.

[S. C. 29 L. J. P. 156; 6 Jur. (N. S.) 760; 2 L. T. 519; 8 W. R. 590. Referred to, *Harris* v. *Knight*, 1890, 15 P. D. 180.]

In this case the deceased Joseph Skidmore died on the 7th of November, 1859. A will was produced in the handwriting of the deceased, headed:—

"14th of February 1832.
"27 Marchmont Street, Burton Crescent, Middlesex.

"I, Joseph Skidmore, Jun., aged 32 the 29th of July last." By it he left "to my dear wife Sarah Skidmore the whole of my property, excepting what I shall hereafter

name. My property is at present the lease of the house No. 27 Marchmont Street, goods, stock-in-trade, horse and cart, business, and all other things that I now enjoy or may hereafter possess." He made his wife sole executrix, and left certain legacies to his father, mother, brothers, and sisters, and concluded with the following words, "all of which to be paid with the then present coin of the realm, upon application to my dear wife Sarah Skidmore, and a receipt to be provided by the receiver from all further claim upon the estate of their departed brother Joseph Skidmore." Immediately below this appeared,

"Witness, JAMES SKIDMORE.
"Witness, HENRY EEDE.
"April 11, 1838."

**[13]** The words, "Witness, James Skidmore," had been written, apparently, in much paler ink than the words "Witness, Henry Eede," and the date was in the same handwriting as the latter words.

The executrix Sarah Skidmore propounded the paper as a will bearing date the 11th of April, 1838, reduced into writing and signed by the testator, whose signature was duly acknowledged in the presence of the two attesting witnesses according to the provisions of 1 Vict. c. 26. The executrix died during the pendency of the suit, which was continued by the plaintiffs, as her executors.

The next of kin denied the due execution according to the statute, and the issue came on for hearing before the Court without a jury. It was proved that the body of the will and the signature, "Joseph Skidmore," were in the handwriting of the deceased, that James Skidmore and Henry Eede were dead, and that their names were in their respective handwritings. It was admitted that the body of the will was written in 1832.

Dr. Phillimore, Q.C. (Dr. Swabey with him), for the defendants, argued, first, that there was no proof that the words "Joseph Skidmore," in the position they occupied, were intended as a signature at the foot or end of the will; that, in the absence of such proof, to have constituted a valid signing and acknowledgment under the Wills Act and Wills Act Amendment Act 1852, the signature of the testator must have been so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will. Secondly, that the presumption omnia ritè esse acta had never been acted upon in spite of any contrary presumptions arising on the face of the will and remaining unexplained, such as the great difference in the colour of the ink in which the witnesses' **[14]** names were respectively written, and the repetition of the word "witness" before each name.

Dr. Spinks (Mr. F. Walford with him) argued in support of the will.

Cur. adv. vult.

June 21.—*Sir C. Cresswell*: The will propounded was written in 1832. It is in the handwriting of the testator, and his name forms the concluding words of the last clause of the will. Then follow the signatures of two witnesses and the date, April 11, 1838.

Both the witnesses are dead, and no account has therefore been given of the manner in which the will was executed.

It was said that this would have been a good will if it had been executed before the statute 1 Vict. c. 26 came into operation, but that as it was executed after the statute had come into operation it was not a good will, because the words Joseph Skidmore at the conclusion of the last clause could not be considered as the testator's signature, and because it was to be inferred from the difference of the colour of the ink in which the signatures of the attesting witnesses are written, that they had not signed at the same time.

The difference of the colour of the ink in which the names of the attesting witnesses are written might have been caused by blotting-paper being used to one, and not to the other. At all events it is too slight a circumstance to found any presumption on; and on the facts as proved, the usual presumption omnia ritè esse acta must prevail.

With reference to the signature, looking at the will itself, at the construction of the last sentence, and at the manner in which the name is introduced, I am of opinion that the testator must have intended his name, as it appears at the end of the will, to be his signature thereto. If he had separated it from the word brother, which immediately precedes it, no one could have entertained a doubt about it.

**[15]** Decree probate of the will; costs of defendants, by consent, out of the estate.

Barlow and Longden, Proctors for plaintiffs.

James and Curtis, Attorneys for defendants.

IN THE GOODS OF ROBERT NODDINGS (deceased), on Motion.(*a*) July 18, 1860.—Will.—Executor.—Surviving Executor cited and not appearing.—Grant to Executor of Executor.—20 & 21 Vict. c. 77, s. 79.—21 & 22 Vict. c. 95, s. 16.—Where an executor, to whom power has been reserved, survives his acting co-executor, and does not appear to a citation, the grant will go as if his name had never appeared in the will, and the executors, if any, of the acting executor will be the representative of the original testator.

[S. C. 3 L. T. 178; 9 W. R. 40. Not applied, *In the Goods of Delacour*, 1874, Ir. R. 9 Eq. 86. Followed, *In the Goods of Reid*, [1896] P. 180.]

In this case Robert Noddings died in 1835, having made a will and codicil, and thereof appointed Henry Robinson, William Steward (the latter of whom died in his lifetime), and Jeremiah Giscard, executors. The will and codicil were proved in January, 1836, in the Prerogative Court of Canterbury, by Henry Robinson, power being reserved to Giscard. Henry Robinson died in July, 1850, leaving part of the estate of Robert Noddings unadministered, having made his will, whereof he appointed his wife, Hannah Robinson, and Henry Fisher executors, with a request that Fisher would act in the affairs of Robert Noddings, which he did till the death of Mrs. Noddings, the testator's wife. The testator left certain legacies to his wife absolutely, and gave to his executors and trustees all his ready money and securities for money, upon trust, to pay the interest to his wife during her life, and after her decease to sell securities, call in all sums, etc., and to pay to the **[16]** British and Foreign Bible Society £30, to the trustees of the Wesleyan Society at Ely £100, and the rest, residue, and remainder of his said moneys, to the treasurer or treasurers for the time being of the Wesleyan Methodist Missionary Society, in aid of their foreign missions.

Mrs. Noddings died in October 1859. The testator left no real estate, and no known next of kin. Jeremiah Giscard never intermeddled with the estate, and at the death of the testator was a debtor to it in the sum of £150. Giscard left England in 1853, and was supposed to be still living in North America among the Mormons. Before he left England he executed a power of attorney, whereby he appointed his sons his lawful attorneys, with general powers for the management of his estate, but without any powers relative to trusts.

At the instance of the treasurers of the Wesleyan Methodist Missionary Society, a citation calling upon Jeremiah Giscard, and the next of kin, if any, of Robert Noddings, etc., etc., was advertised, and citations were personally served upon Her Majesty's proctor, and on the attorneys, in this country, of Jeremiah Giscard. No appearance was entered to these citations, and Her Majesty's proctor declined to interfere.

Dr. Deane, Q.C., moved the Court to decree administration, with the will annexed, of the unadministered goods of Robert Noddings to Fisher, the executor of the testator's acting executor Robinson, or to the treasurers of the Wesleyan Methodist Missionary Society, as principal legatees in the will named. He referred to 20 & 21 Vict. c. 77, s. 79: "Where any person, after the commencement of this Act, renounces probate of the will of which he is appointed an executor, or one of the executors, the rights of such person, in respect of the executorship, shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such

---

(*a*) It is incorrectly stated, in the goods of Robert Noddings, p. 17, that "the grant will be made accordingly": the effect of that decision being, that the executor of the acting executor was the proper representative of the original testator, no fresh grant was needed, and none in fact was made. In similar cases it is understood that the citation is filed in the Registry when returned, and an entry of no appearance having been entered to it is made; it is presumed that on the production of an office copy of such entry, the Bank of England would consider the non-acting executor as accounted for, and recognize the continuance of the chain of executorship in the executor of the acting executor.

person had not been appointed executor." The provisions of this section are ex-[17]-tended by 21 & 22 Vict. c. 95, s. 16: "Whenever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate, and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease," etc.

Cur. adv. vult.

July 25.—*Sir C. Cresswell*: This was a question on the construction of two sections of the Probate and Probate Amendment Acts, referred to by Dr. Deane. Under the 79th section of the original Act, I think it must be taken as if the name of the renouncing executor had never been in the will at all; the effect of the 16th section of the subsequent Act seems to be to extend that provision to the case of a party cited, who will not renounce or take any step. This being so, the executor of the acting executor seems to be the proper representative of the original testator, when the surviving executor of the testator has been cited and does not appear, and the grant will be made accordingly.

CRISPIN *v.* DOGLIONI. August 1, 1860.—Interest to oppose a Will.—Judgment of Foreign Court.—Demurrer.—C., being ordered by the Court to declare his interest to sustain a testamentary suit in respect of certain moneys in English funds, alleged in his declaration, among other things, that by the law of Portugal the natural child of a man, not noble, dying intestate and a bachelor, is entitled to all the movable and immovable property of his father; and that C., in a certain suit of filiation and inheritance in the Portuguese Courts, to which the defendant of the present suit and her husband were defendants, obtained a decree declaring C. to be the natural son of H. C., and to be entitled to his property, and ordering the defendants to deliver to C. all property of H. C., [18] which they had in their possession. The defendant, by her plea, traversed many of the averments of the declaration, but admitted that the above judgment of the Portuguese Courts was in fact obtained.—C. replied and demurred, on the ground that the judgment admitted by the plea established his interest. On argument on the demurrer, the Court—Held, that the judgment as pleaded was not conclusive as to C.'s interest to sustain a suit in this Court, overruled the demurrer without costs, and directed the parties to prove their respective cases.

[S. C. 29 L. J. P. 130; 3 L. T. 179; 9 W. R. 19. See further p. 493, post; 3 Sw. & Tr. 41, 96.]

This case, in its present stage, came before the Court on demurrer. The defendant was one of the surviving residuary legatees in the will of Henry Crispin, deceased; and the plaintiff, by order of the Court, was directed to file a declaration, setting forth his interest to be admitted a contradictor of the will. The plaintiff's declaration alleged accordingly:—

1. That Henry Crispin, late of Faro, in Portugal, was, throughout his life and at the time of his death, domiciled in Portugal.

2. That Henry Crispin died a bachelor and intestate, in 1828, leaving the plaintiff his only and natural child.

3. That the plaintiff was born at Faro, and had all his life been domiciled in Portugal.

4. That by the law of Portugal, when a man, not noble, dies a bachelor, intestate, leaving one natural son only, such son is entitled to succeed to the whole of his father's movable and immovable property.

5. That Henry Crispin was not noble by the law of Portugal.

7. That, under the circumstances, the plaintiff was entitled to the whole of deceased's movable and immovable property; and, amongst other things, to his share in certain stock in the English funds.

8 and 9. That the plaintiff obtained a decree in Portugal, in a suit of filiation and inheritance in the Court of First Instance, at Faro, having jurisdiction, etc., to which Maria Do-[19]-glioni the defendant, and her then husband, were defendants, and had appeared to the suit.

10. That the plaintiff was declared by the judgment of the Court to be the natural son of Henry Crispin, and entitled to his property, and that the defendants were ordered to deliver over to the plaintiff the property of Henry Crispin which was in their possession.

11. That by the law of Portugal the first judgment, unless reversed, was conclusive against all persons, and thereby the plaintiff became entitled to all the property of Henry Crispin.

And further alleged that the defendants carried the cause before the highest Court of Judicature in Portugal having jurisdiction, etc., which confirmed in all respects the judgment of the Court below.

The defendant, Maria Doglioni, by her plea, denied the Portuguese domicil of Henry Crispin; admitted that he died at Faro a bachelor, but denied that he died intestate; denied that the plaintiff was his only and natural child; denied that the plaintiff was born at Faro, and is a domiciled Portuguese subject; denied the law of Portugal to be that the natural son of a man not noble, etc., was entitled to the movable and immovable property of his father; denied that Henry Crispin was not noble by the law of Portugal; denied that the plaintiff at the time of Henry Crispin's death became entitled to his property, including his share in certain English funds; admitted that plaintiff in 1852, being then resident but not domiciled in Portugal, commenced a cause of filiation and inheritance in the Court of First Instance at Faro, against the defendant and her husband, then resident in Portugal, and resident, but not domiciled, within the jurisdiction of the said Court; denied the jurisdiction of the Court of First Instance; admitted that she appeared and defended the suit, and that the plaintiff recovered judgment therein, and was by the sentence of the Court declared to be the natural son of Henry Crispin, and entitled to his property, and that she and her **[20]** husband were ordered to deliver over the property of Henry Crispin which was in their possession; denied the finality of the judgment unless reversed, as against all persons and for all purposes whatsoever, or that the plaintiff thereby became entitled to all the property of Henry Crispin; denied that the said judgment remained of full force and effect; admitted the appeal mentioned in the declaration, but denied the jurisdiction of the Courts; denied that the Supreme Court at Lisbon confirmed in all respects the judgments of the Courts below; alleged that after the judgment of the Supreme Court the plaintiff instituted proceedings in the Court of First Instance, at Faro, called process of liquidation, against the defendant and her husband, and that by order of the said Court attachment and sequestration on all the property of the defendants was awarded by way of security to the plaintiff for the succession claimed by him, but that the order was reversed with costs by the Court of Appeal on the 10th of August, 1857; that no further proceedings had been taken by the plaintiff in the said process of liquidation; and that by reason of the last-mentioned order of the Court of Appeal, the said judgment of the said Court of First Instance at Faro was without force and effect in Portugal; alleged that the said first-mentioned judgment recovered by the plaintiff in the said Court at Faro is, and ought to be deemed and taken to be, of no legal force and effect in this suit as against the said defendant, by reason of the same being contrary to law and justice, and of being on the face of it bad in law.

To this plea the plaintiff obtained leave on summons to reply and demur, and thereupon joined and took issue upon the several allegations in the plea, and demurred thereto on the ground that defendants therein admitted that judgment had been given in plaintiff's favour in the Portuguese Court, and that it therefore appeared on the face of the plea that plaintiff had sufficient interest to enable him to put the defendant on proof of any will.

**[21]** The demurrer was argued on July 30 by

Dr. Phillimore, Q.C., and Hannen for the plaintiff. The question is solely whether we have sufficient interest to appear as contradictor of the will? We submit that the judgment of the Portuguese Court, admitted as it is by the defendants' plea, sufficiently establishes that. It has always been admitted that the slightest interest justifies opposition to a will (*Kipping* v. *Ash*, 4 N. C. 177).

Dr. Spinks and Cleasby against the demurrer. The object of this suit is different from that in which the foreign judgment relied upon was given, and the terms of that decree do not profess to put the plaintiff in possession of any property out of Portugal, or indeed of any property but such as was in the possession of the defendants.

Cur. adv. vult.

August 1.—*Sir C. Cresswell*: The question raised in this case was whether the plaintiff upon his declaration had stated facts, of which so much was admitted upon the defendant's plea as to satisfy the Court that the plaintiff had sufficient interest to

entitle him to be a party in this suit for the purpose of contesting the will propounded by the defendant.

It appeared that the defendant, Madame Doglioni, set up the will of a person who, I believe, was a foreigner; and that Crispin, the plaintiff, wishing to dispute the will, was ordered to declare and shew his interest. He has declared in this manner: that he is the natural child of the deceased, who died domiciled in Portugal a bachelor and intestate; that the deceased was not noble by the law of Portugal; and that by that law, if a person not noble dies intestate, leaving a natural child, that natural child is entitled to his personal and even to his real property. He then goes on to allege that a certain suit was commenced by him in one of the Portuguese Courts, which is called a suit of filiation and inheritance, but he does [22] not further explain the nature of it, or the questions which were necessarily involved in it.

It is admitted by the plea that the present defendant, Madame Doglioni, appeared to that suit, and contested the matter in two or three Courts, and that the judgment in favour of Crispin was affirmed in the last Court to which an appeal could be made. All the allegations of the declaration are traversed in the plea except the fact of the suit and the judgment. It is also alleged in the plea that that Court had not jurisdiction over the question; that it will appear on the face of the judgment and the proceedings that that judgment is void from its being contrary to law; and other matters of that sort.

But, assuming that I must take the judgment as it stands, there is certainly nothing but that judgment to shew an interest in the plaintiff Crispin, for all the other matters are traversed as questions of fact.

What, then, am I bound to call upon the plaintiff to prove in order to establish his interest? Dr. Phillimore quoted a case (reported in 4 Notes of Cases and 1 Robert.) which was decided by the late Sir Herbert Jenner Fust, in which he held that a possibility of interest was sufficient to enable a party to appear as the contradictor of a will. It occurred to me at the time, that the possibility of interest alluded to in that case did not apply to the possibility of a party filling a character which would give him an interest; but to the possibility of his having an interest in the result of setting aside the will. The status of the party alleging an interest, and the right from that status to come in and dispute the will, provided there was any personalty to dispose of, was not there disputed. Here the whole question is, whether this person has any status which authorizes him to come in and dispute the will. As a natural child of his putative father, he has by our law no right at all to come in, and he must shew that by the law of Portugal he has the right to come in and to be in the condition, with refer-[23]-ence to personal property of the deceased, of a legitimate son. But here there is nothing to shew that except this judgment, and the judgment does not shew that that question was involved in the suit. I cannot, therefore, think that that is sufficient. I think he is bound to make out once, and perhaps once for all, as far as this Court is concerned, that he is the natural son, that his father was domiciled in Portugal, and that by the law of Portugal, his father dying intestate and leaving no other child, he is entitled to come in. All that he must establish once. When he has established that once, and is admitted a contradictor, I do not know that it will be necessary to establish it again, so far as this Court is concerned; but not having established it by evidence, I cannot admit him as contradictor. I do not say that in Portugal he has not that right, because it is possible that such may be the law of a foreign country; but he must prove that the law is as he alleges it to be.

I think, therefore, the demurrer to the plea must be overruled, and that the parties must go on to prove their case. I do not say what would have been the result if the judgment had been pleaded in a different manner, so as to shew that the very question had arisen, and that the point had been determined in the Court of Portugal.

Dr. Spinks: Will your Lordship overrule the demurrer with costs?

*Sir C. Cresswell*: No, I think not.

Fielder, Proctor for the plaintiff.

Dyke and Stokes, for the defendant.

[24] LANEUVILLE *v.* ANDERSON AND GUICHARD (intervening). November 7, 1860.—Wills.—French domicil.—Executorship according to French Law.—Law of country of domicil.—Costs.—By the French law, the will of a domiciled Frenchman executed in a foreign country according to the forms required by

the law of that foreign country is a valid will.—The appointment by a domiciled Frenchman in an holograph will of an "exécuteur testamentaire" is subject to the rules of the French law, even as respects personal property out of France; and where the French Court had decreed that the time limited by the French law for the execution of such an executorship had passed, and that the executor had no more right to intermeddle in the estate of the testator, and that the parties beneficially entitled were the only persons who had a right to intermeddle, the Court held itself bound by such decree, and refused to grant probate (with respect to personalty in England) to such an executor.—Semble, the law of the country of the domicil at the time of death as to what constitutes the last will of the deceased is binding on other countries.

[S. C. 30 L. J. P. 25; 6 Jur. (N. S.) 1260; 3 L. T. 304; 9 W. R. 74.

Explained, *Hood* v. *Lord Barrington*, 1868, L. R. 6 Eq. 224.]

This was a question respecting the testamentary papers of William Anderson, deceased.

His nephew, William Anderson, one of the parties to the cause, relied upon a will duly executed in the English form, and bearing date the 24th of June, 1843, of which he was left sole executor, and, with the exception of a legacy of £2000, sole devisee and legatee, in case he survived the testator.

The other testamentary paper was in the handwriting of the deceased, and in the following words:—

"Ceci est mon Testament.

"Je, soussigné Guillaume Anderson, rentier, demeurant à Nogent-sur-Marne, déclare que j'institue pour ma légataire universelle Madame Catherine Burthé, veuve de feu M. Jean Louis Titon Laneuville, demeurant aussi à Nogent-sur-Marne, dans la maison que nous habitons ensemble et ce pour lui donner une preuve de ma reconnoissance des bons soins **[25]** qu'elle a eu pour moi en France, le tout sans rien excepter et notamment pour tous les effets mobiliers et tous les biens meubles, que je possède en France. Fait à Nogent-sur-Marne, ce 26 Janvier, 1848.

"GUILLAUME ANDERSON.

"P.S. Je soussigné déclare nommer pour mon exécuteur testamentaire M. Guichard, avocat, demeurant à Paris, rue Meslay, No. 58. Nogent-sur-Marne, ce 26 Janvier, 1848.

"GUILLAUME ANDERSON."

This latter will was propounded by Madame Laneuville in the year 1850, in the Prerogative Court of Canterbury, when the learned Judge directed the issue to be confined in the first instance to the question of the domicil of the deceased. And in March, 1853, Sir John Dodson, the then Judge of the Prerogative Court, pronounced in favour of the French domicil, concluding his judgment in the following terms:—"I am of opinion that this gentleman, having lost, in the first instance, his domicilium originis, having acquired an English domicil, and having afterwards given up that by selling his furniture, dismissing his servants, parting with his house in England, by going to France, where he fixed his abode for the last years of his life, acquired a French domicil which he never lost. I must therefore pronounce that this gentleman, at the time of his death, was domiciled in France."

This decision was confirmed on appeal to the Judicial Committee. (*Anderson* v. *Laneuville*, 9 Moo. P. C. 325.)

The subsequent proceedings before the French tribunals, and the substance of the pleadings on which the case now came before the Court, are sufficiently stated in the judgment.

This case was argued by Mr. Bovill, Q.C., Mr. T. W. Greene, Q.C., and Dr. Spinks, for Guichard, as executor of the will of 1848.

Sir Hugh Cairns, Q.C., and Dr. Twiss, Q.C., for Mr. Anderson.

**[26]** Dr. Deane, Q.C., and Mr. Godfrey Lushington, for two of the children of Madame Laneuville, as her heirs and personal representatives.

Mr. Eddis, for Eli Laneuville, the third child of Madame Laneuville.

July 14 and 15.—Mr. Bovill stated that there were two questions before the Court. First, is the will of 1848 a good will, of which probate should be granted in England as against Anderson? Secondly, if that is answered in the affirmative, is Guichard the party entitled to probate? Since the decision of the Privy Council on the point of domicil, it is clear that the deceased's will must be made according to French law. It is admitted that the will of 1848 is valid by the law of France; but the extent of

the will, whether it applies to property out of France, is the first point contested; on that point the judgment of the French court on the 8th of December, 1857, as against Anderson, is conclusive; in that suit the heirs of Madame Laneuville and Anderson were the parties. The will of 1848 consists of two parts—the first dispositive, the second containing the appointment of executor. Suppose the will had been in terms confined to property in France, and then, by a codicil made by a domiciled Frenchman, an executor appointed; such executor, it is submitted, would be entitled to probate in England. Upon the construction of the will, however, we contend that it is not confined to property in France: the construction of the document must be according to French law. (Story's "Conflict of Laws," s. 479, a; Westlake on "Private International Law," s. 329.) As to Guichard's right to probate as executor, generally, where a person is named executor, and is willing to act, there is no power, according to the law of England, of substituting anyone else. Take this as a will made by a Frenchman, intended to act on property in this country; the nomination of executor must be supported **[27]** here; the Court has no jurisdiction to vary that, though the dispositive part of the will may not, according to the law of this country, take effect. (*Thornton* v. *Curling*, 8 Sim. 310.) But on behalf of the representatives of Madame Laneuville, it will be said that Guichard's executorship has expired, and that the judgment of the Court of Cassation of the 19th of April, 1859, declared this to be the case; that in France an executor appointed by a testator has certain duties and obligations imposed, one of which is to render an account at the end of the year, and bring his administration to a close; and an executor may be appointed with seisin or without. (Code Civil, arts. 1025-6, 1031.) Here, it will be said, is an executor without seisin; the Laneuvilles are in entire possession of the French property, and Guichard's executorship is no more. But we submit that that rule of French law has no application in a foreign country; the judgment of the French courts has no effect on personal property in other countries. (Story's "Conflict of Laws," ss. 512-14, 525.) Each country must apply its own laws to protect assets within that country, so the duration of the executorship must be regulated by the laws of each country.

Monsieur Mallampert, Doctor of Law and Advocate of the Imperial Court, was then examined on the points of French law contended for on behalf of Guichard.

Dr. Deane, Q.C., for the Laneuvilles.—Our points are, that the testator died a domiciled Frenchman; that the will of 1848 was decreed by the French courts to be his sole last will and testament, and in that Madame Laneuville is named universal legatee; that by the French law Guichard is no longer executor. From the fact of the French domicil, it follows that the French courts have seisin of the will. What have the French courts decided in the matter? Have they decided which is the last and only subsisting will of the deceased Frenchman, and is their decision binding on the Court? **[28]** (*Bremer* v. *Freeman*, 10 Moore P. C. 306; Story's "Conflict of Laws," s. 479, g; 1 Jarm. on Wills, 3rd ed. 1844, p. 3; *Enohin* v. *Wylie*, 1 Swab. & Tris. 118; *De Bonneval* v. *De Bonneval*, 1 Curt. 857.) But on the construction of the will of 1848, according to the rules of law obtaining in this country, we submit that the authorities go to this extent, that a general bequest is not limited or affected by a subsequent enumeration of particulars. As to what words will carry general personal estate, see Jarm. on Wills, p. 700. As to Guichard's claim to probate, here is the will of a domiciled Frenchman, written in the French language. For the legal effect of both the expressions "légataire universelle" and "exécuteur testamentaire," recourse must be had to the French law. (*In the Goods of the Countess Da Cunha*, 1 Hagg. 237; *In the Goods of Anne Dormoy*, 3 Hagg. 767; *In the Goods of David Rogerson*, 2 Curt. 656.)

Sir H. Cairns, for Mr. Anderson, relied on the following propositions:—First, that at the date of the will of 1843, Anderson, the testator, was a domiciled Frenchman, and that will was and is valid according to the law of France; secondly, that the will of 1843, containing particular legacies in favour of Mr. Anderson, was not, quoad hæc, revoked by the will of 1848, even assuming that will to institute a universal legatee according to the meaning of those terms; but, thirdly, that the will of 1848 instituted, not an universal, but a legatee by universal title, i.e. for all the personal property in France; fourthly, that the French judgment of the 8th of December, 1857, is examinable by this court, and constitutes no bar to Mr. Anderson's rights in this court. And even if the Court should, on the construction of the instruments, feel any doubt as to the first and second propositions, it will admit both documents to

probate, so as to enable the question of construction to be raised in the courts whose more peculiar province it is to determine questions of construction. The fact asserted in the first proposition is proved by the remarks **[29]** made on the appeal to the Privy Council from Sir John Dodson's judgment, 9 Moore P. C. 284, 355. The law applicable to that fact is to be found in Article 999 of the Code Civil: "Un Français qui se trouvera en pays étranger pourra faire ses dispositions testamentaires . . . ou par acte authentique avec les formes usitées dans le lieu où cet acte sera passé." As to the second proposition, the construction of the will of 1843 must, it is submitted, be according to the rules of English law; but if this be not so, at least the rules of interpretation applicable are common to both laws, as may be seen on referring to articles 1035-6 of the Code. The terms used in the will of 1843 are specific, and constitute particular legacies, besides the jus universum; after leaving a legacy of £2000 to another William Anderson, a cousin, it proceeds: "And as to, for, and concerning my estates of (naming them), containing by estimation 783 acres, be the same more or less, severally situate in the barony of Connaught, in the county of Limerick, and all other my estates of freehold, copyhold, and for years, messuages, lands, tenements, hereditaments, and real estates whatsoever and wheresoever situate, etc., and also all my moneys and securities for money and capital, or stock in the public funds, and all my personal estate, goods, chattels, credits and effects (subject nevertheless to, and they are hereby expressly charged with and made liable to the payment of the said legacy of £2000, and my just debts, funeral and testamentary expenses), I give, devise, and bequeath the same, and every part and parcel thereof respectively, according to the nature or quality thereof respectively, to my nephew, William Anderson, his heirs, etc., to and for his and their own use," etc. The learned counsel here cited the following cases:—*Clarke* v. *Butler*, 1 Meriv. 304; *Shuttleworth* v. *Greaves*, 4 Myl. & Cr. 35; *Weld* v. *Acton*, 2 Eq. Cas. Abr. 777; *Freeman* v. *Freeman*, 5 De G. & M. and G. 704. The French law, which we shall prove, is stated in Dalloz, Jurisprud. Génér. (18th of July, **[30]** 1831), 186. We contend that the three kinds of legacy there mentioned can coexist.

Argument resumed.—The three sorts of legacy are described in the Code. Art. 1002: "Les dispositions testamentaires sont ou universel, ou à titre universel, ou à titre particulier." Art. 1003: "Le legs universel est la disposition testamentaire par laquelle le testateur donne à une ou plusieurs personnes l'universalité des bien qu'il laissera à son décès." Art. 1010: "Le legs à titre universel est celui par lequel le testateur lègue une quote-part des biens dont la loi lui permet de disposer, telle qu'une moitié, un tiers, ou tous ses immeubles, ou tout son mobilier, ou une quotité fixe de tous ses immeubles, ou de tout son mobilier. Tout autre legs ne forme qu'une disposition à titre particulier." Art. 1014: "Tout legs pur et simple donnera au légataire, du jour du décès du testateur, un droit à la chose léguée," etc. A universal legacy in a later will is not incompatible with, and therefore does not of necessity revoke, particular legacies in a prior will. Dalloz, Jurisprudence Générale, vol. for 1831, p. 186; the Nismes case, February, 1809; Sirey, vol. xxviii. p. 128; the Paris case, November 8, 1830; Dalloz, vol. for 1833, p. 214; the Grenoble case, June, 1827; Sirey, vol. xxviii. p. 188; Case decided, February 25, 1836; Dalloz, vol. for 1836, p. 46. On the third proposition, that the will of 1848, in fact, only constitutes legacies à titre universel, i.e. in respect of the property in France: on this question of construction, how far is the foreign law to be the guide? It is to guide the Court as to technical words and their meaning, but when that is ascertained, this Court is as competent to construe as the Court of the domicil is. The cases cited under the fifth proposition of Wigram's Extrinsic Evidence shew how facts may be called in aid of construction. In the present case we have the fact, that the testator's connection with his relations was kept up after his residence in France. His real property remained tied up by the latter provisions of the will of 1843; **[31]** he was in correspondence with William Anderson till 1849. As to the terms of the will of 1848, there are no words by which the testator expresses an intention of disposing of all his property; the testator must be taken to have known that he could not by a holograph French will dispose of real property out of France. Without saying that the will of 1848 is that of an illiterate man, it is certainly that of an illiterate Frenchman. On the fourth proposition as to the conclusiveness of a foreign judgment, it is submitted that a foreign judgment is not binding: first, if it offends against principles of international law; secondly, if a foreign judgment professing to

proceed on principles of English law, proceeds erroneously on those principles; thirdly, if error be apparent on the face of the judgment; fourthly, if it be against common sense and reason; fifthly, if the Court had no jurisdiction; sixthly, if the object of the suit on which the foreign judgment was rendered be different from the object of the suit in which the foreign judgment is relied upon (*Reimers* v. *Druce*, 23 Beav. 145; *Castrique* v. *Imrie*, 8 W. R. 344: Wheaton on International Law, sixth edit. p. 205).

July 18.—M. Chevalier de Rosay, formerly practising as an advocate in France, and M. Jules Favre, were then examined as to the French law relied upon on behalf of Mr. Anderson.

At the conclusion of the arguments,

Cur. adv. vult.

November 7.—*Sir C. Cresswell*: This suit was commenced in the Prerogative Court of Canterbury, by Catherine Laneuville, otherwise Burthé, under the following circumstances:—William Anderson died at Paris, on the 23rd of December, 1849, leaving a will made at Nogent-sur-Marne on the 26th of January, 1848. This will was duly registered, and possession of the universal legacy bequeathed to Madame Laneuville was awarded to her by the Civil Tribunal of the First Instance of the Seine on the 9th of January, 1850. Madame Laneuville **[32]** then took steps to prove the will in the Prerogative Court; Anderson, the present defendant, having appeared to the warning of the caveat, she brought in an allegation containing many articles: amongst others the twenty-second which stated the factum of the will made and executed so as to be good according to the law of France, and others, stating facts tending to shew that the testator, who died on the 23rd of December, 1849, was then and at the date of the will domiciled in France. The defendant William Anderson, a nephew of the deceased, brought in an allegation, the nineteenth article of which stated the factum of a will bearing date the 24th of June, 1843, executed as required by the statute 1 Vict. c. 26, and of which he was appointed sole executor. The allegation contained many articles stating, inter alia, facts tending to prove an English domicil.

The Judge of the Prerogative Court ordered both these allegations to be reformed, leaving in each of them the statement of the factum of the will, and the articles relating to domicil, striking out all the rest, so as to confine the inquiry to the question of domicil. Evidence was taken on these allegations, and on the 11th of March, 1853, Sir J. Dodson, then Judge of the Prerogative Court, decided that the testator, at the time of making his will in 1848 and of his death, was domiciled in France.

William Anderson appealed to the Queen in Council, and by advice of the Judicial Committee the decision of Sir John Dodson was affirmed on the 11th of December, 1854, and the cause remitted with all incidents.

This decision having been pronounced, Madame Laneuville, to whom possession of the property of the deceased, as a universal legacy under the will of the 26th of January, 1848, had been awarded as before stated, instituted proceedings before the Judge of the First Chamber of the Civil Tribunal of the Seine, and cited Mr. Anderson and Guichard, the former to hear the will of 1843, if it should be produced, declared to **[33]** have been revoked, and that the will of the 26th of January, 1848, should be executed according to its form and tenor; and that consequently, and in conformity with the ordinance awarding possession, dated the 9th of January, 1850, Madame Laneuville should be and remain entitled to take real and effectual possession of all the real and personal property of the testator, wheresoever situate. Guichard was cited to hear it declared that he had no right to meddle with the affairs of the said succession under any pretence whatever, and to hear himself forbidden to intervene therein in his pretended quality as executor. Both Guichard and Anderson appeared, and excepted to the jurisdiction of the Court, the latter on the ground that the testator was a foreigner, and not domiciled in France. Madame Laneuville insisted that the exception was invalid, and that the Court ought to declare effective in France the decision of the Prerogative Court and the Privy Council. The Court, on the 14th of July, 1855, decided in favour of its jurisdiction, and adjourned the cause for a fortnight, for the pleadings on the main question. This decision was, on appeal, affirmed by the Imperial Court of Paris on December 11, 1855.

After this, Madame Laneuville died, leaving as heirs Madame Bovey and Eli and Ferdinand Louis de Laneuville, her three children, and having made a will appointing

one ——— executor. Disputes arose between the two brothers respecting the validity of a legacy left by Madame Laneuville to her daughter Madame Bovey, and that caused a suspension of the litigation of the Anderson-succession. But the suit was resumed in the Tribunal of the First Instance by Madame Bovey and her husband and brothers in April, 1856, as representatives of Madame Laneuville. Certain conclusions were presented on their behalf; none were presented on behalf of Anderson on the main question, and he was declared in default. The Court, on the 9th of May, 1856, gave a judgment, that the suit as against Anderson should be disjoined from that as against Guichard; and, as to the latter, after reciting **[34]** that the widow Laneuville was appointed universal legatee of William Anderson, by the terms of his holograph will, which was registered at Paris on the 3rd of January, 1850, that by this same will Guichard was appointed executor, but without seisin; that by ordinance dated the 9th of January, 1850, rendered by the president of this tribunal, Madame Laneuville (there being no privileged heirs of William Anderson) was awarded possession of the said universal legacy; that it was decided by the Prerogative Court of Canterbury and the Privy Council, that William Anderson was domiciled in France when he made his will, from which it followed that he had to make it according to the form required by the country where he then was, and that the tribunals of the same country are competent; that the nature and extent of the office of executor conferred on Guichard must be estimated by French law, and not by English statutes, even for property situate in England; that the holograph will of the testator did not give seisin to Guichard of the property left by him; and if the quality of executor can in certain circumstances continue beyond one year, that quality cannot extend in an indefinite manner and without utility to the realization of the intention of the testator; that Madame Laneuville was sole legatee, and is now represented by her heirs, who alone have an interest in prosecuting the execution of the will of Anderson, and that the assistance of Guichard becomes at this time without an object, etc. Ordered, that the suit against William Anderson, the nephew, be disunited and separated from that against Guichard, to be pronounced on later; declared as expired the executorship of the succession of William Anderson, which he (Guichard) held by virtue of the holograph will dated the 26th of January, 1848; that he has consequently no right or quality to meddle in any way whatever with the affairs of the succession, either in France or England, or to receive any sum or security appertaining to the succession, and especially funds invested in the Bank of England; that such right ex-**[35]**-clusively belongs to Messrs. Laneuville and Madame Bovey, the sole representatives of Madame Laneuville, universal legatee of William Anderson, etc., and condemned Guichard in costs. This judgment was affirmed by decree of the Imperial Court of Paris, 23rd of June, 1857. Guichard then appealed to the Court of Cassation, and by decree of the 19th of April, 1859, that appeal was rejected. On the 8th of December, 1857, the Civil Tribunal of the First Instance gave judgment in the suit against Anderson, and decreed that the alleged will of the 24th of June, 1843, was revoked by the will of the 26th of January, 1848, and is considered as null and non-existing; that the will of the 26th of January, 1848, shall alone be carried into effect according to its form and tenor; that, consequently, the heirs of Madame Laneuville shall be put in possession and enjoyment of all personal and real property belonging to the succession of William Anderson. Anderson did not appeal against this decision.

In this country no step was taken between the time when the order was made by the Privy Council remitting the suit, and the 31st of January, 1857, when the remission under seal was brought in. On the 9th of February, 1857, Guichard intervened. On the 18th of April, 1857, Guichard prayed for probate of the will of January 26, 1848, which was opposed by Anderson, who prayed to be heard on his petition, and he was ordered to bring in his act on petition on or before the second session of Easter Term. At the first session of Michaelmas Term, 1857, Guichard's proctor not having returned the act on petition, Anderson's proctor was assigned to bring in the act next Court, in order to the same being heard ex parte. At the second session of Michaelmas Term, Guichard's proctor brought in the act. On the 11th of January, 1858, this Court first came into existence, and, by operation of the statute by which it was created, the cause was transferred to the new tribunal. In June 1858, an application was made to the Court to hear Anderson's petition ex parte, upon the ground that **[36]** the Judge of the Prerogative Court had made an order that it

should be so heard. It was ascertained that some misapprehension on the subject had existed, and the cause stood over in order that the real position of the parties might be ascertained, and the question to be ultimately decided raised in such manner as would enable the Court to deal with it on the merits; and in June 1858, administration with the will of Madame Laneuville annexed was granted by this Court to Ferdinand Laneuville and Madame Bovey, the executor having renounced. On the 4th of February, 1859, Ferdinand Laneuville and Madame Bovey appeared as representing Madame Laneuville, the original plaintiff. In March an order was made by consent of all parties that the affidavits filed and the evidence taken in the earlier stages of the cause should be read as evidence in this suit, saving all just exceptions.

On the 19th of March, 1859, Guichard filed a declaration alleging that William Anderson, a British subject, who died on 23rd of December, 1849, at Paris, a domiciled Frenchman, made his last will and codicil thereto, both bearing date the 26th of January, 1848, and by the codicil appointed Guichard sole executor; that the same were duly executed according to the law of France and were by that law valid and effectual; that they have been respectively duly proved in France, and by the competent tribunal pronounced to be valid and effectual. The defendant Anderson pleaded that the documents mentioned in the declaration were only a partial or limited will, confined to certain property situate in France, out of the jurisdiction of this Court. He then pleaded the will of June 1843, and that he, the defendant, was heir-at-law and sole next of kin of the deceased; and further, that by and according to the law of France the appointment of Guichard as executor by the alleged codicil was not an absolute and unlimited appointment, and that the same had expired before the commencement of the proceedings in this Court, and that Guichard was not at such time entitled to have probate of **[37]** the alleged documents, or either of them, or administration of the personal estate of the deceased, and then averred the decision of the Court of First Instance, and that it was affirmed on appeal by the Imperial Court of Paris. Ferdinand Laneuville and Madame Bovey pleaded the death of the testator, the will and codicil made on the 26th of January, 1848; that Guichard, in May 1856, by the law of France, and by orders and decrees of competent tribunals in France, ceased to be and is not entitled to probate of the will and codicil; that the universal legatee, Madame Laneuville, died in January 1856, and that the defendants Ferdinand Laneuville and Madame Bovey are her personal representatives both in England and in France. Eli Titon Laneuville, the third child of Madame Laneuville, appeared in July 1859, and pleaded the will made in France, and prayed probate to Guichard. To the plea of Anderson, Guichard replied that the will made on the 26th of January, 1848, was not a limited will, disposing only of property in France, but disposing of all the testator's property wherever situate, and that it had been so held by the Court of First Instance; secondly, that if the will of the testator of the 24th of June, 1843, was originally valid, it was revoked as to all property wherever situate by the will of the 26th of January, 1848, and that it had been so decided by a formal decree of a competent Court in France; thirdly, that his appointment as executor had not by the laws of France expired, that at the commencement of this suit he was entitled to probate, and that the French Court had not decided that he was not entitled to probate in England; fourthly, that it was not competent to a French Court to limit the powers or regulate the duties of an executor in England, and that if the French Courts have assumed to pronounce that Guichard's functions as executor have expired in England, such decisions are not by the law of England or by the law of nations binding on the Court of Probate. To the plea of Ferdinand Laneuville and Madame Bovey he replied, admitting the will of the 26th **[38]** of January, 1848, but denying that his title as executor had expired; secondly, that, although administration with the will of Madame Laneuville annexed had been granted to Ferdinand Laneuville and Madame Bovey, that will was void by the law of France; no evidence was given to support this allegation, and it need not be further noticed. Anderson rejoined, taking issue on the allegations of the replication, and averring that the allegations of the decisions of the French Courts were irrelevant to the merits of the case.

In this form the record was set down, but at the hearing Anderson obtained leave to amend his second plea by averring that at the date of the will of June 1843 the testator was domiciled in France, and that the will executed in England, with the forms required by the law of England, was valid by the law of France. Guichard

traversed these averments. The case occupied the attention of the Court for several days. In addition to the evidence taken in the Prerogative Court, a good deal of parol evidence was given, and the several decrees of the French tribunals mentioned in the pleadings were put in, and the whole case was very fully and ably argued for all parties. The following appear to be the material points raised for the consideration of the Court: first, whether the testator was domiciled in France at the date of the will of 1843, so as to render that a valid will, and entitled to probate if not revoked; secondly, whether that will was revoked by the will dated the 26th of January, 1848; thirdly, whether this Court is bound by the decrees of the French Court on that point; fourthly, whether Guichard is entitled to probate of the will of 1848, and in this question is included the effect to be given to the decrees of the French Courts, declaring that his title as executor has expired.

The first substantial question in the case is, whether I have one or two wills to deal with, and that depends upon whether the testator had become domiciled in France before the will of 1843 was made: if he had, the evidence proves that the **[39]** will was valid by the law of France; if he had not, it became inoperative as to personal property upon the subsequent change of domicil. This point was not much discussed at the Bar; the evidence taken in the original suit furnishes arguments on both sides. But it seems to me that the reasoning of Sir John Dodson, which was approved and adopted by the Judicial Committee, is applicable to this question, and shews that the domicil had then been changed. I must therefore treat each will as good when made, and as continuing so, unless the first was revoked in whole or in part by the second. This is the next question to be considered.

On this point it was contended for the Laneuvilles and Guichard, that the second will in terms disposed of all his property in a manner at variance with his former will, which it therefore revoked by implication, though not expressly; and further, that on this point the Court ought to adopt the decision of the French tribunal, to which it properly belonged to decide what was the last will of a domiciled Frenchman. On the other hand, it was contended that the second will, read by itself, was confined to property in France; that the words "légataire universelle" were to be read in connection with "en France le tout sans rien excepter et notamment," etc., and that so read the will evidently related to French property only. This point gave rise to much ingenious criticism on the words of the will, and on the apparent imperfection of the testator's acquaintance with the French language. But I must assume that the testator knew the meaning and effect of the words which he used. I must ascertain as well as I can the meaning of those words, and assume that the testator intended that they should take effect according to their primary and legal sense, unless he has by other words in the same will, or in some other will to be considered with it, manifested a contrary intention.

As to the primary and legal sense and operation of the words found in this will, parol evidence was given by some **[40]** distinguished members of the legal profession in France. I take the result of that evidence to be that the words "légataire universelle," taken by themselves, would have the effect of making Madame Burthé legatee of all the testator's property; but that if they are preceded by specific legacies or bequests, giving in general terms any entire share or portion of the testator's property, the "legs particulier," or "legs à titre universel" of the code, then the words "légataire universelle" would be equivalent to "residuary legatee," and would not be incompatible with other parts of the will; that the same would be the effect if a first will gave specific legacies, and made no "légataire universel," and a second will instituted a "légataire universel"; the two would not be incompatible, the general expression in the second would be explained and controlled by the first. Again, if a first will gave specific legacies, and appointed a "légataire universel," and a second will merely appointed a "légataire universel," he would be considered as substituted for the first, and the specific legacies given by the first will would not be revoked. But if a second will appointing a "légataire universel" contains other words shewing that the technical expression is used in its primary sense, and that the intention is to give all to the legatee, then it is incompatible with any different disposition in a former will, and of necessity revokes it. In order to entitle themselves to the benefit of this evidence, Sir Hugh Cairns and his juniors contended that the will of 1843 gave specific legacies to W. Anderson, since deceased, and to the present defendant, W. Anderson, and then made the latter residuary legatee. On the other hand, it was

said that the legacy to the W. Anderson, deceased, could have no effect, for he was dead, and the testator knew it, before the second will was made, and that as to W. Anderson the defendant, the testator had not given him specific legacies, but, intending to make him residuary legatee, enumerated the various items of his property, and, lest anything should have been omitted, added the general words.

**[41]** It seems to me unnecessary to express an opinion upon this somewhat difficult question, for, as I construe the second will, the testator has shewn on the face of it that he used the words "légataire universelle" in their primary and legal sense, and therefore they would be incompatible with the former will, and as to personal property, would revoke it. The testator begins by instituting Madame Burthé his "légataire universelle"; then, by words which must be read as in a parenthesis, he explains his reason for so doing, "et ce pour lui donner," etc. Sir Hugh Cairns contended that this parenthesis ends with the word "moi," and that the words "en France," which follow, must be read in connection with "le tout sans rien excepter," so as to confine the bequest to property in France. But that I think a very forced construction. The attentions of Madame Burthé had been bestowed upon him in France; why should we suppose that he did not intend to mention that? And if he meant to give all in France and nothing more, it is more natural to suppose that he would have written "le tout en France." Assuming that he was a bad French scholar, and might be expected to think in English, and then as it were translate into French, I cannot but think it more probable that he would use the latter expression if he meant to confine his bequest to property in France. Counsel on each side claimed the benefit of that which follows, "et notamment," etc. I can do no more than guess at the testator's reason for introducing these words; they have no legal operation in controlling the former part of the will, and I think furnish no foundation for any judicial opinion on the subject, and I forbear to indulge in guesses.

Upon this part of the case, then, I am of opinion that the testator has expressed an intention to constitute Madame Burthé his légataire universelle, so as to take all without any exception, and consequently that the will of 1843 was thereby revoked.

There was some discussion at the Bar as to the use which **[42]** might be made of the evidence taken in the Prerogative Court in construing the second will of the testator, and it was insisted for Mr. Anderson that, according to the fifth proposition maintained in Sir J. Wigram's excellent work on this subject, I ought to take into consideration that the testator had a large estate in Ireland and considerable personal property in England; that in the will of 1843 he shewed a great desire to keep the real property in his family as long as possible; that he continued to correspond with his nephew on good terms, and other matters of that nature. On the other hand, it was admitted that I ought to consider all the material circumstances by which he was surrounded, but that I could not take into consideration such parts of the evidence as were material only as tending to raise a presumption as to the intention of the testator: this I take to be the correct rule, and this latter portion of the evidence I have discarded, but if considered it would not alter my opinion as to the meaning of the will. There is another of Sir James Wigram's propositions, viz. the fourth, which appears to be somewhat applicable to the case: "Where the language of the will is not understood by the Court, the evidence of persons who understand the language in which the will is written is admissible, to inform the Court of the proper meaning of the words."

Now in this case the language of the will is not understood by the Court, and evidence was given as to the proper meaning of the words, i.e. a sworn translation brought into the Prerogative Court, as to the true meaning of which I have already given my opinion; but I understood the distinguished French advocate Jules Favre to say that the proper meaning of the words "légataire universelle" combined with "le tout sans rien excepter" was, that the legatee should take all without exception, but that in construing those words it must be remembered that the testator was imperfectly acquainted with the French language, and had probably been induced to use words the proper meaning of which he did not understand. **[43]** I am not at liberty to act on any such conjecture; no suggestion of that nature appears on the record, and I must assume that the testator understood the proper meaning of his own words. I find therefore in the evidence of Jules Favre a confirmation of my own opinion as to the meaning of the will.

The third point was much discussed at the Bar, viz. whether this Court is bound

by the decree of the French Court of the 8th of December, 1857. Anderson in his rejoinder averred that the French decrees pleaded were irrelevant to the merits of the case; counsel rather relied upon special objections to the decree of December 1857, than upon its general want of relevancy. It would be difficult to establish that the tribunals of the country of the domicil have not jurisdiction to decide upon what is or is not the last will of a testator in respect of personal property. In *De Bonneval* v. *De Bonneval*, 1 Curt. 856, probate was prayed of the will of the Marquis de Bonneval, deceased; this was opposed by his brother, on the ground that the testator was domiciled in France; that question was discussed on act on petition, and Sir Herbert Jenner Fust made this decree: "That the deceased at the time of his death was a domiciled subject of France, and that the Courts of that country are the competent authority to determine the validity of his will and the succession to his personal estate; and, as in the case of *Hare* v. *Nasmyth*, 2 Add. 25, the Court suspends the proceeding here as to the validity of the will till it is pronounced valid or invalid by the tribunals of France." Again, in *Price* v. *Dewhirst*, 4 Myl. & Cr. 82, Lord Cottenham said, "The law of the country in which the deceased was domiciled at the time of his death not only decides the course of distribution or succession as to personalty, but regulates the decision as to what constitutes the last will." And the evidence given in the present case shewed that the Court which decided what was the last will of the testator was also a Court of construction, and had jurisdiction to decide upon its meaning and operation.

**[44]** It is not necessary that I should say whether I consider this decree binding on this Court. If there is an appeal from my judgment, the decree will be before the House of Lords, and the parties who contend that it is binding may there, if necessary, have the benefit of that argument.

It remains then to be considered whether Guichard has a right to be treated as executor by this Court. His claim was very ably and forcibly pressed by his counsel, who contended that the decrees of the French tribunals could not affect that right; that the testator having selected Guichard as his executor, his rights as executor must be determined, with reference to the property in England, by the law of England; that the law of France could have no extra-territorial effect, and that the appointment of Guichard being general, and not for a limited time, this Court could not do otherwise than treat him as executor; that the Court had no power to set aside the choice of the testator, and give the execution of the will to another; that the power to select the party who is to administer the estate of a deceased person exists only where no executor is appointed, or where he has renounced, or where there is an intestacy. With regard to the assertion that the appointment of an executor in a French will is by law for a year only, the practice of the Prerogative Court was appealed to, the grant of probate of French wills having always been general; whereas, if the appointment was for a year only, the grant of probate should be limited to that time. The practice certainly has been as stated, and the argument founded on it is ingenious, and it may on future occasions give rise to questions not easily solved. But it is one thing to say that a party appointed in general terms is entitled to probate in terms as general, leaving the question of the determination of the authority conferred to be decided by matter subsequent, and another thing to say that when the time within which the functions of an executor should have been discharged has expired, he is nevertheless entitled to come to this Court and claim **[45]** probate. *Dormoy's case*, 3 Hagg. 767, is against him; and with reference to that right I think I am bound by the decrees of the French Courts which have been given in evidence. The will was that of a domiciled Frenchman, the succession to be dealt with was therefore French, and all personal property is by fiction of law in the place where the testator dies domiciled. The rights in England of an executor to whom probate has been granted by an English Court, must be regulated by English law, but the meaning and effect of the appointment of an "exécuteur testamentaire" in such a will as that made in France by a domiciled Frenchman is a question of French law. Seisin or possession of the property was not by such an appointment given to the executor, nor was the property vested in him; and it was by the proper authority given to the universal legatee. Under such circumstances, the Court of First Instance declared that the testamentary executorship which Guichard had of the succession of the testator had expired; that he had no right to interfere in any manner in the affairs of the succession either in France or in England, nor to receive any sum or effects composing such

succession; that such right belonged only to the representatives of Madame Laneuville, the universal legatee. This judgment was affirmed on appeal by the Imperial Court of Paris adopting the reasons of the former judges; a further appeal to the Court of Cassation was rejected by decree of the 19th of April, 1859. It was said that the recitals or grounds of that decree shew that the Court did not decide upon the question; but I do not so construe them; and it seems to me that it adopts the decision that Guichard's rights as executor had ceased. The French Courts, then, having decided that the office conferred upon Guichard had expired before he filed his declaration in this suit, upon what ground can I recognize him as still entitled to it? As granting probate here of a foreign will, the Court is auxiliary to the Courts of the testator's country. By granting probate to Guichard I should confer upon him a right to **[46]** intermeddle with and receive part of the succession in England, when three French tribunals have decided that, under the will of the testator, construed with reference to French law, he has no such right. Upon such a question of French law, I am bound to put faith in the tribunals of that country, and adopting their decision, I pronounce that Monsieur Guichard is not entitled to probate of this will.

November 14.—Dr. Deane, Q.C., moved for administration with the will of 1848 annexed, to the representatives of Madame Laneuville.

Dr. Twiss, Q.C., asked for Anderson's costs out of the estate. He was an executor under a previous will and next of kin.

Dr. Spinks asked for Guichard's costs out of the estate. Without him Madame Laneuville would not have proved her case; he, primâ facie, on the will was entitled to probate; his witnesses proved the will. There was an agreement between the parties that Guichard's renouncing his right as executor, in order to be examined in the original suit, should not prejudice his position as regarded the Laneuvilles. When the case came before the Court it was agreed that he should propound the will, and the declaration in fact was his. Further, by the argument and your Lordship's decision a new point of law was raised, viz. whether an executor named in a will can be set aside in an English Court of Probate by operation of foreign law.

*Sir C. Cresswell*: The administration must go as prayed to the Laneuvilles.

As to Anderson's costs, I am of opinion he cannot have them: he has pursued the case in every shape and aspect in which it could be prosecuted; in the Prerogative Court and Privy Council he fought the question of domicil; Madame **[47]** Laneuville then proceeded to France, Anderson there disputed the authority of the French Courts on the ground that the testator was a domiciled Englishman; he again appeared in this Court, and set up the will of 1843, when it was answered that it was established that the testator was domiciled in France before his death, and so that the will of 1843 became inoperative; he turned round and said that the testator was domiciled in France before 1843, and that by the French law the will of 1843 was good. He has had the benefit of arguing the case in all these forms; he cannot now have the benefit of costs.

As to Guichard, he had notice in the French Courts that the Laneuvilles disputed his right to the executorship of the French will; that question was decided against him, and he carried it to two courts of appeal with the same result. As to any agreement between the present parties, the Laneuvilles' plea to his request for probate seems a full answer. If he had any other agreement with Madame Laneuville, he may claim the benefit of it in another Court if he is so advised—I cannot give him costs out of the estate.

**[48]** (Before *Lord Campbell, C.J., Pollock, C.B.*, and the *Judge Ordinary.*)

HORNE *v.* HORNE. May 10, 1858.—Dissolution of Marriage.—Bigamy coupled with Adultery.—20 & 21 Vict. c. 85, s. 27.—Semble (per Pollock, C.B.), that, in a suit for a dissolution of marriage on the ground of bigamy with adultery, there should be proof of adultery and bigamy with the same woman. Proof of a bigamous marriage with one woman and of adultery with another is not sufficient.

[S. C. 27 L. J. (Mat.) 50.]

This was a suit promoted by the wife against the husband for a dissolution of their marriage: (1) by reason of his adultery coupled with bigamy; and (2) by reason of his adultery coupled with desertion.

Mr. Slade, Q.C., and Dr. Spinks appeared for the petitioner. Proof was given of the respondent's marriage with the petitioner, and of his having subsequently (in

October 1854) contracted a bigamous marriage with Sarah Brown; but there was no evidence that he had committed adultery with her. It also appeared by the evidence that he had been guilty of adultery with a Miss Crispe, and had deserted his wife for upwards of ten years.

[49] *Lord Campbell, C.J.*: The petitioner is entitled to a decree for a dissolution of her marriage, the husband's adultery with Crispe and desertion for two years without reasonable excuse having been proved.

*Pollock, C.B.*: I am of the same opinion. It has been satisfactorily proved that the respondent has been guilty of adultery with Miss Crispe, and of desertion of his wife for two years without reasonable excuse.

If the application had been founded merely on that part of the 27th section of the Divorce Act which makes "bigamy with adultery" a ground for dissolving a marriage, I should have thought that the petitioner had not made out her case, for I think "bigamy with adultery," in that section, means adultery with the person with whom the bigamy is committed, and consequently that proof of adultery with that person should be given, e.g. that there should be some evidence of their having lived together as man and wife. It would not be sufficient, in my opinion, to prove a bigamous marriage with one woman, and adultery with another.

(Before the *Judge Ordinary*, on Motion.)

MARCH *v.* MARCH. November 4, 1858.—Evidence.—Petition for Dissolution of Marriage.—Bigamy.—Proof by Affidavit.—Practice.—20 & 21 Vict. c. 85, s. 46. —A husband was convicted of bigamy in 1852. The wife petitioned for a dissolution of their marriage on the ground of his bigamy and adultery. The witnesses to the facts to be proved were resident at Oldham or Huddersfield.—The Judge Ordinary directed that the petition might be proved by affidavit.

[S. C. 28 L. J. (Mat.) 30.]

In this case the wife had filed a petition for the dissolution [50] of her marriage on the ground of her husband's bigamy coupled with his adultery. The husband had been tried for bigamy in December 1852, and convicted. All the witnesses to the facts which it was necessary for the petitioner to prove were resident either at Oldham or Huddersfield.

Dr. Spinks moved the Court, under the 46th section of 20 & 21 Vict. c. 85, to direct that the petitioner should be at liberty to verify her petition by affidavit. Great expense would be thereby saved.

*The Judge Ordinary.*—I will make the order; but you must remember that the bigamy must be proved. Proof of the conviction of bigamy will not suffice.

(Before the *Judge Ordinary.*)

COOKE *v.* COOKE AND QUAILE. December 20, 1858, and January 13, 1859.—Dissolution of Marriage.—Practice.—Return of Citation when Personal Service has been dispensed with.—Directions as to mode of Trial.—Commission to examine Witnesses. — Commissioner selected by the Court. — The citation must be returned into and filed in the Registry, even where personal service has been dispensed with, before the Court will give directions as to the mode of trial.—Where the only witnesses to the acts of adultery relied upon are resident in a brothel, and there is consequently a risk of their evidence being lost, the Court will allow a Commission to issue for their immediate examination.—In the absence of the respondents, the Court, and not the petitioner, should select the Commissioner before whom the evidence is to be taken.

[S. C. 28 L. J. (Mat.) 37.]

[51] This was a suit for dissolution of marriage on the ground of the wife's adultery with the co-respondent. The respondent and co-respondent had gone to Australia; the citations and copies of the petition had been transmitted to a solicitor's firm at Melbourne for the purpose of personal service; but as no trace could be found of either the respondent or co-respondent, notwithstanding various inquiries had been made for them, the Judge Ordinary had dispensed with personal service. The citations had not been returned from Australia.

December 20.—Dr. Swabey moved the Court for directions as to the mode of trial. It has been intimated in the Registry that this motion cannot be granted until the citations have been filed. By rule 13 (1858), "After personal service of the citation

has been effected, the citation, with the certificate of service indorsed thereon, shall be forthwith returned and filed in the Registry." This does not apply to a case where personal service has been dispensed with, and there is no rule applicable to such a case. If this motion cannot be granted until the citations have been returned and filed, the hearing of the petition will be greatly delayed.

*The Judge Ordinary*: In the Registry it is always considered that they cannot be said to have seisin of the cause until the citation has been returned. The citation is the first step in the record. There can be no record unless it appears that a citation has been returned and filed. By the old practice the citation was always returned into the Registry. I think the citation should be returned and filed before I can grant this motion.

January 13.—Serjeant Pigott (Dr. Swabey with him) renewed the motion. We are now in a position to urge a further reason for granting this application. The only act of adultery on which the petitioner relies was committed in a brothel at Liverpool. The **[52]** only witnesses to the adultery are resident in this brothel. It is doubtful whether they will be forthcoming if the cause is postponed.

*The Judge Ordinary*: I cannot accede to this application. I think I ought not to depart from the old practice in the Registry. According to the old practice, the proceedings could not go on until the citation had been returned. The requiring the citation to be returned is not a mere matter of form; it is necessary in order that evidence may be preserved that the proper steps have been taken. There would be nothing to shew in the Registry that a citation had ever issued, unless it were returned and filed. With respect to the fresh ground urged to-day, viz. the difficulty of ensuring the presence of the witnesses at the hearing, that inconvenience may be provided against by having their evidence taken now.

Serjeant Pigott moved, under section 47 of the Divorce Act, that the evidence of those witnesses should be taken under a Commission, either in London or before A. B., a solicitor, at Liverpool.

*The Judge Ordinary*: I think it better they should be examined in Liverpool. In the absence of the respondents, I do not think I should appoint any person as Commissioner, however respectable, who is suggested by the petitioner. I will name some one myself.

**[53]** (Before the *Judge Ordinary*, *Watson*, *B.*, and *Hill*, *J.*)

BACON *v.* BACON AND BACON. November 28, 1859.—Dissolution of Marriage.—Right to begin.—Right to Cross-examine.—Where a respondent in her answer has not traversed the adultery alleged in the petition, but sets up countercharges of adultery, cruelty, and misconduct, upon which countercharges issue has been joined, upon a trial of these issues before a jury, it is for the respondent to begin.—When these issues have been disposed of by the jury, it is not competent to the respondent to cross-examine the witnesses called to establish the allegations in the petition, either as to these allegations or as to the countercharges contained in the answer.

[S. C. 29 L. J. (Mat.) 61.]

The petition in this case was filed by Samuel Bacon for the dissolution of his marriage on the ground of his wife's adultery. The respondent filed an answer, in which she did not traverse the acts of adultery alleged in the petition, but charged the petitioner with having been guilty of adultery, cruelty, wilful neglect, and of misconduct which had conduced to her adultery.

Upon the charges set up in the answer issues had been joined, and these issues came on for trial before the Court and a common jury.

Dr. Spinks (Mr. Francis with him), for the petitioner, submitted that as the respondent had not traversed the charges of adultery contained in the petition, the onus was upon her to establish the countercharges contained in her answer, and that she ought to begin.

Dr. Phillimore, Q.C., contrà.—The respondent is not bound to prove the countercharges contained in the answer until the petitioner has established the adultery alleged in the petition. **[54]** The case of the respondent will depend in a great measure on the cross-examination of the petitioner's witnesses.

*The Judge Ordinary*: There can be no difficulty in acting upon the common law rule. The intention of the Legislature was that issues of facts should be tried as in

the Courts of common law. The jury have nothing to do with the respondent's adultery. It is taken out of their cognisance by the pleadings. If any injustice could arise to the respondent by her being required to begin, we might take it into our consideration. But there is really no hardship on her; for if she relies on the petitioner's witnesses to make out her case, she may call them herself.

Dr. Phillimore opened the respondent's case, and called witnesses in support of the charge of cruelty. On the other issues no evidence was tendered.

The jury found a verdict for the petitioner on all the issues, and were thereupon discharged.

Witnesses were then called to prove the wife's adultery.

Dr. Phillimore proposed to cross-examine them as to the adultery charged in the petition, as also as to the cruelty alleged in the answer.

Dr. Spinks objected.

*The Judge Ordinary*: Dr. Phillimore cannot cross-examine the witnesses upon these pleadings. The adultery has not been denied, and the charge of cruelty has been disposed of by the jury.

The adultery was proved, and the petitioner pronounced entitled to a decree dissolving the marriage, which was sus-**[55]**-pended to allow time for an application to be made under the 45th section of the Divorce Act for a settlement of some property, to which the wife was entitled, on the children of the marriage.

(Before the *Judge Ordinary*, on Motion.)

BEVAN *v.* M'MAHON AND BEVAN (falsely called M'MAHON). February 15, 1859.—Commission.—Reopening of Commission to enable a Witness to supply omissions in his Evidence.—Discretion of Court.—It is in the discretion of the Court to reopen a Commission, so as to enable a witness, who has been already examined, to be examined again; but it is a discretion to be sparingly exercised.—Where a witness had been examined, re-examined, and cross-examined before a Commissioner, the Court refused to reopen the Commission to enable him to supply important facts omitted in his evidence, although he deposed that it was in consequence of the respondent's personal observations and interruptions during the examination that he forgot to mention them at that time.—If the Commissioner had reported that the respondent had so conducted himself during the examination as to disturb the mind of the witness, the Court would have acceded to the application.

[S. C. 29 L. J. (Mat.) 40.)

This was a suit of nullity of marriage by reason of fraud, instituted by the father of the alleged wife.

The petitioner obtained an order, under the 47th section of the Divorce Act, for a Commission to examine J. T. Smith, who was about to leave this country for Australia. On February the 7th, 1859, Smith was examined at Plymouth, and on the next day he made application to the Commissioner to be permitted to make certain material additions to his evidence, on the ground that they had escaped his recollection at the time of the examination, in consequence of the frequent personal observations and interruptions interposed by the respondent. **[56]** Affidavits by Smith and the petitioner's solicitor to this effect were filed in the Court. The petitioner's solicitor also deposed in his affidavit, that Smith had stated to him the very facts which he omitted to mention in his examination some months prior thereto, and that in his opinion it would not be safe for the petitioner to proceed to trial without the evidence of Smith as to these facts. The Commissioner also made an affidavit stating that to the best of his belief the statement of Smith as to his having omitted to mention those facts was made spontaneously.

Mr. W. Brandt moved the Court to order that the Commission should be reopened, to enable Smith to supply the omission in his evidence. The application was of an unusual character. The Court had a discretionary power in the matter, and he submitted that under the circumstances it should grant the application. This omission of the witness to state facts referred to was entirely caused by the respondent's misconduct, and not through any default of the petitioner or the witness.

Mr. Aspland, contrà.—The Courts of common law have declined to reopen a Commission on the grounds relied on.

If the Court has discretionary power in the matter, the facts of this case are not sufficient to justify it in exercising it. He cited *Lumley* v. *Gye*, 3 Ell. & Bl. 114.

Mr. Brandt in reply.—The case of *Lumley* v. *Gye*, which has been referred to, has no application to the point raised in this case.

*The Judge Ordinary*: This application is one of a most unusual character. I never before remember an application having been made to allow a witness, who had been examined under a Commission, to undergo a second examination, because he had, on his first examination, forgotten to state facts material to the case.

**[57]** It is certainly in the discretion of the Court to grant the application, and I should grant it, if I believed the interests of justice required me to do so. But in my opinion it would be exceedingly dangerous to accede to it; it is quite unprecedented; and I shall therefore reject it.

Take the case which most nearly resembles the present one. Suppose a witness has been examined, cross-examined, and re-examined in Court, and then dismissed, and counsel were to ask for him to be recalled, in order that he might add something to his evidence, which, in consequence of his being flurried, he had forgotten to state during his examination. The Court would in such a case be able to judge from the demeanour of the witness, from the manner in which he gave his evidence in the witness-box, whether his memory was likely to have been so far disturbed as to make it probable that he had made such an omission in his evidence. Even in such a case, I should not look upon the application with much favour; for I have always been very sparing in allowing a witness to be recalled, and whenever I have suspected that he was being again brought forward to meet the stress of the case, I have invariably refused to accede to it. There are much stronger objections to granting the application in this case. It is by an indulgence that the witness has been allowed to be examined before the Commissioner instead of in open Court. This alone would make me feel some reluctance in granting the application. It moreover appears that the witness is about to leave the country; he will therefore not be amenable to the temporal consequences of a false oath,—the Court will have only the religious sanction of the oath. It appears also that the witness was not only examined, cross-examined, and re-examined, but that the evidence was afterwards read over by the Commissioner in his presence and that of the party who called him, and that it was then signed by him. It is hardly to be supposed, that if the witness had omitted anything of importance he would not then have remembered it and supplied it.

**[58]** If the Commissioner had reported that the respondent had misconducted himself during the examination, had endeavoured to throw the examination into confusion, and had disturbed the mind of the witness, I should have allowed him to be examined again. But he does not state this. Upon the evidence before me, I think that it would be extremely dangerous, and that the interests of justice might be prejudiced, if I were to allow a second examination of this witness. If his evidence is of so great importance, let the petitioner get him to delay his departure for Australia, so that he may give evidence at the hearing in open Court.

(Before the *Judge Ordinary*, on Motion.)

BEVAN *v.* M'MAHON AND BEVAN (falsely called M'MAHON). June 22, 1859.—Petition for Decree of Nullity.—Death of Petitioner.—Interest to commence or continue Suit.—Under 43 Eliz. c. 2, s. 7, it has been decided that a father has sufficient interest to institute a civil suit to establish the nullity of his daughter's marriage; but where a father died after such suit was instituted, and the pleadings were finished, but before the trial, the Court—Held, that it had no authority to allow the mother, who was also the executrix of the father, to take up the suit at the point at which it was left at the father's death.

[S. C. 28 L. J. (Mat.) 127.]

This was an application arising out of a petition for a decree of nullity filed by the petitioner in respect of the marriage of his daughter Margaret Lea Bevan, one of the respondents, with James M'Mahon, by reason of undue celebration under the statute. Such a petition was competent to the father, according to the case of *Ray* v. *Sherwood and Ray*, 1 Curt. 173, 193, and (on appeal to the Privy Council), 1 Moore, P. C. 402, where their Lordships held that the statu-**[59]**-tory liability of the father to maintain his grandchildren gave him a sufficient interest to sustain a civil suit of this description. 43 Eliz. c. 2, s. 7, enacts "that the father and grandfather and the mother and grandmother and the children of every poor old blind, lame, and impotent person not able to work, being of a sufficient ability, shall at their own charge relieve and maintain

every such poor person in that manner and according to that rate as by the justices of the peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter-sessions, shall be assessed, upon pain, that every one of them shall forfeit 20s. for every month which they shall fail therein."

June 15.—The respondent, James M'Mahon, appeared, and demurred to the petition; he also filed an answer traversing some of the facts alleged, and likewise pleading in confession and avoidance.

The petitioner replied (1) by traversing the answer; (2)[1] by setting up matter in confession and avoidance.

He also demurred to the answer.

The petitioner died before the case was set down for hearing.

June 15.—Mr. W. Brandt now moved the Court on behalf of the widow and executrix of the late petitioner, that she might be allowed to take up and continue the suit in the position at which it stood at the time of the petitioner's death, on entering a suggestion of his death on the record.

Mr. Aspland for the respondent M'Mahon, did not object to **[60]** the revival of the suit, but apprehended that, as the present applicant had no interest sufficient to have entitled her to commence the suit, any sentence pronounced under the present circumstances of the case would be invalid. Cur. adv. vult.

*The Judge Ordinary*: This was a suit for a declaration of nullity of marriage instituted by the father of a lady, one of the respondents in the suit, who is alleged to have contracted a marriage with James M'Mahon, the other respondent. In *Sherwood* v. *Ray*, a father was allowed by the Judicial Committee of the Privy Council to maintain such a suit in respect of his daughter's marriage, on the ground that he had a pecuniary interest—no other interest being recognised by law—in inquiring into its validity. For it was said that if the marriage in that case was held to be valid, and the daughter had children, and they were cast upon the parish for support, he, as grandfather, under 43 Eliz. c. 2, s. 7, might possibly be called upon to maintain them. That somewhat remote liability was considered to give him a sufficient interest to entitle him to maintain the suit.

In the present case Mr. Bevan had a right to proceed on the ground that his interest might be similarly affected, if this marriage were held to be a valid one. He accordingly commenced proceedings; the suit had progressed a considerable way when Mr. Bevan died; and I am now asked to allow Mrs. Bevan, his widow and executrix, to take up the suit at the point where he left it. I am of opinion that I have no authority to do so. The case is of a painful character, and there are circumstances which render it very desirable that it should be inquired into, and if the marriage is null and void, that it should be so declared; but I have no power to substitute the widow for the husband in order that the suit may be carried on. When the suit was commenced, she had no interest in it, and could not then have instituted it; she was not at that time liable under 43 Eliz. c. 2, s. 7, to be called upon **[61]** to maintain her grandchildren (if any), as the statute confers no power of charging the grandfather and grandmother jointly with their maintenance. Mr. Bevan's estate does not remain liable to this obligation, and Mrs. Bevan cannot therefore carry on the suit in her character as executrix. The suit abated at the death of Mr. Bevan, and I must reject the application.

(Before the *Judge Ordinary*, on Motion.)

PALMER *v.* PALMER. May 24, 1860.—Wife's Petition for Dissolution.—Cruelty condoned.—Subsequent Adultery.—All condonation is conditional on no offence of which the Matrimonial Court can take cognisance being in future perpetrated. Cruelty once condoned may be so revived by subsequent adultery as to form, coupled with that adultery, ground for a sentence of dissolution.

[S. C. 29 L. J. (Mat.) 124; 2 L. T. 88, 363.]

---

[1] Before *the Judge Ordinary* in chambers, on summons.

Mr. Aspland submitted that so much of the replication as pleaded matter of confession and avoidance should be struck out, on the ground that leave to reply and demur at the same time had not been obtained.

Mr. W. Brandt contrà.

*The Judge Ordinary* rejected the application, saying that in this Court it was not necessary to obtain such leave.

This was a petition for dissolution of marriage at the suit of the wife, on the grounds of cruelty and adultery. The answer of the husband denied the cruelty and adultery, and, among other things, pleaded condonation of the cruelty; the reply took issue on the allegations in the answer, and further pleaded that the cruelty, if condoned, was revived by the subsequent adultery.

Mr. Murray, for the respondent, now moved the Court to direct this part of the replication to be struck out on the ground that cruelty, once condoned, could not be revived by subsequent adultery; the reviving act must be ejusdem generis. With respect to the state of the law before the present Divorce Act, he contended that there was no decision fully in point. He cited and remarked upon *Hart* v. *Hart*, 2 Eccl. and Adm. **[62]** 193; *Durant* v. *Durant*, 1 Hagg. 760, and cases there cited. As to the present statute, which gave the wife power to petition for a dissolution of marriage under certain circumstances, he contended that the Legislature must have intended the adultery and cruelty, ex. gr., to be distinct offences co-existing at the same time; not that cruelty committed twenty years back and forgiven, should be revived by, and so coupled with, a subsequent act of adultery, as to found a sentence of dissolution.

Dr. Spinks, in support of the paragraph of the replication, argued that the term ejusdem generis used by Sir John Dodson in *Hart* v. *Hart*, must be understood of any act which would lay the foundation for a sentence in a matrimonial Court; in the then state of the law desertion was not such an act. The principle of the doctrine of revival is, that all condonation is conditional. In the words of Sir John Nicholl, in *Durant* v. *Durant*, 1 Hagg. 762, the plainer reason and the good sense of the implied condition is, that "you shall not only abstain from adultery, but shall in future treat me—in every respect treat me (to use the words of the law)—with conjugal kindness; on this condition I will overlook the past injuries you have done me." In principle it seems impossible to distinguish between adultery revived by cruelty, and cruelty revived by adultery, with respect to the state of the law before the Divorce Act.

*The Judge Ordinary*: I cannot accede to this application. The cases cited establish that, if a marital offence which might have been the foundation of a sentence in a matrimonial Court has been condoned, it is revived by any subsequent offence which might itself have been the ground of a sentence of divorce à mensâ et thoro; and this on the ground that condonation is always assumed to be conditional, and the condition extends not only to a repetition of the same, but of any other **[63]** marital offence which falls within the cognizance of a matrimonial Court. With respect to observations made on the supposed intention of the statute, I can see no reason why the husband should be placed in a better position by the lenity and forbearance of his wife than he would have been if she had not forgiven the first offence.

(Before the Full Court,—*The Judge Ordinary*, *Martin*, *B.*, and *Willes*, *J.*)

FURNESS *v.* FURNESS. May 29, 1860.—Bigamy and Adultery.—Condonation.—Revival.—Quære, whether the husband's bigamy condoned by the wife would be revived by his subsequent marital misconduct so as to found a sentence of dissolution of marriage.

[S. C. 29 L. J. (Mat.) 133; 2 L. T. 439.]

This was a petition for dissolution of marriage at the suit of the wife, by reason of adultery, coupled with bigamy, and adultery coupled with cruelty.

Mr. Huddleston, Q.C., conducted the petition. From his statement and the evidence it appeared that bigamy committed some years previously had been clearly condoned by the wife returning to cohabitation; but the learned counsel submitted that, if necessary, the Court would hold that the subsequent misconduct of the husband had revived the wife's right to rely upon the bigamy as a ground for the decree prayed.

By the Court.—We say nothing about the bigamy being revived—that might be a curious question; but quite enough has been proved in this case to found the decree without that.

[Note.—But quære, whether the principle laid down in *Palmer* v. *Palmer*, ante, is not directly applicable.]

**[64]** (Before the *Judge Ordinary*, on Motion.)

THOMAS *v.* THOMAS. May 30, 1860.—Costs.—Service of order and demand.—Attachment.—The Court made an order for the payment of the wife's costs to her

proctor in a suit for judicial separation.—A demand for payment of these costs having been personally made on the respondent by a person on behalf of the petitioner's proctor, a receipt for the costs, signed by the proctor, being at the same time shewn to the respondent, the Court held such demand for payment to be sufficient to found an order for attachment.

[S. C. 2 L. T. 390; 8 W. R. 476.]

In this case the Court had pronounced a decree of judicial separation on the petition of the wife, and had condemned the respondent in the costs of the suit.

The costs of the suit had been taxed at £82, 16s. 10d., and the Court made an order for the payment by the respondent (within one week from the service thereof) of this sum to the petitioner's proctor.

The respondent had been personally served with this order, and a personal demand for payment, which had been omitted to be made at the time of the service, was subsequently made by a person on behalf of the petitioner's proctor, who at the same time shewed to the respondent the receipt for the costs signed by the proctor.

Mr. Pritchard moved the Court to decree a writ of attachment against the respondent for nonpayment of the costs.

*The Judge Ordinary*: I understand that the steps you have taken are in accordance with the practice of the ecclesiastical courts. I grant the motion.

Pritchard, petitioner's proctor.

**[65]** (Before the Full Court,—*The Judge Ordinary*, *Martin*, *B.*, and *Willes*, *J.*)

CASE *v.* CASE.—June 2, 1860.—Petition for Dissolution.—Desertion.—Evidence of contents of letters without notice to produce.—Practice.—Where the husband had been served with a citation in England, and had not appeared, the Court refused to decide whether the wife's evidence of the contents of letters written by her to her husband after he had left her was admissible, no notice to produce, etc., having been served; but made its decree on the other evidence given in the case, independently of the supposed contents of the letters.

[S. C. 29 L. J. (Mat.) 127; 2 L. T. 391; 8 W. R. 532.]

This was a petition by the wife for dissolution of marriage by reason of the husband's adultery and desertion. The citation had been served on the husband in this country, but he had not appeared.

Dr. Spinks conducted the petition. In course of examining the wife to prove desertion, she stated that she had, after her husband had left her, written to him asking him to return.

*Willes*, *J.*, asked whether notice to produce these letters had been served on the respondent, and on this being answered in the negative refused to take down the evidence.

A sister of the petitioner proved that in April 1856 she received a letter from the respondent, asking her to allow his wife to stay with her for a short time, as she was ill and business obliged him to go into the country. She took the petitioner to her house, and for a time the respondent contributed a few shillings a week towards her support. She had since met him in the street and spoken to him about providing **[66]** a home for her sister; she asked him where he lived, and he said anywhere, and he slept at the nearest place he happened to be of a night. It was proved that in 1856-57 the respondent had occupied part of a house in Great Portland Street with the woman with whom the adultery was charged.

When the petitioner's case was concluded,

*The Judge Ordinary*: We think the two positions necessary to be established to support this petition are proved, but we think it right to observe that we make the decree quite irrespective of the supposed contents of the letters said to have been written to the husband; we do not determine that we could not take notice of the contents of letters under such circumstances, but there is sufficient evidence in this case without. No service of notice to produce these letters has been made. In some cases petitions are allowed to be proceeded with without service of the citation, or service may have been effected in some distant country, as Australia, and no appearance entered. It might be a denial of justice, under such circumstances, to exclude evidence of the contents of letters. But, as in the present case, the husband was accessible, and there could be no difficulty about serving him, the case is different. The Court pronounces no opinion as to the admissibility of this evidence, but it does not act upon it.

**[67]** (Before the Full Court,—*The Judge Ordinary*, *Channell*, *B.*, and *Keating*, *J.*)
SIMONIN (falsely called MALLAC) *v.* MALLAC.—January 18 and April 26, 1860.—Petition for Nullity of Marriage.—Jurisdiction.—Lex domicilii.—Lex loci contractus.—C. and D., being native subjects of France, and then domiciled in that country, came over to London in June 1854, and were married by license according to the law of England, but without the observance of certain formalities and consents required by the law of France in respect of the marriage of its own subjects in foreign countries.—C. and D. returned to France, when D., the man, refused to celebrate the marriage according to the French law, and C. instituted a suit for nullity in the French Courts, which D. did not defend, and in December 1854 C. obtained a decree of nullity. C. subsequently came to reside in England, and petitioned for a decree of nullity in this Court; personal service of the citation was effected on D. in Naples, who did not appear.—Held, first, that D. having entered into a contract in this country, was subject to the jurisdiction of the Courts of this country in respect of the personal status resulting from such contract; secondly, that the personal status resulting from such contract is to be ascertained by the law of this country in which the contract was made, and not any special law of the country of the domicil of the parties to the contract.

[S. C. 29 L. J. (Mat.) 97; 6 Jur. (N. S.) 561; 2 L. T. 327. Considered, *Sottomayor* v. *De Barros*, 1877, 3 P. D. 1. Adopted, *Le Sueur* v. *Le Sueur*, 1876, 1 P. D. 139. Questioned, *Niboyet* v. *Niboyet*, 1878, 4 P. D. 1. Followed, *Hay* v. *Northcote* [1900] 2 Ch. 262; *Ogden* v. *Ogden*, [1918] P. 46. Referred to, *Chetti* v. *Chetti*, [1909] P. 69; *Countess de Gasquet James* v. *Duke of Mecklenburg-Schwerin*, [1914] P. 69.]

This was a petition for a decree of nullity of marriage. The petition was dated the 23rd of December, 1858; the petitioner was therein described as Valérie Josephine Wilhelmine Simonin (falsely called Mallac), of Kingston, in the county of Surrey, spinster. The petition set forth:—

"First, that on or about the 21st of June, 1854, a pretended form or ceremony of marriage was had between your petitioner and Leon Mallac, of Paris, in the empire of France, at the parish church of St. Martin-in-the-Fields, in the county of Middlesex. Secondly, that in about two days after the said pretended form or ceremony of marriage, your peti-**[68]**-tioner and the said Leon Mallac returned to the city of Paris, but that your petitioner did not cohabit with the said Leon Mallac, nor was the said pretended form or ceremony of marriage ever consummated between your petitioner and the said Leon Mallac. Thirdly, that the said pretended form or ceremony of marriage was had in contravention to and in evasion of the law of France regulating the marriage of native and domiciled French subjects contracted in foreign countries, and particularly in contravention to and in evasion of the provisions of articles 170, 63, 148, 151, and 152 of the Code Civil or Code Napoléon. Fourthly, that your petitioner and the said Leon Mallac are native subjects of France, and were at the date of the said pretended form or ceremony of marriage domiciled in the city of Paris aforesaid; that your petitioner was of about the age of twenty-two years, and the said Leon Mallac was of or about the age of twenty-nine years. Fifthly, that on or about the 1st day of December, 1854, the Civil Tribunal of the First Instance of the department of the Seine, sitting at Paris aforesaid, did at a public session of the first chamber of the said tribunal, at the suit of your said petitioner, the said Leon Mallac having been first duly summoned but not appearing, declare null and of no effect the pretended marriage of the 21st of June, 1854, between the said Leon Mallac and your said petitioner, and did condemn the said Leon Mallac in the costs of the said suit.

"Your petitioner therefore humbly prays that your Lordships will be pleased to decree that the said pretended form or ceremony of marriage had between the said Leon Mallac and your said petitioner was and is void and of no effect in law whatsoever, and that the said Leon Mallac be condemned in the costs of the petition," etc.

The citation and copy petition were served personally on Monsieur Mallac at Naples. He put in no answer, and the petition now came on for hearing and proof.

**[69]** The articles of the Code Civil referred to were as follows:—

Art. 170. "Le mariage contracté en pays étranger entre Français et entre Français et étrangers, sera valable, s'il a été célébré dans les formes usitées dans le pays, pourvu qu'il ait été précédé des publications présentes par l'art. 63, au titre

des actes de l'état civil, et que le Français n'ait point contravenu aux dispositions contenues au chapitre précédent."

Art. 63. "Avant la célébration du mariage, l'officier de l'état civil fera deux publications, à huit jours d'intervalle, un jour de dimanche, devant la porte de la maison commune. Ces publications, et l'acte qui en sera dressé, énonceront les prénoms, etc."

"Titre 5me. Du mariage. Chap. 1er. Des qualités et conditions requises pour pouvoir contracter mariage."

Art. 148. "Le fils qui n'a pas atteint l'âge de vingt-cinq ans accomplis, la fille qui n'a pas atteint l'âge de vingt-un ans accomplis, ne peuvent contracter mariage sans le consentement de leurs père et mère."

Art. 151. "Les enfans de famille ayant atteint la majorité fixée par l'art. 148, sont tenus, avant de contracter mariage, de demander, par un acte respectueux et formel, le consent de leur père et de leur mère, etc."

Art. 152. "Depuis la majorité fixée par l'art. 148 jusqu'à l'âge de trente ans accomplis pour les fils et jusqu'à l'âge de vingt-cinq ans accomplis pour les filles, l'acte respectueux présent par l'art. précédent, et sur lequel il n'y aurait pas de consentement au mariage, sera renouvelé deux ou trois fois, de mois en mois; et un mois après le troisième acte, il pourra être passé outre à la célébration du mariage."

Art. 153. "Après l'âge de trente ans, il pourra être, à défaut de consentement sur un acte respectueux, passé outre à la célébration du mariage."

Art. 154. "L'acte respectueux sera notifié à celui ou ceux des ascendans désignés en l'article 151, par deux notaires ou **[70]** par un notaire et deux témoins; et, dans le procès-verbal qui doit en être dressé, il sera fait mention de la réponse."

Art. 183. "L'action en nullité ne peut plus être intentée ni par les époux ni par les parens dont le consentement était requis, toutes les fois que le mariage a été approuvé expressément ou tacitement par ceux dont le consentement était nécessaire, ou lorsqu'il s'est écoulé une année sans réclamation de leur part, depuis qu'ils ont eu connaissance du mariage. Elle ne peut être intentée non plus par l'époux lorsqu'il s'est écoulé une année sans réclamation de sa part, depuis qu'il a atteint l'âge compétent pour consentir par lui-même au mariage."

Dr. Phillimore, Q.C. (with him Dr. Swabey), conducted the petitioner's case. The petitioner was examined, and a Monsieur Auguste Noël was called to prove the law of France applicable to the facts of the case; the result of their evidence respectively is stated in the judgment.

Counsel argued, first, that the jurisdiction of the Court was founded,—because the contract as to the effect of which a decision was now sought, was entered into voluntarily by both the petitioner and respondent in this country,—because the petitioner was now domiciled in this country and had a right to resort to the only court which could, in the first instance, determine her marriage status. It would be a denial of justice to leave this to be determined, say on an indictment for bigamy or a question of legitimacy, if she were to contract a second marriage here, because the respondent had been duly cited and did not contest the jurisdiction; secondly, if the Court had jurisdiction, it would pronounce a decree of nullity. Admitting that the lex loci contractûs generally governs the validity of contracts, these persons were by the law of their domicile under an incapacity to enter into the contract; an incapacity which accompanies them out of their own country especially where the intention was to evade the law of their own country.

**[71]** They cited on the first point, *Tenducci's* case, quoted in *Yelverton* v. *Yelverton*, 1 Swab. & Trist. 574; *Scrimshire* v. *Scrimshire*, 2 Hagg. Con. 395; *Jeffreys* v. *Boosey*, 4 H. L. Cas. 955; *Conelly* v. *Conelly*, 7 Moore, P. C. C. 138; *Robins and Paxton* v. *Dolphin*, 1 Swab. & Trist. 537; *Munro* v. *Munro*, 7 Cl. & F. 842; *Dalrymple* v. *Dalrymple*, 2 Consist. 54; *Brook* v. *Brook*, 2 Sm. & G. 481; *Butler* v. *Dolbin*, 2 Lee, 317; Donellus, lib. 7, C. 12, 14; Story's Conflict, ss. 539, 542; Daniell's Practice of Ct. of Chancery, s. 6.

On the second point, 1 Burge, 190-4.

Fœlix, Traité du Droit International, vol. ii. c. 2, p. 380; ibid. tit. ii. c. 2, s. 3; Merlin, Répertoire, art. "Loi," sec. 6, num. 6; ibid. art. "Mariage, Question de Droit, Publication de Mariage," vol. x. p. 12; Savigny, vol. viii. p. 359; Pothier, Traité de Mariage, pt. iv. c. 1, n. 363; Fœlix, Mariage Contracté en Pays Etranger, vol. i. sec. 33; *Harford* v. *Morris*, 2 Consist. 437; *Robinson* v. *Blunt*, 2 Burr. 1079; *Compton* v. *Bearcroft*, quoted 2 Hagg. Con. 444. Cur. adv. vult.

April 26.—*The Judge Ordinary*: This was a petition for a decree of nullity of marriage. [The learned Judge Ordinary here read the substance of the petition.] Leon Mallac was served at Naples with a citation out of this Court, and a copy of the petition, but did not appear. The case came on for hearing before my brothers Channell and Keating and myself, on the 18th of January, 1860, when the petitioner proved that she was of French origin, and in 1853 was residing in Paris with her mother, her father being then dead. In that year she became acquainted with Leon Mallac, also of French origin, who made her an offer of marriage, which she accepted. In June 1854 he proposed that they should come to England and be married in this country, assigning as a reason that if that were done his father would afterwards consent, and he would then marry her in France. The parties came to London, and were married in due form by licence on the 21st of June, **[72]** 1854, in the parish church of St. Martin-in-the-Fields. Leon Mallac was then of the age of twenty-nine years, and the petitioner twenty-two. The marriage was not consummated, and the parties returned to Paris the next day, and went to the residence of the petitioner's mother, Leon Mallac occupying another part of the same building. The petitioner asked him to marry her in France; he did not do so, but said he would go to his own country and ask the consent of his father, who lived on the banks of the Garonne. He afterwards wrote to her a letter, refusing to marry in France, and admitting that he had broken his word. The petitioner then instituted a suit before the Civil Tribunal of the First Instance of the Seine to procure a decree of nullity of the pretended marriage; and on the 1st of December, 1854, a decree was made, of which the original and a translation were put in evidence. The grounds on which that decree was made are stated in the following words in the translation:—"The Court decides by default against Leon Mallac, who did not appear, nor any one for him, although duly called as follows: Considering in law that, by the words of art. 170 of the Code Napoléon, when a marriage between French subjects had been celebrated in foreign countries, it must have been preceded by publication in France prescribed by the law, and that there must not have been any contravention (infringement) of the provisions of articles 144 and following of the Code Napoléon; considering that the nullity provided for by art. 170 is not absolute, but ought to be pronounced when an omission of formalities has taken place with the formal intention to elude the law, it being in the province of the tribunal to appreciate the circumstances thereof; considering in fact that Leon Mallac and Valérie Simonin, artist of the Théâtre Français, both being French subjects, and domiciled in Paris, have contracted marriage in London, on the 22nd of June, 1854, before a minister of the Protestant Church, in the presence of witnesses; considering that this marriage was cele-**[73]**-brated without the parties having obtained or sought the consent of their parents, and without having been preceded in France by the publications prescribed by art. 63 of the Code Napoléon; considering that the married couple having resided in Paris, only went momentarily to England for the purpose of contracting marriage there, and returned to France directly after the celebration; considering that from this it is evident that they acted in this manner with the formal intention of evading the prescriptions of the French law; considering that Valérie Simonin states distinctly that this marriage was not followed by any consummation or cohabitation between the parties, and that the assertion is not contradicted by Leon Mallac, who did not appear, but allowed the demand for nullity presented by her to go by default; considering that under these circumstances the marriage contracted in London on the 22nd of June, 1854, between Leon Mallac and Valérie Simonin, cannot be recognized as valid and regular; on these grounds it declares the pretended marriage of 22nd of June, 1854, between Leon Mallac and Valérie Simonin for null and void," etc.

In the month of May, 1857, the petitioner and her mother came to England, and have resided here from that time, and she stated that she had no intention to return to France, and had no property there. A witness, Auguste Noël, called to prove the law of France as applicable to the case, stated that he had acted as a notary public in Paris, and in order to do so it was necessary that he should be acquainted with the law of marriage in France. He deposed that art. 63 of the Code Napoléon as to publication of banns of marriage is part of the existing law of France, and was so in 1854; that article 170 and articles 151, 2, 3, and 4, are part of the law of France, and were so in 1854; that those articles do not prohibit the marriage, but only postpone it, and if the form prescribed is followed, and the time prescribed has elapsed,

the parties may marry without consent; that a marriage in a foreign land as [74] mentioned in art. 170, without attention to the articles 144 and 164 therein referred to, is good or bad according as the French tribunal before whom the question is raised may think the parties went abroad to marry in fraud of the law of France or not; that if a Frenchman was married here in England without consent, and consent afterwards given in France, that would render the marriage valid, whatever were the formalities omitted; that art. 184 of the Code is part of the law of France, and was so in 1854; that the prescription therein mentioned would run in the case of a daughter from the age of twenty-one, and of a son from the age of twenty-five; that if a daughter between the ages of twenty-one and twenty-five allows a year to elapse without impeaching the marriage, this is a statute of limitations, and she cannot impeach it afterwards.

This state of facts presented two very important questions for our consideration: first, whether the Court has any jurisdiction over Leon Mallac, the party cited; and, secondly, assuming that such jurisdiction exists, whether, according to the law of this country, the marriage solemnized is to be held null and void. We had the advantage of a learned argument on the part of the petitioner, and feel that the responsibility cast upon the Court is greatly increased by the want of any such assistance on the other side. The argument in favour of the jurisdiction was rested on the ground, first, that the contract was made in England, and that the Court is called upon for its decision with regard to the effect of a civil and religious English contract, celebrated under an English statute, 4 Geo. IV. c. 76, and that the tribunals loci contractûs have, generally speaking, cognisance of the contract; secondly, that England is now the domicil of the petitioner, but that objection begs the main question in dispute, for if the marriage be valid it is not her domicil; thirdly, that the respondent was personally served with the citation and petition, and has not appeared to contest the jurisdiction of the Court.

[75] The 42nd section of the statute 20 & 21 Vict. c. 85, by which this Court was established, removes all objection on the ground of the citation having been served without Her Majesty's dominions, but in our opinion would not of itself suffice to give to the Court authority to decide upon the rights of a party not otherwise subject to its jurisdiction. This question therefore depends upon the first proposition, that the parties, by professing to enter into a contract in England, mutually gave to each other the right to have the force and effect of that contract determined by an English tribunal. Huber, 65, tit. 1, De Foro Competente, s. 5, says, "Sequitur causa fori tertia quam rem gestam esse diximus eamque vel è contractu vel è delicto admisso." In another place he adds, "Si reus illic haberi posse," etc. The same doctrine is to be found in John Voet, Boullenois, Donellus, and Story. The Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 19, which allows a writ of summons to be issued against a person residing out of the jurisdiction, and not being a British subject, and proceedings to be had thereon, notice of such writ having been served on the party, appears to have been founded on this principle; and sect. 42 of the 20 & 21 Vict. c. 85, already adverted to, removes all difficulty as to service of process, although the party cited is a foreigner by origin and domicil. There is nothing contrary to natural justice in calling upon him to have the validity or invalidity of a supposed contract ascertained and determined by the tribunal of the country where it was entered into by him; for according to Lord Stowell, in *Dalrymple* and *Dalrmyple*, 2 Hagg. Con. 61, it is an indisputable rule of law, as exercised in all civilized countries, that a man who contracts in a country engages for a competent knowledge of the law of contracts in that country. If he rashly presumes to contract without such knowledge, he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party.

We think, therefore, that this Court is competent to enter-[76]-tain the present suit, and to adjudicate upon the petition presented by the party calling herself Valérie Simonin, which prays the Court to decree that the pretended form or ceremony of marriage had between the petitioner and Leon Mallac was and is void, and of no effect in law whatsoever.

This, which is the second question to be determined, is no doubt of the gravest importance, and, as far as this Court has been able to ascertain, primæ impressionis. No decision on the point was cited to us by the learned advocate for the petitioner, and we have not had the benefit of any other diligence save our own in the attempt

to discover precedents for our guidance. The question is this—whether a marriage duly solemnized in England in the manner prescribed by the law of England, between parties of full age and capable of contracting according to that law, is to be held null and void because the parties to that marriage, being foreigners, contracted it in England in order to evade the laws of the country to which they belonged and in which they were domiciled. It may indeed be doubted whether the evidence of the petitioner established the intention to evade the law of France, and whether that which the witness Auguste Noël called a statute of limitation, viz. sect. 183 of the Code Napoléon, did or did not operate to bar the right of the petitioner to institute this proceeding four years after the marriage was solemnized; but we pass over those points in order to deal with the broad and important question that has been raised. It was contended that, the parties being French, the law of that country affixed to them an incapacity to contract marriage without attending to the formalities prescribed, and that such incapacity was a personal status which travelled with them everywhere, and rendered them incapable of making a valid contract in any other country. But, according to the evidence, such incapacity to contract was not absolute but conditional only, and a contract made by them would be good unless they came here with the intention to evade the law of France. So a con-[77]-tract made here would be unimpeachable if ratified by the subsequent assent of the parents; and a contract made here would be perfectly valid unless impeached within a certain time, and therefore a marriage contracted between a man and woman of the respective ages of twenty-five and twenty-two, without attending to the formalities prescribed by the Code Napoléon, arts. 151, 152, 153, and 154, may receive a different consideration from one absolutely prohibited by art. 148, by parties respectively under those ages. But taking the decree of the French Court, in the suit there instituted, as evidence that by the law of France this marriage was void, we again come to the broad question, is it to be judged of here by the law of England or the law of France? In general the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract is made. But it was and is contended that such rule does not extend to contracts of marriage; and that parties are, with reference to them, bound by the law of their domicil. This question, of so much importance in all civilized communities, has been largely discussed by jurists of all nations, but they all apply their observations to controversies arising, not in the countries where the marriage was celebrated, but in other countries where it is brought in dispute, and of which the parties were domiciled subjects. That a marriage, good by the law of the country where solemnized, should be held good in all other countries, and the converse, is strongly maintained as a general rule by nearly all writers on international law. But, according to the same authorities, it is subject to some few exceptions, viz. marriages involving polygamy and incest; those positively prohibited by the public law of a country from motives of policy, ex. gr. by our Royal Marriage Act. Story, on the Conflict of Laws, s. 113 a, mentions a third exception: "Those celebrated in foreign countries by subjects entitling themselves under special circumstances to the benefit of the laws of their own country." In several [78] instances, learned Judges presiding in our Ecclesiastical Courts have stated the general rule, without mentioning the exceptions, whence it has sometimes been contended that they meant to controvert their existence. But, inasmuch as none of the cases referred to fell within the exceptions above-mentioned, it cannot justly be inferred that those learned persons intended their words to bear so extensive a meaning; for they would hardly have repudiated the doctrine of several learned writers, whose works are always received as worthy of great attention, without condescending to advert to it in terms, and assigning some reasons for dissenting from it.

In addition to the writings of jurists as to the existence of such a general rule by the law of all civilized nations, we find that in several cases it has been adopted by the Courts of this country as the ground of their decisions.

I believe the earliest of them was *Scrimshire* v. *Scrimshire*, decided by Sir E. Simpson in 1752, and reported 2 Hagg. Con. 395, for that learned judge then said it was a case primæ impressionis. The judgment is of great value, from the full manner in which he dealt with the principles on which the Court should proceed in adjudicating upon such cases. The parties were British subjects, domiciled in England; it was a suit for restitution of conjugal rights. The respondent pleaded that the marriage was celebrated in France, set forth circumstances under which that celebration took place,

and averred that by the laws of France the marriage was null and void. Sir E. Simpson, after disposing of one or two preliminary points, observed: "The general questions are two: first, whether there be full and legal proof that the parties did mutually, freely, and voluntarily celebrate marriage in such manner as the laws of this country would deem to constitute marriage, if there was nothing else in the case but a question on the fact of the marriage: secondly, whether, if the fact of the marriage should be proved, this marriage can by the laws of this country be effectuated and pronounced to [79] be good, being solemnised in France, where by law it is null and void, to all intents and purposes? For it seemed to be admitted in the argument that the rule was so, but insisted that it ought not to be a rule of determination in this cause." The first point he determined in the affirmative, and would have held the marriage valid had it been agreeable to the laws of France, where it was celebrated. "But," he proceeds, "the great difficulty arises on the second question, from the marriage being celebrated in France, where such marriage is null by the laws of France." He afterwards says: "The only question before me is, whether this is a good or bad marriage by the laws of England; and I am inclined to think that it is not good. On this point I apprehend that it is the law of this country to take notice of the laws of France, or of any foreign country, in determining upon marriages of this kind. The question being in substance this—whether, by the law of this country, marriage contracts are not to be deemed good or bad according to the laws of the country in which they are formed, and whether they are not to be construed by that law." He then quotes several passages from Sanchez, J. Voet, and others, shewing that if subjects of a country where clandestine marriages are prohibited go to another country where there is no such prohibition, and celebrate a clandestine marriage there, it is to be held good; and the converse is established by the same authorities. He sums up the effects of the books referred to in these words: "These authorities fully shew that all contracts are to be considered according to the laws of the country where they are made, and the practice of civilized countries has been conformable to this doctrine, and by the common consent of nations has been so received."

In many instances judges have used similar language with reference to cases where the form and ceremonial of the marriage were alone in question; and it can hardly, in such cases, be presumed that they intended their words to bear a more [80] extensive sense than was necessary for the question then before them; but the sense ascribed by Sir E. Simpson to these passages extends to the clandestine character of the marriage, and not merely to the form of the contract or ceremonial. He then explains, in the clearest manner, the principle on which Courts have proceeded in holding that marriages are to be considered according to the law of the country in which they are celebrated. "All nations allow marriage contracts; they are juris gentium, and the subjects of all nations are equally concerned in them; and from the infinite mischief and confusion which must necessarily arise to the subjects of all nations with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not according to the laws of the country where they are made. It is of equal consequence to all that one rule in these cases should be observed by all countries, that is, the law where the contract is made. By observing this law no inconvenience can arise, but infinite mischief will ensue if it is not." The same rule was recognized and made the ground of the judgment of Sir W. Wynne, in *Middleton* v. *Janverin*, 2 Hagg. Con. 437; nor is their reasoning weakened by the fact that certain exceptions out of that rule have been generally recognized, viz. where marriages deemed contrary to the law of religion and morality, and contrary to the settled policy of a nation, have been contracted abroad and held void in the country of which the parties were domiciled subjects, and where such a marriage would not be allowed.

It is very remarkable that neither in the writings of jurists, nor in the arguments of counsel, nor in the judgments delivered in the courts of justice, is any case quoted or suggestion offered to establish the proposition that the tribunals of [81] a country where a marriage has been solemnized in conformity with the laws of that country should hold it void because the parties to the contract were the domiciled subjects of another country where such a marriage would not be allowed. No such argument has been advanced, even in the case of marriages deemed to be incestuous. There is

a passage in Huber, Prælectiones Juris Civilis, lib. 1, tit. 3, "De Conflictu Legum," on this subject, which ought to be noticed. After discussing contracts made in foreign countries, in sect. 8, he proceeds: "Matrimonium pertinet etiam ad has regulas, si licitum est eo loco ubi contractum et celebratum est, ubique validum erit affectumque habebit, sub eâdem exceptione prejudicii aliis non creandi, cui licet addere si exempli nimis sit abominandi, ut si incestum juris gentium in secundo gradu contingeret alicubi esse permissum; quod vix est ut usu veniri possit"; and he proceeds to say, that if parties go to a country where such a marriage is tolerated, and celebrate it there, and return to their own country, it will not be recognized: "Quia sic jus nostrum pessimis exemplis eluderetur, eoque pertinet hæc observatio; sæpe fit ut adolescentes sub curatoribus agentes, furtivos amores nuptiis conglutinare cupientes, abeant in Frisiam Orientalem aliave loca in quibus curatorum consensus ad matrimonium non requiritur juxta leges Romanas, quæ apud nos hâc parte cessant. Celebrant ibi matrimonium et mox redeunt in patriam. Ego ita existimo hanc rem manifeste pertinere ad eversionem juris nostri, ac ideo non esse magistratus hic obligatos è jure gentium ejusmodi nuptias agnoscere et ratas habere; multoque magis statuendum est eos contra jus gentium facere videri qui civibus alieni imperii suâ facilitate jus patriis legibus contrarium scientes volentes impertiuntur."

Now this passage is remarkable. Hüber discusses the two exceptions out of the general rule, that marriages good where celebrated are by the law of nations to be acknowledged everywhere,—incestuous marriages and marriages of minors without [82] consent (curatorum), celebrated in countries whither they have gone for the purpose of evading the laws of the country of their domicil,—and he does not suggest the slightest doubt as to either class being held good in the country where solemnized; but, with reference to the second class, vindicates the country of the domicil against the charge of violating the laws of nations by refusing to recognize them. Story is, I believe, the only writer who has expressed an opinion on this point, and he, after mentioning that France has ventured on the doctrine that the marriages of Frenchmen under such circumstances shall not be deemed valid, adds: "There can be little doubt that foreign countries where such marriages are celebrated will follow their own law, and disregard that of France" (Conf. of Laws, sect. 90). The question appears to have occurred to Lord Meadowbank, a judge of great eminence; for in the note of his opinion annexed to his interlocutor of remit, in the case of *Gordon* v. *Pye*, Fergusson's Consist. R. p. 361, he puts this question: "Or would a marriage here be declared void because the parties were domiciled in England, and minors when they married here, and of course incapable by the law of their country of contracting marriage?" plainly intimating his own opinion that it would not.

In this country marriages have been solemnly recognized as valid, although celebrated in Scotland between English domiciled minors without the consent required by the Marriage Act, 26 Geo. II., to which country they had resorted for the purpose of evading the operation of that Act. I allude to the case of *Compton* v. *Bearcroft*, in a note to the report of *Middleton* v. *Janverin*, 2 Hagg. Con. 444. The libel in that case is set out, in which the minority of the lady, the want of consent, the English domicil, and the Marriage Act were pleaded, and it was alleged that the parties were married in Dumfries merely to evade the laws of this country, and returned to England the same day. The prayer was "that the marriage might be [83] declared null and void, pursuant to the said Act for clandestine marriages." The libel was rejected? the Court therefore must have held, that if all the matters alleged were proved, they would not supply a ground for declaring the marriage null.

It has been said that the parties did not in that case evade the Marriage Act, for that it contains an express exception of marriages solemnized in Scotland. It is true that marriages of minors in Scotland without consent are not prohibited by the Marriage Act, and therefore they cannot be said to be contrary to the law of England; but there can be no doubt that the parties went to Scotland to evade the operation of the law which was established in England. *Compton* v. *Bearcroft* is therefore an authority to this extent, that a marriage contracted by English domiciled subjects abroad, where it is not prohibited by English law, will not be held bad because the parties have gone thither to evade the necessity of complying with certain conditions that would have been imposed upon them in England.

The French tribunal in this case appears to have held the marriage null and void,

not because it was absolutely prohibited by the law of France, but because the parties contracted it in England with the formal intention of evading the prescriptions of the French law.

Every nation has a right to impose on its own subjects restrictions and prohibitions as to entering into marriage contracts, either within or without its own territories; and if its subjects sustain hardships in consequence of those restrictions, their own nation only must bear the blame; but what right has one independent nation to call upon any other nation equally independent to surrender its own laws in order to give effect to such restrictions and prohibitions? If there be any such right, it must be found in the law of nations, that law "to which all nations have consented, or to which they must be presumed to consent, for the common benefit and advan-**[84]**-tage." Which would be for the common benefit and advantage in such cases as the present, the observance of the law of the country where the marriage is celebrated, or of a foreign country? Parties contracting in any country are to be assumed to know, or to take the responsibility of not knowing, the law of that country. Now the law of France is equally stringent whether both parties are French, or one only. Assume then that a French subject comes to England, and there marries, without consent, a subject of another foreign country, by the laws of which such a marriage would be valid, which law is to prevail? to which country is an English tribunal to pay the compliment of adopting its law? As far as the law of nations is concerned, each must have an equal right to claim respect for its laws. Both cannot be observed. Would it not then be more just, and therefore more for the interest of all, that the law of that country should prevail which both are presumed to know and to agree to be bound by? Again, assume that one of the parties is English: would not an English subject have as strong a claim to the benefit of English law as a foreigner to the benefit of foreign law? But it may be said that in the case now before the Court both parties are French, and therefore no such difficulty can arise. That is true; but if once the principle of surrendering our own law to that of a foreign country is recognized, it must be followed out to all its consequences; the cases put are, therefore, a fair test as to the possibility of maintaining that by an comitas or jus gentium this Court is bound to adopt the law of France as its guide. Huber, indeed, in the passage cited, after vindicating the refusal to acknowledge a marriage solemnized abroad between parties who have gone there to evade the laws of their own country, proceeds: "Multoque magis statuendum est eos contra jus gentium facere videri qui civibus alieni imperii suâ facilitate jus patriis legibus contrarium scientes volentes impertiuntur."

It is somewhat difficult to ascertain what Huber would re-**[85]**-quire to be done by foreigners in order that they may be exempted from his reproach. He assumes that they are scientes. It is intended that they are to inquire and ascertain whether the law of any foreign nation will be evaded if the proposed marriage is solemnized? Is the domicil of the parties and the law prevailing there to be investigated? Are the parties to be called upon to prove their ages, consent of certain relations, or the non-existence of certain relations? or that they have not come to this country to evade the laws of their own? Are the clergy of this country to be deemed scientes that a foreign law is about to be evaded unless they have proof to the contrary? Unless that proposition can be established, the reproach of violating the law of nations cannot attach to this country if such marriages are here celebrated.

The great importance of having some one certain rule applicable to all cases; the difficulty, not to say impossibility, of having any rule applicable to all cases, save that the law of the country where a marriage is solemnized shall in that country at least decide whether it is valid or invalid; the absence of any judicial decision or dictum, or of even any opposite opinion of any writer of authority on the law of nations, have led us to the conclusion that we ought not to found our judgment in this case on any other rule than the law of England as prevailing amongst English subjects.

France may make laws for her own subjects, and impose on them all the consequences, good or evil, that result from those laws; but England also may make laws for the regulation of all matters within her own territory. Either nation may refuse to surrender its own laws to those of the other, and if either is guilty of any breach of the comitas or jus gentium, that reproach should attach to the nation whose laws are least calculated to ensure the common benefit and advantage of all. For these reasons we feel bound to dismiss this petition.

It may be unfortunate for the petitioner that she should be held a wife in England and not so in France. If she had re-[86]-mained in her own country, she might have enjoyed there the freedom conferred upon her by a French tribunal; having elected England as her residence, she must be contented to take English law as she finds it, and to be treated as bound by the contract which she there made. The novelty and importance of the question has cast upon the Court much anxiety, but from some portion of it we are relieved by the consideration that, if our judgment is wrong, it may be corrected by the highest tribunal in this country.

(Before the Full Court,—*The Judge Ordinary, Martin, B.*, and *Willes, J.*)

BACON *v.* BACON AND BACON. May 31, 1860.—Dissolution of Marriage.—Settlement of Wife's Property.—20 & 21 Vict. c. 85, s. 45.—On a decree of dissolution by reason of the wife's adultery, the Court directed two-thirds of the bulk of certain property to which she was entitled under certain trusts, to be settled on the children immediately, and the remaining third after her death.

[S. C. 29 L. J. (Mat.) 129; 2 L. T. 438; 8 W. R. 552. Applied, *Midwinter* v. *Midwinter*, [1893] P. 93.]

This was originally a petition for dissolution of the marriage at the suit of the husband by reason of the wife's adultery. Certain issues raised by the pleadings were, on the 28th of November, 1859 (before the Judge Ordinary, Watson and Hill, JJ.), determined by the verdict of a jury in favour of the petitioner, and the decree suspended to enable the petitioner to make an application for the settlement of the wife's property under the 45th section of 20 & 21 Vict. c. 85.

Dr. Spinks (Mr. G. Francis with him).—Under the trusts of certain wills, it appeared that when certain mortgages were [87] paid off, the respondent would be in receipt of one-sixth of an income of upwards of £600 arising out of real property, with power to dispose thereof: she was also entitled to £15 per annum from another source.

Petitioner's counsel asked for a settlement of the property on the children of the marriage, two sons and a daughter, of the respective ages of nine, seven, and five years, leaving the respondent a proportion for her maintenance during life, or whilst unmarried.

Dr. Phillimore, Q.C., for the respondent, consented to such arrangement as the Court might think fit.

By the Court: We are of opinion that the following will be a reasonable arrangement as regards the property:—The £15 we do not touch. As to the property under the will, over which, when the marriage is dissolved, the respondent would have absolute control, we think that she ought not to have any controlling power after her life; the two-thirds should be settled on the children immediately, and the remaining third on them after the mother's death. The 45th section does not point out any mode in which the directions of the Court are to be carried out. With respect to permanent alimony, the 32nd section enables the Court to have a deed settled by a conveyancing counsel, and executed by the parties; but we have no such power in the present case; if we had, we should undoubtedly think it reasonable that the father should be joined with the other trustees to protect the interests of the children.

[88] (Before the Full Court,—*The Judge Ordinary, Martin, B.*, and *Willes, J.*)

BURT *v.* BURT. June 5, 1860.—Bigamy and Adultery.—Evidence.—To establish bigamy as a ground for the sentence of the Court, there must be proof of such a ceremony as, but for the former marriage, would constitute a valid marriage. Thus, if the bigamy relied upon took place abroad, it will be necessary to give formal proof of the marriage law of that country.

[S. C. 29 L. J. (Mat.) 133; 8 W. R. 552; 2 L. T. 439. Referred to, *Allen* v. *Allen*, 1872, L. R. 1 C. C. R. 371.]

This was a petition for dissolution of marriage, at the suit of the wife, by reason of bigamy, adultery, and desertion. The respondent made no answer.

Dr. Spinks conducted the petition.

It appeared that the husband had left the wife in England, and had married another woman in Australia. This woman was produced as a witness, and said that she had married a person of the name of Burt at Melbourne, according to the form of

the Kirk of Scotland; that she had lived nine years there, and had known many persons married there in the same form, who afterwards lived together as husband and wife. A certificate of the marriage was also put in, but there was no formal proof of the marriage law of Australia.

By the Court: We cannot in this case consider the bigamy as proved. There must be proof of such a ceremony as, but for the former marriage, would have constituted a valid marriage. In the absence of the formal proof of the law of Australia, we cannot say that this is the case. But, without putting our decree on the ground of bigamy, we think that Burt's cohabitation with the woman with whom he went **[89]** through the ceremony described, and his desertion of his wife, are sufficiently established to warrant a decree of dissolution.

(Before the Full Court,—*The Judge Ordinary*, *Martin*, *B.*, and *Willes*, *J.*)

THOMAS *v.* THOMAS. May 31, 1860.—Marriage Settlement.—No Children of Marriage.—Jurisdiction of Court under s. 5 of 22 & 23 Vict. c. 61.—Where there is a marriage settlement and there are no children of the marriage, the Court has not jurisdiction on a dissolution of the marriage to make an order under sect. 5 of 22 and 23 Vict. c. 61, with reference to the application of the settled property.

[S. C. 29 L. J. (Mat.) 160, n.; 2 L. T. 438; 8 W. R. 504. Referred to, *Bird* v. *Bird*, 1866, L. R. 1 P. & D. 232; *March* v. *March*, 1867, L. R. 1 P. & D. 447; *Corrance* v. *Corrance*, 1868, L. R. 1 P. & D. 498; *Graham* v. *Graham*, 1869, L. R. 1 P. & D. 712: *Dormer* v. *Ward*, [1901] P. 20.]

This was a suit for a dissolution of marriage promoted by the wife against her husband. The Court was of opinion that the wife was entitled to a decree, dissolving the marriage, on the ground of her husband's adultery, coupled with cruelty.

Dr. Phillimore, Q.C. (Dr. Tristram with him), asked the Court to suspend the decree, in order to enable the petitioner to present a petition for permanent alimony, unless the Court should be of opinion that it could deal with the property comprised in the marriage-settlement under s. 5 of 22 & 23 Vict. c. 61. The settlement included property belonging to both the husband and the wife. The husband under it took the first life-interest in the wife's property, and it contained no provision for the wife during his life. There were no issue of the marriage, and as by the words of s. 5 the Court was only **[90]** authorised "to make such order with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage, or of their respective parents as to the Court should seem fit," it might be a question whether the use of the term "parents" did not exclude from the operation of this section a case where there were no children of the marriage. There was, however, no apparent reason for such exclusion.

By the Court: We think we have no power by the terms of this section to deal with the settlement in this case. We suspend the decree to enable the petitioner to make an application for permanent alimony.

Attorneys for the petitioner, Davies, Son, Campbell, and Reeve.

(Before the Full Court,—*The Judge Ordinary*, *Martin*, *B.*, and *Willes*, *J.*)

DECK *v.* DECK. July 2, 1860.—Petition by wife for Dissolution.—Domicil of Husband at date of service of citation.—Jurisdiction.—D., a natural-born English subject, married C., an Englishwoman, in England; he afterwards left her, acquired a domicil in the United States, North America, and intermarried there with E.—C. petitioned for dissolution. The Court took time to consider whether its jurisdiction, under the circumstances, was founded; and—Held, first, that C., being a native-born Englishwoman, was entitled, under the 27th section of the Divorce Act, to present her petition; secondly, that D., being a natural-born English subject, could not **[91]** shake off his liability to the authority of the laws of his native country, and pronounced for the jurisdiction.

[S. C. 29 L. T. (Mat.) 129; 2 L. T. 542; 8 W. R. 666. Referred to, *Wilson* v. *Wilson*, 1871, L. R. 2 P. & D. 344; *Le Sueur* v. *Le Sueur*, 1876, 1 P. D. 142; *Niboyet* v. *Niboyet*, 1878, 4 P. D. 18; *Rayment* v. *Rayment*, [1910] P. 285.]

This was a petition for dissolution of marriage at the suit of the wife, by reason of husband's adultery and bigamy. The citation was served upon the respondent in the United States, North America.

May 28.—The petitioner's case was conducted by Mr. O'Malley, Q.C., and Mr. D. Keene.

On the evidence it appeared that the husband, a natural-born English subject, was, at the time of the service of the citation, domiciled in the United States, North America; and the Court took time to consider how this fact affected its jurisdiction. The circumstances are sufficiently stated in the following judgment of the Court.

July 2.—*The Judge Ordinary*: This was a petition for dissolution of marriage by reason of bigamy and adultery alleged to have been committed by the respondent. It appeared in evidence before us that the parties were married at Norwich in 1844. In 1848 a deed of separation was executed, and they ceased to live together. Soon afterwards the respondent went to America and became domiciled there. In 1853 he intermarried in America with Louisa Halpin, and by her had one child. She afterwards in the Supreme Court of the State of New York obtained a decree of nullity of marriage, on the ground of his having a wife living at the time when the marriage ceremony was performed. The citation out of this Court was served on the respondent personally in America. On this evidence it was quite clear that the respondent had been guilty of bigamy and adultery, but a doubt was entertained whether the Court had jurisdiction to adjudicate on a petition presented against a party domiciled in America. We **[92]** have considered the question, and are of opinion that we have jurisdiction. Both parties were natural-born English subjects; both, therefore, owed allegiance to the crown of England, and obedience to the laws of England; that allegiance could not be shaken off by change of domicil; the husband, therefore, although he became domiciled in America, continued liable to be affected by the laws of his native country. In Story's "Conflict of Laws," s. 540, it is said: "It is true that nations generally assert a claim to regulate the rights, duties, obligations, and acts of their own citizens, wherever they may be domiciled; and so far as those rights, duties, obligations and acts afterwards come under the cognizance of the tribunals of the sovereign power of their own country, either for enforcement or protection, or for remedy, there may be no just ground to exclude their claim." In that opinion we concur. Now the Imperial Parliament has, by statute 20 & 21 Vict. c. 85, regulated the rights, duties, obligations and acts with regard to matrimonial causes in England. And by s. 27 it was enacted, "That it shall be lawful for any wife" (which we think must certainly include any wife being an English natural-born subject) "to present a petition to this Court praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of bigamy with adultery, and that bigamy shall be taken to mean the marriage of any person being married to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere." In this case, then, we have before us the petition of an English wife against an English husband, complaining that he has, since the celebration of her marriage with him, been guilty of bigamy and adultery in America; the case seems to come within the letter as well as the spirit of the enactment, and s. 42 removes all difficulty as to the service of process out of this country. Having then jurisdic-**[93]**-tion, and the petitioner's case having been proved, we are bound to exercise that jurisdiction, and accordingly pronounce our decree for the dissolution of the marriage, and condemn the respondent in costs.

(Before the Full Court,—*The Judge Ordinary*, *Martin*, *B.*, and *Willes*, *J.*)

BOND *v.* BOND. May 28 and July 2, 1860.—Petition by Wife for Dissolution.—Domicil of Husband.—Jurisdiction.—C., a natural-born Englishwoman, married B. in England, and lived with him partly in England, partly in Ireland; in the latter country they stayed on one occasion with B.'s father, on another at a house which B. himself was occupying. Cruelty was proved both in England and Ireland; adultery in Ireland. The citation was served on B. in England, where he was then living; he did not appear. The Court took time to consider whether its jurisdiction was, under the circumstances, founded, and—Held, that C. was entitled to present her petition, and that it did not so distinctly appear on the evidence that B.'s domicil was Irish as to oblige the Court to consider whether its jurisdiction over a foreigner could be maintained, and pronounced for the jurisdiction.—Semble, if a foreigner appears to a citation otherwise than under protest, he submits himself to the jurisdiction of the Court.

[S. C. 29 L. J. (Mat.) 143; 2 L. T. 543; 8 W. R. 630. Referred to, *Wilson* v. *Wilson*, 1871, L. R. 2 P. & D. 344; *Le Sueur* v. *Le Sueur*, 1876, 1 P. D. 143.]

This was a petition for a dissolution of marriage at the suit of the wife, by reason of the husband's adultery and cruelty. There was no appearance on the part of the respondent. The petitioner's case was conducted by

Mr. Serjt. Pigott and Dr. Spinks.

On the evidence a question arose as to the jurisdiction of the Court, on the supposition that the domicil of origin of the **[94]** respondent was Irish, and the Court took time to consider how far this might affect its jurisdiction. The circumstances of the case are sufficiently stated in the following judgment of the Court.

July 2.—*The Judge Ordinary*: This was a petition for dissolution of marriage by Charlotte Bond, on the ground of the adultery and cruelty of her husband. The petitioner was an Englishwoman. On the 28th of July, 1840, she was married to the respondent, in England; they then went to live at Clifton, from thence they went to Ireland, to the house of the respondent's father; not long afterwards they returned to England and lived some time in London. In 1843 they were at the house of a sister of the petitioner, in Warwickshire, where she was treated with great cruelty by the respondent. They afterwards again went to Ireland, but returned to England in 1845, bringing with them a servant named Hegan; this woman shortly afterwards returned to Ireland, and the respondent went there also. In the same year the petitioner went to Ireland to her husband, who was then living at a place called Grange Hall. Soon after her arrival she found that the respondent was living in open adultery with Mary Ann Hegan; she was there again treated with great cruelty by the respondent, and shortly after returned to England to her friends. She has not since seen her husband, nor did she hear from him until 1860, when he was living in England, where he was served with the petition. According to this evidence the petitioner was English, and therefore had a right, according to the 27th section of the Divorce Act, to present her petition; but the respondent appears to have had a residence in Ireland, from which, if that evidence stood alone, it might be inferred that his origin was Irish, and Ireland, for the purpose of this question, must be treated as a foreign country. If the evidence on this point had been so cogent as to compel the Court to take notice that the respondent was not English, we must **[95]** have decided whether or no the Court can, consistently with the principles of international law, assume a right to adjudicate on a petition presented against a foreigner who is served abroad with a citation, to which he does not appear. But the marriage was solemnized in England, and the respondent afterwards lived with his wife at various places in England, and although he has not appeared and submitted to the jurisdiction of this Court, he has not contested it, and we do not find evidence of so conclusive a nature as to compel us to deal with him as an Irishman; the case is therefore the same in substance as *Deck* v. *Deck*, and our decree is that the marriage be dissolved and the respondent condemned in costs.

(Before the Full Court,—*The Judge Ordinary*, etc.)

ALEXANDER *v.* ALEXANDER AND AMOS. April 30, 1860.—Dissolution of Marriage.—Adjournment of hearing.—Leave to Wife to appear.—Proof of Adultery.—Evidence.—Where a wife had been deterred from putting in an appearance to a petition filed by her husband charging her with adultery, in consequence of a threat made by her husband's agent, the Court (the case having been adjourned) gave her leave to appear and file an answer.—The case on coming on for re-hearing (the wife having filed an answer), was treated as a new and not as an adjourned case.—Quære, whether, when a case, which has been adjourned, comes on for further hearing, the petitioner is entitled to examine any of the witnesses whom he had examined at the former hearing.—Where a wife has conducted herself during a married life of twenty years with propriety, the Court will not conclude that she has been guilty of adultery charged to have been committed without the slightest regard for decency or fear of detection, unless established by cogent evidence.

[S. C. 29 L. J. (Mat.) 56; 6 Jur. (N. S.) 56; 8 W. R. 452.]

This was a petition for dissolution of marriage, on the ground of the wife's adultery.

**[96]** The petitioner, Mr. Samuel Alexander, son of a banker at Ipswich, married the respondent (then a Miss Milborne) in January 1838. The respondent was a person of humble origin, and of little or no education, and the marriage did not meet

with the approval of the petitioner's family. They had cohabited from the date of their marriage up to September 1858, and they had issue of the marriage four children. It was admitted by the petitioner's brother, that his family had endeavoured to induce the respondent to sign a deed of separation six years ago, and that a similar attempt had been unsuccessfully renewed shortly before the petition was filed. The respondent was charged with having committed adultery with Frank Amos, the co-respondent, a groom in the husband's employment.

November 19, 1859.—The petition was heard before the full Court.

Mr. Maude and Mr. Beck appeared for the petitioner.

The respondent had not entered an appearance.

Two witnesses were examined in support of the charge of adultery, Patrick Sullivan, a farm labourer, and Eliza Vallens, who had both been in the petitioner's service.

Mr. Maude submitted that the charge in the petition was established. If the Court was not satisfied with the evidence, he should ask it to adjourn the case.

*The Judge Ordinary* (after consultation): The Court has been deliberating upon the evidence which has been laid before it. It is of a very singular character. The Court is not prepared upon that evidence to pronounce a decree dissolving the marriage. The case may be adjourned for further evidence.

A sister of the respondent, who had been called to prove her **[97]** handwriting, stated that Mrs. Alexander denied the charge of adultery; that she had only been prevented from opposing the suit in consequence of a threat made by the petitioner's agent, and that she was ready and anxious, if permitted, to appear and defend the suit.

*The Judge Ordinary*: This application is made irregularly. The Court cannot entertain it at present. But if Mrs. Alexander should hereafter make a formal application to the Court for leave to appear and defend herself, I am not prepared to say that the Court would not, upon sufficient grounds shewn, grant her application.

November 30.—Mr. Couch moved (before the Judge Ordinary) for a rule nisi, calling upon the petitioner to shew cause why the respondent should not be allowed to put in an appearance and file an answer to the petition. The motion was supported by an affidavit of the respondent, in which she denied the charge of adultery, and stated that in September, 1858, she came with her husband from Jersey, where they were residing, to London, to consult a physician as to the state of her health; that she then went to Ipswich to visit her family; that about a week afterwards a brother of her husband's (he having separated from her) made an application for her signature to a deed of separation, which she refused to give; that her husband had since they separated made her an allowance of £2 a fortnight; that the petition was served upon her by her husband's solicitor, to whom she said that the statements in it were utterly untrue; that he told her that if she appeared, she would lose her allowance and be left penniless; and that if her husband did not get a divorce, he would go abroad with the children, and she would have to go to the workhouse; that being intimidated by this representation, and not knowing what to do, she had not appeared to the petition.

**[98]** *The Judge Ordinary* made an order calling upon petitioner to shew cause why the respondent should not be allowed to appear and file an answer to the petition.

No cause having been shewn on the part of the petitioner, the Court made the rule absolute.

April 30, 1860.—The case again came on before the full Court for hearing.

Dr. Deane, Q.C., and Mr. Maude, appeared for the petitioner.

Mr. O'Malley, Q.C., and Mr. Couch, for the respondent, who had filed an answer denying the adultery.

Patrick Sullivan, a farm labourer, was again examined, and said he was in Mr. Alexander's service from January to about August, 1858. In April or May, Amos went into the service as groom. Amos had a great many conversations with him about Mrs. Alexander, and said to him, about six weeks after entering the service, that he would have connection with her before long. Between ten and eleven o'clock one night he put a ladder up to the window of a bedroom in which one of the children, a boy twelve years of age, was lying ill, and watched Mrs. Alexander and Amos. He heard them go into another room, and went round to a stable, upon which he climbed, and looked through the window of that room. It was a bedroom on the same floor.

He witnessed them in an act of adultery. He then went to the stable, got some sand, and threw it against the window. Mrs. Alexander and Amos came down. Mrs. Alexander was drunk and could hardly tell what she did. He said he should tell his master. They both struck him and dragged him about the yard. They went to his room, took his clothes and threw them about the yard. He considered that his mistresss might not do wrong again, and he did not therefore then tell his master. He said to Mrs. [99] Alexander that he would not tell. She and Frank went into his bedroom with him, and she said she would be as good as a mother to him if he did not tell. Mr. Alexander and Miss Ada, his daughter, were out. Frank and he slept in the same room in an outhouse looking into the yard. One day, when Mr. Alexander was at a review, he watched Mrs. Alexander and Amos, and saw them kissing each other in the kitchen. Not many days before he left, he saw Mrs. Alexander and Amos together in the outhouse in the afternoon. He went in and saw them in an indecent attitude. He one morning told Mr. Alexander what he had seen, and Mr. Alexander turned him away. He and Mrs. Alexander and Amos were brought face to face by Mr. Alexander, and he was going to tell all he had seen, but Mr. Alexander would not listen to him. Amos struck him, and kicked him, and knocked him about. He did not see Mr. Alexander again until the following Christmas. On the occasions of which he had spoken, Mrs. Alexander and Amos were generally three-parts drunk, and he heard the other servants had fetched brandy for them.

In cross-examination the witness gave a very confused account of the circumstances under which he had seen the acts of improper familiarity of which he had spoken. He was standing two or three hours on the ladder watching. He went back to Mr. Alexander's service at the beginning of 1859, and had remained in it up to last week. Some discrepancies were also elicited between his evidence at the last trial and his present statements.

Eliza Vallens, a girl who had been in Mr. Alexander's service, first as housemaid and then as cook, also spoke to several acts of improper familiarity between Mrs. Alexander and Amos.

In cross-examination she said she was still in Mr. Alexander's service. She had a sister who was in his service in 1858. Her sister went to Australia about Christmas, 1858. She did not tell Mr. Alexander anything about Amos's conduct [100] until after Mr. Alexander had been to England with his wife. Her attention was called to several statements she had made at the last trial, which were entirely at variance with her present statements, but she said that on the former occasion she had made mistakes.

Mrs. Randall, the widow of a medical man who had lived within a few minutes' walk of the Alexanders at Jersey, said that Amos was a married man, and had lived in their service for ten years before he went to the Alexanders. He was discharged by Mr. Alexander on the 2nd of September, 1858. On the 4th of September she saw Mrs. Alexander and Amos driving together in a gig along a lane between her house and Mr. Alexander's. She afterwards went to Mrs. Randall's. She said she wanted to see Frank, to get some plate. Mrs. Randall spoke to her about her conduct; she said she would not be talked to. Two days afterwards Mr. and Mrs. Alexander went to England together to get medical advice for their sick child. She frequently visited the Alexanders, and had noticed that Mrs. Alexander was too familiar in her manner with Amos.

Mr. John Alexander, a brother of the petitioner, and a banker at Ipswich, was then examined to prove Mrs. Alexander's handwriting to two letters she had written, one to Amos and one to his wife, since the separation, asking him to bring a parcel to her mother's at Ipswich, where she was staying. It appeared that after coming from Jersey, Mr. and Mrs. Alexander lived together for a short time in lodgings in London, with their sick child, that Mrs. Alexander went to Ipswich to pay a visit to her relations, and that while she was there her husband returned to Jersey, and then finally separated from her. Six years ago her husband's family had endeavoured to induce her to sign a deed of separation, but she refused. That endeavour was renewed while she was at Ipswich, before the petition was presented, but again failed.

Dr. Deane, in addressing the Court for the petitioner, sub-[101]-mitted that Mrs. Alexander's counsel was not entitled to treat the examination at the former hearing as evidence in the cause, as she was not then a party to cause. He could only refer to those parts of the evidence which had been examined on.

*The Judge Ordinary*: If I had treated this as a mere adjournment of the case, I should have hesitated long before I allowed you to call the same witnesses to improve your case.

Mr. O'Malley addressed the Court for the respondent.

*The Judge Ordinary* (after consultation): We are now called upon to decide whether Mrs. Alexander has been guilty of the adultery charged against her.

In deciding this question, we must act upon the same principles as juries are directed to act upon in deciding similar cases. It is a well-known principle of our jurisprudence that the party who alleges misconduct against another is bound to establish such misconduct by affirmative evidence. Unless, therefore, it is proved to the satisfaction of the Court, that the respondent has been guilty of the misconduct imputed to her, it is bound to dismiss the petition.

The particular adultery charged is with a groom who was in the employment of Mr. Alexander; and it is said that it was committed in 1858, only three months after he had entered his service. Mrs. Alexander is a person of humble origin, and was at the time of her marriage of scarcely any education; she had not been brought up in habits of delicacy and refinement, and some allowance must therefore be made for her conduct in some of the particulars proved. She continued to live with her husband from her marriage in 1838, until September, 1858, always under the displeasure of his family; and there were several children of the marriage. There is not a tittle of evidence to shew that during the whole period of their cohabita-**[102]**-tion she had done anything to raise the slightest suspicion of her infidelity in the mind of her husband, or that up to the time of the alleged adultery she had in any way misconducted herself. The Court is now called upon to believe that Mrs. Alexander at once, without any preparation, condescended to disgrace herself with a groom who had been about two months in her husband's service, with so little regard for decency, with so little regard as to whether she was discovered or not, that she was guilty of acts of adultery with him in the face of day, without taking the precaution of pulling down a window-blind, or closing a washhouse door. There may be cases of this sort in which passion, amounting to insanity, may lead a person to forget all sense of duty, all regard for decency, and all fear of detection. But is there any evidence of this sort here? If a case of this description is to be established, it must be proved by the most cogent testimony.

Upon an examination of the evidence of Sullivan and Vallens, the Court is of opinion that it is in itself so improbable, and so inconsistent with what they had said on the former trial, that it is impossible for the Court to act upon it. No woman's character would be safe, if it could be destroyed under the circumstances proved in this case. It is stated that Mrs. Alexander was a person of drunken habits; but if this had been so, the persons who visited at the house must have noticed it.

The Court does not consider that the adultery charged is proved, and is therefore bound to dismiss the petition.

Proctors for the petitioner, Laurie and Co.

Solicitor for the respondent, Fluker.

**[103]** (Before the *Judge Ordinary*, on Motion.)

DICKENS *v.* DICKENS. March 9, 1859.—Wife's Costs.—Wife's Petition.—Taxed Costs during Suit.—Practice.—On taxation of wife's costs in a petition for judicial separation pending suit, the registrar disallowed all costs incurred before actual proceedings taken against the husband, and various items charged for attendance on the wife's father in connection with her case. On cause shewn against a rule nisi for a review of taxation:—The Court affirmed the registrar's taxation as being in accordance with the practice of both the common law and ecclesiastical courts.

[S. C. 28 L. J. (Mat.) 94.]

This was a question of the taxation of the wife's costs against the husband, pending the suit, in a petition for judicial separation by reason of the husband's adultery. The petitioner's bill amounted to £75, 19s. 2d., of which the registrar disallowed £38, 2s. 2d.; of this upwards of £31 consisted of various expenses in taking opinions and advice previous to "the instructions for a petition." The remainder of what was disallowed chiefly consisted of charges for attendances on and conferences with Mr. Weller, the petitioner's father.

February 23.—Mr. John B. Karslake, for the petitioner, prayed a rule to shew cause why the registrar's taxation should not be reviewed. There were two classes of items disallowed by the registrar, both of which he submitted ought to have been allowed; one related to matters preliminary to the filing of the petition, the other class of items was thus incurred:—Mrs. Dickens was in ill health; her father consequently acted for her in the matter, and there were certain necessary attendances on and conferences with him charged for. These attendances and conferences, under the peculiar circumstances of the case, should be treated as if they had taken place with Mrs. Dickens.

[104] *The Judge Ordinary*: The mode of reviewing the registrar's taxation in the ecclesiastical courts was to proceed by act on petition and affidavits. For the future I think the most convenient and least expensive course will be to follow the practice of the courts of common law, and to take a rule to shew cause why the taxation should not be reviewed. The motion should be supported by an affidavit shewing in what respect the taxation is objected to, so as to enable the taxing registrar to furnish the Court with a report before the rule comes on for argument. The expenses preliminary to the institution of the suit would not have been allowed at common law. I shall adhere to this practice, unless you can shew that they would have been allowed in the ecclesiastical courts. With reference to the charges for the attendances on the father of the petitioner, if the registrar disallowed them on the ground that attendances upon any other person than the wife could not, under any circumstances, be allowed, this may be deserving of consideration. You may take a rule generally.

Rule nisi granted.

Dr. Swabey, for the respondent, shewed cause. With respect to the first class of items, neither at common law nor in the ecclesiastical courts were any costs as between party and party incurred previous to the institution of the suit allowed to be taxed; and the registrar was bound to disallow the £31. As to the items of attendance, etc., upon Mr. Weller, they were most of them unnecessary, even allowing Mrs. Dickens to have been so ill as not to be able to see her own attorney.

Dr. Phillimore, contrà.

Cur. adv. vult.

March 9.—*The Judge Ordinary*: This was an application to review a taxation of costs taxed during the progress of the suit. It was first objected that the taxing officer had struck off a num-[105]-ber of items in respect of certain steps taken by the wife preliminary to the principal proceeding: in so doing he followed the practice of the Common Law Courts, of the Prerogative Court, and of the Courts which this Court represents, and as to these items I must confirm his taxation. Secondly, there were a number of items for attendances on the wife's father, Mr. Weller. I find that it would be quite contrary to the practice of the ecclesiastical courts to allow for attendances on any one except the party herself. It would appear from the aspect of the bill, that Mr. Weller, taking a natural interest for his daughter in the suit, looked into the attorney's office whenever he passed that way, and talked matters over. I must confirm the taxation. The rule must therefore be discharged.

Rule discharged.

(Before the *Judge Ordinary*, on Motion.)

SOPWITH *v.* SOPWITH. March 28, 1860.—Wife's Costs.—Wife's Petition dismissed.—Taxation of Costs.—Practice.—Where the registrar has directed a sum of money to be paid into Court to meet the expenses of the wife's petition at the hearing, and her suit fails, the husband will not be liable to a greater amount than the sum so paid in, though the wife's costs as ascertained on taxation exceed that sum.

[S. C. 29 L. J. (Mat.) 132; 2 L. T. 472; 6 Jur. (N. S.) 404; 8 W. R. 552.

Adopted, *Ellyatt* v. *Ellyatt*, 1864, 3 Sw. & Tr. 509.]

This was originally a petition by the wife for judicial separation by reason of the husband's adultery. The case was tried by the Judge Ordinary without a jury. The learned judge was of opinion that the evidence failed to establish the adultery, and dismissed the petition. £90 had been paid into court by order of the registrar before the hearing to meet the [106] wife's costs. After the trial the wife's costs were taxed by order of the Court, and were found to amount to £132, 10s.

Dr. Spinks now moved the Court for an order on the respondent to pay the balance, viz. £42, 10s. The amount here was that ascertained on the taxation

directed by the Court. There was no laches on the part of the wife, but an error of judgment in the registrar in directing £90 only to be paid in.

Dr. Wambey, for the respondent, contrà.

*The Judge Ordinary*: I am of opinion that no order should be made. I have already decided that where the wife has failed in her suit, she is not entitled to a larger sum than has been paid into the registry to meet the costs of the hearing, for according to the old practice, on failure of the wife's suit, the Court would have made no order for the payment of her costs if they had not been paid before the trial. The ecclesiastical courts allowed these costs to be taxed, and enforced their payment before the hearing, in order that the wife might not be deprived of justice from being unable, from want of funds, to appear at the hearing. The practice in the House of Lords was to order a sum of money to be paid to the wife to enable her to obtain professional assistance.

In this Court it is impossible to tell accurately before the trial to what the costs of the hearing will amount. I therefore considered that I should best do justice by making the nearest approximation to what was the old practice, and accordingly directed the registrar to fix such a sum as, from the representations of the parties, would, to the best of his calculation, meet the wife's costs, and that the husband should pay that sum into the registry, or find security for the same, so that the wife's professional adviser up to that amount may be se-**[107]**-cured. As to anything beyond that, the wife in this case must be in the position of any other failing suitor.

Motion rejected.

(Before the *Judge Ordinary*, on Motion.)

ALLEN *v.* ALLEN AND D'ARCY (on Motion). November 7, 1860.—Wife's Costs.—Suit for Dissolution by the Husband.—Some issues found for the Petitioner, some for Respondent.—Petition dismissed with Costs.—Principles of Taxation.—Definition of Connivance.—Costs of wife in a matrimonial suit are taxed as between party and party, but not in all respects on the same principles as a taxation at common law between party and party. Thus, though certain issues may have been found against the wife, whose costs are being taxed, the expenses incurred by them will be allowed unless the registrar should think that they were wantonly and vexatiously raised. Expense of witnesses to prove the circumstances of a plea not in issue, if such circumstances have a bearing on other parts of the case in issue, may be allowed; and a reasonable amount of expense incurred in investigating and acquiring information as to the circumstances of the case should be allowed.

[S. C. 30 L. J. (Mat.) 9; 3 L. T. 480; 7 Jur. (N. S.) 103; 9 W. R. 389. Referred to *Ottaway* v. *Hamilton*, 1878, 3 C. P. D. 402.]

This was a question as to the principles applicable to the taxation of costs in matrimonial suits. It was originally a petition for dissolution of marriage presented by the husband against the wife, by reason of her adultery with Robert D'Arcy. The respondent denied the adultery, pleaded condonation and connivance, and charged the petitioner with adultery and cruelty.

The respondent alleged condonation as to the adultery pleaded, denied the cruelty, but alleged condonation of it (if any).

**[108]** The case was tried before the full Court (the Judge Ordinary, Watson, B., and Hill, J.) and a special jury, on the 2nd, 3rd, and 5th days of December, 1859.

Mr. Edwin James, Q.C., Dr. Deane, Q.C., Dr. Wambey, and Mr. T. L. Clarke, being counsel for the petitioner.

Mr. M. Chambers, Q.C., Mr. Hawkins, Q.C., and Dr. Spinks, for the respondent.—The jury by their verdict found that the adultery[1] of Mrs. Allen had been proved,

[1] Hill, J., in summing up the case to the jury, observed on the issue as to connivance: "That the jury must take the law from the Court as to what constituted connivance. That in order to justify them in finding by their verdict that the husband had been guilty of connivance, they must be satisfied from the facts, which had been established in evidence, that he had so connived at his wife's adultery as to have given a willing consent to it. They would have to consider whether he was or was not an accessory before the fact. Mere negligence, mere inattention, mere dullness of apprehension, mere indifference, would not suffice; there must have been an intention on his part that she should commit adultery. If such a state of things

that the husband had connived at the adultery (adding that they were of opinion that there had been a base conspiracy against Mrs. Allen), and found the other issues in favour of the husband.

Upon this the Court expressed their entire approval of the verdict, and, referring to the 29th and 30th sections of the Divorce Act, dismissed the petition with costs.

On the taxation of the wife's costs, the registrar disallowed a large amount of the bill tendered, proceeding, in two main points, on the common law rule of not allowing for the issues found against the wife, or for the expenses incurred by jour-[109]-neys to Paris and elsewhere, to identify the co-respondent, and produce evidence of his previous intimacy, under some other name, with the petitioner, such identification and evidence having a material bearing on the issue of connivance, i.e. in this case, of a conspiracy to bring about the adultery of the wife.

November 7.—Dr. Spinks, for the respondent, moved the Court for a rule nisi to direct a revision of the taxation. He submitted that the registrar had been in error in following the common law rule with respect to costs of issues found against the respondent; it would deprive the wife of her defence, if the solicitor's right to his costs depended on the success of the defence. It was not a question of taxation between party and party; the wife was not liable to costs, but the husband paid costs as for his wife's attorney; the taxation, therefore, ought to be as between party and attorney. The witnesses produced to prove the circumstances of the adultery of the husband, though it was admitted, laid a ground and shewed a motive for the conspiracy. As to the expenses incurred in investigating certain circumstances in this case, how could the wife, or her advisers, safely put such a plea as connivance on the record without prior investigation?

The Court granted a rule nisi.

November 14.—Dr. Wambey now shewed cause. He admitted that he was not prepared to support the taxation in all respects. The common law principle of taxing costs as between party and party was inapplicable to matrimonial suits, the husband being liable for costs in these suits on the presumption that he has the whole of the property, and that the wife has no funds of her own with which to defray her costs. The jury had found that the husband had not been guilty of cruelty as charged by the wife; she had no reasonable grounds for pleading it, and the husband therefore ought not to be liable for her costs of [110] attempting to prove it. (*Brown* v. *Akroyd*, 5 Ell. & Bl. 819.) The registrar had allowed £52, 10s. for instructions for the brief, which ought to cover the expense incurred in investigating the circumstances connected with the charge of connivance. Mrs. Allen was not concerned in the motion to dispense with service on the co-respondent, and ought not to have the costs for appearing on that motion. She was also disentitled to the costs of the motion to postpone the trial. It was made on the ground of the absence of John Boxell, who was alleged to be a necessary witness, and yet he was not examined at the trial.

November 21.—*The Judge Ordinary*: This taxation must certainly be reviewed. The question of the principle on which costs are to be taxed in matrimonial suits has not yet been settled, but I apprehend that I must adopt, as far as I can, the principles on which the Ecclesiastical Courts proceeded. I am informed that the principle of taxation in those courts was as between party and party; but that term had a very different construction from that put upon it in Common Law Courts, because there they only allow the costs of such issues as are found for the persons who are to receive costs. I think that the only limit which can with propriety be put upon the allowance of the costs of the different issues raised in this Court is this: where the taxing officer is satisfied that an issue has been vexatiously and improperly put on the record, so as to occasion a wanton and unnecessary increase in the amount of costs, he is not to allow the costs of that issue. The party guilty of putting such an issue on the record must take the consequences and lose his costs; but that is the only limit. With reference to the number of witnesses called to prove any par-

had existed as would, in the apprehension of reasonable men, result in the adultery of the wife,—whether that state of things was produced by the connivance of the husband, or independent of it,—and if the husband, intending that the result of adultery should take place, did not interfere, when he might have done so, to protect his own honour, he was guilty of connivance. Such was the rule that they must apply to the facts before them."

ticular fact, in a case where expenses are to be allowed, that must be a question for the discretion of the registrar. That question, again, depends upon whether there was any reasonable ground for calling them, or whether the attorney **[111]** has oppressively called or subpœnaed a number of persons whose evidence he, as a professional man, would know would be of no service to his client. Subject to that limitation, the expenses of witnesses of course are to be allowed. The question as to the costs of the issue of cruelty is disposed of by what I have already said. The registrar would hardly find in this case that there was no pretext for introducing such a charge. A good deal of evidence was given on the subject of cruelty, and it was only the evidence on the other side which shewed that the charge could not be maintained. Then there is the question of the expense of taking witnesses to Paris, for the purpose of giving evidence as to identity and handwriting. In the Common Law Courts the expense incurred by witnesses in obtaining information are not allowed. If a witness makes a journey to learn something, he is not allowed the expenses of his journey. I have inquired whether the same principle was applied to the taxation of costs in the Ecclesiastical Courts, and I am told it was not, but that where a journey to procure information was necessary to prove the case, the cost of the journey was allowed as a necessary expense for the wife. I think a reasonable amount should be allowed for those expenses. If the registrar, in allowing fifty guineas for instructions for the brief, included those expenses, he will probably not allow anything more, but it is a matter for his discretion. With reference to the motions to dispense with service upon the co-respondent, I cannot see how the wife could have an interest in the matter, and she cannot therefore be allowed the costs. It is reasonable to allow costs of the postponement of the trial to procure Boxell's attendance. The proof of the adultery of the petitioner, under particular circumstances, was, I think, legitimate evidence, bearing upon the issue of conspiracy. The taxation will be reviewed upon these principles.

**[112]** (Before the *Judge Ordinary*, on Motion.)

BAILY *v.* BAILY AND DELLA ROCCA. 1860.—Wife's Costs.—Commission for Examination abroad.—Sum advanced for Wife's Expenses.—The Court having, with the consent of the husband and wife, made an order for a joint Commission to issue for the examination of witnesses at Rome, directed the husband to advance to the wife a sum (the amount to be settled by the registrar) to enable her to defray her expenses of the Commission.

[S. C. 30 L. J. (Mat.) 47.]

Dr. Spinks, for the petitioner, moved for a Commission to issue for the examination, at Rome, of certain necessary and material witnesses.

Mr. Pritchard, for the respondent, did not object to the motion. The wife was desirous of examining witnesses herself also at Rome. He submitted, however, that the Commission should be granted subject to an order on the husband to pay into the Registry a sum sufficient to defray the expenses of the wife in respect of the Commission. He cited *Hood* v. *Hood*,[1] Pritchard's Handbook, p. 211.

*The Judge Ordinary*: There should be a joint Commission. The Commissioner should be appointed by agreement **[113]** between the parties, and if they cannot agree upon a Commissioner, the Court will appoint one. I think the petitione. should advance to the wife a sum of money to enable her to defray her expenses of the Commission; the amount to be advanced to be settled by one of the Registrars of the Court.

(Before the *Judge Ordinary.*)

THOMAS *v.* THOMAS. July 25, 1860.—Petition for Judicial Separation.—Deed to live separate.—Connivance and Consent.—A husband and wife executed a deed

---

[1] HOOD *v.* Hood.

(Before the *Judge Ordinary*, on Motion.)

July 13, 1858.—This was a suit for dissolution of marriage, in which an application was made on behalf of the husband for a Commission to examine witnesses in Australia.

Per Curiam: "The Commission may issue. The husband must however advance such a sum of money as the registrar may think sufficient to defray the wife's expenses in respect of such Commission." See *Fitzgerald* v. *Fitzgerald*, 2 Lee 312.

of separation in 1854, which recited, amongst other things, that the husband had for some months been living with a Miss H., and referred to certain articles of agreement concerning certain trust-moneys and other property to which Miss H. as well as the husband and wife had been party. In 1860 the wife petitioned for a judicial separation on the ground of the husband's adultery with H. in 1858-1859:—The Court held, that the execution of the deed of separation by the wife, knowing at the time that the husband was cohabiting with H., was virtually a consent to the continuance of such cohabitation, and dismissed the petition.

[S. C. 3 L. T. 180. Referred to, *Ross* v. *Ross*, 1869, L. R. 1 P. & D. 736; *Gandy* v. *Gandy*, 1882, 7 P. D. 83.]

This was a petition for judicial separation and custody of children at the suit of the wife, by reason of the husband's adultery.

The petition alleged the marriage of the parties in April, 1839, and the birth of eight children, and charged adultery between the 1st of March and 1st of August, 1858, at Greenwich, and on subsequent dates at Dublin, London, and Gravesend, with a Miss Hargrave.

The answer of the husband denied the adultery, and alleged **[114]** that the petitioner was fully cognizant thereof, conniving thereat, and consenting thereto.

At the hearing it appeared that in 1854 a deed of separation was executed, to which Mr. Thomas, Mrs. Thomas, and two gentlemen of the name of Everard, Mrs. Thomas's brothers, as her trustees, were parties. This deed contained, among others, the following recitals:—

"And whereas a post-nuptial settlement was agreed upon and executed between and by the same parties, on or about the 3rd of August, 1839, whereby certain moneys and properties of the said Ann Thomas were settled and secured for her sole and separate use and benefit for life, and after her death for the use and benefit of her said children, etc., but of which said moneys and property the said J. N. H. Thomas afterwards himself became and is still wrongfully possessed. And whereas the said J. N. H. Thomas, several months ago, left his said wife and children at their residence at Millbrook aforesaid, and has since been living in Ireland aforesaid with one Miss Elizabeth Margaret Hargrave, and proceedings have been accordingly taken, and are now pending against him, in the Court of Chancery in Ireland aforesaid, for compelling the restitution and resettlement by him of the moneys and property aforesaid, upon the trusts above referred to, and proceedings have also been contemplated and threatened to be taken against the said J. N. H. Thomas in the ecclesiastical or other proper court, for obtaining a divorce between him and his said wife, etc.: and whereas, in order to put an end to the said suit or proceedings so pending, and also to prevent further litigation and expense, certain articles of agreement were made and entered into by and between the said several parties hereto, and the aforesaid Elizabeth Margaret Hargrave, on the 11th day of November last, whereby (amongst other things) terms have been settled and agreed upon for the refunding or securing the aforesaid trust-moneys and property, and making further provi-**[115]**sions for the future maintenance and benefit of the said Ann Thomas and her aforesaid children, and whereby it was also arranged and agreed, on the requirement of her the said Ann Thomas, that such deed of separation, with such additional provision for herself and children, should be made and executed between and by her and her aforesaid husband as are hereinafter respectively contained and set forth."

Mr. Maples, of Spalding, who acted as Mrs. Thomas's solicitor in the transactions referred to in the deed of separation, said, on cross-examination by respondent's counsel, that he was sent over to Ireland by Mr. Everard; that he saw Mrs. Thomas before he went over to Ireland; that he went there for the purpose of finding Mr. Thomas and Miss Hargrave; that he heard from Mrs. Thomas they had been living in the house together in England; that he received instructions from Everard to commence a suit against Mr. Thomas in the Irish Court of Chancery to recover the trust-money; that he afterwards drew a deed of separation between Mr. and Mrs. Thomas; that the deed produced was executed by the parties and the new trustees; that the Elizabeth Hargrave there mentioned was the person with whom the charge of adultery is now brought; that he had within a year or two received a sum of money from Mr. Hooper, Miss Hargrave's solicitor, consisting of £1080, 0s. 9d., trust-fund recovered; £159, 6s. 9d., taxed costs in Chancery; £150, further costs;

£259, 19s. 3d., estimated moiety of the Terenure estate, on which estate he had obtained a security for the trustees; that the Terenure estate had been conveyed to Mr. Thomas and Miss Hargrave jointly.[1]

**[116]** July 19.—Dr. Spinks submitted that this deed was executed by the petitioner in contemplation of the continuance of the adulterous connection then existing between her husband and Miss Hargrave, that the present suit could not have been instituted in consequence of her feeling aggrieved at the injury she had received, because she had taken no steps to obtain a divorce for several years after the execution of the deed, and that the case was governed by *Matthews* v. *Matthews* (*ante*, Vol. I. p. 499).

Dr. Deane, Q.C. (Mr. G. H. Cooper with him), for the petitioner, said, there was no case in the Ecclesiastical Courts in which a deed of separation had been held to be a bar to a suit for divorce. The deed in this case merely carried into effect an arrangement about money, and put an end to litigation respecting the trust funds. Mrs. Thomas and her trustees merely undertook, for a certain consideration, that the proceedings in Chancery should be abandoned, and there was no pretence for suggesting that she intended to allow her husband to continue to live in adultery. The deed referred to the past, not to the future.

*The Judge Ordinary*: If a wife once consents to allow her husband to commit adultery, she has no right afterwards to claim a decree on account of that adultery.

Dr. Deane: This deed was only a remission of that which was past; it was an abandonment of proceedings on account of what had occurred up to the date of its execution.

*The Judge Ordinary*: Assume that there is no express license for the future, but when you find a woman with a clear case against her husband, saying to him, "I know you have committed adultery, and I am about to sue for a divorce, and to get alimony, but if you will come to terms, and **[117]** give me a certain sum, I will not take proceedings," she being cognizant that he is living in adultery at the time, do you mean to say that is no evidence of her connivance at his continuing to do so?

Dr. Deane could not deny that it was.

*The Judge Ordinary*: We should introduce a strange state of morals into the country if we did not say that it was. My present impression is, that the deed is an answer to the suit.

Cur. adv. vult.

July 24.—*The Judge Ordinary*: It was urged in this case, that the deed of separation which had been executed, and to which the wife was a party, was a sufficient ground for dismissing her petition.

I certainly thought it would be very strange if, after executing a deed of that description, and being cognizant of, and approving of the negotiations which led to its preparation, it was open to her to insist upon a judicial separation on account of the adultery which her husband had committed since the date of the deed with the person with whom he was cohabiting when it was executed. I have looked into the authorities on the subject, and I find in *Barker* v. *Barker* (2 Add. 285) ample authority for the opinion I had formed. In *Barker* v. *Barker*, the Chancellor of London considered that the deed of separation did not itself give a license to the husband to commit adultery, but that it was evidence of consent on the part of the wife to his committing it. There was an appeal to Sir John Nicholl, and that learned Judge said, not that the deed would not be evidence to that effect, but that it was not in itself an authority for the adultery. Then treating it only as evidence that might be rebutted by other evidence, he considered that the evidence which had been given before him was sufficient to rebut it.

**[118]** The deed, in the present case, does not in terms in itself constitute a license to the husband, but let us see what it is. It recites "a post-nuptial settlement between the lady and her husband, and that the husband several months ago left his

[1] To prevent any misunderstanding arising from this evidence, it may be as well to state that Miss Hargrave had, in 1852, been residing as a lodger with Mr. and Mrs. Thomas, at their house in Cornwall, and that the Terenure estate was a house and grounds near Dublin, purchased as above stated, though Mrs. Thomas was not aware of the fact till the summer of 1854.

wife and children at their residence at Millbrook, and has since been living in Ireland with one Elizabeth Margaret Hargrave, and proceedings have been accordingly taken and are now pending against him in the Court of Chancery in Ireland, and proceedings have also been contemplated and threatened to be taken against him in the Ecclesiastical or other proper court for obtaining a divorce between him and his said wife, and alimony for herself and children, and whereas, in order to put an end to the suit or proceeding so pending as aforesaid, and also to prevent further litigation and expense, certain articles of agreement were made and entered into by and between the said several parties hereto, and the aforesaid Elizabeth Margaret Hargrave, on the 11th day of November last, whereby, amongst other things, terms have been settled," etc.—Here is a lady, who, knowing that her husband had been, and was then living in a state of adultery with this Elizabeth Hargrave, threatens him with proceedings in the Ecclesiastical Court, and then enters into a negotiation whereby a certain provision is made for her and her children, in order to prevent further proceedings in Chancery, and litigation in the Ecclesiastical Court.

Is there any provision in the agreement, that the husband is to cease, or is it contemplated by her that he should cease, to maintain his adulterous connection with the other woman? It is impossible to draw any other inference from this deed, than that she was a consenting party to his continuing to live in a state of adultery, and therefore her petition must be dismissed.

**[119]** IN THE GOODS OF EDWARD MILLER MUNDY, Esq., (deceased). November 14 and 21, 1860.—Codicil.—Informal Paper.—Doubt as to Dispositive Effect of.—Title to Probate.—B. on his deathbed dictated a writing in the form of a letter, but attested by two witnesses, requesting C., the devisee for life of certain estates under B.'s will, to consent to charge them with £10,000, to be raised as soon as possible after B.'s death, adding that he knew the request was not legal. The Court decreed probate of the paper on motion, in order that the question of construction might be brought before a court of equity.

[S. C. 30 L. J. (P.) 85; 3 L. T. 380; 7 Jur. (N. S.) 52; 9 W. R. 171.]

This was a question of the title to probate of a pencil writing in the following terms:—

"Barbadoes, Jan. 23, 1849.

"My dear Alfred,—It is my deathbed request that you will consent to charge the Shipley estate with £10,000, to be equally divided between our dear brothers and sisters; and that this sum shall be raised and paid as soon as possible after my death. I make this request knowing that it is not legal, but trusting in your affection to myself and to our dear brothers and sisters. I feel satisfied also, in the very improved condition of the property, that this charge will be **[120]** no serious encumbrance to you." [The remainder of the letter was immaterial.]

"E. M. MUNDY.

"Witness, 23rd Jan., 1849, HENRY S. WILMOT.

"WM. CLARKE, M.D."

From the affidavit of Sir Henry S. Wilmot, one of the witnesses, it appeared that the testator was tenant-in-fee of the Shipley estates, and that under his will and codicils, proved by his executors on the 11th of August, 1849, Alfred Miller Mundy, the person addressed in the above note, was the present tenant for life; that the pencil writing was made by Sir Henry S. Wilmot, at the dictation of the deceased when on his deathbed, and duly executed; that the £10,000 had been paid by Alfred M. Mundy; that the paper had been treated as untestamentary when the will and codicils were proved; but that, in consequence of counsel's opinion lately taken, it was thought desirable to prove the paper in question.

Dr. Deane, Q.C., moved for probate. Whether the words of this paper are operative, and in what manner, is a question for a court of equity; but if it is not entitled to probate, a court of equity cannot take notice of it. He cited *Chaworth* v. *Beech*, 4 Ves. 565.

Cur. adv. vult.

*Sir C. Cresswell*: I think, as the construction of this document raises a question which would be more properly decided by a court of equity than by this Court, I ought to grant probate of it.

**[121]** ROSBOTHAM AND OTHERS *v.* ROSBOTHAM. December 5, 1860.—Suit for Revocation of Probate. — Declaration. — Pleading. — Practice. — Where the executors of a later will having called in the probate of a will of prior date propound in a declaration the later will, it is not competent to them to allege in their declaration that the probate of the earlier will was surreptitiously obtained, or that the earlier will ought to be pronounced null and invalid.

[S. C. 30 L. J. (P.) 38; 3 L. T. 557; 9 W. R. 148.]

The defendant in this cause (Margaret Rosbotham) had obtained probate in common form of an alleged last will of Samuel Rosbotham, deceased, bearing date the 13th of June, 1859. The plaintiffs alleged themselves to be executors of a later will of the said Samuel Rosbotham, which bore date the 19th of June, 1860, and as such executors issued a citation against the defendant, calling upon her to bring the said probate into and leave it in the Registry, and to shew cause why the same should not be revoked, and the said pretended will pronounced to be null and invalid. The defendant had appeared to the citation, and had brought in the probate. The plaintiffs then filed their declaration, in which, after propounding the will of June 19, 1860, it was alleged "that, notwithstanding the premises, the defendant being well aware of the existence of the said last will of the said deceased, on the 21st of September, 1860, surreptitiously obtained probate of a pretended will of the said deceased, bearing date the 13th of June, 1859; that the said probate having been, in obedience to a citation issued at the suit of the plaintiffs, brought into the principal Registry of the Court, ought to be revoked, and the said pretended will ought to be pronounced null and invalid."

Dr. Phillimore, Q.C., moved that the plaintiffs be directed to amend their declaration by striking out so much of it as **[122]** related to the will of the 13th of June, 1859, and to the probate thereof. By the declaration in the present form, two issues were sought to be put upon the defendant: first, as to the validity of the will of 1860; secondly, as to the validity of the will of 1859. If the will of 1860 were pronounced against, non constat that the plaintiffs had any interest to entitle them to oppose the will of 1859. He submitted that the plaintiffs had no right to endeavour in this suit to impose the second issue upon the defendant.

Dr. Spinks, contrà: This is a suit for the revocation of the probate of the will of 1859, and not a mere cause of proving in solemn form the will of 1860. By the citation the defendant is expressly cited to bring in the probate she had surreptitiously obtained, and to shew cause why the probate should not be revoked, and this pretended will pronounced to be null and invalid. The declaration merely follows the citation. The defendant committed a wrongful act to the plaintiffs in obtaining this probate, and if she has done so, the plaintiffs are entitled to a remedy. She might bring her probate into the Registry, leave it there, refuse to plead, and thereby escape her liability for costs.

*Sir C. Cresswell*: As at present advised, I do not think that I have anything to do with trying the validity or invalidity of the will of 1859 at the present time. The question raised in the latter part of the declaration might, if the later will were pronounced for, come before the Court in some other form. It is not a proper subject for an issue. If the defendant were to plead to it, it might lead us into all sorts of irrelevant issues. The declaration must be amended by striking out the latter part of it.

**[123]** IN THE GOODS OF THOMAS TUCKER (deceased), on Motion. December 19, 1860.—Chain of Executorship.—Diocesan Grants.—Bank of England.—20 & 21 Vict. c. 77, ss. 86, 87.—A grant in a chain of executorship, made by a diocesan court in general terms, and not limited to property within its jurisdiction, is valid under the 87th section of the Probate Act, and entitles the personal representative of an original testator claiming under such grant to the transfer of stock standing in the Bank of England books in the name of the original testator. —Semble, otherwise, if the diocesan grant were limited in its terms.

[S. C. 3 L. T. 557; 9 W. R. 420.]

This was a question as to the right of the personal representative of Thomas Tucker, deceased, to the transfer of a sum in stock in the books of the Bank of England, under the following circumstances:—

Thomas Tucker died in March, 1800, leaving a will dated the 11th of July, 1799,

whereby, among other things, he gave to his executors thereinafter named £600 five per cent. Bank Annuities, upon trust for the benefit of Mary Lankford for her life, with power of appointment among her children, and appointed Samuel Wright and William Townsend executors of his will, who proved the will in the Prerogative Court of Canterbury. William Townsend survived his co-executor, and died in July, 1814, leaving a will and two codicils, which were proved in the Prerogative Court of Canterbury by John Pownall and John Hogarth, the executors therein named. John Pownall survived his co-executor, and died in October, 1845, leaving a will, of which he appointed William Pownall sole executor, who proved the same in the Diocesan Court of Chester on the 6th of May, 1851.

Mary Lankford, the legatee, married William Harvey, and died on the 20th of December, 1859, a widow, leaving sons and daughters her surviving, among whom she had by will ap-**[124]**-pointed the said sum of stock. Her will was proved by the three executors therein named on the 26th of January, 1860. The said sum of £600 was standing in the Bank books in the name of Thomas Tucker, deceased, but the Bank refused to transfer the stock to William Pownall, the executor of John Pownall, the surviving executor of Townsend, the surviving executor of the original deceased, contending that William Pownall should take out probate as to the goods not covered by the Chester grant, or that administration de bonis non of Thomas Tucker should be obtained. Application had been made to the Registrars for a citation against William Pownall to accept or refuse a further grant of probate, and against the residuary legatee in Tucker's will, to shew cause why administration should not be granted to the appointees under Mrs. Harvey's will, and, as such, substituted legatees in the will of Tucker. The Registrars desired the opinion of the Court as to the effect of the 87th section of Probate Act, 1857, on the facts above stated to be taken.

Dr. Spinks moved the Court accordingly, but stated that in his opinion William Pownall was already, under the Chester grant, entitled to the transfer. The 87th section enacts that "Legal grants of probate and administration made before the commencement of this Act, and grants of probate and administration made legal by this Act, shall have the same force and effect as if they had been granted under this Act, but in every such case there shall be due and payable to Her Majesty such further stamp duty, if any, as would have been chargeable on any probate or administration which, but for this Act, would or ought to have been obtained in respect of the personal estate not covered by the grant," etc. He referred to *The Goods of George Freckleton*, 1 Swab & Trist. 16.

*Sir C. Cresswell*: I think, if the Chester grant had been **[125]** in terms limited to property within the jurisdiction of the diocesan court, it could have extended to nothing else. I find the ordinary form for diocesan courts was "property within the diocese," but Chester as well as London adopted the general form. I have great difficulty in allowing these citations to issue. I doubt whether I ought to burden the subject with the necessity and expense of a further grant. Either the Chester grant was a good grant, or it might have been assailed; if assailable, then the 86th section of the Probate Act comes in: "All grants of probates and administrations made before the commencement of this Act, which may be void or voidable by reason only that the courts from which respectively the same were obtained had not jurisdiction to make such grants, shall be as valid as if the same had been obtained from courts entitled to make such grants," etc. If unassailable, it is good without that provision, and the 87th section gives it the same force as if granted under the Probate Act. I think the person who has the Chester grant is entitled to the transfer of the stock; it might be otherwise where the limited form has been adopted in the diocesan registry. The Bank of England is well advised, and naturally anxious to be secure in the transfers it makes; and if they are not satisfied with this expression of my opinion, which in fact I gave in *The Goods of Freckleton*, the most satisfactory way of settling the question will be by application to the Queen's Bench for a mandamus on the Bank to transfer.

Motion rejected.

*Note* (reprinted from end of volume).—"It afterwards turned out that the Chester probate was in terms limited to the goods within the diocese, and the citation was thereupon ordered to issue."

**[126]** IN THE GOODS OF WILLIAM WALKER FELL (deceased), on Motion. January 16, 1861.—Administration.—Intermeddling with Estate through mistake.—Widow.—Form of Renunciation.—Practice.—On a proxy of renunciation and consent being filed by the widow, which omitted, however, the usual declaration that she had not intermeddled in the estate of the deceased (she having intermeddled therein through mistake), the Court granted administration to the natural and lawful father of the deceased.

[S. C. 3 L. T. 756; 9 W. R. 252.]

William Walker Fell, late of No. 8 Camden Street, in the parish of St. Pancras, died on the 3rd of May, 1860, leaving Sarah Fell, his widow, and Mr. John Fell his natural and lawful father (the only persons entitled in distribution to his personal effects), him surviving.

The deceased left behind him a testamentary paper dated the 2nd of May, 1860, of which he appointed his wife and Mr. King executors.

The Court on motion refused to grant probate of this paper, on the ground of its having been unduly executed.

The widow was anxious that the deceased's father should take out administration to the estate. She had executed a proxy of renunciation and consent. She was, however, unable to execute a renunciation in the usual form, which contains a recital that the renunciant has not intermeddled in the estate of the deceased, inasmuch as she had intermeddled on the supposition that she was an executor, and had a right to do so.

Robert Pritchard moved for a grant of administration of the estate of the deceased to be decreed to Mr. John Fell, as his natural and lawful father. The widow was generally preferred; but if she waived her right, the next of kin might come in and take the grant. The only objection here was, **[127]** that she had intermeddled in the estate, and so could not renounce in the usual form. If an executor intermeddled in the estate, the Court would not allow him to renounce, but compel him to take probate.

*Sir C. Cresswell*: But if a person entitled to the grant has intermeddled in the estate, can the Court compel him to take out administration?

Robert Pritchard: No; I suppose not. The administrator is merely an officer of the Court.

*Sir C. Cresswell*: I think you may take the grant. Mrs. Fell may renounce without declaring that she has not intermeddled in the estate. There is no doubt that she intermeddled on the supposition that she herself was one of the executors.

Motion granted.

IN THE GOODS OF ANNE HILL RYDER (deceased), on Motion. January 23 and 30, 1861.—Will.—Directions to nominate Executor.—Self-appointment.—A. B. made her will, concluding "I must beg C. D. to appoint some one to see this will executed." And the Court granted probate to C. D. on his appointment of himself being filed in the Registry.

[S. C. 31 L. J. (P.) 215; 7 Jur. (N. S.) 196; 3 L. T. 756.]

In this case Anne Hill Ryder made her will on the 23rd of September, 1856, partly written and partly printed; the formal appointment of executor towards the beginning of the paper was left in blank; and at the end was written, "I must beg Edmund S. P. Calvert, Esq., to appoint some one to see this my will executed."

**[128]** Under the circumstances of the deceased's family and property, it was convenient that Mr. Calvert should act as executor, and an appointment of him by himself as executor was filed in the Registry.

Dr. Swabey moved the Court to grant probate to Mr. Calvert as executor so appointed. There is authority for granting probate to persons nominated by those authorized by the testator so to nominate (*In the Goods of Cringan*, 1 Hagg. 548; *Jackson and Gill* v. *Paulet*, 2 Rob. 345); but no direct authority for granting probate to the person so authorized on his having appointed himself.

*Sir C. Cresswell*: Let the motion stand over, and see whether you can find any authority or support from the practice in Chancery in analogous matters, e.g. appointment of trustees.

January 30.—Dr. Swabey renewed the motion, and submitted that as far as he could ascertain the principles of equity applicable to the circumstances, general powers

may either include or exclude the individuals to whom they are given; a power to appoint to such person or persons as the appointor may think fit, includes the appointor himself; and instances are constantly occurring in practice in which under such a power a person appoints to himself. So under the ordinary uses to bar dower, a purchaser may appoint the estates to himself. No authority can be wanting on this point, as it is of daily practice with conveyancers. If, therefore, the power in this instance had been "to appoint some one to take my property," Mr. Calvert could, beyond question, have appointed this to himself. . . . . Now here the words are of the most comprehensive kind: "I must beg Mr. S. P. Calvert to appoint some one" (i.e. any one, and not any other person) "to see this my will executed." Mr. Calvert himself, therefore, is within the words **[129]** employed, and could clearly nominate himself, unless there were some legal restraint or impediment arising out of the office to which the appointment relates.

*Sir C. Cresswell*: I think the grant may go to Mr. Calvert as prayed.

IN THE GOODS OF ROBERT MORRISON, the Elder (deceased), on Motion. February 6, 1861.—Administration de bonis non.—Executor.—Residuary Legatee.—Practice.—B. appointed C. and D. executors and residuary legatees in trust, his widow residuary legatee for life or widowhood, and C., D., E., F., and G. substituted residuary legatees. C. and D. renounced probate and administration as executors and residuary legatees in trust, and letters of administration with the will annexed were granted to the widow; she died, leaving part of the estate unadministered. The Court refused to allow C. to retract his renunciation as residuary legatee in trust, but granted him administration de bonis non as substituted residuary legatee.

[S. C. 3 L. T. 786; 9 W. R. 518. Referred to, *In the Estate of Toscani*, [1912] P. 3.]

In this case the deceased Robert Morrison died in September, 1856, having made his will, and therein appointed his sons George and John Morrison executors and residuary legatees in trust, his wife Eleanor Morrison residuary legatee for life or widowhood, and upon her death or marriage substituted the above-named George and John Morrison, and three other sons, residuary legatees. George and John Morrison renounced probate and administration with the will annexed, as executors and residuary legatees in trust, and in October, **[130]** 1856, administration with the will annexed was granted by the Consistorial Court of Durham to the widow, as residuary legatee for life or widowhood; she intermeddled with the deceased's personal estate, and died in August, 1860, leaving part thereof unadministered. It was desirable that a grant of the unadministered goods should be made to John Morrison, and the question was, in what capacity he could take the grant, whether by retracting his renunciation as residuary legatee in trust, or as substituted residuary legatee beneficially interested, in which latter character he had never renounced.

Dr. Deane, Q.C., moved the Court. If the Court is of opinion that the rule acted upon (*In the Goods of Samuel Richardson*, 1 Swab. & Trist. 515) applies to the circumstances of this case, I submit that John Morrison is entitled as beneficial residuary legatee substituted.

*Sir C. Cresswell*: I am of opinion that the rule acted upon in the case you have referred to does apply to the circumstances of this case. Great inconvenience would result from allowing a person to take a grant in an inferior character, who had once, and at the same period, been entitled in a superior character. But I think John Morrison may take the grant as beneficial residuary legatee substituted. He never renounced in that character; it did not actually exist when the renunciation was made.

**[131]** DEPIT AND CHAPOT *v.* DELERIELEUSE. February 6, 1861.—Bankruptcy of Domiciled Frenchman.—Sale of Debts by Assignee.—Application for Administration to Purchaser of a Debt due from a Resident in London.—D. died in Paris, intestate and insolvent, in February, 1859. On petition of his widow the Tribunal of Commerce of the Seine, in October, 1859, declared the estate bankrupt, and appointed B. assignee, who, under a further decree, proceeded to sell the debts due to D.'s estate by auction. C. purchased the debts, among which was one due from F. of Lombard Street, London. By the law of France,

C. would be entitled to sue there for the recovery of such debts in his own name. On motion to grant administration to the attorney of C. of D.'s estate, limited to the debt due from F., on the suggestion that a personal representative of D. was necessary to sue in this country for the debt due from F., the Court rejected such motion.—Semble, first, the title to the debt vested in C. by the law of France would enable him to maintain a suit in this country.—Secondly, there is no authority for granting administration to the purchaser of any part of the deceased's estate after his death.

[S. C. 30 L. J. (P.) 86; 7 Jur. (N. S.) 196; 4 L. T. 894. Referred to, *In the Goods of Coles*, 1863, 3 Sw. & Tr. 181.]

In this case, Antoine Ferdinand Delerieleuse, of Rue Montmartre, in the city of Paris, agent in silk, deceased, died on the 5th of February, 1859, intestate and insolvent. He left him surviving Julia his widow and an infant daughter, the only persons entitled to his personal estate. On the 20th of October, 1859, Madame Delerieleuse filed a petition in the Tribunal of Commerce of the Seine, praying that the estate of the said deceased might be duly administered by the said Tribunal. On the same day the Tribunal of Commerce, by a decree, declared the estate bankrupt, and appointed Mons. Le François syndic and official assignee. By a further decree of 7th of March, 1860, Mons. Le François was authorized to proceed to a disposal of the debts due and owing to the estate of the said deceased; and pursuant thereto, on the 23rd of March, 1860, the debts were sold by auction at Paris to **[132]** Mons. Maurice Chatain, as agent for Messrs. Depit and Chapot, of Romdus, Drome, bankers. Amongst the debts thus sold was one due from Mons. Kammare, of 79 Lombard Street, London, amounting to 11,115 francs (£444, 12s.), with interest thereon. A procès-verbal of this procedure, signed by Messrs. Delaporte and Prevost, the notaries engaged in the sale, was duly registered at Paris on the 24th of March, 1860, and a copy thereof was as usual delivered to Messrs. Depit and Chapot, which copy was before the Court. The widow and child, in the presence of the mother, were cited personally, and did not appear. Mons. Edouard Foulon, of No. 45 Rue Recties, Paris, an avoué and notaire of twenty years' standing, and particularly conversant with matters of bankruptcy, stated in affidavit that these proceedings had been had in entire accordance with the French law; that by the decree of the 20th of October, 1859, the estate of the deceased vested in the syndic Mons. Le François; and that by the subsequent sale of the said debts they vested in and were the absolute property of the purchaser thereof; by such purchase the title of assignee or syndic to the same vested in the said purchasers, together with the right to maintain any action at law or other process necessary for the recovery of the same, and that the law of France sanctions the maintenance of such process by and in the names of the purchasers; that no other judicial act, save and except the assignment of such debts as set forth in the procès-verbal is necessary to complete the title to the debts, and the right of the purchasers to recover them, suing in their own names; that no letters of administration are at any period of the proceedings as aforesaid necessary or required by the French Law, and that such letters are unknown to the law of France.

Dr. Middleton moved the Court to decree letters of administration to the attorney of the Messrs. Depit and Chapot, limited to the said debt of £444, 12s., and the interest due thereon. **[133]** A personal representative was necessary in order to sue in this country for the debt. By the 19th section of the Court of Probate Act, 1858, the personal property of the intestate in this country would vest in the Judge of the Court of Probate. He cited *Almes* v. *Almes*, 2 Hagg. 155, Ap.; and *Baynes* v. *Harrison*, Deane, 15.

*Sir C. Cresswell*: What assistance do you want from me? Your own statement is, that the title of the purchasers of this debt from the syndic or assignee is good by the French bankruptcy law. If it had been the case of an ordinary bankruptcy in France, and an assignment had been made of all the bankrupt's estate, the assignee could have sued in this country for a debt due to the estate. In the present case the bankruptcy took place after the death of the bankrupt, a proceeding unknown to our law; but if, as your affidavit states, your clients are by French law entitled to sue for the debts in France, why should they not do so in this country?[1] Again, is there any case where a person who has purchased part of the deceased's property

[1] Case of *Odwin* v. *Forbes*, by J. Henry. London, 1823.

after his death has been held entitled to be a representative? *Baynes* v. *Harrison* is rather against you on that point. I must reject this motion.

IN THE GOODS OF ELIZABETH GODFREY (deceased), on Motion. February 13, 1861. —Mortgage of an Interest under a Will.—Administration to Mortgagee.—E. G. being a married woman, and having an interest under her father's will expectant on the death of his widow, joined with her husband in 1841 in executing a mortgage of such interest to B., to secure a running **[134]** account. E. G. died in 1851, and her husband in 1853, neither possessed of any other property. On the death of her father's widow, a representative to E. G. was required to release the trustees. B.'s debt being larger than the amount of E. G.'s interest under the will, the Court granted administration to the goods of E. G. to B.

[S. C. 4 L. T. 895; 9 W. R. 499.]

In 1841, Elizabeth Godfrey, wife of Robert Godfrey, being entitled to a legacy and a share of the residue under the will of her father, Thomas Patchett, payable on the decease of his wife, Mr. and Mrs. Godfrey, by deed dated the 27th of September, 1841, assigned all their interest under the said will to Messrs. Brown and Barrow, to secure a running account not exceeding £300, with powers of attorney, sale, etc.

Elizabeth Godfrey died in June, 1851. Robert Godfrey died in October, 1853, a convict. In 1843 the mortgage of the 27th of September, 1841, became the sole property of Brown, and an amount exceeding £300 was due thereon. Mrs. Patchett died about two and a half years ago, and the proceeds of the legacy and share were ascertained to be about £197. Elizabeth and Robert Godfrey left three children, a son and two daughters; neither left any property, and no benefit could accrue to their estate from the mortgaged fund.

The trustees of Mr. Patchett's will required administration to be taken to Mrs. Godfrey, and that such administrators should join with Brown in their release.

The Queen's Proctor refused to interfere.

Dr. Spinks moved the Court on the above facts to grant administration to Brown alone, under the 73rd section of the Probate Act.

*Sir C. Cresswell*: I do not see that we need have recourse to the 73rd section. I think Brown may take the grant as mortgagee of the fund.

**[135]** IN THE GOODS OF MARIA BAILEY (wife of HENRY WOODROFFE BAILEY, deceased), on Motion. March 20, 1861.—Will of Married Woman.—Husband surviving.—No Executor.—Where a married woman makes a will and appoints no executor, the persons interested under the will are entitled to the grant in priority to the husband, who can only obtain the grant on their renunciation being filed in the registry.

[S. C. 30 L. J. (P.) 190; 4 L. T. 90; 9 W. R. 540.]

Maria Bailey died on the 16th September, 1859, leaving the said H. W. Bailey, her lawful husband, her surviving. During her coverture, in pursuance of certain powers vested in her under the will of her late father, Robert Harding, the deceased made her last will and testament, bearing date the 31st of March, 1833, but appointed no executor thereof. By it she appointed and bequeathed two sums of £1000 and £500, over which her power of appointment extended, to the trustees of a certain indenture of settlement made upon the marriage of her daughter, Maria H. Bailey, with Richard Pugh, upon the trusts of the same indenture of settlement, in substitution, pro tanto, for the fund settled by the said indenture, and in part satisfaction of the liability of her husband under the covenants on his part contained in the said indenture of settlement. There was also a small sum of interest due at the death of the deceased, over which she had no disposing power.

The legatees had by letter declined applying for letters of administration with the will annexed.

Dr. Spinks now moved the Court to grant letters of administration with the will annexed to the husband of the deceased, as the person really interested under the will. The appointment is in substitution of his covenant under the daughter's marriage settlement; and if the grant is not made in this way, it may necessitate a cæterorum grant in respect **[136]** of the small amount of interest due, to which the husband is entitled.

*Sir C. Cresswell*: I think not. The persons at present entitled to the annuity or

the principal sum of £1500, viz. the trustees of the daughter's settlement, have the real interest. The effect it may have as regards the husband of the deceased is merely collateral. The practice in the registry, with respect to the right of administration with the will annexed in the case of married women, seems never to have been satisfactorily settled; but I understand that, since Dr. Lushington's judgment in *Brenchley v. Lynn*, 2 Rob. 469, the practice has been to let the grant follow the interest. It probably does not matter which rule is adopted; but it is desirable that one rule only should prevail, and I shall follow the course that has been adopted since that judgment. In the present case the grant can only be made to the husband on the legatees filing their renunciation in the registry.

ONSLOW AND ALLARDICE *v.* CANNON. April 16, 1861.—Execution of Will by Law of Scotland.—Practice.—Costs.—The next of kin opposed a will executed in the Mysore territory in the East Indies, on the ground that the testator was a domiciled Scotsman, and that the execution was invalid by the law of Scotland. Pending the suit, a Court of Appeal in Scotland, in another case, determined that the will of a domiciled Scotsman as to personalty was good if executed according to the lex loci actus. The next of kin gave notice to the plaintiffs that they no longer intended to dispute probate; and when the cause came on for hearing asked for their costs out of the estate; but the Court refused to make any order for costs, on the ground that they had raised an issue of fact as to domicil likely to put the plaintiffs to great expense, as well as the issue at law.

[S. C. 30 L. J. (P.) 165; 4 L. T. 217.]

William Campbell Onslow and William Patrick Allardice, **[137]** by John Irving Glennie, their proctor, having warned the Rev. Francis Cannon (clerk) to appear and support any interest he might have in the estate of Thomas Cannon, late of Wastarah, in the Mysore territory in the East Indies, coffee-planter, deceased, who died on the 12th of March, 1860, at Wastarah aforesaid, the said Rev. Francis Cannon appeared by John Wilson Nicholson, his attorney; whereupon John Irving Glennie delivered his declaration to the said John Wilson Nicholson in the words and figures following:—

"In Her Majesty's Court of Probate.

"The 20th day of November, 1860.

"William Campbell Onslow and William Patrick Allardice, by John Irving Glennie, their proctor, say that Thomas Cannon, late of Wastarah, in the Mysore territory in the East Indies, coffee-planter, who died on the 12th day of March, 1860, at Wastarah, made his last will and testament, bearing date the 21st day of October, 1859, and in the said will appointed the said William Campbell Onslow and William Patrick Allardice executors; that the said will, after having been reduced into writing, was signed by the said testator in the presence of two witnesses present at the same time, and who subscribed the same in the presence of the said testator, and whose names severally appear upon the said will; and the said testator was at the time of the execution of the said will of perfect sound mind, memory, and understanding."

Whereupon the said John Wilson Nicholson delivered to the said John Irving Glennie his plea, in the words and figures following:—

"The defendant, John Wilson Nicholson, his attorney, says that the said Thomas Cannon, at the time of making the supposed will, and from thence until and at the time of his death, was domiciled in Scotland; and the defendant further says that the said will was not made and executed in conformity with nor in the manner and form required to **[138]** render the same valid by the law of Scotland in that behalf then and still in force."

Whereupon the said John Irving Glennie delivered to the said John Wilson Nicholson his answer, in the words and figures following:—

"1. The plaintiffs, William Campbell Onslow and William Patrick Allardice, by John Irving Glennie, their proctor, say, that Thomas Cannon, the deceased, in this cause, at the time of making his said will, and at the time of his death, was not domiciled in Scotland, but in Wastarah, in the Mysore territory in the East Indies, and that the said will was made and executed in conformity with and in manner and form required by the law in force in the Mysore territory.

"2. That for a further answer, the plaintiffs by their aforesaid proctor say, that the said will was made and executed in the manner and form which render it valid

according to the law of Scotland, if the said Thomas Cannon was at the time of the making the said will and at the time of his death domiciled in Scotland."

Whereupon issue was joined, and the Judge ordered the cause to be heard by oral evidence before the Court itself.

Dr. Phillimore, Q.C. (Mr. Mundell with him), for the plaintiffs, now moved for probate. He understood the opposition to this will was withdrawn.

Dr. Deane, Q.C. (Mr. J. A. Russell with him), for the defendants. In consequence of a recent decision in a court of appeal in Scotland, after a deliberation of some months by the learned judges, the defendants have thought it right to abstain from offering any further opposition to probate being taken in this case. In *Purvis's Trustees v. Purvis's Executors*, on the 11th of March in the present year, the opinions of the consulted judges determined that a will of personalty executed **[139]** by a domiciled Scotsman abroad is valid, if executed according to the lex loci actus;[1] thus, if in the present case we had established a Scotch domicil, it would not have invalidated the will being executed in accordance with the law of the place where it was actually made. But, as the law has been so recently settled in Scotland, we submit that the defendants are entitled to their costs out of the estate.

Dr. Phillimore, Q.C., opposed the defendants' costs out of the estate, but did not ask to condemn them in costs.

*Sir C. Cresswell*: If the defendants had raised merely a point of law, they might have had some ground for asking for their costs; but, here, they chose to raise the question of domicil, which was likely to put the plaintiffs to great expense. Under these circumstances I shall make no order as to costs.

IN THE GOODS OF ELEANOR BURCH (deceased): May 1 and 8, 1861.—Administration.—Practice.—Attorney.—Person entitled to grant resident in England.—Where the person solely entitled to a grant of administration was resident in this country, and able to take it himself, the Court declined to decree it to his attorney for his use and benefit.

[S. C. 30 L. J. (P.) 171; 4 L. T. 451; 9 W. R. 639; 5 L. T. 119.]

Eleanor Burch, wife of James Burch (formerly Eleanor Briten, widow), died on the 6th of July, 1859, intestate, leaving her husband her surviving. By her former husband she **[140]** had an only child, Franklin J. H. Briten, who survived his father, but died in her lifetime, a bachelor and intestate, leaving her his sole next of kin, and the only person entitled in distribution to his personal estate, and who was supposed to have taken a vested interest under the will and codicil of John Dodd, in a portion of the residuary personal estate of the said John Dodd. The opinion of the Court of Chancery was about to be taken in respect of the construction of the residuary clauses of the said will and codicil, and for that purpose it was necessary that there should be representations (none having heretofore been taken out) to the personal effects of the said Franklin J. H. Briten, as well as of the said Eleanor Burch.

James Burch was unwilling to take out himself a grant of administration for the purpose of representing his deceased wife or her son, but was anxious that both grants should be made to Mr. Charles Cockell, his solicitor. He had accordingly filed a renunciation of his rights to a grant of administration of the effects of his wife, and a consent to the same being granted to Mr. C. Cockell.

Dr. Tristram moved the Court to decree letters of administration of the personal effects of the said Eleanor Burch to be granted to Mr. Charles Cockell, as the attorney of and for the use and benefit of James Burch.

*Sir C. Cresswell*: It is the practice of the Court to grant administration to the attorney of a person entitled to the grant, and who is absent from this country; but can you cite any authority for giving the grant to the attorney of a person who is in the country, and able but unwilling to take it himself?

Dr. Tristram: There is no authority precisely in point (see 1 Wms. on Exors., 5th edit. 383). *In the Goods of Sarah Hannah Roberts* (ante, Vol. I. p. 64), the Court granted administration to the nephew of the party entitled, who was of an ad-**[141]**-

[1] See 24 & 25 Vict. c. 94, "An Act to amend the law with respect to wills of personal estate made by British subjects," and 24 & 25 Vict. c. 121, as to domicil of British subjects dying abroad in relation to wills.

vanced age, and unwilling to take upon himself the burden of administration. The husband here is entitled to the whole of the property, and is the only person concerned. Why should he not be allowed to nominate some one to act for him in the matter? The grant might be made under the 73rd section of the Probate Act.

*Sir C. Cresswell*: I have an objection to departing from the practice of the Registry. The 73rd section is, I think, inapplicable to this case. Cur. adv. vult.

May 8.—*Sir C. Cresswell*: I directed a search to be made in the Registry, and am informed that no case can be found where an administration has been granted to A. B. for the use of C. D. when C. D. was within the jurisdiction of the Court, and able to take the grant. I have an objection to creating a new precedent, and must reject the motion.

Motion rejected.

IN THE GOODS OF JOSEPH GOODENOUGH (deceased). May 1, 1861. — Wills. — Revocation and Destruction of earlier one.—Reference to by subsequent Codicil. —Where there is a distinct reference in a subsequent codicil to a revoked and destroyed will of an earlier date, as "my last will of such a date," parol evidence cannot be admitted to shew that the reference was by mistake, and that the testator intended a will of a later date to operate. Probate of such later will refused.

[S. C. 30 L. J. (P.) 166.]

The deceased in this case made a will, dated the 30th of June, 1858, and thereof appointed George Rogers and George James Andrews executors.

**[142]** On the 15th of April, 1859, he duly executed another will, whereby, among other things, he revoked all former and other wills, and whereof he appointed his son Stephen Goodenough and the above-named George Rogers and George James Andrews executors. Upon the execution of this will, the will of June, 1858, was by his direction destroyed by burning.

On the 2nd of February, 1860, the testator executed a codicil written by himself, and commencing with these words, "It is my wish that this should be added as a codicil to my last will made 30th June, 1858." By this codicil the testator disposed of certain specific legacies.

The testator died on the 30th of November, 1860.

On an affidavit of George James Andrews of declarations of the deceased previous to and after the date of the codicil, tending to shew that the reference in it to the will of 1858 was a mistake:

Dr. Spinks moved the Court for probate of the will of 1859 and of the codicil of 1860.

*Sir C. Cresswell*: I cannot consider the evidence of Mr. Andrews as to the testator's declarations and intentions. If the substance of the codicil had been connected with, or referred to the will of 1859, I should have thought that the reference to that of 1858 was unintentional, but it in no way refers to it. I cannot grant probate of the will of 1859.

Probate of the will of 1859 refused.[1]

**[143]** SMETHURST *v.* TOMLIN AND BANKES (on Demurrer). May 24 and July 11, 1861.—Will.—Executor.—Conviction of Felony.—Title to Probate.—A person appointed executor, and after the testator's death convicted of felony, is not thereby disentitled to maintain a suit in a Court of Probate with a view of establishing the validity of the will by which he is appointed executor.

[S. C. 30 L. J. (P.) 269; 7 Jur. (N. S.) 763; 4 L. T. 712.]

This was a petition arising on demurrer to the defendant's plea. The plaintiff, by his declaration dated the 31st of May, 1860, propounded the last will and testament of Isabella Bankes, who died on or about the 3rd of May, 1859, the said will bearing date the 1st of May, 1859, and the plaintiff being thereof appointed sole executor.

The defendants pleaded several pleas, and among them the following:—

That the alleged will is in the words and figures following:—"This is the last will and testament of me, Isabella Bankes, now residing at No. 10 Alma Villas, Richmond, in the county of Surrey, spinster. I give and bequeath to my beloved friend, Miss Jenkins, of Walthamstow, Essex, my brooch, set with brilliants and pearls, and containing the hair of my late father. And as to all my real and personal property, estate and effects whatsoever and wheresoever, and of what nature or kind

[1] See *In the Goods of William Chapman*, 1 Rob. 1

soever the same may be, I give, devise, and bequeath the same unto my sincere and beloved friend Thomas Smethurst, doctor of medicine, now also of No. 10 Alma Villas, Richmond, aforesaid, for his own use absolutely for ever; and I hereby appoint the said Thomas Smethurst sole executor of this my will, and hereby revoking all former wills or testamentary dispositions at any time heretofore by me made, do declare this only to be my last will and testament, as witness the hand of me the said Isabella Bankes, the 1st day of May, 1859." And that after the alleged execution of the said will, and after the decease of the said Isa-**[144]**-bella Bankes, the plaintiff was in due form of law convicted of a certain felony, to wit, on the 30th day of November, in the year of our Lord 1859, and thereupon sentenced to one year's imprisonment, which said conviction still remains unreversed and in full force, and under which the said plaintiff was at the time of his preferring this suit undergoing imprisonment. And the defendants further say that after the death of the said Isabella Bankes, and after the commencement of this suit, by a certain instrument bearing date the 23rd day of November, 1860, and under the hand and seal of Anne Catherine Elizabeth Jenkins, being the said Miss Jenkins in the said will mentioned, the said A. C. E. Jenkins renounced the brooch thereby to her alleged to have been devised, and released the said plaintiff from all claims and liabilities in respect of the said alleged bequest.

Demurrer to this plea on the ground that the plaintiff's title to probate of the will of the said Isabella Bankes, as the executor therein named, is not in any way affected by the will set out and the facts alleged in the said fourth plea.

Joinder in demurrer.

Dr. Phillimore, Q.C. (Dr. Swabey with him), now argued in support of the demurrer.—In Williams's Executors, the principle is laid down at p. 204 of the 5th edition in the following words :—"There are few or none who by our law are disabled, on account of their crimes, from being executors; and therefore it has always been holden that persons attainted or outlawed may sue as executors, because they sue in auter droit, and for the benefit of the party deceased. By the civil and common law, indeed, not only traitors and felons, but heretics, apostates, usurers, famous libellers, incestuous bastards, and many others, are incapable of being executors." Comparing this passage with the same learned author's accounts of those who are incapable of being administrators at p. 390, "the incapacities of an administrator not only extend to those **[145]** persons who have already been enunciated as disqualified for the office of executors, as non compotes mentis, popish recusants, convicts, persons denying the Christian religion to be true, but comprise attainder of treason or felony, or other lawful disability, outlawry and bankruptcy," it would seem beyond doubt that a felon is not disabled to be an executor. So Co. Lit. s. 197 : "The second is where a man is outlawed upon an action of debt or trespass, or upon any other action or indictment, etc. But these general words receive a distinction, viz. if an executor or administrator sueth any action, outlawry in the plaintiff shall not disable him, because the suit is in auter droit, that is, in the right of the testator and not in his own right." If it is said that these statements and the cases cited in the notes of Williams on Executors are consistent with the fact of an executor obtaining probate, afterwards becoming a felon, and then not being disenabled to sue, but do not extend to the present case, where a person asks probate as executor, being at the time a felon, it may be answered that the principle of the one case is applicable to the other. The character of executor is distinct from the personal civil status of the man; he is the choice and creature of the testator, and, as such, asks for probate; if in that character he can sue in spite of a subsequent felony, why is he not capable of taking probate? Primâ facie, the Ordinary is bound to grant probate to the person named by the testator; it will be for the other side to shew that in any case such an application has been refused.

By the Court : There is one matter not yet noticed. The plea states the release to the plaintiff of a specific legacy. This must assume that he is capable of taking a release.

Dr. Deane, Q.C. (Serjt. Ballantine and Mr. C. G. Merewether with him), in support of the plea : In all the cases cited probate has been granted before the felony. No case can be **[146]** shewn in which a felon has applied for and obtained probate. In certain cases of physical incapacity the Ordinary may set aside the person nominated by the testator to be executor (*Evans v. Tyler*, 2 Rob. 128) : why may not a similar discretion be exercised in such circumstances as the present?

Dr. Phillimore in reply. Cur. adv. vult.

July 11.—*Sir C. Cresswell*, after stating the substance of the pleadings, said:—The contents of the will and the release of the specific legacy may at once be set aside as having nothing to do with the real question, as to which there is but little to be found in our books. The authorities, however, clearly establish these points:—

First, that where a will has been made and an executor appointed, the Ordinary cannot exercise any discretion as to granting or refusing probate. If he refuses probate, it must be on the ground of some legal disability, recognised and allowed by the common law, and not by the Canon law only.

Secondly, that an executor who has obtained probate, notwithstanding a conviction of felony, and notwithstanding outlawry or attainder, may continue to act as executor, and maintain actions and exercise all other rights of an executor. This shews that the office of executor is not forfeited; and if his testator were himself an executor, he would represent him in that capacity.

The only question upon which doubt can be entertained is, whether an executor, having been convicted of felony after the death of the testator, is in a condition to ask for probate. His rights are derived from the will and not from the probate. Before probate he is in possession of all the testator's goods, and may bring trover or detinue; but for such things as lie in action, although he may commence he cannot maintain an action before probate. He may before probate pay debts, and **[147]** receive or release debts. His office, then, not being forfeited, and his right to exercise the functions of an executor remaining unimpaired, notwithstanding an attainder, it is difficult to find any satisfactory reason why the party so entitled should not be allowed to perfect his title as executor, by proving that the testator duly executed the will by which he was appointed.

I find no authority for saying that he shall not be admitted to prove the will. In Swinburne, pt. 5, s. 4, it is said: "Whosoever is convicted of treason or felony, as he cannot make a testament or last will, as is before confirmed, no more is he capable of anything disposed of by testament or last will. But if a man being attainted of felony be admitted to his clergy, I suppose that he lawfully may be an executor." By a note it appears that a felon, not admitted to his clergy, being condemned to death, was considered as dead, and therefore incapable of being an executor, a reason which is no longer applicable to the subject.

I am for these reasons of opinion that the present plaintiff, having been appointed executor, his office being in auter droit, was not forfeited by the conviction of felony; that he is still entitled to exercise the rights of an executor, and that he has a right to perfect his title by proving in this Court the due execution of the will by which he was appointed. I must allow the demurrer.

IN THE GOODS OF JOHN MOSS WINN (deceased). July 3 and 11, 1861.—Will.—Condition precedent.—Evidence.—Where a will is expressed to take effect during absence on a particular voyage, and the writer returns to England, the Court cannot admit parol evidence to shew the writer's intention of adhering to that will during a subsequent absence.

[S. C. 7 Jur. (N. S.) 764; 4 L. T. 655; 9 W. R. 852. Distinguished, *In the Goods of Dobson*, 1866, L. R. 1 P. & D. 88. Applied, *In the Goods of Hugo*, 1877, 2 P. D. 74. Referred to, *In the Goods of Spratt*, [1897] P. 31.]

John Moss Winn duly executed a testamentary paper bear-**[148]**-ing date the 18th of December, 1849, commencing in the following words:—"Be it known unto all men that I, John Moss Winn, of Birkenhead, in the county of Chester, formerly a book-keeper, but now out of business, being on the eve of embarking for San Francisco, South America, or Mexico, do hereby, in the case of my decease during my absence being fully ascertained and proved, do and will over the whole of my furniture, etc. or any property of whatsoever description," for the joint support of his wife and children during the wife's widowhood, and in case of her second marriage for the children, and appointed his brother William Henry Winn and a Mr. M'Culloch, executors.

John Moss Winn sailed for San Francisco in January, 1850, the will being deposited with his brother. He returned to England in June, 1852, and William Winchester, who was one of the attesting witnesses of the will, deposed that during John Moss Winn's stay in England, he frequently mentioned to the deponent that he

intended the will made by him on the 18th of December, 1849, prior to his going to San Francisco, and which was then deposited with his brother William, to continue in force in case of his death during the time he should be away on a voyage he then intended to make to Australia.

In July, 1852, Winn left England for Australia, and the last thing which had been heard of him was a letter from him received by his wife, which bore date the 11th of September, 1853. Thus, in the end of 1860, the presumption of law arose that he was dead. William Winn died in August, 1852, and the paper in question was found among his papers by his executor, who handed it to M'Culloch, who renounced the executorship, and the widow now asked for letters of administration with the will annexed.

Dr. Swabey moved accordingly: He cited Sir John Nicholl's remarks in *Strauss v. Schmidt*, 3 Phill. 217: "Courts, however, are cautious how they construe conditions of this sort. [149] I have looked whether it is an absolute condition, or dependent on any particular motive operating at the time. It does not say it is to take place only in the event of his dying. If on the return of the deceased in 1802, by subsequent acts, he has recognised these papers, I should not hold his return to be such a defeasance as to invalidate the will."

*Sir C. Cresswell*: In the present case the condition seems absolutely a condition precedent. Again, can I, since the Wills Act, admit evidence of such declarations of the deceased as are now before me? Would it not be making a will by word of mouth? You had better consider this point.

July 11.—Dr. Swabey, referring to *Parsons v. Lanoe*, 1 Ves. sen. 190, said that in that case Lord Hardwicke held similar words, "If I die before my return from my journey to Ireland," to be an absolute condition, and, under the Statute of Frauds, considered that he was not at liberty to admit parol evidence to shew adherence after the return from Ireland. Thus, unless the Court can in the present case disconnect the words "during my absence" from the "San Francisco or Mexico," it would seem that *Parsons v. Lanoe* must govern it.

*Sir C. Cresswell*: I am afraid it must be so. The Court is unwilling by reason of such expressions to set aside testamentary papers, which probably contain the deceased's intentions, but the present words are too clear to admit of any doubt as to their legal construction.

Motion refused.

[150] HAWARDEN *v.* DUNLOP. March 20 and 27 and April 24, 1861.—Citation on alleged Executor to prove Will.—Motion to stay Proceedings.—Lis alibi pendens.—Motion to raise question of Domicil.—Practice.—It is no stay of proceedings in a testamentary suit commenced by the next of kin in this Court, that the defendent, the alleged executor of a will, has filed a petition in a commissary court in Scotland, to obtain confirmation of the same instrument.—When an alleged executor is cited by the next of kin to prove a will, and has appeared, he cannot try the question of the domicil of the alleged testator before propounding the will.

[S. C. 4 L. T. 339. See further, p. 340, post.]

This was a question arising out of a testamentary suit commenced by a citation, dated the 8th of February, 1861, taken out on behalf of Viscountess Hawarden, reciting that John Fleeming Baron Elphinstone, in the peerage of Scotland, late of Bournemouth, in the county of Hants, died on the 13th of January, 1861, a bachelor, without a father, leaving his mother (now Mrs. Katon), and Lady Hawarden, one of his sisters and one of the persons entitled in distribution in case he died intestate, him surviving, and calling upon George Dunlop, of Edinburgh, to appear and propound a paper writing alleged to have been executed by Lord Elphinstone on the 13th of February, 1854, as a will or mortis causâ disposition and settlement in the Scotch form, in which George Dunlop was sole executor and universal legatee.

Dr. Phillimore, Q.C. (Mr. C. E. Coleridge with him), on behalf of the defendant, Mr. Dunlop, now moved the Court to order proceedings in this court to be stayed, on the ground that a petition had been presented on the 28th of January, by Mr. Dunlop, with a view of proving this will, to the Commissary of Dumbartonshire. Mrs. Bontine, another sister of the deceased, had entered a caveat in that court and Lady [151] Hawarden had appeared as an objector. It is necessary to call attention

to the Confirmation and Probate Act, 1858 (21 & 22 Vict. c. 56). Section 9 enacts, "That from and after the date aforesaid, it shall be competent to include in the inventory of the personal estate and effects of any person who shall die domiciled in Scotland, any personal estate or effects of the deceased, situated in England or Ireland, or both ; provided that the person applying for confirmation shall satisfy the commissary, and the commissary shall, by his interlocutor, find that the deceased died domiciled in Scotland, which interlocutor shall be conclusive evidence of the fact of domicil," etc. Section 10. "From and after the date aforesaid, when any confirmation of an executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland (which includes, besides the personal estate situated in Scotland, also personal estate situated in England), shall be produced in the principal Court of Probate in England, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate." We submit, a Scotch court of competent jurisdiction has seisin of the cause. It may be that the commissary court can only inquire into the formal execution of the document, and, under the sections referred to, into the question of domicil. But further questions that might arise of incapacity, undue influence, etc., would be carried before the Court of Session by a summons of reduction. Suppose the commissary in Scotland is satisfied that the Scotch domicil is made out, and the confirmation, with his interlocutor, is brought down here, the Court has **[152]** held that it would be bound to affix its seal ; that in such cases it is merely ministerial ; but if the present suit goes on here, the question of domicil may be raised, and your Lordship may come to a conclusion contrary to that to which you will already have affixed your seal. At all events, it seems a matter within the discretion of the Court.

Mr. Anderson, Q.C., for the plaintiff, contrà : Lis albi pendens, to be effectual as a ground for stay of proceedings, must be lis ad idem ; it is admitted that the jurisdiction of the Commissary Court is of a limited or inferior nature, and cannot give the same remedies in a testamentary suit that the Court of Probate can give. A summons of reduction is an independent and distinct proceeding, and is not alleged to have been taken. Again, the lis asserted is in a foreign country (*Cox* v. *Mitchell*, 7 C. B. (N. S.) 55). The proceedings in Scotland are taken by the person who is defendant here ; he is dominus litus there, and may withdraw those proceedings. Why am I, who am dominus litis here, to be stayed from going on with this suit because there is a suit in a foreign country over which I have no control?

Dr. Phillimore in reply.

*Sir C. Cresswell* : This motion is addressed to the discretion of the Court, and I will take time to consider it, but my present impression is in favour of Mr. Anderson. It seems strange that I should refuse to the plaintiffs here the privilege of going on with their suit because one point which will probably arise in it is now in litigation in another suit in another country. I know of no principle on which I should be justified in saying that the suit should not go on. What may result afterwards is another question. Cur. adv. vult.

March 27.—*Sir C. Cresswell* : On considering these papers, I see no **[153]** reason to change the opinion which I intimated on a previous day. This motion must be rejected, and I think with costs.

Dr. Phillimore, Q.C. (Mr. C. E. Coleridge with him), moved the Court to order the question of domicil to be first tried. In *De Bonneval* v. *De Bonneval*, 1 Curt. 856, the question of domicil was raised by act on petition, independently of any other question, and decided.

Mr. Anderson, Q.C., contrà : At all events the motion is premature. The plaintiff calls upon the defendants to propound a will if he thinks it his interest to do so, and he says, "I will propound a domicil." At present we don't know what issues are to be tried.

*Sir C. Cresswell* : I think the motion is premature. In *De Bonneval* v. *De Bonneval* the will seems to have been before the Court. In this case I think the will must be propounded.

LEWIS *v.* LEWIS (on Motion). May 30, 1861.—Will.—Subscribed Witness.—Execution.—The attesting witnesses to a will, not being able to write, held the top of the pen while the writer of the will subscribed their names, and the Court held that, as the witnesses took some share in the act of writing, it could not determine on the more or less, and that the attestation and subscription were good.

[S. C. 31 L. J. (P.) 153; 4 L. T. 583; 7 Jur. (N. S.) 688.]

This was a question arising on the mode in which the attesting witnesses' names were written to the will of Lewis Lewis. The due execution by mark of the testator in the presence of the two witnesses, John Lloyd and John Jones, was **[154]** deposed to by William Croft, the writer thereof, who also deposed as follows:—"I, the said William Croft, further say that the several signatures of the said attesting witnesses to the said will were made in the following manner; that is to say, I, the said William Croft, wrote the name of each witness whilst he (the witness) at the same time had hold of the pen with which the name was being written in his hand, and that during the whole time the signature was being so written." John Lloyd, the surviving subscribed witness, deposed:—"I, the said John Lloyd, for myself say the statements contained in the foregoing paragraphs of this affidavit as to the execution of this will and as to the signatures of the attesting witnesses are quite correct; for I well remember that upon the occasion of the execution of the said will, I and the said John Jones, not being able to write, we requested the said William Croft to write our names, each of us at the same time holding the pen as his name was written."

Dr. Wambey submitted that this was a valid subscription. *In the Goods of Kilner*, 6 N. C. 15, Sir Herbert Jenner rejected a motion for probate where a will was produced with the names of the attesting witnesses written in a similar manner. It appeared there, however, that the witnesses could write, and there were other circumstances of suspicion which seem to have led Sir Herbert Jenner to reject that motion, rather than the mere fact of the subscribed witnesses' names being so written.

June 12.—*Sir C. Cresswell*: In this case Dr. Wambey moved for probate. It was a question as to due execution. The attesting witnesses, who could not write, held the pen at the top, while the pen was guided to write the name. In *Harrison* v. *Elwin*, 3 Q. B. 117, the will had the names of two parties, Croft and Galor, subscribed as witnesses. Croft had written his own name, but Galor, who was called as a witness, said **[155]** that Croft held his (Galor's) hand, "and wriggled it about on the paper." Galor could not write or read, and a jury, and subsequently the Court, held it to be a good attestation. In the present case I think the affidavits shew that the party, by holding the pen, was taking some share in the act of writing, and I cannot distinguish as to quantum.

Motion granted.

IN THE GOODS OF JAMES JONES (deceased), on Motion. May 30 and June 5, 1861.—Will.—Trustee for specific purpose.—Executor according to the tenor.—Where the whole personal property is left to a trustee on trust for a specific purpose, and no executor is named in the will, such trustee is not entitled to probate as executor according to the tenor.—Semble, to constitute an executor according to the tenor, there must be words importing a general power to receive and pay what is due to and from the estate.

[S. C. 31 L. J. (P.) 199; 4 L. T. 477. Distinguished, *In the Goods of Baylis*, 1865, L. R. 1 P. D. 21. Followed, *In the Goods of Morgan*, 1866, L. R. 1 P. D. 214. Discussed, *In the Goods of Fraser*, 1870, L. R. 2 P. D. 186. Not applied, *In the Goods of M'Kane*, 1887, 21 L. R. Ir. 7; *In the Goods of Gray*, 1888, ibid. 251.]

In this case James Jones, of the parish of Grosmont, in the county of Monmouth, labourer, left a will in the following words:—"This is the last will and testament of me, James Jones, of Grosmont, in the county of Monmouth. I give and bequeath to my dearly-beloved brother Thomas Jones, all my money, notes of hand, and all securities, together with all other effects, my property, in trust, to be equally divided by him between himself and all others of my surviving brothers. In witness whereof," etc.

Mr. Henry James now moved the Court to grant probate to Thomas Jones as executor according to the tenor. He referred to Williams on Executors, 5th edit. p. 209, and cases there cited.

**[156]** *Sir C. Cresswell*: I doubt whether the principle of any reported case reaches

this. Here is a specific trust, without any general power to receive or pay. If you can find any more direct authority, the motion may be renewed.

June 12.—*Sir C. Cresswell*: This was an application for probate to a person who claimed as executor according to the tenor. The cases on the subject have proceeded on very fine distinctions. The nearest in its circumstances to the present which I can find is *Boddicott and Hamilton* v. *Dalzeel*, 2 Sir G. Lee, 294. In the judgment I find the following remark:—"I was of opinion that there were no words in the will to make the trustees executors. They had only power to pay what was vested in them as trustees to the particular persons for whose use they held it, but not a general power to receive and pay what was due to and from the estate, which is the office of an executor." I think that case must govern the present, and I reject the motion for probate to Thomas Jones as executor according to the tenor.

Motion rejected.

IN THE GOODS OF ELIZA BAILEY, Spinster, deceased (on Motion). June 12, 1861.—Will.—Verdict of Felo de se.—Executor.—Probate.—The executor of the will of a person found felo de se by the verdict of a coroner's inquest is entitled to probate thereof, though the effect of the verdict is to work a forfeiture of the personal property of the deceased to the Crown.—There is a distinction between the operative effect of a testamentary paper and its title to probate.

[S. C. 31 L. J. (P.) 178; 4 L. T. 477; 7 Jur. (N. S.) 712.]

In this case Eliza Bailey had made her will, dated the 9th **[157]** of February, 1860. By it she left various small pecuniary legacies, and "as to the rest, residue, and remainder of my estate and effects, both real and personal, of or to which I am now or at the time of my decease may be seised, possessed, or entitled, I give, devise, and bequeath the same, and every part thereof, unto Mary, the wife of John Usher, her heirs, etc., to and for her and their own use and benefit absolutely. And I appoint the said John Usher sole executor of this my will, to whom, his heirs, executors, administrators, and assigns, I devise all estates vested in me as trustee or mortgagee, subject to the trusts and equities affecting the same respectively, and I revoke all former wills, codicils," etc. Eliza Bailey died on or about the 5th of May, 1860. A coroner's inquest was held on view of the body, and the jury returned a verdict of felo de se, the effect of which would be forfeiture of the goods and chattels belonging to the deceased to the Crown.

John Usher petitioned the Lords Commissioners of Her Majesty's Treasury, and on their representation, a warrant was granted by the Crown, reciting the facts of the inquest and verdict and the will, legacies and executorship, and proceeding "to give and grant unto the said John Usher all our right, title, interest, property, claim, and demand whatsoever of or belonging to the said Eliza Bailey at the time of death, to hold the same premises hereby granted unto and to the said John Usher to the intent that he the said John Usher may obtain letters of administration of the goods, chattels, and credits of or belonging to the said Eliza Bailey at the time of her death, from all or every court or courts competent or willing to grant the same, both in England or elsewhere, for the benefit of the creditors of the said deceased, and the legatees named in her said will, and to be applied in such manner and with all such powers and authorities in all respects as the same would be applicable in case the same **[158]** did not belong to us, and as if the said Eliza Bailey had died possessed thereof, and without having killed herself with malice aforethought, and as if the said will had been good and valid, and letters of administration with the said will annexed had thereupon been duly granted to him, the said John Usher, provided always that the said John Usher shall pay stamp duty," etc. Upon application to the registry under these circumstances for probate, a difficulty was felt as to what grant should be made, and the matter now came before the Court on motion.

Dr. Swabey submitted that the executor was entitled to probate irrespective of the Queen's warrant. That might be necessary for the beneficial enjoyment of the personal property of the deceased, but did not affect the present question. There are some dicta in the books against the executor, as in 1 Williams on Executors (5th edit.), p. 56, after stating that traitors and felons from the time of their conviction are incapable of making testaments, "neither can a felo de se make a will of goods and chattels, for they are forfeited by the act and manner of his death,

although he may make a devise of his lands, for they are not subjected to any forfeiture; and if (a convict felon) hath goods as executor to another, the same are not forfeited by conviction, whence it follows that of such goods he may make his will." And in 4 Phillimore's Burns's Eccl. Law, 75, "If a man do willingly kill himself, his testament, if he make any, is void both concerning the appointment of the executor, and also concerning the legacy or bequest of any goods, for they are confiscate," and Swinburne, p. 106, is there referred to. But it is submitted that the principle of law is more accurately expressed in Toller's Law of Executors and Administrators, p. 11, "Nor shall the will of a felo de se, so far as it respects goods and chattels, have any operation"; and in 2 Steph. Com. (edit. 1842), p. 233, where on the capacity of persons to be testators **[159]** there is the following note:—"Blackstone also mentions conviction of treason or felony as a ground of incompetency, but this is not properly an incapacity, it is a case of forfeiture of goods." The distinction between the operative effect of a testamentary paper and its title to probate is well established, and this Court has primarily and generally to deal with the latter only. Again, the executor may be a representative of previous testators, and entitled as under the present will, to trust properties, to deal with which probate may be necessary. There are reported cases which indirectly shew that there may be an administrator or an executor of a felo de se. It was Lord Coke's opinion that an inquisition of felo de se taken before the coroner upon sight of the body is not traversable, but is conclusive upon the executors and administrators of the deceased (3 Inst. 55). Lord Hale however was of a different opinion (1 Hale, Pleas of the Crown, 416); and the following cases adopted the latter view, and admit administrators or executors of a felo de se to remove the inquisition by certiorari and traverse it, in order to which it would seem that administration or probate, as the case may be, must have been granted. *R.* v. *Parker*, 2 Lev. 140; *R.* v. *Aldenham*, ib. 152, and *R.* v. *Ripley*, Skinner, 45; and in *Sir William Darcy's case*, 1 Freeman, R. in Ch. 28, it appears that the courts of equity would recognize an administrator of a felo de se.

*Sir C. Cresswell*: In my opinion the executor is entitled to probate.

**[160]** (Before the *Judge Ordinary.*)

SOPWITH *v.* SOPWITH. November 7, 1860, and April 24, 1861.—Petition for Restitution of Conjugal Rights.—Answer alleging Petitioner's Adultery.—Reply of Estoppel.—Demurrer.—B. petitioned for restitution of conjugal rights, C. in answer alleged (inter alia) B.'s adultery between certain dates. B. replied, by way of estoppel, that the same charges of adultery had been put in issue in a suit for judicial separation brought by C. against him, in which she had failed to prove the adultery. On demurrer to this reply of estoppel, the Court overruled the demurrer, and held that C. was not entitled, in answer to the petition for restitution, to allege the same facts of adultery which she had failed to prove in the previous suit; but—Semble, if the identical issue were triable by different evidence in the one case, and in the other, the doctrine of estoppel would not apply.

[S. C. 30 L. J. (P.) 131; 7 Jur. (N. S.) 554; 4 L. T. 256. Discussed, *Carnegie* v. *Carnegie*, 1886, 17 L. R. Ir. 430.]

This was a question arising on the pleadings in a suit for restitution of conjugal rights, brought by Henry Lindsell Sopwith against Matilda Sopwith. The petition, dated the 3rd of February, 1860, alleged the marriage of the parties on June the 25th, 1857, cohabitation till the 18th of May, 1858, and that since that date the wife had withdrawn herself, etc., and concluded with the usual prayer.

**[161]** The answer of the wife, dated February the 29th, 1860, admitted her withdrawal in fact, but justified such withdrawal by alleging that her husband had, on divers occasions since the 25th of June, 1857, committed adultery with one M. A. Prickett; *that* on divers occasions between August the 1st, 1857, and December the 20, 1857, he met the said M. A. Prickett in London, and committed adultery with her; *that* during the years 1858 and 1859 the said M. A. Prickett habitually visited the said H. L. Sopwith at his residence at Tunbridge Wells, and that on divers occasions they committed adultery; *that* between April the 1st, 1858, and March the 1st, 1859, the said H. L. Sopwith frequently visited the said M. A. Prickett at her residence at Tunbridge Wells, and on divers occasions committed

adultery; *that* in or about the month of April, 1858, the said H. L. Sopwith and the said M. A. Prickett committed adultery in a certain building at Tunbridge Wells aforesaid; *that* in or about the month of April, 1858, the said H. L. Sopwith committed adultery with the said M. A. Prickett in a certain place called Jack Wood Quarry, at Tunbridge Wells, aforesaid; *that* in or about the month of June, 1858, the said H. L. Sopwith committed adultery with the said M. A. Prickett in the said Jack Wood Quarry.

Wherefore the respondent prayed a judicial separation, by reason of such adultery.

In a further answer dated July the 2nd, 1860, the respondent alleged *that* on divers occasions between June the 29th, 1857, and June the 29th, 1859, the said H. L. Sopwith committed adultery with M. A. Prickett, *and particularly*[1] as hereinafter set forth; *that* between January the 1st, 1858, and June the 29th, 1859, the said M. A. Prickett habitually visited the said H. L. Sopwith at his residence, Tunbridge Wells, and that the said H. L. Sopwith on divers of such occasions committed adultery with the said M. A. Prickett, **[162]** and that from July the 1st, 1859, to December the 31st, 1859, the said M. A. Prickett resided in the house of the said H. L. Sopwith aforesaid, and habitually committed adultery.

The petitioner, in his reply, denied *that* from the 1st of July, 1859, to the 31st December, 1859, he, at his residence at Tunbridge Wells, habitually committed adultery, etc.; and alleged, secondly, *that* the respondent ought not to be admitted to allege in her answer adultery committed by the petitioner with the said M. A. Prickett previously to the 29th of June, 1859, for that on the 29th of June, 1859, the respondent filed a petition in this Court against the petitioner, in a cause of judicial separation, on the ground that he had committed adultery with the said M. A. Prickett; that the petitioner, in his answer to the said petition, denied the adultery therein alleged, and that issue having been joined thereon, the said cause was tried before the Judge Ordinary, without a jury, who by his judgment, delivered on the 24th of December, 1859, pronounced that the said alleged adultery had not been proved, and dismissed the petition. Thirdly, similar replications as to the other charges of adultery pleaded in the answer up to the 29th of June, 1859.

On the 2nd of November the petitioner's solicitors were served with a notice that the respondent would move the Court by counsel to direct the second and third paragraphs of the replication to be struck out, as bad in law and irrelevant to the issue in the cause.

On this motion being called on the 7th of November, the Judge Ordinary directed the question to be raised by demurrer, that the whole matter might appear on the record in case of its going before the Court of Appeal.

The case accordingly came on for argument on demurrer.

Dr. Phillimore, Q.C., and Dr. Spinks, in support of the demurrer, contended that the common-law doctrine of estoppel was not applicable to this suit, being a suit other than **[163]** for dissolution of marriage, and therefore to be governed by the principles on which the Ecclesiastical Court used to act in such matters. Though the evidence may fall short of adultery, yet it may establish such misconduct as would induce the Court to withhold its decree for restitution of conjugal rights. They cited *Best* v. *Best*, 1 Add. 411; *Moore* v. *Moore*, 3 Moo. P. C.; *Forster* v. *Forster*, 1 Const. 153; *Bramwell* v. *Bramwell*, 3 Hagg. 618; *Dysart* v. *Dysart*, 2 N. C. 16.

Dr. Wambey, in support of the estoppel: A judgment of a court of competent jurisdiction on a matter directly in issue, is conclusive between the same parties upon the same matter, and the principle is as applicable in this Court as in any other (*Duchess of Kingston*, 3 Smith's L. C. 424; Buller's Nisi Prius (2nd edit.) 233; *Outram* v. *Morewood*, 3 East, 346; *Marriott* v. *Hampton*, 7 T. R. 269; *Barrs* v. *Jackson*, 1 Phil. 582). The argument on the other side is founded on certain dicta to the effect that less is required to bar a suit than to maintain one; these are at best doubtful (*Barlee* v. *Barlee*, 1 Add. 301).

Cur. adv. vult.

April 24.—*The Judge Ordinary* gave judgment: This suit was instituted by the petitioner for restitution of conjugal rights. The respondent by her answer charged the petitioner with having committed adultery with one Mary Ann Prickett, at various places and on various occasions. The petitioner, in reply, traversed some

[1] Words in italics struck out by order on July 11, 1860.

of the matters alleged, and as to others stated in substance that the respondent ought not to be admitted to allege such matters, because she had in 1859 filed her petition for a judicial separation from the present petitioner, on account of adultery alleged to have been committed by him with Mary Ann Prickett on the same occasions as mentioned in her present answer; that issues were joined on those identical allegations, which were tried before the Judge Ordinary without a jury, who decided that the then re-**[164]**-spondent had not committed adultery as alleged, and dismissed the petition. This replication was demurred to, and the petitioner joined in demurrer. On the argument of the case before me it was not denied that the transactions alleged in the original petition by the wife, and those in her answer to the present petition to which the estoppel is pleaded, were identical; and it was admitted that if the doctrine of estoppel is applicable under such circumstances, the answer could not be sustained. But it was contended that, according to the principles on which the Ecclesiastical Courts proceeded, and which are to be observed by this Court in all suits and proceedings other than proceedings to dissolve any marriage, the doctrine of estoppel is inapplicable in this case. It was said (and there are dicta of learned judges to justify the assertion), that the same strictness of proof has not been required to establish a matter pleaded by way of defence as when the same matter is alleged in the petition, and therefore it does not follow that the respondent may not be able to establish her defence charging the petitioner with adultery, although she failed to give such evidence of it as would suffice to support her petition for judicial separation; and if that be so, it cannot in strictness be said that the question now to be dealt with has been already decided. It is certainly a startling proposition, that if an issue be joined as to the same identical fact, a different amount of evidence is necessary to sustain the issue according as the averment of that fact is made by the plaintiff or defendant. I am not aware that any such difference has ever been recognized in a common-law court. No case or even dictum to that effect was cited at the bar, but reliance was placed upon the language of some of the most distinguished persons who ever presided in the ecclesiastical courts of this country. Still no case precisely in point was cited. If I had found any such I should have considered myself bound by it; although I cannot but think that great inconvenience would result from such a doctrine. Suppose an issue joined on the allegation of **[165]** adultery made by the respondent and tried before a jury. What amount of proof is to be required? Surely that which convinces them that the act alleged was done; and the same must be the rule when the fact is alleged by the petitioner. Can it be said that the judge is to tell the jury in the latter case that, if they are not convinced, they must negative the fact alleged, but that in the former, unless they are satisfied of innocence, they should find guilt. I do not believe that any of the dicta to be found in the reports of the Ecclesiastical Courts will warrant such a conclusion. One of the earliest and most remarkable proceeded from Sir W. Scott, in *Forster* v. *Forster*, 1 Cons. Rep. 144. That was a case of divorce brought by the husband against the wife, by reason of adultery. The wife recriminated, and pleaded in bar a similar charge against the husband. In his judgment Sir W. Scott says: "The defence sets up, secondly, a species of justification arising from similar misconduct of the husband, which certainly is not inconsistent with the plea of denial, for it is fairly open to the party to say in the same breath, 'I have not committed adultery; but if I have, you have barred yourself of the remedy you pray, by your own misconduct of the same species; for though adultery cannot be justified in itself, it may be legally justified against you by the proof that you have produced the evil of which you pretend to complain.'" The learned Judge then commented on the evidence brought to prove the charge made by the wife, and proceeded:—"In these cases I am to understand that he failed in his endeavours, but failed from no want of purpose or activity on his own part, but from an honest and powerful resistance on the other. These instances, therefore, furnish a strong corroboration to the conclusion to be drawn from the other case, where it is evident that no such resistance was to be apprehended, and where the conquest by such arguments and solicitations and bribes, and his bodily force, all which were used, must be presumed to be easy. But **[166]** even if no such definitive presumption attached, I should be inclined to hold that the general conduct of the husband, as shewn, is quite sufficient to support a plea in bar, though not sufficient to support an original accusation of adultery. For it is a principle which runs through a variety of cases, that many things are good for

the one purpose though deficient for the other. *The husband who enters the court with a criminal imputation on the conduct of his wife must purge his own conduct of all reasonable imputation of the same nature;* and, if he complained of her impurities, must be untainted by any gross impurities of his own. It is a satisfaction to find this doctrine in the case alluded to, of *Lord Leicester and Lady Leicester*, laid down by the able person who then presided in the Court of Arches. In an accurate note of his judgment I find it expressly laid down, 'that where adultery was pleaded by way of recrimination only, to bar, it was not necessary to prove such strong facts against the plaintiff as would be sufficient to convict the other party in a suit for divorce; for, to obtain a sentence of divorce, *the husband must have a pure character.*'" I have found it very difficult to form a positive opinion as to the meaning of this passage. It may mean, that a husband complaining of his wife's adultery, if his own conduct is impeached, has the onus probandi cast upon him at least to this extent, that if a case of suspicion is made out, he must clear himself; or it may mean that a wife does enough to bar the husband's claim to relief by shewing that he has been guilty of impure and indecent conduct, although not of the act of adultery. If the latter is the true meaning, it would seem to follow that a plea imputing misconduct to that extent, and not alleging adultery, would be a good plea. If in the present case Mrs. Sopwith had been advised that misconduct short of adultery would suffice to bar her husband's petition, no doubt her plea would have been in that form. But whatever be the real meaning of the passage cited from the judgment **[167]** delivered in *Forster* v. *Forster*, the decision is not an authority in the present case, for there Sir William Scott clearly was of opinion that the evidence established the adultery of the husband; and the passage cited is inapplicable to the present case on another ground, for here the husband is not "entering the Court with a criminal imputation on the conduct of his wife, and is not called upon to purge his own conduct of all reasonable imputation of the same nature." There are also several cases in which it has been said by learned judges that offences that have been condoned are revived by proof of a less stringent nature than would be required to establish an original charge. Thus it has been said that adultery condoned may be revived by solicitation of chastity; and either condoned adultery or cruelty may be revived by acts of unkindness and harshness, which would not sustain a petition for judicial separation on the ground of cruelty (*Durant* v. *Durant*, 1 Hagg. 733; *D'Aguilar* v. *D'Aguilar*, ib. 773; *Bramwell* v. *Bramwell*, 3 Hagg. 618). But it is remarkable that in none of these cases was the point actually decided. The principle upon which the question of revival of condoned offences depends is inapplicable to the present case. All condonations are held to be conditional, and misconduct short of that which would sustain a suit may be a breach of the implied condition. Thus solicitation of chastity, acts of harshness, although not amounting to legal cruelty, may be sufficient to constitute a breach of the condition; and if that be so, it would seem that a plea alleging such acts, and not shewing either adultery or legal cruelty, would be a good answer to a plea of condonation. *Molony* v. *Molony*, 2 Add. 249, was a cause of restitution of conjugal rights, and involved a principle resembling that which I have suggested. The admission of the wife's responsive allegation was opposed, on the ground that the facts pleaded in bar were not such as would entitle the wife to a sentence of separation, and were therefore insufficient, such sentence being prayed. The learned judge **[168]** admitted the allegation without pledging himself as to the effect of the facts pleaded as a bar, either wholly or in part, to the sentence prayed on behalf of the husband, at the final hearing of the cause. That decision seems to proceed on the ground that matters of a less aggravated character than are necessary to sustain a suit may be sufficient to bar it; and that it is sufficient to allege in pleading such matters according to the truth. In none of these cases do I find it decided, that where a distinct fact is put in issue, a greater or less amount of evidence is required to establish it according as the fact is averred in a libel or responsive allegation; and, unless that can be established as a principle upon which the Ecclesiastical Court proceeded, the whole foundation for the argument in this case on behalf of the respondent fails. The case of *Moore* v. *Moore*, 3 Moore, P. C. 84, which was much relied on by the counsel for the respondent, does not seem in principle to go beyond *Molony* v. *Molony*. James Moore had instituted proceedings against his wife Jane Moore, in a cause of divorce by reason of adultery. His libel was rejected. The wife afterwards sued for restitution of conjugal rights. The husband brought in a

responsive allegation, pleading the same acts and in the same form as in the libel that had been rejected. The Judge of the Court of Arches refused to admit the allegation on the ground of its being in substance the same as the libel originally given in and rejected by that court. On appeal to the Judicial Committee the responsive allegation was admitted, and Dr. Lushington, in pronouncing the opinion of the Committee, said: "Unless the husband had condoned or been a party to the concealment of acts of adultery, it is undoubtedly competent for him to allege them as grounds for a decree in a suit for restitution of conjugal rights, even though they should not be sufficiently specific to support an allegation in a suit for divorce." But this decides nothing with regard to the point now before the Court; it turned on a question of pleading, and whether **[169]** the allegations were sufficiently specific, not on the amount of evidence necessary to prove them. Inasmuch, then, as I do not find any decision in the Ecclesiastical Courts, that a matter once brought directly in issue and decided, can be again controverted between the same parties so as to be again triable, I think that the principle upon which the common-law doctrine of estoppel rests, and which extends to decrees in equity, is applicable to suits in this Court; and that in this case it is not competent to the wife to bring against her husband the same identical charge of adultery which was put in issue, tried, and disposed of by the judgment in the former suit, and consequently that she cannot be admitted to plead that charge in answer to the present petition. The principle however upon which my judgment proceeds, may not be applicable in all cases, in consequence of the different rules of evidence that prevail in different suits; e.g. in a suit instituted by the husband for divorce on account of adultery, the wife may plead cruelty, desertion, or such wilful misconduct as has conduced to the adultery, so as to bring her case within the latter part of the 31st section of the 20 & 21 Vict. c. 85; but she cannot be heard as a witness in support of such an allegation. In an independent suit by her for judicial separation on the ground of cruelty or desertion, or for dissolution of marriage on the ground of adultery coupled with cruelty or desertion, she may give evidence in support of her case; and inasmuch as the same identical issue in these two cases would be triable on different principles as to the admissibility of evidence, the doctrine of estoppel could not justly be applied. In the present case, my judgment on the demurrer is for the petitioner.

**[170]** Legitimacy Declaration Act, 1858.

(Before the Full Court,—*The Judge Ordinary*, *Wightman*, and *Williams*, *JJ.*)

WILLIAM PATRICK RALSTON SHEDDEN AND ANABELLA JEAN SHEDDEN, petitioners, *v.* HER MAJESTY'S ATTORNEY-GENERAL, respondent, AND ROBERT SHEDDEN PATRICK AND WILLIAM PATRICK (cited to see proceedings, intervening).[1] November 9 to 27, exclusive of Sundays and Wednesdays, 1860.—Petition for Declaration of Legitimacy and Status of British-born Subject.—21 & 22 Vict. c. 93.—Parties to such a Petition.—Plea of res judicata.—Declarations in Questions of Legitimacy. —*Berkeley Peerage case.*—To a petition under the Legitimacy Declaration Act the Attorney-General is the necessary respondent; the petitioners have a right to have their case heard as between themselves and him; and the parties cited pro interresse suo, cannot sustain a plea of res judicata, as between themselves and the petitioners, in bar of the whole proceedings.—Semble, by the 10th section of the Act, the Legislature intended to guard against the danger of disturbing former judgments, not to hinder a petition under the Act from being heard.—Declarations of members of the family in questions of legitimacy are not

[1] This report does not pretend to give even an abstract of the evidence and arguments which occupied the Court for fourteen days. Certain points of law arose and were decided in the course of the argument; these it is hoped are correctly stated. In the result, the whole case, though of the deepest interest to the parties concerned, was merely a question of fact, depending very much on the genuineness of a certain letter. As the, at present, last act of a course of litigation, which commenced in 1801 and has twice, at a long interval of time, occupied the attention of the Scots Courts and the House of Lords, the judgment of the Court is given at length. The substance of the petition and answer, and the above-mentioned letter, printed herewith, will, it is believed, be all that is necessary to make the judgment quite intelligible.

admissible post litem motam, whether the lis be known or not known to the person making the declarations.—To constitute lis mota, for this purpose, there must be more than the existence of the state of facts on which the claim is founded, or even of litigation on kindred matters; there must have been controversy in respect of the very point in dispute as to which the evidence is tendered.—Alderson, B.'s description of lis mota, in *Walker* v. *Beauchamp*, 6 C. & P. 552, has been overruled.

[S. C. 30 L. J. (P.) 217; 6 Jur. (N. S.) 1163; 3 L. T. 592; 9 W. R. 285. For former proceedings in Scots Courts and in House of Lords, see 1 Macq. 535.]

This was a proceeding under the Legitimacy Declaration Act, 21 & 22 Vict. c. 93. The petition stated:—

1. That the petitioners were both natural-born subjects of **[171]** Her Majesty; that William Patrick Ralston Shedden is the son and heir, and Anabella Jean Shedden a grandchild of William Shedden, late of Roughwood, county of Ayr, in North Britain, but at New York in America deceased, whilst living also a natural-born British subject, and that the petitioners are both domiciled in England.

2. That William Shedden, the father of the elder petitioner, was the son of John Shedden of Roughwood, and his wife Jean Shedden, formerly Ralston; that John Shedden was the owner in fee of the estate called Roughwood, and other freehold estates in Ayrshire; that he died in 1770, aged eighty, leaving the said William Shedden his only son, and two daughters—Marion, married to John Patrick, of Trearne, and Anabella, who died unmarried.

3. That William Shedden, who was born and resided in Scotland, left that country animo revertendi, and went to Virginia about the year 1770, for temporary trading purposes; that in consequence of the political disturbances which ensued in the North-American provinces from 1774 till 1783 his return home was delayed; that in 1783 he went to New York to establish certain claims to compensation under the treaty of peace as a British subject who by reason of his loyalty to the British Crown had suffered losses, and also to wind up his Virginia affairs; that he always intended to leave New York and return to Scotland for life as soon as his com-**[172]**-pensation claims should be settled, but that, in fact, such claims were not settled till 1802.

4. That the said William Shedden died at New York, on 13th of November, 1798, aged fifty-one, being then a British subject, and seised of real estates in Scotland, which had descended to him from his father, and of other real estates which he had acquired.

5. That the said William Shedden, at the end of the year 1785, intermarried with Rachel Kennedy, who soon after died, and by whom he had an only child, a daughter, born in 1786.

6. That the said William Shedden whilst residing in the State of New York was, in the year 1790, being then a widower, lawfully married to Ann Wilson, spinster; that from and after their said marriage the said William Shedden and the said Ann Wilson, then Shedden, lived and cohabited together as lawful husband and wife, until the death of the said William Shedden; that during such time they owned and acknowledged each other to be husband and wife, and as such were accounted, etc., amongst their neighbours, friends, acquaintance, and others, and that such marriage was an open and notorious fact.

7. That there was issue of such marriage one daughter, Jean Ralston Shedden, born in the year 1792, and one son, William Patrick Ralston Shedden, the petitioner, born in 1794.

8. That the said William Patrick Ralston Shedden, the petitioner, in the year 1855 brought an action for the recovery of some land at Whitehall, in the State of New York, of which his father was seised at the time of his death, which action was tried in the State of New York in February, 1855, and that by the verdict and judgment thereon obtained in that action the validity of the said marriage, and consequent legitimacy of the petitioner, were established in the State of New York, where it was contracted.

9. That William Patrick Ralston Shedden, the petitioner, **[173]** would have succeeded long since in establishing in Great Britain the validity of the said marriage, but for the state of ignorance in which he was purposely kept as to the said marriage and other family matters by various members of his family who were interested in denying his legitimacy, some of whom had the sole care and charge of him during his youth, and that he had specially been prevented, etc., by the conduct of Robert

Patrick, John Patrick, William Patrick, hereinafter mentioned, and one Hugh Crawfurd, since deceased.

10. That in case of the intestacy of the said William Shedden and the illegitimacy of his children, his next of kin at the time of his death, and the persons entitled in distribution to his personal estate, would have been his nephews and nieces, Robert Patrick, John Patrick, and William Patrick, and Jean and Elizabeth Patrick, spinsters, but that their claims to any share of his personal estate in distribution were and are barred by his will and codicils, proved by his executors in America at the time, and afterwards proved by the said William Patrick Ralston Shedden in this country.

11. That in case of the illegitimacy of the children of the said William Shedden, his heir-at-law would have been his nephew Robert Partick, the eldest son of his aforesaid sister Marion, wife of John Patrick, of Trearne; that the said Robert Patrick died about the year 1838, leaving John Shedden Patrick his eldest son and heir-at-law; that the said John Shedden Patrick died about 1844, and that Robert Shedden Patrick, of Trearne and Hasselhead, is his eldest son and present heir-at-law.

12. That the said William Patrick, a writer to the Signet in Edinburgh, and who was the guardian of William Patrick Ralston Shedden, the petitioner, is at present in possession of the aforesaid freehold estates in Ayrshire, or some part thereof, of which the said William Shedden died seised.

13. That the said William Patrick is the only surviving **[174]** child of the aforesaid John Patrick, and there is no child now living of any brother or sister of the said William Patrick, and in case of the illegitimacy of William Shedden's children, the said William Patrick would now be his sole next of kin.

14. Stated the issue of Anabella Burr, the eldest daughter of William Shedden.

Your petitioners therefore humbly pray that your Lordships will be pleased to entertain this their application, and allow them to prosecute the necessary proceedings thereupon, and will be pleased to hear and determine the same, and to pronounce (on sufficient evidence being adduced by them or on their behalf) that the said William Shedden and Ann Wilson were lawfully married prior to the birth of the first-named petitioner and his sister Jean Ralston Shedden, and that your said first-named petitioner William Patrick Ralston Shedden is their legitimate son and heir, and a natural-born subject of Her Majesty, and that all proper parties may be cited.

To this petition the respondent, Her Majesty's Attorney-General, answered:— First, that he left the said petitioners to make such proof thereof as they shall be enabled; and secondly, claimed on behalf of the Crown all such right and interest as he on behalf of the Crown should appear to have in the premises, and in any matter arising out of the proceedings upon this said petition, and submitted the same to the judgment, order, and direction of this honourable Court.

Robert Shedden Patrick and William Patrick, the parties cited, in substance answered that:—

1. The questions raised by the said petition (the material allegations of which we deny) have already been adjudged and finally determined against the first-named petitioner, in suits instituted by him in the Court of Session in Scotland, which judgments have been affirmed by the House of Lords, and will appear from the statement herinafter contained; and we say that neither of the petitioners possesses the condition re-**[175]**-quired by the 1st section of the Legitimacy Declaration Act, 1858, to entitle him or her to petition this honourable Court, or to claim the benefit of that Act.

1 *a*. The matters raised by the petition were concluded by and in the judgments hereinafter mentioned.

2. That William Shedden was, at the time of his death, owner in fee-simple of landed property in Ayrshire, and died without lawful issue, and intestate as to his estate in Scotland, leaving his nephew Robert Patrick his heir-at-law, who thereupon became entitled to the said lands (subject to the debts of the said William Shedden, which he, Robert Patrick, paid to a large amount), and was served thereto as heir, and entered into possession thereof; by such service his title to the estate, according to the law of Scotland, was asserted and perfected; but was liable to be challenged within a certain period by an action of reduction.

3. That on the 18th of December, 1801, the said William Patrick Ralston Shedden, then an infant, by Hugh Crawfurd, his factor loco tutoris, instituted in the Court of Session in Scotland (having jurisdiction) an action of reduction against the

said Robert Patrick, seeking to have the said service set aside, on the ground that he, William Patrick Ralston Shedden, and not the said Robert Patrick, was the rightful heir-at-law of the said William Shedden, and entitled to the lands of Roughwood; that Robert Patrick duly appeared to and defended the said action, in which the following issues between the parties arose, whether the said William Patrick Ralston Shedden was the legitimate son of the said William Shedden, and a natural-born subject of the realm, and heir-at-law of the said William Shedden; that by decree of the said Court of the 1st of July, 1803, it was determined that the said William Patrick Ralston Shedden was not the legitimate son of the said William Shedden, nor his heir-at-law, nor a natural-born subject of this realm, and that the said service should not be set aside.

**[176]** 4. That the said decree was conclusive, unless reversed by the House of Lords, to whom an appeal lay.

5. That a petition of appeal to the House of Lords, in which the same material questions were directly in issue, was presented; that the House of Lords of the 3rd of March, 1808, affirmed the decree of the Court of Session; that by the said judgment the status of the said Robert Patrick, as heir-at-law of the said William Shedden, and the illegitimacy of the petitioner William Partick Ralston Shedden, became and were, as between the parties to the said cause, matters finally adjudged and determined.

6. A bonâ fide sale of the lands of Roughwood, with warranty, etc., by Robert Patrick to William Patrick, who is now in possession.

7. That in February, 1848, the said William Patrick Ralston Shedden instituted in the Court of Session in Scotland (having competent jurisdiction) an action of declarator, reduction, and count and reckoning, against William Patrick and Robert Shedden Patrick, and the guardian of the latter (since deceased), seeking, among other things, to have the said service and the said decrees of the Court of Session and House of Lords and the said sale set aside, on the ground, as alleged, that the said service and decree had been obtained by fraud of William Patrick, Robert Patrick, and Hugh Crawfurd, then deceased; that on the 25th of April, 1849, pending the said last-mentioned action, the said William Patrick Ralston Shedden instituted, in the said Court of Session, a supplementary action of declarator, reduction, and count and reckoning, against the same parties, seeking to have it declared that he, as the only and lawful son of the said William Shedden, was his lawful heir, and praying the same relief as before, which actions were conjoined; that by a decree of the Court of Session on the 10th of March, 1852, it was adjudged that the said service and judgments and decrees had not been obtained by fraud, and that the said William Shedden was **[177]** not married to the said Ann Wilson prior to the birth of the said William Partick Ralston Shedden, etc.[1]

8. That the said William Patrick Ralston Shedden presented an appeal from the last-mentioned judgment to the House of Lords, who on the 15th of May, 1854, affirmed in all respects the decree of the Court of Session in the said conjoined actions, and also adjudged that the said William Patrick Ralston Shedden was not a natural-born subject, but an alien, which question was in issue between the parties.

9. That at the time of bringing the original action of declarator, reduction, etc., in the seventh paragraph mentioned, another action was brought in the Court of Session, as a consistorial court having jurisdiction, by the said William Patrick Ralston Shedden, against the same parties, called an action of declaration of legitimacy, which was suspended till the termination of the said conjoined actions, when judgment was given by default against the said William Patrick Ralston Shedden.

10. That the suits, actions, and appeals in the 3rd, 5th, 7th, and 8th paragraphs above mentioned were brought by the said William Patrick Ralston Shedden for the same objects and in respect of the same matters and things as those for and in respect of which the said William Patrick Ralston Shedden and the other petitioner now petition this Court, etc., and that the said final judgment and decrees in the said

[1] In the report of *Shedden* v. *Patrick et al.*, 1 Macqueen's Appeal Cases from Scotland to House of Lords, p. 579, it is stated that "on the 17th of January, 1851, the appellant obtained permission to amend his libel by the putting on record the following allegations (viz. of marriage prior to the birth of children), which gave the case a new complexion."

suits, actions, and appeals are finally conclusive and binding as to those questions, and are a bar to the present petition.

11. That the petitioners ought not to have the relief and decree for which they pray, because such relief and decree would be a proceeding which would necessarily and unavoidably affect and be repugnant to, and inconsistent with the [178] said final judgments and decrees referred to, and would necessarily confer on the said William Patrick Ralston Shedden the status or condition of heir-at-law to the said William Shedden, which has already, by the said judgments, been pronounced to have belonged to the said Robert Patrick, and successively to the said Robert Shedden Patrick, and would necessarily declare that the said William Shedden and Ann Wilson were lawfully married prior to the birth of the said William Patrick Ralston Shedden, and that the said William Patrick Ralston Shedden is their legitimate son and heir, and a natural-born subject of the realm, contrary to the said final judgments and decrees whereby, etc., and that the relief and decree prayed by the said petitioners is precluded by the 10th section of the Legitimacy Declaration Act, 1858, whereby it is enacted "that no proceeding to be had under the said Act shall affect any final judgment or decree already pronounced or made by any court of competent jurisdiction."

12. Denies that the said William Patrick Ralston Shedden is a natural-born subject of the realm, or son and heir-at-law of the said William Shedden, or that the other petitioner has any interest in the matter save through the said William Patrick Ralston Shedden.

13. Denies William Shedden to have been the lawful father of William Patrick Ralston Shedden.

14. Denies William Shedden at the time of his death to have been a British subject.

15. Denies the marriage of William Shedden and Rachel Kennedy.

16. Denies the marriage of William Shedden, widower, to Ann Wilson, in 1790, or that from that time they cohabited as lawful husband and wife, and were so reputed, etc.

17. Denies any lawful issue of William Shedden and Ann Wilson.

18. Denies any knowledge of, or privity to the action of ejectment in New York in 1855.

[179] 19. Denies that William Patrick Ralston Shedden was left in a state of ignorance as to the alleged marriage of William Shedden, and of other family matters, by any member of his family, or was hindered from establishing in Great Britain the said alleged marriage by the conduct of Robert Patrick, John Patrick, William Patrick, or Hugh Crawfurd.

Prayed to reject the prayer of the petition, and to be dismissed with costs.

This petition now came on for hearing.

Mr. K. Macaulay, Q.C., Sir Hugh Cairns, Q.C., Dr. Phillimore, Q.C., Mr. A. J. Stephens, Q.C., and Mr. W. C. Beasley for the petitioners.

The Honourable R. Bourke for the Attorney-General.

Mr. Rolt, Q.C., Mr. Bovill, Q.C., Dr. Deane, Q.C., and Mr. John J. Powell for the respondents.

The petitioners' counsel prayed the Court to postpone the hearing of the case on the ground that their briefs, containing an immense mass of documentary and written evidence, had been delivered at so late a period that it was impossible to do justice either to their clients or themselves without further time to make themselves masters of the case.

Mr. Rolt, Q.C., contrà.

And the Court refused to postpone the case; whereupon the counsel for the petitioners left the Court and Miss Anabella Jean Shedden, the younger petitioner, commenced the statement of the petitioners' case.

A question of law being raised by Mr. Patrick having put in a plea of res judicata in bar to any proceedings taking place, the Court directed this question to be argued by one [180] counsel on each side before going further into the facts of the case.

Mr. Rolt, Q.C., in support of the objection: First, independently of the 10th section of the Act, the general principle of res judicata is applicable to the present case, for the questions and matters raised and put in issue by the present pleadings are the same on which the final judgment and decree of the House of Lords passed

(*Shedden* v. *Patrick and others*, 1 Macqueen's House of Lords Cas. on appeal from Scotland, 535.) The learned counsel referred to Lord Cranworth's opinion in that case at p. 607, and cited *Outram* v. *Morewood*, 3 East, 345; *Eastman* v. *Laws*, 5 Bing. N. C. 444, and *Barrs* v. *Jackson*, 1 Phill. 582.

*The Judge Ordinary*: Lord Cranworth's remarks are not, I think, strictly applicable to the point before us. In that case there was no question of new proceedings to be barred by a plea of res judicata; but whether sufficient fraud was alleged relevant to upset a previous judgment of the House of Lords.

*Williams, J.*: It is of the very nature and essence of all estoppel that it should be reciprocal. Could it be said, if the judgment of the House of Lords had been the other way, that your parties or the Attorney-General would have been estopped under this Act? It appears that under the statute Miss Shedden and her father have a perfect right to have the case heard as between themselves and the Attorney-General.

Mr. Rolt contended, secondly, that whatever opinion the Court might come to on the applicability of the general principle, the 10th section of the Act would hinder the Court entertaining this suit, as a judgment affirming the petitioner's legitimacy would be in direct conflict with, and must necessarily affect, the previous decisions.

**[181]** The Attorney-General, Sir R. Bethell (the Hon. R. Bourke with him), stated that in his view, if it were not for the 10th section of the Act, the ordinary objection of res judicata would be no bar to the petitioner; the question seems to be whether these proceedings will necessarily affect a judgment. If but for the 10th section they would, then comes the further question whether this would prevent this Court entertaining the petition, or whether the section would prevent any proceedings being taken elsewhere, with a view to affect previous judgments.

The Court, without calling on Dr. Phillimore, who was ready to argue the point for the petitioners, said:—We are all of opinion that the case must proceed; it depends entirely on this Act of Parliament, before which no such proceeding was known in this country. In construing an Act of Parliament it is difficult to apply technical rules of courts of law; we must determine as well as we can the meaning of the words used by the Legislature. The Act has given certain persons a right to call on the Court for a decision in respect of the matter specified in the 1st and 2nd sections, and by the 6th section the Attorney-General is the necessary respondent; by the 7th section other persons are allowed to come in pro interesse suo and supply any deficiencies, but they cannot say res judicata. Then as to the 10th section, which says, "no proceedings to be had under this Act shall affect any final judgment or decree already pronounced or made by any Court of competent jurisdiction"; what the object of the Legislature was, we can only judge from the language it has used, and we suppose they thought some decrees might have the effect of disturbing former judgments, and so have endeavoured to guard against such damage as they thought might accrue; but the words are not "no proceedings shall be taken," but "no proceedings shall affect."

The case then proceeded, Miss Shedden for several days **[182]** conducting the petitioners' case; Dr. Phillimore for some time, and subsequently Mr. J. B. Phear, watching the case for the petitioners, in respect of points of evidence and questions of law arising out of the conduct of the case. During the last three or four days the petitioners' case was entrusted wholly to Mr. Collier, Q.C., and Mr. Couch.

The case as summed up by the counsel on either side, and, as decided by the Court, was purely a question of fact, turning principally on documentary evidence, and the conduct of the parties in reference to the previous suits. The question of what constitutes lis mota, so as to render declarations by members of the family inadmissible in cases of pedigree, was however discussed, and the following letter from John Patrick, of New York, to W. Shedden, W.S., gave occasion, with some others of later date, to some judicial decision on the point:—

"New York, November 9th, 1798.

"Dear William,—I wrote you some time ago, viâ London, informing you of the melancholy state of this city, and our situation as refugees. I have pleasure in adding that the fever has at last totally disappeared. We have all been fortunate in escaping it. I was absent only three weeks; Mr. Todd seven, and Bob Patrick nine. The consequences of this pestilence have been the death of about 3000 persons, many of them citizens of the utmost respectability.

"It is with the most extreme sorrow I have now to inform you that our friend Mr. William Shedden's disorder has at last arrived at a crisis. He is at this moment in the most advanced stage of an unconquerable consumption, and all the weakness of mortality before his eyes. Every revolving hour threatens a dissolution to his existence. His fate is fixed; he must die; he cannot live. But this is not all; he has, from considerations which he conceived moral, [183] natural, legal, and proper, at the moment when eternity was staring him in the face, united himself in matrimony to the woman who has for many years lived with him in a very different situation.

"His object in this proceeding was to rescue from a state of bastardy and introduce into the world with all the privileges appertaining to those who are born under the influence of the law, two infant children; one a girl of about six years old, the other a boy of about five. The ceremony took place only on the 7th instant; it was to him a hard struggle, but the considerations above-mentioned preponderated. I of course was not consulted, but he communicated the whole to me after it had taken place, with his motives. It was out of my power to interfere or prevent it, nor was it my wish. I have always had a pride in acting in things of that sort with a spirit of independence and propriety, nor did I ever interfere. In addition to that instrument, he has likewise executed his last will and testament, the substance of which I am unable to communicate at present, but you may of course guess nearly the contents.

"On his deathbed (which it will doubtless prove) he communicated to me things that have been hid from the world; facts that would excite surprise. He likewise requested me to accept of the office of executor, in conjunction with two others who are but little connected, to which I consented, being unwilling to refuse this last request; although it will undoubtedly entail on me a world of toil, trouble, and difficulty, and besides place me in a situation that may prove unpleasant and delicate: but the thing is done. Besides the two children mentioned, he has one other, a girl about twelve years old, by another woman who is long dead, his very image, but who can reap no benefit from the measures adopted, being considered in the eye of the law a bastard.

[184] "The other two children, though charming infants, have not the same resemblance to him.

"* I have further to add in the most perfect confidence, that in my opinion the state of things will be such as to render a disposal of his property necessary in order to liquidate the claims that I apprehend will come against it. Indeed, I have every reason to fear, and I speak from facts within my own knowledge, that his affairs are in a very desperate and deranged state.*

"This being the case (of which I will in due time communicate more), and as we have claims, and they from natural rights are certainly entitled to a priority, I think in justice to ourselves they ought not to be overlooked; and on you, as representative of the family, the guardianship of this right will devolve. I mean the dowry left to our mother, with interest, the interest on the advances by our father during the war, the commission for his agency in accepting and paying bills, and likewise as factor for the estate, on the rents, &c. All these are proper and legal claims, and ought not in right to be set aside and put into the pockets of others. I would act with strict propriety, nor would I swerve one degree from that justice which devolves as a duty on every honest man, but I would carefully watch over those rights that become our inheritance in common with the rest of mankind. These are my ideas, and I well know that yours will fully co-operate. I am placed in a situation extremely delicate and unpleasant. I have interests of my own to watch over, and I have likewise those in opposition to them, as an executor, to promote. These must be reconciled as much as the nature of the thing will admit, and the sacred duties devolving on me will be fulfilled as far as I am able with justice and a regard to truth and rectitude.

"Yours is likewise extremely so as agent for his heirs, and as representative of those who have claims that counteract them; but you must reconcile them to the best of your [185] ability, holding in view the sacred and unerring principle of truth and justice.

"This is a situation we never could have contemplated; but it is a part of that thorny path that we must all encounter through life, and we must meet it with a fortitude proportioned to its magnitude.

"Mr. William Patrick and Mr. Robert Shedden, junior, are both absent in Virginia. I have wrote to them both, and expect them in a few days.

"Should this vessel not go off for a little time I will make some additions. In the meantime believe me to be, very affectionately, dear William,—Yours,

"JNO. PATRICK."

"P.S.—The contents of this you will of course only communicate to those who have an interest or in whom the necessary confidence can be reposed. I shall not have time to write my sister by this ship, but will by the next."

"Evening of 9th November.

"I have just to say that our friend's disorder advances with gradual progression; every hour wafts him nearer to eternity. But amidst this gloom I have inexpressible pleasure in adding that he bears his situation, which is as trying a one as can possibly fall to the lot of human nature, with that greatness of soul, and with a composure, recollection, and resignation, that extracts the greatest reverence and admiration from all who have an opportunity of approaching him. Indeed, he shines under the shade of death greater if possible than when in the sunshine of prosperity. He has a heart pure and untainted; his memory with me will always be held in the most reverential remembrance. Oh, could I but imitate his virtues, while I could divest myself of those foibles that have unfortunately thrown a momentary shade over a character that would otherwise **[186]** have been unsullied, and a memory that would have defied the shafts of malice! but such perfections are not [to] be met with in this sublunary world. He is reconciled to his fate, has made his peace with his Maker, resigns himself to His bosom, and dies a man and a Christian.

"Excuse this effusion. I could say much more, but I am overwhelmed in sorrow. Adieu. "J. P."

"November 11th.

"In the morning Mr. Shedden gradually approached his end. He has looked into his affairs, and wrote to his friends.

"He has two important letters to write, and he dies contented. One is to you respecting his children, etc. The boy is to be sent to Scotland. I will be glad if you will keep that part of my letter to yourself which is comprehended between the mark.* I may be mistaken; I should be happy was it so. "J. P."

"I requested him if possible to write to my brother Robert; his susceptible heart I know would be much gratified. "J. P."

Mr. William Shedden died on the 13th of November, 1798, which event was communicated to William Patrick, W.S., by letter dated New York, November 18th, 1798.

There were also tendered in evidence letters from William Patrick, of Virginia, to Miss Jane Shedden, of Beith, in Scotland, dated New York, 8th of December, 1798. From the same to the same, dated New York, 22nd of February, 1799. Other letters of John Patrick to Robert Shedden, of London, from New York, in the month of November, 1798; from Robert Shedden, jun., dated New York, 11th of December, 1798, to Robert Shedden, sen.; and other similar ones, all containing allusions and declarations respecting Mr. William **[187]** Shedden's deathbed, marriage, and previous cohabitation, to the same effect as the statements in John Patrick's letter of the 9th of November.

It was admitted that, as declarations of members of the family in a question of legitimacy, they were admissible if made ante litem motam (*Berkeley Peerage case*, 4 Camp. N. P.); The Court observing: "We cannot find, since the *Berkeley Peerage case*, that the fact of the lis being known or not known to the person making the declarations would affect the admissibility. Any doubt on this point can only have arisen from a note in the 3rd edition of Taylor on Evidence, p. 520."

November 20.—Mr. Phear objected to the admissibility of the letter of the 9th of November, 1798, and the others, on the ground that a letter from William Patrick, W.S., of the 31st of December, 1798, in answer to that of the 9th of November, 1798, shewed that the declarations sought to be used were not the natural effusion of unbiassed and even minds (Wood, B.'s opinion in the *Berkeley Peerage*). He cited the description of Alderson, B., of the commencement of a controversy (in which sense lis mota was to be taken in such cases), as being the arising of a state of facts on which the claim is founded, without anything more (*Walker* v. *Beauchamp*, 6 C. & P. 552).

By the Court: That opinion was repudiated by Sir Edward Sugden when Lord Chancellor of Ireland. (See *Reilly* v. *Fitzgerald*, cited 3rd edition of Taylor on Evidence, p. 516.)

The Court, without calling on counsel on the other side, proceeded to express their opinion.

*The Judge Ordinary*: The declarations are admissible; the letter by John Patrick of the 10th of November was commenced three days before the death of William Shedden. We [188] cannot carry back the letter of William Patrick of the 31st of December to that date. We must judge of the feelings of the party from what he knew at the time, and when it is said that there was then lis mota, I am of opinion that that means a controversy about that which is the very subject-matter of the action in which the evidence is tendered. Now there was then no controversy as to the deathbed marriage, or as to the fact that William Shedden and Ann Wilson had lived together previously.

*Wightman, J.*: The whole of Mr. Phear's argument was founded on certain expressions of Alderson, B.; but the cases decided since establish that there must be not merely the existence of facts which may lead to a suit, but an actual controversy; and secondly, that if a controversy exist, it must be on the very point in respect of which the declarations are sought to be used. Now, as far as we know, down to about 1850 there was no question as to any marriage previous to that of the 7th of November, 1798.

*Williams, J.*: I am of the same opinion. The point is quite clear; the controversy which is to exclude such evidence must be controversy in respect of the very point in dispute; it is quite immaterial that there has been controversy, even litigation on kindred matters, if the point itself has not been raised. The learned Judge referred to *Freeman* v. *Philips*, 4 M. & S. 486; *Duke of Newcastle* v. *Hundred of Broxtowe*, 4 B. & Ad. 280, Parke, B.'s judgment.

Subsequently, in the course of Mr. Rolt's summing up, the Court said that a letter of William Patrick, W.S., to the executors, of the 18th of September, 1800, shewed that the matter[1] was then in dispute between the parties. Parol evi-[189]-dence, partly vivâ voce and partly taken by commission in New York and in Edinburgh, was produced on both sides. That from New York chiefly with the view to prove or disprove a marriage by cohabitation and repute. The Edinburgh evidence was chiefly that of William Patrick, the party cited.

The following letter from William Shedden to William Patrick, on the genuineness of which the judgment of the Court principally turned, was, as printed by the parties cited, in the following terms:—

William Shedden of New York, to William Patrick, W.S.:

"New York, 12th November, 1798.

"My very dear Nephew,—My long and painful illness must apologize for my long silence. I am now going to quit this world; I have married Miss Ann Wilson, which is approved of by my friends here, and which restores her, and two fine children I have by her, to honour and credit. I have settled all my affairs, and appointed executors here, who will correspond with you. One of my children is a boy, named William Patrick Shedden; they are charming children, he in particular. I have ordered my executors to send him to you. I now remit first of Griffith and Walrond's exchange on Messrs. Thomas Daniel & Co., London, dated Barbadoes, 23rd of June, at sixty days, for £326, 15s. 8d., and first of B. Farquharson and Co., on Barclay and Farquhar-[190]-son, London, dated Martinico, 21st of July, at sixty days, for £91; altogether £417, 15s. 8d. sterling: and I desire that such further sum or sums of money may be appropriated for the purpose of maintaining and educating him genteelly and according to his talents and inclination, not exceeding £500 sterling, without the

[1] This letter of William Patrick, taking the deathbed marriage as a fact, pointed out that it was extremely doubtful whether, under all the circumstances, it would effect the legitimation of the children; that as regarded the real property in Scotland, his brother Robert Patrick's interest was directly opposed to that of the children, and that the question must necessarily be settled by a lawsuit.

It is presumed that this ruling means that the legitimacy of the children was the real point of controversy, and not, as suggested by the remarks of the learned Judges above, the deathbed marriage, which was only one piece of evidence tending to prove or disprove, according to the law applicable to the case, the legitimacy of the children. All the letters however to which Mr. Phear's objection was taken, bore date before the 18th of September, 1800.

consent of my executors, of whom you are to be totally independent in this business. I can only add, that I remain till death, dear William, your affectionate uncle,

"WILLIAM SHEDDEN."

This letter and the first of exchange were, according to William Patrick's evidence, received by him in due course of post, and also two copies with second and third of exchange, in the handwriting of William Shedden's clerk—the original was not forthcoming: William Patrick said he had sent it, with other documents and letters, to William Patrick Ralston Shedden in October, 1823, and had not received it back. William Patrick Ralston Shedden admitted the receipt of certain documents in October, 1823, but alleged that he had returned them.

Mr. Rolt, in summing up for the parties cited, contended that three distinct points had been clearly established, any one of which was conclusive against the burlesque evidence tendered on behalf of the petitioners to establish the affirmative of the issue which lay upon them. First, the documentary evidence, especially the deathbed letter of the 12th of November, 1798. Secondly, the fact that William Patrick Ralston Shedden in 1848 proceeded in the Court of Session in Scotland, and in that year he solemnly averred an intimacy and connection between his father and a Miss Ann Wilson, and that his father, on his deathbed, married her with the view of legitimating the issue born previously; the previous marriage by cohabitation and repute, now relied upon, was first heard of in the supplementary action in April, 1849; and yet from 1833 to 1848 William Patrick Ralston Shedden had been in com-**[191]**-munication with several parties who knew all the history of the last years, and all the facts and circumstances of the deathbed of William Shedden. Thirdly, the parol evidence produced by the parties cited proved the terms on which William Shedden and Ann Wilson had lived, and that they were not those of man and wife.

The Hon. R. Bourke, for the Attorney-General: The case is important, as a precedent for the conduct of the law officers of the Crown in similar petitions. The petition concludes with a twofold prayer: first, that the elder petitioner should be declared the legitimate son of certain persons; and, secondly, that he should be declared a natural-born subject of Her Majesty. The latter is the point of public importance, and is a question of personal status, distinct from any capacity to inherit or succeed to either real or personal property. If the parents of the petitioner were unmarried at the time of his birth, he is no British subject (*Rose* v. *Ross*, 4 Wills. and Shaw, 296–7, App. No. 4, p. 57). If his parents were married at the time of his birth, he was a natural-born British subject. His father was a natural-born British subject, and there is nothing to shew that his allegiance was dissolved. By the statutes 7 Anne, c. 5, and 4 Geo. II. c. 21, the petitioner would be a natural-born British subject, unless the treaties of 1783 and 1794 with the United States of America interfere. In the latter it is provided that all persons who should continue within the limits of the United States of America till 1794, should be considered as having elected to become citizens of that country; but this can have no bearing upon the status of the petitioner's father in 1794, when he was born. As to the first part of the prayer of the petition, we are content to leave it to the Court, subject to the observations of the learned counsel for the petitioners and party cited.

Mr. Collier, on behalf of the petitioners, admitted that if the **[192]** deathbed letter were genuine, and written at the time, there was an end of their case; and if they had thought it genuine they would never have brought the petition: but if not genuine, he should contend that it almost destroyed the respondents' case. The learned counsel then commented with great minuteness and ability on the evidence before the Court, and contended that it entitled his clients to a sentence in their favour.

*The Judge Ordinary*: We have now arrived at the last stage of this very singular inquiry—an inquiry from the length and complexity of which it must follow that the Court have felt that a very considerable degree of responsibility was cast upon them. Two or three circumstances have somewhat diminished that feeling. The first is, that the evidence having been given somewhat slowly—that which was material intermixed with that which was not—they have had abundant time during many days to consider and to discuss that evidence which was material, and which they felt had a bearing upon the true point to be decided. Another circumstance which might have embarrassed them very much was that the female petitioner for a considerable time was left without the assistance of counsel to conduct the case on behalf of herself and

her father; but the perfect and intimate knowledge which she displayed of every single fact, material and immaterial, connected with the history of these people, and the singular tact and dexterity which she shewed in managing the case as presented to the Court, relieved us from any apprehension that, for want of the aid of counsel, her case might not be presented sufficiently before us, and that, from want of sufficient assistance from the bar, we might be likely to fall into some error. Towards the close of the case she had an opportunity of bringing some evidence before us, and of having the whole commented upon very ably by an experienced counsel. These circumstances, therefore, have [193] relieved us from a good deal of the anxiety we might have been expected to feel in the case; and still more are we relieved from anxiety by the perfect union of opinion that exists in the Court; and we feel that we have no nice question of balanced evidence to decide, but we have been enabled to come to the most clear, unhesitating judgment as to the decision which we ought to pronounce.

The question that we have to deal with is a simple question of fact, namely, whether a marriage, in fact, was solemnized—either with or without religious rites—between the father and the mother of the first petitioner before he was born? and having acted as Judges during fourteen days in this matter, we now have to discharge the functions of jurymen, and return a verdict upon that question of fact. But we have not the privilege of dealing with it in all respects as jurymen, and giving simply a verdict of aye or no. We feel bound to state our reasons, and our views of the evidence which have brought us to the conclusion we are about to pronounce. In dealing with the matter, I desire to say that the reasons I give are my own only—my learned brothers will add such reasons for themselves (which perhaps may controvert and repudiate some of mine) as they may think fit. I am about to state the reasons that have led me to the conclusion at which I have arrived. They will not be very long, and the facts are not very numerous upon which I think this case turns.

Now, the first part of the case, namely, the alleged marriage in fact, depends entirely, as far as the petitioners are concerned, upon the evidence given for them, which is confined entirely to what is called habit and repute. No attempt was made to prove by direct evidence any marriage between these parties; but it was said, at this distance of time, some seventy years after the marriage is supposed to have been contracted, it is not to be expected that these parties can bring forward better evidence than they have; they say "we [194] bring forward a primâ facie case, which it is very difficult for you on the other side to rebut." The first thing the petitioners admit they have to account for is, why this marriage should be private, or rather not private, but secret. Why should the marriage be secret? I suppose if a marriage was intended to be private in America, where it was not necessary to solemnize the marriage in a church, it would be as private with the presence of a clergyman as without. But what is the reason given for any privacy or secrecy in the matter? Why, that Mr. Wilson, the father of the lady, disapproved of the match, because the difference of their ages was too great. That is the reason assigned now. It is suggested that as soon as they married they cohabited together as man and wife, and lived together from that day down to the period of William Shedden's death; were received in society, visited by ladies, and visiting ladies of the most respectable class; and that, therefore, there could be no doubt of that marriage. But what a strange reason to give for keeping the marriage secret and private! Would the father be more reconciled to his daughter's cohabiting with William Shedden because he thought she was not married, or did not know that she was married? It does appear to me to be one of the strangest reasons that ever was assigned for having a secret unacknowledged marriage when the parties were cohabiting together as man and wife. But it is well to observe whether the parties have always been in the same story about that; whether any other reason for secrecy or privacy in the marriage has ever been given. Now, in one of the letters of the petitioner—that of the 14th of June, 1839—I do find another reason assigned. He asserts a former marriage, but assigns a different reason for secrecy. It is a remarkable letter, and to be duly understood, the whole of it should be read and considered. It is a letter written when he was in angry controversy with William Patrick—when he is repeating to William Patrick that all his father had said and desired [195] to accomplish by the last marriage, and relying upon his undoubted wish that he, William Shedden, the petitioner, should be made heir to the Scotch property. That is the scope of the letter, and therein he

deals with this matter of a former marriage. There had been a negotiation between William Patrick and William Shedden, after he returned from India the second time, for enabling him to possess that which was the great object of his ambition, the Scotch property. Some terms had been proposed, but William Shedden did not choose to accede to those, and he writes thus upon the subject:—"Now one would have thought, as there was no house or garden, or lodge or grounds about the property, no stranger would have given more than from twenty-eight to thirty years' purchase," and so on, and then he objects to give that. Then he says, "I would have given you so much, and therefore there would have been no favour conferred upon me, and I was ready to give it, particularly"—now, here is a curious passage in the letter, very curious—"particularly as it is likely that no other person knowing my claims would be anxious to have it, or, at all events, without an indemnity bond; for although I am not able to establish just now my father's first private marriage, which I have given you notice of, what is known already would not be in your favour, and I conceive it to be my duty now to inform you, that my sister told me it was really the case that my mother was a respectable young person living with her parents upon a small farm on my father's land, and he did not acknowledge the marriage publicly on account of her humble birth, but nevertheless he always treated her as his wife." Is that so? Then what becomes of this being a marriage which was to be kept private because the father thought he was too old a husband for her? He now says, everybody in New York knew it, but then his statement is, that his father "did not choose to acknowledge the marriage publicly, because of her humble birth." And this is a letter written by the man **[196]** who, to-day by his counsel, and on former occasions, has declared solemnly that until the year 1848 and 1849 he never had the slightest intimation of any former marriage supposed to have been had between his father and mother! What are we to think of such a man? But that is not all—"Nevertheless, he always treated her as his wife, and Mr. Robert Shedden informed me that he found her at the head of my father's table when he went to America"; which is not inconsistent with the evidence now given, for the earliest account we have had about Robert Shedden going to America was that he was there a few months before the man's death, when that bond was executed. "Moreover, my sister told me in 1829, when she mentioned these circumstances"—his sister had told him that in 1829, ten years before this letter—"that a woman was still alive who was present at the private marriage." I take that for what it is worth—an assertion that he had heard that from his sister; I shall have occasion to observe presently upon that part of it. But take those two opposite reasons, assigned at different periods and for different purposes, for the marriage being kept secret. Does it increase one's confidence in the evidence of habit and repute? Against that evidence of habit and repute set the evidence of Mr. Neilson, who certainly does not go into particulars, but merely says he was reputed to be a single man. Mr. Neilson was of much greater age than most of those who spoke on the other side; he had no interest at all; he was older at the time, and had as good means of knowledge. There is also the evidence of John Barr. John Barr must have known the circumstances, and, unless he was a perjured man, his evidence is exceedingly strong. Well, if the case had rested there, I for one might have felt a little embarrassed as to the judgment I should pronounce. I cannot tell what would have been my opinion if there had been no other evidence, because my mind may now be influenced by the other evidence unknown to myself. As far as I can **[197]** judge, it would have been that there was no such evidence given of the affirmative of the marriage as to warrant a judicial conclusion that any marriage had taken place.

But I now come to the second marriage. There was an undoubted marriage in fact when the man was on his deathbed on the 7th November, 1798. Now, what are the reasons suggested for his marrying then? It could not be to make reparation for any wrong that he had done to Ann Wilson, because, according to their theory, he had done no wrong at all. It could not be, I think, that which Mr. Collier suggests, a religious scruple. I can perfectly understand a religious scruple having come across his mind as to marital intercourse without the sanction of the church, and if he was contemplating a continuance of it, that might form a reason for the marriage being solemnized at that time; but he knew that that was at an end, and it is absurd to suppose that he would have married then in order to sanction that which he had done years before. Therefore it could not be that. Then what reason remains? Why, it

is suggested that he wanted a marriage more easy of proof. But it could hardly be more easy of proof. All New York knew of the other. The lady's father was living; Dr. Hosack, the particular friend and physician, was living; Mrs. Hamilton, described by one of the witnesses as a "particular crony" of Mrs. Shedden, was living; Judge Pendleton, whose acquaintance they boast of, was living. Where could be the difficulty? Why, the man himself was living, and might have made a declaration which would have been conclusive. Therefore, I think it is quite absurd to put it upon that ground. What, then is the ground? To make his children legitimate. And that is the ground which, as long as it suited his purpose, was adopted by the petitioner himself. Throughout this long letter of the 14th of June 1839, the argument is—"You know perfectly well that your uncle married my mother in order to make me legitimate and the heir to the **[198]** Scotch property, and yet, in defiance of all that, you basely avail yourself of a technical objection in order to get possession of it for your brother Robert"; and that beyond all doubt was his case. Well, then, in addition to that, you have declarations of John Patrick, the declaration of Robert Shedden, declarations of William Patrick of Virginia, all to the same effect, repudiating a former marriage, saying there was none until this marriage was solemnized.

I now come to the letter, the important letter of the 12th November, 1798, and it is admitted by the petitioners, that if that was a genuine letter, there is an end of the case. Now, let us inquire a little into the probability of such a letter having being written. It was said by Mr. Rolt in his argument, that if John Patrick and William Patrick of Virginia and Robert Shedden wrote to different people stating that there had been no previous marriage, when in fact there had been one in 1790, that marriage must have been known to the friends in Scotland. They had correspondence with the Patricks in Scotland, and with the Sheddens in London. Mr. Collier argues, on the other hand, that it does not follow that they would know it; very likely they would know nothing at all about it. I think that is exceedingly improbable. The Scotch families are somewhat particular about their pedigrees—somewhat proud of them. Mr. Shedden of New York was the owner of the old Roughwood property, which had been long in the family, and of the possession of which they were proud. Would it not be made known to the members of the family that there was a marriage, and children born of an acknowledged marriage? Would they never have heard of it? It is quite incredible. One must judge of things somewhat according to probabilities and one's intercourse with the world. But assume, according to Mr. Collier, that it was not known, and I dare say it was not, that he had had these children—is it likely, assuming that he married at that time for the purpose of making the chil-**[199]**-dren legitimate, that the letter of the 12th November would be written? If I mistake not, he appointed by his will William Patrick as a guardian of the boy. But this reminds me that I have omitted one reason which was assigned in the opening as a reason for solemnizing that marriage, and it was this,—that the testator had discovered some grounds for suspecting a conspiracy to deny the former marriage, and therefore, to make all sure, he had it solemnized again with ecclesiastical forms. If there was such a conspiracy, who were the parties to it? Who could be the parties in it? Who had an interest or a motive? Why, it could only be John Patrick, with William Patrick or Robert Patrick in Scotland, in order to advance their interests. Is it possible that such a thing can be suggested? Here is a man on his deathbed discovers that his nephews have entered into a fraudulent conspiracy to cheat his children of their inheritance, and immediately he makes the fraudulent nephew in America his executor, and the fraudulent nephew in Scotland the guardian of his child. Why, it is too absurd a supposition to be entertained for a moment. But as to that letter, is it likely that such a letter would be written? If he had married then, to make that child legitimate; if he had not avowed the existence of that child before; if he had not communicated with his nephew, the Writer to the Signet, or Dr. Robert Patrick, before;—is it likely that he would make a will appointing a guardian to the child, having, as he supposed, legitimated him by the marriage,—and send him over to that guardian in Scotland without any communication from himself? Is it not likely that he would give the guardian some intimation of it; that he would write something to shew that he remembered him, and to bespeak his kindness to the child? Therefore, it seems to me that there is every probability that some such letter would be written. But to what a theory are we driven in order to suppose that no such letter was written? Why, to get rid of the effect **[200]** of John Patrick's

letter of the 9th November, 1798, they say that he had very artfully written that letter to pave the way for a forgery to be subsequently executed of a letter to be sent in the name of William Shedden to William Patrick. Now, in the first place, let us see what the effect of that letter is, in respect to the opinion that John Patrick himself had, as to the consequence of what his uncle had done. He speaks of his having married; states that he had married; states that his object in that proceeding was to rescue from a state of bastardy, and introduce into the world with all the privileges appertaining to those who are born under the influence of the law, two infant children,—evidently alluding to the right of inheritance. Well, then, he speaks of its being a hard struggle, but that he had done it. He then speaks again of the other girl, who is said to have been an illegitimate child by another woman. "Besides the two children mentioned, he has one other, a girl of about twelve years old, by another woman, who is long dead, his very image, but who can reap no benefits from the measures taken, being considered in the eye of the law a bastard." He therefore distinguishes between her status and the status of the two who were to have the benefit of the marriage which had then been solemnized. He again mentions certain claims upon the estates which he thought his brother William ought to take care of, evidently supposing that the estate would pass into the hands of the boy; and after speaking of the delicate position in which he was placed as an executor, he says, "This is likewise in your situation extremely so, as agent of his heirs and as representative of those who have claims to counteract them." He, the writer, is made agent for the girl, but William Patrick being appointed guardian for the boy, he has these family claims to take care of, which are claims upon the estate. It is therefore very plain that John Patrick at that time supposed that the marriage was effectual to give them all the rights of legitimate children. **[201]** He knew that his uncle had made a will disposing of all his American property; then what possible motive could he have for entering into any conspiracy to send a forged letter? But it is supposed he had, because otherwise it is difficult to get rid of the fact of the postscript of 11th November:—"In the morning Mr. Shedden gradually approached his end. He has looked into his affairs, and wrote to his friends. He has two important letters to write, and dies contented. One is to you respecting his children, etc. The boy is to be sent to Scotland." Then in a postscript he says, "I requested him, if possible, to write to my brother Robert; his susceptible heart, I know, would be much gratified," assuming, that from his exhausted condition, it was doubtful how much he would be able to write,—I say, therefore, there was every reason to suppose that such a letter as that of the 12th November would be written.

Well, then, we have had produced to us two letters, which purport to be copies, which are called duplicate and triplicate; and I have the duplicate in my hand, in which he says, "Original by the ship 'Fanny,' viâ Greenock." Rather a curious concoction of a letter this, if it was a fraudulent pretence that there was an original; that this duplicate should be prepared in this manner, "Original by the ship 'Fanny,' viâ Greenock. New York, Nov. 12th." Then, as this is supposed to be from the man himself, there is the name "William Shedden," and, curiously enough, there is the word "signed" against it, which, you know, is the constant practice; in making a copy, you put "signed" against the name, to shew that it is not meant to pass for an original signature, as instead of the seal you have "L.S.," to shew the position of the seal; and then we have by the side, "Attested, John Mills." If this was a fraudulent pretence, it is necessary to suppose that John Mills was a party to the fraud, was a party to the concoction of this fabricated letter, he asserting by that which he writes that the original **[202]** was sent by the ship "Fanny," and that this was a duplicate of it; he attests the correctness of the duplicate. So likewise John Mills attests the correctness of the triplicate, he being a person ascertained to be in the employ of the testator, William Shedden, because by his will he left him a legacy. Now, this triplicate begins also, "Triplicate; original by the ship 'Fanny'; duplicate by the Amsterdam packet." This part of the assertion is proved to be true, "duplicate by the Amsterdam packet," because there is the duplicate which came by the Amsterdam packet; therefore some part of this statement is true. Then, is it not monstrous, where we have no imputation upon John Mills, no reason to suspect him; no surmise against his character of any kind or description; when it is proved that the testator had had some regard for him, by remembering him in his will; that the man is to be supposed instantly, without motive, without anything to induce him

that we know of, to enter into this combination with John Patrick, to assert a gross and abominable falsehood, viz. that there was an original letter, of which these two were the duplicate and triplicate? Well, then, what was the course of business in that day? Why, to send bills in three parts. I believe it is somewhat altered now. I believe it is not very common to go beyond a duplicate, but at that day it was almost invariable to send three parts, one being enclosed in each letter; and therefore you have the course of business to confirm that which is so stated. But I think that there is the strongest internal evidence of the truth of the story, that this was William Shedden's letter, and not a letter fabricated and concocted by John Patrick. Observe what is said to be the motive. It is to lead people in Scotland to conclude that he never had been married before—in fact, that it is to operate as a denial of a former marriage. Now, what are the contents of it? "My very dear Nephew,—My long and painful illness must apologize for my long silence. I am now going to quit this [203] world. I have married Miss Ann Wilson, which is approved of by my friends here." That is a truism; John Patrick did not invent that in order to cause it to be believed in Scotland that he had married Miss Wilson. That could be proved by plenty of people. There was no doubt about it. "And which restores her and two fine children I have by her to honour and credit." Now, the whole pith of the letter is in the word "restore." There is nothing else which by inference would lead you to conclude that he meant to say that it was necessary to "restore" her—that there was some need for a restoration—that she had lost honour and credit before, but that that was to "restore" her. John Patrick must have been very cunning, if he invented this letter to operate as a denial of any former marriage, to hit upon that word "restore," so that people might draw that inference from it, and not make a direct statement of it. It is inconsistent with human nature to suppose that a man so dealing with the subject, and with such a transaction, would not have made some positive statement of the fact in such a letter—"I have hitherto lived with Miss Ann Wilson as my mistress, but I have at last married her." Here the whole point of it is in the word "restore." There is nothing else in the letter but facts known to everybody—mere truisms, about which there could be no controversy or dispute. He goes on—"one of my children is a boy named William Patrick Shedden"—shewing, therefore, that which is consistent with all one expects to be the case, that the existence of that boy, the illegitimate child, had not been made known to his friends in Scotland before, and therefore he told him his name; and then he speaks of having sent the bills of exchange, which the petitioners have proved had duly arrived, by introducing Mr. Patrick's book in which the receipt of the bills, and of the payment of the bills afterwards when they were due, is acknowledged. Then, "I desire that such further sum or sums of money may be appropriated for the [204] purpose of maintaining and educating him genteelly and according to his talents and inclination, not exceeding £500 sterling, without the consent of my executors, of whom you are to be totally independent in this business. I can only add, that I remain till death," &c. This, again, is exactly consistent with the will; the daughters were to be under the care of the executors, the elder one absolutely, the younger one as soon as the mother ceased to obey their instructions and to act according to their wishes in reference to her. The boy was handed over to Mr. William Patrick as his guardian. What is there against that? What is there to lead us to doubt that such a letter was written? What is the improbability of it? Why, it is not produced. It cannot be produced. The letter was received in January, 1799. But before I go to that I must advert a little to Ann Wilson's letter, which sometimes has been relied upon, and then been repudiated by the petitioners—the letter of the 3rd September, 1799, which is legitimately in evidence, and we will see what she says about it. "On looking at my signature, you will of course find that I am a stranger to you, but when I inform you that I am unfortunately the widow of your late uncle, William Shedden, Esq., of this place, I trust that you will listen to the contents of this letter with that attention which the memory of your late uncle, and the interest of his son, is in my opinion fully entitled to." Then she talks about the loss of her husband, and so forth. "My worthy husband made his last will and testament some time before his death, making settlements as far as he could, and appointed executors for fulfilling his intentions. He also at the same time wrote your brother William in the most affectionate terms, recommending our son William to his guardianship and protection, and made a remittance on account of this infant, the view being to send William to Scotland for

his education." She speaks incidentally of that letter. "He wrote to your brother **[205]** William in the most affectionate terms." What, was she, on the 3rd September, 1799, concocting evidence in order to establish that such a letter was written, or was John Patrick doing it? The theory is, that this letter was forged by John Patrick, or by some of his wicked associates. Assume that John Patrick, on the 3rd September, 1799, was actually writing this letter for the far-fetched purpose and object of giving some collateral evidence of the existence of such a letter as that of the 12th November, and I think you will assume one of the most preposterous propositions that ever was presented to the consideration of rational men. It is absolutely absurd and ridiculous. If genuine, it proves that she not only knew of such a letter, but knew the contents, of it. She states them correctly. Her husband had written to William Patrick in affectionate terms, and recommended their son to his care, and made a remittance for the purpose of his education. Well, then, the letter is not produced. What has become of it? What does Mr. Patrick say? Mr. Patrick says, "I gave it to William Shedden, the petitioner; I never got it back again." Then we have produced a list of papers which are admitted—at least the greater part of them—to have been at one time handed to William Shedden. The date of the list is the 7th October, 1823. I do not say that that is positively so, but it is a list of papers that purport to have been sent to him on that day; and the clerk, Mr. Love, says that, according to the course of the office, no doubt that list was made out, and he made a copy at the time the transaction took place. Now, how came this list to be made out? It appears that this gentleman, the petitioner, returned from India in 1823, and that then Mrs. Robert Patrick observing that he was wholly ignorant of his family and his status, and who he belonged to, as far as family connections were concerned, revealed to him the secret of his birth. He became much excited, very angry, and entered into a violent and angry controversy with **[206]** Mr. Patrick on the subject. He says, Mr. Patrick, by various specious arguments, sought to pacify him; and great imputation has been cast upon Mr. Patrick on account of his having never communicated the secret of his history and his birth to this young man before he went to sea or went to India. Whether that was right or wrong—whether there was anything blamable in that or not—must depend, I think, mainly upon whether Mr. William Patrick had acted faithfully towards him or not. If he had acted faithfully—if the question respecting his rights had been fairly and honestly brought forward and tried, and the decision was in favour of Robert Patrick and against the petitioner—if the executors in America had acted faithfully, and had not robbed him of his estate,—and there were three executors, not only John Patrick, but Dr. Hosack and Mr. Farquhar, and Mr. Farquhar appears to have acted as well as Dr. Hosack, for in Mr. Farquhar's possession the papers belonging to the deceased man were found,—why, then, I say, if they had acted faithfully, was there anything unkind or unworthy in keeping from the knowledge of this young man that he was illegitimate? Would he go to sea amongst his young comrades in the navy, or would he associate with young men in India, with any more freedom or satisfaction, with any more consciousness of the dignity and position of an honest young man, because he thought he was a bastard? Would it have added to his happiness to have known that circumstance? Would it have been likely to advance his pecuniary interests or his personal interests, or to gratify his personal feelings to have known it? If not, assume that he was faithful in discharging his trust, and I do not see what imputation is to be cast upon Mr. Patrick for not making the communication. But, at a certain age, it seems that Mrs. Robert Patrick thought it right that he should know who and what he was. Then they entered into this discussion.

Now, it appears that in order to give him information, **[207]** these papers were given to him for perusal—Mr. Patrick says all; the petitioner says not all, most of them. First there is a letter of John Patrick of the 9th, with postscript of the 11th November, 1798, regarding Mr. Shedden's affairs; second, a letter of the 18th November informing him of Mr. Shedden's death; and I think it was in that same letter of the 18th November—if not, it was a letter about the same date of John Patrick's—in which he says, "I send you a newspaper containing the announcement"; and very probably the obituary in that newspaper is the one afterwards referred to, which possibly contained some complimentary notice of the deceased—"with newspaper of the 14th November," intimating the date and as having given it at that time; "third, probate of the will of William Shedden; fourth, letter from William Shedden to William

Patrick of 12th November 1798, enclosing two bills of exchange, amounting together to £417, 15s. 8d.; fifth, letter of John Patrick of the 8th December, 1798, with a copy of the letter of the 18th November prefixed." Now, I should remark upon this "fourth,—letter from William Shedden to William Patrick of the 12th November, 1798, enclosing two bills of exchange,"—that what seems to be considered the important part of that time was the enclosure of the bills—the money that was sent for his son's use; and whether that was meant as the original, or the duplicate, or triplicate, may be left very fairly in doubt. Nothing more is heard of this. Mr. Shedden says, "Whatever papers I got" (he acknowledges having received papers in the letter of the 14th October) "they were all returned." I think it is very probable they were. But then some papers were sent back again to him before the 3rd of January, 1824. I assume he sent them all back as he says, but there must have been a subsequent transmission of something to him, as appears by the letter that he wrote on the 3rd of January, 1824:—"Dear Sir,—On my arrival last night from the west country, I received your **[208]** letter of the 31st ultimo" (if that letter had been produced it would have set this question at rest); "and I have to thank you very sincerely for the letter of my father's to you and the obituary." I assume they were all sent back in 1823. Here, in January, 1824, he got the obituary again, and a letter of his father's also. It appears that Mr. Patrick wrote in the margin of this list against the letter of the 12th November, "Not returned." That was written, as far as has been ascertained, in the progress of Mr. Carment's examination of the papers in the suit of 1848, twenty-four years after the transaction, Mr. Patrick then approaching the age of eighty. It is possible, his attention not being particularly drawn to the subject, that when he was asked, as he would be by Mr. Carment, "What about the letter and obituary? we cannot find these," he may have said, "Oh, those were not returned when he sent the others back again." But there is this expression in the petitioner's letter of the 3rd January which Mr. Collier very properly noticed, "As I had never seen my father's handwriting before, you will easily be assured that this is a dear relic to me." That only operates to negative the fact that he had his father's writing or signature in the month of October before. I think it is very strong to shew that. But how do you account for that? Why, the letter of the 12th November put down in the list was originally sent for the purpose of shewing the bills enclosed—nothing is more probable—without distinguishing between the original and the duplicate. The whole were sent to give him information about his affairs and his status; they were returned; and afterwards, for some reason which was probably assigned in the letter of the 31st December,—which the petitioner would have, as it was his, and if it has been lost it is not the fault of the respondent,—the original and the obituary were again sent, for we find him, on the 3rd January 1824, acknowledging the receipt of a letter from his father to William Patrick and the obituary, and thanking **[209]** him for the letter, as probably containing nearly, if not absolutely, his last signature. Now, how did Mr. Patrick become possessed of his last signature? John Patrick says, on the 11th November, "William Shedden has two letters to write, one to you about his boy." Only one to him. If, therefore, he had the last signature, it must have been that one. I apprehend, from this examination of this part of the evidence, no reasonable man can doubt that that letter did go to him at that time. Mr. Shedden denies it. Can we rely upon Mr. Shedden's evidence in this matter? Mr. Shedden has denied, both in the House of Lords in 1854, and in his petition presented there after the suit was over, and through his counsel to-day, that he had the slightest knowledge or intimation of his father's former marriage, or any suggestion of it, until 1849. In the petition is this paragraph:—"That your petitioner first became aware of the civil contract of marriage between his father and mother in the month of October 1849, when in New York; and he then, with the assistance of eminent lawyers in that State, collected the most satisfactory and conclusive evidence of the marriage of his father and mother previous to the birth of his sister, who was born before your petitioner."

What have we in his own letter? Why, that he knew it in 1829, and that he was told in 1829 that there was a witness then living who was present at the prior marriage. Do you think he did not inquire? If he did not inquire, he must have been perfectly satisfied that that was a false story. If he did inquire, what was the result of his inquiry? Twenty years afterwards, or thereabouts, for the first time, he set up that former marriage. Can we trust him? In Court here, upon his oath, he

stated that he had never seen or heard of that document, the father's letter, until 1841. Again I refer to the remarkable letter of the 14th June, 1839, for his statement with reference to it. He is quarrelling with Mr. Patrick, not because he had denied **[210]** the former marriage, but because, knowing from his brother what his uncle's intentions were in solemnizing the deathbed marriage, he had defeated those intentions. He says here, "Just to think of your seeking for an American certificate, when you had received my father's own letter telling you of his marriage with my mother." What does he mean by that? What ought we to infer from it? It is open to various constructions. Taking the whole tenor of the letter, I imagine he means this: that Mr. Patrick had employed somebody in America to examine whether there was such a certificate; that he is imputing to him that he tried, if he could, to deny the existence of such a marriage. "Only think," he says, "of your sending to America for a certificate, and not being satisfied with my father's own declaration, under his own hand, that he had married my mother." That is the fair meaning. And then he goes on, "In order to annul the Scotch custom in my father's case, and his honest intention for the Scotch estate." Why, then I come to the conclusion upon this evidence, if it stopped there, that such a letter was written by the testator, that that letter was given to the petitioner, and that the petitioner has not produced it. Is it harsh to come to this conclusion? How has the petitioner dealt with other documents—the documents abstracted from the Registry in Scotland—the documents obtained from his own parliamentary agent in London, upon the assurance, the positive and solemn assurance, that they should be returned, which they never have been —the documents, through the instrumentality of Jean Shedden, burnt by Van Hook in America?

But it is said that William Patrick is not be credited, for that he entered into a fraudulent combination with Crawfurd. It is only necessary to touch the case, and to have fraud imputed—fraud, perjury, falsehood, forgery, everything, in order to establish the legitimacy of this man by a supposed former marriage of his father and mother. This charge is **[211]** founded upon two letters from Hugh Crawfurd to William Patrick. What are these letters? How was Crawfurd introduced into the case? Remember the letter of Mr. William Patrick, the guardian, or rather the intended guardian, for he rejected that office, to the executors in America, telling them he could not take the office. John Patrick wrote, nothing doubting, that the boy was entitled to the estate; that he was rendered legitimate; that the marriage was sufficient. William Patrick writes: "I cannot take the office of guardian. This is a very doubtful point: I am inclined to think it is in favour of my brother Robert, and he is absent in the service of his country—I am acting for him—I must protect his interests—I therefore can take no guardianship of the boy which would involve me in a collision of interests of that sort; you must appoint some one to have the question fairly and fully tried." Now, what was the question which William Patrick supposed was to be fairly and fully tried? Why, the effect of that marriage solemnized on the 7th November, 1798. Then afterwards Crawfurd is appointed, but not by him. Is Crawfurd a respectable man? "Oh dear, no. He is implicated in the frauds of these other people." What other transaction of Mr. Crawfurd ever cast a suspicion upon his character or conduct? None has been suggested, but here are two letters, one of them, it appears, just about the time when the cause was determined in Scotland, the 9th July, 1803. At the close of the letter he says, "What is now to be done in William Shedden's case?" Crawfurd asks directions, it is said, of Mr. William Patrick. "What is now to be done?" he asks. Why, just to do or leave undone, as William Patrick might direct. What is the other letter he writes? The purport of it I think I sufficiently remember. He there says,—"Mr. Miller has communicated to me the judgment of the court. It is very strong. I think it very improbable that it will ever be reversed, especially in the House of Lords, for it is entirely in **[212]** accordance with the principles of English law. Nevertheless, I think it would be better to appeal to the House of Lords; for if I do not, the boy may challenge it —William Shedden may challenge it. At all events, I think my duty will be best discharged by appealing to the House of Lords." Now, persons who are so disposed may find in that matter of suspicion and accusation. Bear in mind it has been proved that William Patrick, on behalf of his brother Robert, engaged that if he gained the estate in that suit he should pay all the expenses. Well, then, here is Mr. Crawfurd, a respectable man, writing to him: "The judgment is a strong one; I feel confident

it will not be reversed; nevertheless, I must put you to the expense of an appeal." Did it not require something like an apology? It is not in many instances that a person having a clear judgment against him, which he knows and feels to be right, can be justified in prolonging and protracting the litigation, even if he does it at his own expense, and it certainly calls for some excuse if he avails himself of an opportunity of doing it at the expense of another party. A fair and candid consideration of those letters, I think, would shew they came to no more than this: "I think the judgment is right; I have little, if any, expectation that it will be reversed; but as I am watching over the rights of an infant, I think it right not to abandon his cause until the highest tribunal of the country has pronounced an opinion as to his rights." And as to the fact of the appeal being made fairly and fully, and honestly argued out in the House of Lords, it is only necessary to read that which I have read with the greatest satisfaction; that is, the wonderfully acute and learned argument then prepared by Lord Brougham[1]—I believe the only instance in which he prepared a case from Scotland to the House of Lords. It is an argument well worth reading for **[213]** the sake of the learning and ingenuity therein displayed. What else is there? Nothing except general surmises, general accusations; the estate has been plundered, everybody connected with it was fraudulent,—Robert Shedden of London, Robert Shedden the younger, William Patrick of Virginia, and all the members of those families; nay, the petitioners have not hesitated to say that some of these unfortunate people actually quitted the world to conceal themselves and their crimes in the grave, in order to avoid exposure and shame! The only tangible thing that they mention is the bond for £4000. They say that that was forged. We have had evidence of the handwriting of William Shedden to it. We have had the explanation of Mr. William George Shedden as to how that bond came to be given, and the reason why it never appeared upon the books of Robert Shedden and Sons. We have had evidence, given by the petitioner himself, of the handwriting of William Shedden of New York, as signed to a bill. That bond was open to inspection, and was inspected by the petitioners and one or more persons employed by them, and no person has been brought forward to say, either by comparison of handwriting or otherwise, that he entertained a doubt as to the genuineness of the signature. The charge and imputation upon William Patrick failing, the facts and circumstances already mentioned leave me without a particle of doubt as to where the truth lies in this case. Finding, then, that the evidence to support the allegation of a former marriage is of the slightest kind; that there are such contradictory and conflicting reasons assigned for the secrecy of that marriage, and these having been given just as it suited the purpose of the party for the moment—finding that the contents of the disputed letter of the 12th November are just what you might expect to find in a true story, with reference to a marriage solemnized for the purpose of rendering a child legitimate, and with reference to the appeal to the guardian appointed by the dying man, and con-**[214]**-sidering the manner in which Mr. Patrick has accounted for not producing that letter now, I am entirely satisfied that it was written; and without the least hesitation I must pronounce that William Patrick Ralston Shedden, the petitioner, is not the legitimate child of William Shedden and his mother, and is not a natural-born British subject.

One word about the position in which these parties are placed by the presen decision.

From the manner in which this case has been conducted, and the manner in which the evidence of the male petitioner was given, I can have no sympathy with him. He may have become excited; he may have brooded over fancied wrongs until his faculty of judging was disturbed; but the course he has pursued in other matters where he had no such excuse, leaves him, I think, without any title to the sympathy of the Court.

For the female petitioner I do feel most deeply. I have no doubt she has been brought up to believe in the truth of her father's story; and from the intimate and familiar knowledge she has displayed of every particle of evidence connected mediately or immediately with the case, I have no doubt that for years and years her mind must have been devoted to the consideration of the subject. I have no doubt she has received her father's statements with the unhesitating confidence of a dutiful and affectionate child, until they have become interwoven in her very nature. And what is to be the consequence to her of this judgment? It must be one of two things. If

[1] See 1 Macqueen's "House of Lords Cases on Appeal from Scotland," p. 539.

she is not convinced by it, she will live under the harassing belief that she has sustained a grievous wrong, and is unable to obtain any remedy,—a position sad enough. If she is convinced, she will have to mourn and lament that the course of conduct pursued by her and her father has embittered the latter days of an aged man, who, for a period far exceeding the ordinary life of man, has lived honoured and respected, with his integrity unimpeached; and that she has been instrumental in submit-[215]-ting him to a relentless persecution, carried on by means of unfounded aspersions and most unjustifiable litigation.

*Mr. Justice Wightman*: All the material evidence and circumstances in this case have been so fully stated by the Judge Ordinary in the judgment he has now pronounced, that I do not consider it necessary to do more than advert to those prominent points upon which my opinion is founded.

The petitioners in this case pray the Court to pronounce, on sufficient evidence being adduced by them, that William Shedden and Ann Wilson, the father and mother of the first-named petitioner, were lawfully married prior to his birth, and that he is their legitimate son and heir, and a natural-born subject of Her Majesty.

The question is, whether the petitioners have satisfied the Court by sufficient evidence, that the father and mother of the first-named petitioner were lawfully married prior to his birth? For if they have, it is not made a question but that he was a natural-born subject of Her Majesty.

The first-named petitioner was born in March, 1794, and evidence was adduced to shew that before and at that time William Shedden and Ann Wilson, the father and mother, did live together as man and wife, and that they were reputed and treated as such down to the death of William Shedden on the 13th November, 1798. There was, however, contradictory evidence on this point; and it might be a question if the case turned wholly upon the presumption of the marriage arising from evidence of cohabitation, reputation, and treatment, whether there would be found sufficient evidence to warrant primâ facie such a presumption. Upon the whole, I am inclined to think there would; and the question then arises, whether the other circumstances appearing in evidence do not rebut any presumption of marriage arising primâ facie from the evidence of cohabitation, reputation, and treatment, as given by the witnesses? Wil-[216]-liam Shedden, the father, was a Scotchman, and Ann Wilson, an American; and on the 7th November, 1798, he then being sick even unto death, and lying upon his deathbed, married Ann Wilson, by a regular marriage by a clergyman, in due form. If he had been married before, it might be and was asked why did he marry again? And the answer suggested for the petitioners was, that it was from abundant caution, and to render proof of the marriage easier either in the Scotch Courts or elsewhere,—he having an estate in Scotland, and believing that the Scotch law as to ante nati would apply to his children, and render the question of a previous marriage comparatively unimportant.

Whatever weight might be attached to this reason, evidence was given by the respondents to shew that a letter, said to have been written by William Shedden on his deathbed, was addressed and sent to William Patrick, one of the parties cited, dated the 12th November, 1798, which, if genuine, clearly shewed the object of William Shedden in marrying Ann Wilson on the 7th November, five days previously, and is wholly inconsistent with the presumption of a prior marriage. In that letter, William Shedden addresses William Patrick, his nephew, thus:—"My very dear Nephew,—My long and painful illness must apologize for my long silence. I am now going to quit this world. I have married Miss Ann Wilson, which is approved of by my friends here, and which restores her, and two fine children I have by her, to honour and credit."

It is hardly necessary to comment upon the language of this letter. His object is stated to have been to restore her and his two children by her to honour and credit. If he had been previously married, and, as was suggested by the evidence of reputation, everybody knew it, what occasion could there be to restore her and her children to honour and credit?

They had lost none if there had been a previous marriage. [217] So cogent, indeed, is the inference to be drawn from this letter, that it is admitted for the petitioners that their case fails if that letter be genuine: but they assert that there never was such a letter; that the supposed copies called duplicate and triplicate are mere fabrications; and that the whole of that part of the respondents' case is

founded in fraud. The case may, indeed, be said to turn upon the question of the existence and genuineness of that letter.

The letter itself was not produced before us, but William Patrick, to whom it was said to have been addressed and sent, said that he did receive such a letter, and that in 1823 or 1824 he handed it to the first-named petitioner at his request, and never got it back again, and that at the same time he handed to the petitioner an obituary in a New York newspaper. This is entirely denied by the petitioner, who swears that he never saw such a letter, and never received it. A letter, however, addressed to William Patrick is put in by the respondents, dated the 3rd January, 1824, and admitted by the petitioner to have been written and sent by him, in which he says:—"Dear Sir,—On my arrival last night from the west country I received your letter of the 31st ult., and I have to thank you very sincerely for the letter of my father to you, and the obituary. As I have never seen my father's handwriting before, you will easily be assured that this is a dear relic to me, being perhaps his last signature in this world."

The petitioner being asked what letter of his father's he spoke of in that letter of his of the 3rd of January, said it was some perfectly unimportant letter, and related to a trifling transaction with some merchants at Glasgow; and being asked to produce it, said it was of so little consequence that he had it not, and did not know what had become of it. One of the copies called duplicate and triplicate was produced, and William Patrick said that it was, to the best of his belief, a correct copy of that letter.

**[218]** Now, whether or not that letter had been handed to the petitioner in the previous month of October, and returned to William Patrick, and afterwards sent by him to the petitioner in a letter of the 31st December, I feel satisfied that the letter referred to in the petitioner's letter of the 3rd January, 1824, was no other than that letter. It seems to me impossible to reconcile the terms in which the petitioner speaks of that letter with his statement that it was an unimportant letter relating to some trifling transaction with Messrs. M'Call at Glasgow—so valueless, that he did not think it worth while to preserve it or the letter of the 31st December, 1823, in which it was contained. This is very unfortunate, as a production of either of them must have thrown great light upon the subject.

It is remarkable that the petitioner, in his summons in 1848, relies upon the circumstance that William Patrick was expressly informed that the marriage on the 7th November, 1798, was for the legitimating of the children, and charges William Patrick with having carefully suppressed the letter of the 12th November, 1798. At that time it suited the petitioner to treat that letter as genuine, he at that time relying upon the applicability of the Scotch law as to ante nati to his case; but now that he finds that the Scotch law is inapplicable, and that that letter, if genuine, would be fatal to the presumption of a prior marriage, his case is, that that letter which he charges William Patrick with suppressing is a mere fabrication, and had no real existence as a genuine document. This is a circumstance not calculated to advance the credit to be given to his evidence.

A very long letter of the petitioner to William Patrick, dated the 14th June, 1839, was also read, in which is the passage, "Just to think of your seeking for an American certificate, when you had received my father's own letter, telling you of his marriage with my mother." Throughout the whole of the proceedings there is no intimation of any **[219]** other letter from the petitioner's father to William Patrick, mentioning his marriage, than that of the 12th November, 1798.

There is other evidence, to which I do not think it necessary to advert, particularly as it has been already mentioned by the Judge Ordinary, tending to shew that a letter of the 12th November, 1798, from the petitioner's father to William Patrick, had been handed to him in 1823.

Upon the whole, I am abundantly satisfied by the evidence of the existence of the letter of the 12th November, 1798, from the petitioner's father, and that it was handed to him.

But the evidence to rebut the presumption of a prior marriage does not stop there. A letter from Ann Vincent (*sic*), the petitioner's mother, who had married again after the death of William Shedden, has been produced and given in evidence. It is dated New York, 3rd September, 1799, and is addressed to Dr. Robert Patrick. In it she says, "My worthy husband made his last will and testament some time before his death,

making settlements as far as he could, and appointed executors for fulfilling his intentions. He also, at the same time, wrote your brother William in the most affectionate terms, recommending our son William to his guardianship and protection, and made a remittance on account of this infant, the view being to send William to Scotland for his education."

As far as we can judge, from what she states of that letter of her husband in this letter of hers, it is precisely according to that which is put in as being the genuine letter written by the petitioner's father when he was on his deathbed.

In this letter she treats the marriage and the will as contemporaneous acts. She says, "The fact is, the marriage was solemnly performed, and the will as regularly executed, as any two acts of their nature could possibly require, and ample testimony of the facts I trust I have furnished." That is what she says. She seems to think that the marriage **[220]** removes her son's defect of title on the ground of illegitimacy, appearing to have the same view of the law upon the subject that her husband, William Shedden, had, viz., that a marriage would legitimate the children born before; but she makes no mention of a previous marriage, or any other than a marriage solemnly performed. I may say that, throughout the whole of the proceedings down to the 5th of April, 1849, when the supplementary summons was introduced, none of the parties in this case seemed to have any idea of suggesting a previous marriage, but relied wholly upon the applicability of the Scotch law respecting ante nati to the case of the petitioner.

In this letter she also states that her husband, when he made his will, wrote a letter to William Patrick in the most affectionate terms, recommending their son William to his guardianship, and making a remittance on his account. This is an additional piece of evidence of the strongest kind to shew the existence and genuineness of the letter of the 12th November, 1798.

As it is said by the petitioners that the reputation of the marriage of William Shedden and Ann Wilson, at some time previous to the birth of the petitioner, was generally notorious at New York, and he might be presumed to be in communication with his sisters and others who would be acquainted with that repute, it would appear to be somewhat extraordinary that the petitioner, in the proceedings in 1848, gave no intimation of a prior marriage, but rested his case wholly upon the marriage of the 7th November, 1798.

In his petition to the House of Lords he states that he first became aware of the civil contract of marriage when in New York in 1849. This, however, is hardly consistent with his letter of the 14th June, 1839, in which he says, "that he had heard from his sister in 1829 of the former marriage, and of her father treating Ann Wilson as his wife, and that there was a woman then alive who was present at the marriage."

**[221]** With this information in 1829, it does seem extraordinary, if the petitioner believed it, that in the summons of 1848 he should state that "it was during this last temporary residence in New York that he formed an intimacy and connection with Miss Ann Wilson, mother of the pursuer William Patrick Ralston Shedden, and of which connexion there was born the pursuer and a daughter."

He then says, "With the special view and avowed purpose of legitimating the pursuer and his sister, the pursuer's said father married the said Ann Wilson, the pursuer's mother, at New York on or about the 7th day of November, 1798." No one reading that could understand it to be other than the expression of a man who had no idea of any previous marriage, but that he was relying wholly at that time upon the marriage which was solemnly celebrated in 1798. This proceeding, however, may well be accounted for, if he had, as I believe he had, seen and had in his hands his father's letter of the 12th November, 1798, which seems decisive against the presumption of a prior marriage, and he would naturally rely upon the effect of that marriage of the 7th November, 1798, upon the question of the legitimacy. It is not until the 5th April, 1849, that in a supplementary summons he for the first time relies upon a prior marriage, and says that by the law of America his father and Ann Wilson had been married prior to his birth, inasmuch as they had before and after his birth lived and cohabited together as man and wife, acknowledging each other as such, and were held and reputed as such by their friends, neighbours, and acquaintances—treating these facts, if proved, not as presumptive evidence, liable to be rebutted, of a marriage, but as constituting an actual marriage.

These circumstances, however, do not of themselves constitute a marriage, as the petitioner seems to infer, but are primâ facie evidence from which a marriage may be inferred, unless rebutted by other evidence negativing the presumption arising from such primâ facie evidence.

[222] In the present case, whatever weight may be attached to the primâ facie evidence for the petitioner, it is, in my opinion, amply rebutted by the evidence relied upon by the respondents, and it appears to me the petitioners have failed in proving that there was a prior marriage to that of 1798, and, consequently, that they have not shewn that the first-named petitioner was the legitimate child of his parents, and that being so, he is not a natural-born subject of Her Majesty.

*Mr. Justice Williams*: I am very clearly of the same opinion; and after the very full investigation and discussion by the Judge Ordinary and my brother Wightman of the evidence which has been adduced on the one side and the other, agreeing altogether as I do in the views they have taken of it, I do not think that I am called upon to go over the same ground again, and I shall content myself with saying that I do not feel one particle of doubt that the letter alleged to have been written by the late William Shedden on his deathbed, on the 12th November, 1798, is a genuine letter; and further, that I do not feel one particle of doubt that the letters of the different members of the Patrick and Shedden families, written at the close of the year 1798 and the early part of the year 1799, are genuine letters, and were sincerely and honestly written by the members of these families respectively. It follows, as was conceded by Mr. Collier, with the full concurrence of his clients, and as, indeed, no reasonable person could help conceding, that I must come to the conclusion that no marriage between the petitioner's parents took place until the marriage in November, 1798, and that, therefore, the petitioner was not their legitimate son.

Decree, that the elder petitioner is not legitimate, and is not a natural-born subject; and condemn the petitioners in the costs of the petition.

[223] (Before the *Judge Ordinary* and a Common Jury.)

STOATE *v.* STOATE. December 11, 1860, and January 30, 1861.—Husband and Wife. —Suit for a Separation.—Verdict and Decree.—Such Decree inadmissible as Evidence in a subsequent Suit for Dissolution.—Wife petitioned for judicial separation by reason of cruelty and desertion, and a decree was made in her favour on a verdict finding cruelty and desertion against the husband. The husband subsequently petitioned for dissolution of marriage by reason of the wife's adultery, who answered charging, inter alia, cruelty and desertion, as in her original petition. Issue joined, and at the trial the counsel tendered as evidence a certified copy, under seal, of the decree of judicial separation, in proof of the cruelty and desertion; but the Judge Ordinary refused to let it go to the jury, on the ground that it would be indirectly making use of evidence which was directly inadmissible in the present trial.

[S. C. 30 L. J. (Mat.) 102; 3 L. T. 756.)

This was a petition for a dissolution of marriage at the suit of the husband, by reason of the wife's adultery in 1855, in the months of July, August, and November, 1858, at certain specified places in Bristol. Previously to the commencement of this petition the wife had, on the 16th of February, 1859, obtained a sentence of judicial separation, grounded on the verdict of a jury which had found that the husband had deserted his wife for upwards of two years without cause, and had treated her with cruelty. On the petition for judicial separation, the wife was examined as a witness to prove the desertion and cruelty.

In answer to the petition for dissolution, she denied the adultery, alleged adultery by the husband, desertion since December, 1853, cruelty since marriage, and pleaded the verdict and decree of the Court thereon in her suit for judicial separation, and alleged connivance of her adultery, if any.

The husband took issue on these answers, and the issues [224] were tried before the Judge Ordinary and a common jury, on December 11th, 1860.

The petitioner conducted his own case.

Mr. Serjt. Parry and Dr. Swabey for the respondent.

In the course of the case counsel tendered, as evidence to prove the desertion and cruelty alleged in the answer, a certified copy under seal of the decree for judicial separation.

*The Judge Ordinary* refused to admit it, on the ground that it would be indirectly making use of evidence which was directly inadmissible in the present suit (14 & 15 Vict. c. 99, s. 4; 22 & 23 Vict. c. 71, s. 6; *R.* v. *Boston*, 4 East, 572).

The jury ultimately found a verdict for the petitioner, who thereupon prayed the Court to make a decree nisi for the dissolution of the marriage. Cur. adv. vult.

January 30.—*The Judge Ordinary*: I have considered this case, and am of opinion that the petitioner is entitled to a decree nisi for a dissolution; the wife's taxed costs to be paid out of the sum paid by the petitioner into the registry, if sufficient to meet them.

**[225]** (Before the Full Court,—*The Judge Ordinary*, *Willes*, *J.*, and *Channell*, *B.*)

RYDER *v.* RYDER (on appeal from interim order as to Custody of Children). January 18 and 19, 1861.—Custody of Children.—35th Section of Divorce Act.—Age.—Practice on Motion for Interim Order.—On a motion for an interim order for the custody of children, the Court will consider all the existing circumstances at the time of the application, but will not allow affidavits to be read as to the truth or falsehood of charges brought by the parties to the petition against each other.—The Court has, under the 35th section of the Divorce Act, no jurisdiction to make any order as to custody of children upwards of sixteen years of age:—Semble, but if necessary, might make an order as to their maintenance.

[S. C. 30 L. J. (Mat.) 44; 3 L. T. 678; 9 W. R. 44. Disapproved, *Thomasset* v. *Thomasset*, [1894] P. 295.]

This was a question arising out of a petition for dissolution of marriage at the suit of the Honourable Marion Charlotte Emsly Ryder against the Honourable Frederick Dudley Ryder, to which an answer was filed by him. The petition and answer contained very serious charges against the respective parties.

On the 24th of May, 1860, a motion was made on behalf of the petitioner before the Judge Ordinary, praying that the children of the marriage should be withdrawn from the custody of the respondent, and committed to the care of the petitioner. There were ten children, the eldest a daughter then in her twentieth year, two sons between that age and sixteen, and the other children under the age of fourteen years.

On the 30th May the Judge Ordinary made the following order:—

"The Judge Ordinary having heard counsel on the part of the petitioner, and also of the respondent, made no order with respect to the eldest, second, and third child, the **[226]** issue of the marriage between the respondent and the petitioner, but ordered that the younger sons, issue of the said marriage, should remain at school, where they now severally are, until further order, and pass their vacation at the house of the Earl of Harrowby, their uncle, or at the house of the Honourable Granville Dudley Ryder, also their uncle, until further order. The Judge Ordinary further directed that during the residence of the said children at the house of their uncles, but not elsewhere, the respondent and petitioner should be allowed access to them, or any of them, once a fortnight, and whenever the respondent or petitioner so visited them, such visit should be made in the presence of some person selected by the uncle in whose house they were."

At the time of making this order, the Judge Ordinary stated that the three elder children were above the age at which the Court interfered in such matters, and that he would make no order as to them. On the original motion no affidavits were read in Court, but, at the request of counsel for both parties, the Judge Ordinary read the affidavits out of Court, and made the above order without alluding to them.

The present appeal was by Mrs. Ryder, from the refusal of the Judge Ordinary to make any order with respect to the three elder children, and prayed for the interference of the Court as to their custody.

Mr. Serjt. Pigott and Mr. M'Queen, for Mrs. Ryder, contended that under the 35th section of the Divorce Act the Court had a large discretionary power, which was not fettered by the common law rule of not interfering with children after the age of fourteen, or rather, as now seems settled, sixteen years (*Reg.* v. *Howes*, 30 L. J. Mag. Cas. 47). That this Court stood under the statute in a similar position to the Court of Chancery when there is ground for its interference, and had a jurisdiction which it was its duty to exercise during **[227]** minority, i.e. till twenty-one years of age complete. On the learned counsel proceeding to read certain affidavits filed in the case, objection was taken by

Sir F. Slade (Dr. Twiss and Dr. Spinks with him), for Mr. Ryder, to any affidavits being read which tended to affect the truth or falsehood of the charges alleged in the petition and answer respectively.

And the Court was of opinion not to allow any affidavits to be read to prove the truth or falsehood of such allegations; that it would be most mischievous to prejudice, by discussion on the present motion, points which might hereafter be in issue before a jury; that the duty of the Court was to look at all the actual circumstances of the present application: the age of children, the position in which they find themselves in relation to other members of the family, the fact that a suit is pending between the parents, in which such and such charges are made on both sides, but not to attempt to ascertain the truth or falsehood of the charges.

January 19.—Dr. Twiss (in the absence of Sir F. Slade) contended that it was a question affecting the liberty of the subject; that there were no words in the section which would warrant the interference of the Court after the age at which the courts of common law would interfere, whether that were to be taken at fourteen or sixteen years; that the Chancery jurisdiction was founded on totally different considerations, and in respect of those the Court had power, under the 35th section, if it should think fit, to direct proceedings to be taken for placing such children under the protection of the Court of Chancery. , The learned counsel was stopped by

*Wilde, J.*, who said that the Court was satisfied that it had no power to make any order with respect to the three **[228]** elder children, so that any inquiry into the circumstances in which they were placed was unnecessary. The jurisdiction sought to be exercised is the creation of the Act, and there seems a plain reason why that exercised by the Court of Chancery is no guide, viz. that in that Court the persons whose liberty is sought to be controlled are represented before the Court, but that cannot be the case before this Court. Again, suppose this Court were to make an order restraining the liberty of these children who are sixteen years and upwards, how could we enforce obedience to it? A Court is slow to exercise a jurisdiction it cannot enforce. With respect to the children under fourteen years, the persons interested in their control, viz. the parents, are before the Court, and may be heard. The question as to any order in respect to the maintenance of children above sixteen, if necessary, is not effected by our present decision.

*Channell, B.*, concurred. The common law courts never assisted parents seeking to obtain the custody of their children, those children resisting, after years of discretion; and for the present case it is immaterial whether that is fourteen or sixteen years, for here there are no children between those ages.

(Before the *Judge Ordinary* and a Common Jury.)

DOLBY *v.* DOLBY AND HEWITT. January 22, 1861.—Petition for Dissolution.—Issue between Petitioner and Co-respondent found against the latter.—Unsatisfactory Evidence.—No Decree against Wife.—On the husband's petition for dissolution, the co-respondent put the charge of adultery in issue; but the wife did not answer the petition. **[229]** On trial of the issue, the jury found a verdict of adultery against the co-respondent; and the Judge Ordinary, not being satisfied that the adultery was proved by the evidence, refused to make a decree against the wife, but permitted the petitioner to amend his evidence if he could.

[S. C. 30 L. J. (Mat.) 110; 3 L. T. 679; 9 W. R. 476.]

This was a petition for dissolution of marriage at the suit of the husband by reason of the wife's adultery with one Hewitt. The issue for the jury was between the petitioner and co-respondent only, and was tried in the sittings after Michaelmas Term.

Mr. Ward for the petitioner.

Mr. Biron for the co-respondent.

The respondent had not answered. The evidence in proof of the adultery was of a very unsatisfactory nature, but the jury returned a verdict for the petitioner, and the Judge Ordinary took time to consider his decree.

*The Judge Ordinary.*—I have considered what course I shall pursue in this case. The only question for the jury was the issue raised between the petitioner and co-respondent, whether the latter had committed adultery. They found a verdict for the petitioner, but it is for me to be satisfied that the case was made out as against

the wife, and upon the evidence I then heard, I am not satisfied and therefore cannot make a decree against her. The petitioner is at liberty to amend his case if he can do so.

**[230]** (Before the Full Court,—*The Judge Ordinary, Willes, J.*, and *Channell, B.*)
MARGARET LEE BEVAN (falsely called M'MAHON) *v.* JAMES M'MAHON. January 24 and February 16, 1861.—False Statement in Affidavit to lead Marriage License. Suit for Nullity not sustained.—B. and C., man and woman, both of full age, intending to marry, B., with the knowledge of C., in his statement to the surrogate, and affidavit in pursuance therewith, omitted one of C.'s names, gave her place of residence falsely, and falsely described his own residence and occupation, with the view, as was alleged, of fraudulently obtaining the license from the surrogate. C. petitioned for a declaration of nullity, but the Court held the marriage to be valid, and confirmed the distinction between banns and licenses which had been adverted to in the previous cases.

[S. C. 30 L. J. (Mat.) 61 ; 7 Jur. (N. S.) 218 ; 3 L. T. 820.]

This was a petition for a declaratory sentence of nullity of marriage, brought by petitioner against the respondent, who had appeared to the citation, but had filed no answer. The petition was in the following terms :—

"The petition of Margaret Lee Bevan, of Ellesmere, Shropshire, and late of Clayton Lodge, in the County of Lancaster, falsely called M'Mahon,

"Humbly sheweth,

"1. That the ceremony of marriage according to the rites of the Church of England was, on the 23rd of July, 1858, performed in the church of St. George, Everton, in the parish of Walton-on-the-Hill, in the county of Lancaster, by the Rev. Anthony Winter Bailey, clerk, the curate of the said church of St. George, Everton, between your petitioner and one James M'Mahon, the above-named respondent, but that the said ceremony of marriage was performed by virtue of a license procured by the respondent, with the knowledge and **[231]** assent of your petitioner, by fraud in the following respect, viz. that the respondent tendered to the surrogate, as the name of the woman to be married, the name Margaret Bevan, and in answer to the inquiry of the said surrogate described her as of Whitfield Street, Toxteth Park, and tendered his own address to the said surrogate as Yates Street, Toxteth, and also described himself to the said surrogate as a bookkeeper, and also swore to the said surrogate that the woman to be married had resided for fifteen days then last past in the parish of Walton-on-the-Hill, and also prayed the said license for a marriage to be celebrated at the church of St. George, Everton, in the parish of Walton-on-the-Hill, and the said license was made out and issued by the said surrogate, following the exact form in which the name of one party, and the addresses of both, were tendered, as hereinbefore alleged, and did embody the statement concerning the occupation of the man hereinbefore alleged to have been made by the respondent, and was made out for a marriage to take place at the said church of St. George, Everton, in the parish of Walton-on-the-Hill, and the said ceremony of marriage was celebrated at the said church.

"2. And the said petitioner further shews, that the residence of the petitioner at the time of the praying for the said license was not, nor never had been, Whitfield Street, Toxteth Park, but was, and for a long time had been, Clayton Lodge, Aigburgh, the two last-mentioned places being utterly distinct, and never confounded in repute, and that the residence of the respondent at the said time was not Yates Street, but at Aigburgh aforesaid, and that she said respondent was not at the said time a bookkeeper, but the conductor of an omnibus, and that the petitioner had not for the said fifteen days resided in the said parish of Walton-on-the-Hill, but in the parish of Childwall, and that each and all of the facts mentioned in this article of the petition were at the time of the praying for the said license, and of **[232]** the agreement in the next Article mentioned, well known to the petitioner and the respondent.

"3. And the petitioner further shews, that the respondent prayed for the said license in the form set out above, as to the particulars spoken to hereinabove, with the knowledge of the petitioner, and in pursuance of a conspiracy and agreement previously made between them the said parties, which agreement was that the respondent should obtain the said license by fraud, and in particular by fraudulently

tendering as the name of the woman to be married a name not the name of the petitioner, and by tendering as the addresses of the parties addresses not the addresses of the petitioner and respondent, and by fraud in the respect of the occupation of the respondent, and in respect of the residence of the woman during the said fifteen days, and in particular by the specific frauds in all the particulars herein spoken to, which are in the first article of this petition alleged to have been actually committed by the respondent, and that the respondent should pray for the license for a marriage to be celebrated in the said church of St. George, Everton; and the petitioner shews that the petitioner and the respondent agreed that the above things should be done in order to conceal from the said surrogate and your petitioner's parents and family that the said license was intended to be used for the marriage of the petitioner, and in order to cause the said surrogate to believe that the said license was intended to be used for the marriage of some woman other than the petitioner. And the petitioner further shews, that at the time of the making of the said agreement, and at the time of the said praying for the license, the petitioner and the respondent believed that if the name and address of the woman to be married was tendered in the form in which it is hereinbefore alleged to have been tendered, the surrogate would not know that the said license was intended to be used for the marriage of the petitioner, and that, if the true name and true address of the petitioner were tendered, the said [233] surrogate might and would know that the said license was intended to be used for the marriage of the petitioner, and that the other frauds hereinbefore stated to have been agreed upon and executed were designed to support the same fraud touching the names and addresses aforesaid. And the petitioner further shews that the said surrogate, on issuing the said license, did not know that the same was intended to be used for the marriage of the petitioner, and that the respondent was well aware that he did not know the same.

"4. And the petitioner further shews, that before the said ceremony of marriage, the petitioner as well as the respondent was well aware that the said license had been issued in the form in which it has been hereinbefore alleged to have been issued, as to each and all the particulars hereinbefore spoken to, and had been obtained by the respondent tendering the name of the woman to be married and the addresses of the woman and the man, and by his making oath as to the residence of the woman during the said fifteen days, and by his making a statement concerning the occupation of the man in manner and form in which the same are hereinbefore alleged to have been tendered and done, and by his fraud in respect of the said matters, that is to say, by the specific frauds hereinbefore alleged to have been committed by the respondent; and the petitioner shews that the petitioner at the same time also knew that the said frauds had been committed with the intent in the last foregoing articles mentioned, and that the said license had been issued by the said surrogate, not knowing that which he is in the said last foregoing articles alleged not to have known, concerning the woman to be married. And this petitioner further shews, that the petitioner and respondent, well knowing the premises, used the said license to procure the celebration of the said ceremony of marriage.

"5. And the petitioner further shews that the said disputed marriage has never been consummated.

[234] "Your petitioner on the premises submits that the said marriage is null and void, and prays your Lordships to declare the said marriage null and void accordingly.

"And your petitioner will ever pray, etc.

"(Signed) MARGARET LEE BEVAN,
"Falsely called M'MAHON."

The case was argued ex parte on behalf of the petitioner on the 24th of January, by Mr. Collier, Q.C., and Mr. W. Brandt. The petitioner, her mother, and other witnesses on her behalf, were examined, and the facts stated in the petition, so far as necessary to found the arguments and the judgment, were proved.

The counsel for the petitioner argued that a serious variation in the names of parties in publication of banns, and even a slight variation where fraud was shewn to have been intended, had been held to vitiate the marriage; that no such difference in this respect between banns and license as, it must be admitted, several obiter dicta of learned judges hold out, can be maintained. That a license obtained by fraudulent misrepresentation as to the names, place of residence, and description of the parties,

was no license to marry the parties who in fact go through the ceremony; and as both parties in this case were cognizant of the fraudulent misrepresentation, that the petitioner was entitled to a decree of nullity.

The Court desired the case to stand over that the Queen's Proctor might instruct counsel to argue the point of law arising on the facts in evidence on their Lordships' notes, in support of the validity of the marriage, after which Mr. Collier would have an opportunity of replying.[1]

**[235]** Dr. Phillimore, Q.C., in the absence of the Attorney-General, contended that neither by the Ecclesiastical, Common, or Statute Law could such a marriage be declared null. The ecclesiastical law obtaining in this country as to licenses is to be found in the canons of A.D. 1604, 100 to 104, inclusive. Before the nullities created by positive enactment, no case can be shewn in which a marriage, deliberately solemnized between two persons capable of contracting, has been set aside by reason of non-compliance with the regulations respecting banns and license: such marriages were irregular, and might subject the parties to ecclesiastical censure, but were never invalid. The first Marriage Act, Lord Hardwicke's, 26 Geo. II. c. 33, first introduced nullities of this description, but the distinction between banns and licenses as to the necessity of using the true names has been adverted to in every judgment on the subject from *Cockburn* v. *Garnault*, 1792 (cited in *Cope* v. *Burt*, 1 Consist. 434), to the present time. The statutes enforce the use of the true names, etc., in banns, which is consistent with their intent, namely publication; but the license is a permission to dispense with the publication of banns on such terms as the law prescribes and the ordinary consents to accept. The present Marriage Act contains no enactment under which this marriage can be held void. As to there being no license to marry Margaret Lee Bevan, *è concessis*, both parties intended the instrument to have that effect, and no one was defrauded of any legal rights.

Mr. Collier and Mr. Brandt replied.

The sections of 4 Geo. IV. c. 76, bearing on the questions argued are:—

**[236]** "2. And be it further enacted, that from and after the 1st day of November, all banns of matrimony shall be published in an audible manner in the parish church or in some public chapel, in which chapel banns of matrimony may now or may hereafter be lawfully published, of or belonging to such parish or chapelry wherein the persons to be married shall dwell, according to the form of words prescribed by the rubric prefixed to the Office of Matrimony in the Book of Common Prayer," etc.

"7. Provided always, and it is hereby further enacted, that no parson, vicar, minister, or curate shall be obliged to publish the banns of matrimony between any persons whatsoever, unless the persons to be married shall seven days at the least before the time required for the first publication of such banns respectively, deliver or cause to be delivered to such parson, vicar, minister, or curate a notice in writing dated on the day on which the same shall be so delivered, of their true Christian names and surnames, and of the house or houses of their respective abodes within such parish or chapelry as aforesaid, and of the time during which they have dwelt, inhabited, or lodged in such house or houses respectively."

"14. And be it further enacted, for avoiding all fraud and collusion in obtaining of licenses for marriage, that before any such license be granted, one of the parties shall personally swear before the surrogate or other person having authority to grant the same, that he or she believes that there is no impediment of kindred or alliance or of any other lawful cause, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceedings of the said matrimony according to the terms of the said license; and that one of the said parties hath for the space of fifteen days immediately preceding such license, had his or her usual place of abode within the parish or

[1] 23 & 24 Vict. c. 144, s. 5. In every case of a petition for a dissolution of marriage it shall be lawful for the Court, if it shall see fit, to direct all necessary papers in the matter to be sent to Her Majesty's Proctor, who shall, under the direction of the Attorney-General, instruct counsel to argue before the Court any question in relation to such matter, and which the Court may deem it necessary or expedient to have duly argued, and her Majesty's Proctor shall be entitled to charge and be reimbursed the costs of such proceeding as part of the expense of his office.

chapelry within which such marriage is to be solemnized" [the rest of this section refers to consent in case of minors not being widower or widow].

**[237]** "22. [The only enactment of nullity in the statute.] Provided always, and be it further enacted, that if any persons shall knowingly and wilfully intermarry in any other place than a church or such public chapel wherein banns may be lawfully published, unless by special license as aforesaid, or shall knowingly and wilfully intermarry without the publication of banns or license from a person or persons having authority to grant the same first had was obtained, or shall knowingly or willingly consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void to all intents and purposes whatsoever.

"23. And be it further enacted, that if any valid marriage solemnized by license shall, after the 1st day of November next, be procured by a party to such marriage to be solemnized between persons, one or both of whom shall be under the age of twenty-one years, not being a widower or a widow, contrary to the provisions of this Act, by means of such party falsely swearing as to any matter or matters to which such party is hereinbefore required personally to swear, such party wilfully and knowingly so swearing shall forfeit all estate and interest, if any, accruing by force of the said marriage."

"26. Provided always, and be it further enacted, that after a solemnization of any marriage under a publication of banns, it shall not be necessary in support of such marriage to give any proof of the actual dwelling of the parties in the respective parishes or chapelries wherein the banns of matrimony were published; or where the marriage is by license it shall not be necessary to give any proof that the usual place of abode of one of the parties, for the space of fifteen days as aforesaid, was in the parish or chapelry when the marriage was solemnized; nor shall any evidence in either of the said cases be received to prove the contrary in any suit touching the validity of such marriage."

The following cases were cited and commented upon:—**[238]** *Reg.* v. *Birmingham*, 8 B. & C. 34; *Reg.* v. *Tibshelf*, 1 B. & C. 290; *Wyatt* v. *Henry*, 2 Consist. 215; *Orme* v. *Holloway*, 5 N. C. 267; *Agar* v. *Holdsworth*, 2 Sir George Lee, 464; *Ewing* v. *Wheatley*, 2 Consist. 175; *Cope* v. *Burt*, 1 Consist. 434; *Frankland* v. *Nicholson*, 3 Maw. & S. 259, in note to the case of *Reg.* v. *Bellinghurst*; *Dormer* v. *Williams*, 1 Curt. 870; *Clowes* v. *Clowes*, 2 N. C. 1; *Tongue* v. *Allen*, 1 Curt. 38; S. C. on appeal, 1 Moore, 90; *Catterall* v. *Sweetman*, 1 Robert, 304; *Swift* v. *Kelly*, 3 Knapp, 282: *The Prince of Capua's case*, "Times" newspaper of 5th and 6th of May, 1836, in which Dr. Nicholl, Master of the Faculties, after hearing counsel on both sides, refused a marriage license to the brother of the then King of the Two Sicilies, a caveat having been entered against such license being granted by Count de Ludolf on behalf of his Sicilian Majesty.

*The Judge Ordinary* delivered the judgment of the Court. The Court desired the question to be argued on both sides, not because we entertained any serious doubt upon it, but because of its very grave nature, and of its importance to one at least of the parties interested. Having now had the benefit of a very able argument on both sides, we are satisfied that our first view was correct, and that we are bound to hold the marriage good. In this particular instance our decision may inflict a good deal of sorrow and misery upon the petitioner; but a decision the other way might have been still more disastrous to a person in her position if the point had been raised in another manner; for a man after marriage under these circumstances, followed by cohabitation and the birth of children, might have called upon the Court to annul that marriage, to reduce the woman at a late period of life to the position of a mistress, and to bastardize the children. If, therefore, we are to be governed by considerations of public policy, we should be inclined to uphold the marriage; but the question must be decided upon the terms of the statute of Geo. IV. In that **[239]** statute a great distinction is made between banns and licenses. The 7th section directs, with respect to banns, that notice is to be given to the minister, at a certain time before the publication, of the true Christian names and surnames, and of the places of residence, etc., of the parties: and by another clause marriages without "due publication," which has been held to include publication of the true Christian names and surnames, were to be null and void. Something more was required beyond the mere names, namely, the places of abode and the length of time in which

the parties had dwelt in the parish; but a subsequent section enacted that misdescription in these matters should not be a ground of nullity. Then the 10th section, as to licenses, provides that no licenses are to be granted except in certain cases, and the only section relating to nullity, the 22nd, says: "If any persons shall knowingly and wilfully intermarry without due publication of banns or license from a person or persons having authority to grant the same first had and obtained, the marriage of such persons shall be null and void to all intents and purposes." In *Dormer* v. *Williams*, 1 Curt. 70, one question was, whether the license was granted by a person having authority to grant the same. No question of that sort arises in this case. The marriage was solemnized at a place within the jurisdiction of the person who granted the license, and who had authority to grant it. He had an affidavit before him containing statements as to matters in respect to which he was authorized by statute to require a statement. Is the marriage to be vitiated by reason of misstatement in that affidavit? We find no authority for that proposition, but, on the contrary, many dicta, in a long series of cases, directly the other way, and pointing out the difference in that respect between banns and licenses.

It comes at last to the question, as Mr. Brandt had put it with great force, whether or not this was a license for the marriage of these parties? From the time of Lord Stowell downwards, there have been cases in which a partial departure **[240]** from the true name even in the publication of banns has been held, in the absence of fraud, not to annul the marriage. These decisions shew that the name so altered represented the person. Did not the name Margaret Bevan in this case represent the lady? Was not the license granted for her? Did she not authorize M'Mahon to get it for her under that description? Had she not contracted with him to marry him? The license was granted by a person who had authority to grant it, although one of the lady's names was suppressed in order that the surrogate might not suspect who she was; yet there being no pretence for saying that it was obtained for any other person and transferred to her, and there being authority for saying that such an altered name might represent her, she having authorized M'Mahon to obtain the license, and he having accordingly obtained it, the Court cannot say that the marriage solemnized under it is null.

The other learned Judges concurred.

The prayer for a declaration of nullity was accordingly rejected.

(Before the *Judge Ordinary.*)

W——— *v.* H——— (falsely called W———). January 26 and March 2, 1861.—Petition for nullity by reason of malformation—Report of inspectors—Evidence.—On a petition for a decree of nullity by reason of malformation of the woman, neither the Court nor the parties are concluded by the terms of the report of medical inspectors, but the inspectors themselves and other medical men may be examined. There is no rule as to any particular age constituting a bar to such petitions. Where the result of the medical evidence is that the malformation might possibly, but at great risk to life, and with doubtful success as to the end de-**[241]**-sired, be removed, the petitioner need not call upon the respondent to submit to an operation, and such a state of things is equivalent to a permanent and irremovable malformation.

[S. C. 30 L. J. (Mat.) 73.]

This was a petition for a decree of nullity of marriage, at the suit of the man. The petition stated a marriage in fact in June, 1859, and that the marriage had never been consummated by reason of the malformation of the parts of generation of the woman, which would be apparent on inspection by medical men, and that such malformation was incurable by art or skill. The answer, as originally filed, denied the latter allegations of the petition, charged cruelty against W———, and prayed the Court to reject the prayer of the petition, and to decree a judicial separation on the ground of cruelty. That part of the answer and prayer which alleged cruelty and prayed for a separation were directed to be struck out by order of the Court, on the motion of counsel for the petitioner, which was opposed by counsel for the respondent. (See *Anonymous* case, Deane & Swab. 295.)

The report of Dr. Brodie, Dr. Sewell, and Mr. James Paget, the inspectors appointed, was as follows:—"We have this day examined together the parts of generation of Margaret H——— (falsely called W———). We find the external parts

of generation well formed, and the hymen perfect, as in a virgin, and are of opinion that sexual intercourse with her has never been consummated. The hymen is thick, tough, extremely sensitive, and has an aperture of not more than an eighth of an inch in diameter. These conditions of the hymen constitute an impediment on her part to prevent the consummation of the marriage, but we find no reason to believe that these conditions are incurable by surgical operation."

January 27.—On the 27th of January the petition came on for hearing before the Judge Ordinary, on the above report and oral evidence.

**[242]** Mr. M. Chambers, Q.C., and Dr. Spinks for the petitioner.

Dr. Phillimore and Dr. Wambey for the respondent.

Mr. M. Chambers stated the case for the petitioner, and proposed to call Dr. B. Sewell to explain the conclusion of the inspectors' report.

Dr. Phillimore, contrà: The petitioner is not entitled to contradict or vary the terms of the report by calling other evidence. He has alleged in the petition that the malformation is incurable, but the adverse evidence of the inspectors is conclusive against him on this point. The degree of danger that might arise from the process of cure, and the skill required, have never been considered in the Ecclesiastical Courts. *Brown* v. *Brown*, 1 Hagg. 523, was decided on the ground that the husband had failed to prove that the disease was incurable. Further, it does not appear that the wife has been asked to submit to an operation.

Mr. M. Chambers: In the case first cited witnesses on both sides were examined, and in *D———l* v. *A———g*, 1 Rob. 279, where it is stated, page 299, that if there is a reasonable probability of the woman being made capable, the marriage could not be pronounced void, the Court rescinded the conclusion of the cause in order that Dr. Cape might be re-examined with respect to the discrepancy between the report of and the evidence of himself and the other medical inspectors.

*The Judge Ordinary* was of opinion that he ought to hear the evidence, but thought that both inspectors should be examined if one was.

The inspectors and Messrs. Critchett, Solly, and Ericsson were examined.

**[243]** The result of the evidence so taken is sufficiently stated in the judgment.

Dr. Phillimore: The age of the parties is sufficient to disentitle the petitioner to a decree (*Briggs* v. *Morgan*, 2 Consist. 324). There is no precedent for such a decree where the defect is not incurable. The woman has an interest in the question as well as the man, and non constat but she might submit to an operation.

Mr. M. Chambers in support of the petition. Cur. adv. vult.

March 6.—*The Judge Ordinary* gave the following judgment:—This was a petition for decree of nullity of marriage, on the ground of malformation of the respondent. The petition alleged it to be such as rendered the consummation of the marriage impossible, and that it was incurable by art or skill, as would appear on inspection. The answer denied the allegations of the petition, and averred that the marriage had been consummated, and that she was apt, etc., as would appear on inspection. The marriage was solemnized on 3rd June, 1859; the parties cohabited for seven weeks and then separated; they were of the respective ages of fifty-four and forty-nine. Inspectors were appointed, who on the 19th of June, 1860, made their report in the following terms. [The learned Judge here read the report.] The cause came on for hearing on Saturday, January 26th, when Dr. Phillimore, on behalf of the respondent, contended that the Court was bound by the report of the inspectors, and that, as they did not say the impediment was irremovable, but the contrary, the petition must be dismissed, it being an essential ingredient in the petitioner's case that the defect is incurable (*Brown* v. *Brown*, 1 Hagg. 524). On the other hand, it was contended by Mr. Chambers, that, according to the case of *D———* v. *A———*, **[244]** 1 Rob. 279, evidence beyond the report and explanatory of it was admissible, and I am of that opinion. The petitioner then called one of the inspectors, and several eminent surgeons, the result of whose evidence was that the obstruction was congenital, and that it might possibly be removed by a surgical operation; that such an operation would in this case, the woman being forty-nine years of age, be attended with considerable danger to her life, and the success of it, with regard to the result to be obtained, doubtful. This evidence having been given for the petitioner, Dr. Phillimore declined calling any witnesses for the respondent, but contended there was no authority for making a decree of nullity on the ground of malformation, the marriage having been contracted between parties of the

advanced ages of fifty-four and forty-nine; and he cited the dictum of Sir J. Nicholl in *Brown* v. *Brown*, that a man of sixty who marries a woman of fifty-two should be contented to take her tanquam soror, 1 Hagg. 524; and the assertion of Lord Stowell in *Briggs* v. *Morgan*, 2 Consist. 328, that the Court in different cases had declined to proceed in suits where the parties are at an advanced period of life, and for that reason he considered the libel open to objection, because the age of the parties was not stated. It appeared afterwards that the woman was fifty, the man who complained forty-two; but the decision did not in either of those cases turn upon the age of the parties, but on the merits; nor can I find any case in which it did. In the case of *D*——— v. *A*———, 1 Rob. 298, Dr. Lushington said:—"I apprehend we are all agreed that, in order to constitute the marriage-bond between young persons, there must be the power present or to come of sexual intercourse"; but he says nothing of any limit to the age at which the right to complain ceases; and in both *Brown* v. *Brown* and *Briggs* v. *Morgan* the complaint was heard and inquired into: I think I must take the same course here. The question, then, is simply this: the evidence shews a congenital malformation of the woman, which **[245]** renders consummation impracticable; that it is not absolutely irremovable, but that any attempt to remove it would be attended with considerable danger to the life of the woman. What course is to be taken? The report of the medical inspectors was made known to her advisers; she has not expressed any desire to undergo an operation, and the Court can hardly assume, under the circumstances of this case, the existence of any such desire. It was said that the petitioner ought to have called upon her to do so; no precedent for such a proceeding has been suggested, and I am not disposed to make one. The petitioner may with great propriety decline proposing that the respondent's life should be placed in danger; she must judge for herself; and there having been no prayer for delay on her part, I think it my duty to proceed with the case on the assumption that things will remain as they are. In the case of *D*——— v. *A*———, 1 Rob., one of the inspectors, Dr. Cape, being cross-examined, stated: "I will not swear that the vagina is impossible to be further elongated, but I do swear that it could not be effected without endangering life, or running a serious risk of doing so." No suggestion was there made that the woman should be called upon to submit to such operation, and the Court proceeded to pronounce sentence. That course I think it incumbent on me to take now. The case is therefore a simple one of malformation congenital and permanent, and the petitioner is entitled to the relief that he prays.

**[246]** (Before the *Judge Ordinary*, on Motion.)

WINSTONE *v.* WINSTONE AND DYNE. February 13 and 27, 1861.—Petition for Dissolution of Marriage—Petition for Permanent Alimony after Decree Nisi for Dissolution—Practice.—After a decree nisi for dissolution of marriage at the petition of the husband, the wife filed a petition for permanent alimony, or for some payment in lieu thereof, setting forth, as usual, the amount and sources of the husband's income. On motion on behalf of the husband, the Court directed the petition for alimony to be struck off the file of the Court, and refused to allow the costs to be taxed against the husband.

[S. C. 30 L. J. (Mat.) 109; 3 L. T. 895.]

This was a question as to the right of the wife to file a petition for permanent alimony, under the following circumstances:—In April, 1859, Mrs. Winstone petitioned for a decree of judicial separation from her husband, by reason of his cruelty towards her, in consequence of which, as she alleged, she had been compelled to live apart from him since 1847. Mr. Winstone in his answer denied the cruelty, and alleged that between 1847 and 1851 Mrs. Winstone had committed adultery with John G. Dyne, and prayed for a decree of judicial separation on that ground. In August, 1859, Mrs. Winstone having filed a petition for alimony pendente lite, the Judge Ordinary made a decree for alimony pendente lite, at the rate of £65 per annum. The issues in the suit for judicial separation were tried before the Judge Ordinary and a common jury in February, 1860, when a verdict on both points was given in favour of Mr. Winstone. In June, 1859, Mr. Winstone had filed his petition in the present suit for a decree of dissolution, by reason of his wife's adultery with the said Mr. Dyne. During the pendency of this suit the alimony pendente lite was duly paid. Similar issues to those in the previous suit were raised, and were tried

before the Judge Ordinary and a special jury on the 13th and 14th **[247]** of December, 1860, who returned a verdict in favour of Mr. Winstone, and the Judge Ordinary thereupon made a decree nisi for dissolution of the marriage. On the 28th of January, 1861, Mrs. Winstone filed a petition for alimony, alleging the sources and amount of Mr. Winstone's income, and praying the Court to decree that Mr. Winstone should secure to her such gross sum of money, or such annual sum of money for her life, by way of permanent alimony, as to the Court should seem meet.

Dr. Spinks, for Mr. Winstone, now moved the Court to direct this petition for permanent alimony to be taken off the file and dismissed with costs. The power to apply at all for permanent alimony depends on the 20 & 21 Vict. c. 85, s. 32:—"The Court may, if it shall think fit, on any such decree (*i.e.* for dissolution of marriage), order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune, if any, to the ability of the husband, and the conduct of the parties, it shall deem reasonable; and for that purpose may refer it to any one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties; and the said Court may in such case, if it shall see fit, suspend the pronouncing of its decree until such deed shall have been duly executed."

In the present case the application is too late. Notice of such intended application should be given in the answer to the original petition; otherwise, the husband might content himself with proving enough to obtain a decree without going into the whole of his wife's misconduct, which he would be entitled to do under the words of the section in respect of such an application as this; or at all events the application should be made when the decree nisi (23 & 24 Vict. c. 144, **[248]** s. 7) is about to be pronounced, and if necessary, that should be suspended till the Court has the necessary information; for, as between the parties, it is submitted that the decree nisi is in reality absolute: they could not be heard against its being made absolute; that privilege is given to third parties on behalf of public interests. Again, if made absolute, must it not be so in the very words of the decree nisi? But the order for permanent alimony must form part of the decree, and in this case it forms no part of the decree nisi.

Mr. Holl, in support of the petition, contended that the wife was at liberty to bring the present question before the Court at any time before the absolute decree was made.

Cur. adv. vult.

February 27.—*The Judge Ordinary*, after referring to the above stated circumstances, said:—This is a very novel attempt with respect to permanent alimony. The wife now brings in a petition in the usual form, stating the sources and amount of the husband's income; to which, if she is to be allowed to proceed, he must give in his sworn answer; on his behalf the motion has been made to take this off the file. Anything in the nature of permanent alimony in a case of dissolution of marriage is the creature of the 32nd section of the Divorce Act; the 29th rule refers only to permanent alimony on a decree of judicial separation. I cannot think that the 32nd section intended, that after a decree nisi of dissolution obtained against the wife, she should be at liberty to file her petition for alimony. The petition must be taken off the file; and this part of the costs cannot be taxed against the husband.

**[249]** (Before the *Judge Ordinary*, on Motion.)

ANONYMOUS. February 20, 1861.—23 & 24 Vict. c. 144, s. 7.—Intervention of Queen's Proctor. — Practice. — The Queen's Proctor, under direction of the Attorney-General, may move the Court by counsel, without affidavit, for leave to intervene in a divorce suit. But if he moves to have the hearing of the petition postponed that he may have time to plead, that part of the motion must be founded on affidavit, and notice given to the other parties.

[S. C. 30 L. J. (Mat.) 88; 3 L. T. 823. Referred to, *Hudson* v. *Hudson*, 1875, L. R. 1 P. D. 68.]

Dr. Spinks moved for leave for the Queen's Proctor, under the direction of Her Majesty's Attorney-General, to intervene in a petition for dissolution of marriage, which he need not at present mention by name, but which would in ordinary course come on for hearing before long; and for an order to postpone the hearing of the

petition, that the Queen's Proctor might plead. 23 & 24 Vict c. 144, s. 7:—"And at any time during the progress of a cause, or before the decree is made absolute, any person may give information to Her Majesty's Proctor, of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or expedient; and if, from any such information or otherwise, the said Proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the Attorney-General, and by leave of the Court, intervene in the suit, alleging such case of collusion, and retain counsel, and subpœna witnesses to prove it," etc. Rule 16 of "Further Rules and Regulations":—"When the Queen's Proctor, by leave of the Court, intervenes, he shall, within eight days after such leave obtained, enter an appearance and plead to the petition; and all subsequent pleadings shall proceed between the petitioner and the intervener, according to the rules established **[250]** with regard to pleadings between the original parties to the cause."

*The Judge Ordinary*: Have you any affidavits?

Dr. Spinks: No; I submit that the directions of the Attorney-General are sufficient. There is nothing in the section or the rules to require an affidavit.

*The Judge Ordinary*: As to the leave to intervene, I think you are right. I may very well take from counsel that the Attorney-General has so directed the Queen's Proctor; but as to that part of the motion which asks for postponement, as that is an interference with the ordinary right of the petitioner to have the cause heard in its turn, I think I must have an affidavit stating the time at which the information on which the Queen's Proctor is acting was furnished him; and notice should be given to the other parties. This may be done in the course of the afternoon, and you may renew the motion to-morrow morning.

(Before the *Judge Ordinary*, on Motion.)

GOODHEIM *v.* GOODHEIM AND FRANKINSON. February 23, 1861.—Petition for Alimony pendente lite.—Wife in actual possession of Income.—Not only the wife's income derived from separate property will be taken into account in allotting alimony pendente lite, but income of which she is in the actual enjoyment, though earned by herself.

[S. C. 30 L. J. (Mat.) 162; 4 L. T. 449; 9 W. R. 853. Referred to, *Madan* v. *Madan*, 1868, 37 L. J. (Mat.) 11.]

This was a question arising on the answer to a petition for alimony pendente lite. The petition alleged the husband's **[251]** income to be £500 per annum; from the husband's answer it appeared that he was a cap-manufacturer at Manchester, and that his net annual income was about £100. The answer further stated that the wife before marriage earned 12s. a week by making caps, that the husband derived no pecuniary advantage from his marriage, that the wife left him in November, 1846, taking furniture and linen to the value of about £80, and that the husband had not since that time had any communication with her, and ended with the following statement:—"That the said Hannah Goodheim, as I have been informed since the filing of this petition for divorce and verily believe, is now and has for many months been residing at and occupying a house at Wolverhampton; that from the use of the said house, and from the use and letting of the apartments therein, she has for many months derived and still continues to derive large gains, profits, and sums of money, amply sufficient to maintain and support her with all necessaries and comforts suitable to her former position as my wife; that the said house is well furnished, and the said Hannah Goodheim always appears well dressed and as if she were in easy circumstances."

Dr. Spinks moved the Court to decree alimony pendente lite.

Mr. Francis Russell, for the husband, contrà: The husband's answer, which is uncontradicted, shews that the woman is actually in receipt of a sufficient income. Under somewhat similar circumstances of separation the wife has been held entitled to dispose of property (*Haddon* v. *Fladgate*, 1 Swab. and Trist. 48); but, however that may be, separate property, for the purpose of such inquiries as the present, cannot be taken in the same strict sense as it would be in the Court of Chancery. The class of cases that came before the Ecclesiastical Courts were for the most part from so different a rank of **[252]** life from such a case as this, that they hardly afford a safe guide.

Dr. Spinks in reply; The part of the answer now relied on for the husband is

wholly irrelevant. There is no averment of property possessed by the wife, and independently of her industry the wife has a right to be supported by the husband.

By the Court: That the wife might earn an income would not be sufficient to relieve the husband; but here it is said that she does earn. Can I with justice shut my eyes to the fact that she is in receipt of an income?

Cur. adv. vult.

February 27.—*The Judge Ordinary*: This was an application for alimony pendente lite. To the petition the husband filed an answer, stating that the wife was in possession of a house and a sufficient income. There was no reply to that; but it was suggested that no such ground as that would have availed in the Ecclesiastical Courts, there being no statement that the wife was in possession of separate property. But if actually in possession of an income—take the case of husband and wife living separately and supporting themselves by tuition—I think I must take it into account, and as in the present case the wife does not deny that she is actually in possession of an income, I shall make no decree for alimony pendente lite.

**[253]** (Before the *Judge Ordinary.*)

GOODE *v.* GOODE AND HAMSON. March 1, 2, and 20, 1861.—Petition for Dissolution by Husband.—Adultery pleaded.—Condonation replied.—Discretion of the Court.—The adultery or cruelty of the petitioner, though condoned, enable the Court to exercise the discretionary power given to it by the 31st section of the Divorce Act, and to dismiss the petition if it think fit, though the adultery of the respondent is proved.

[S. C. 30 L. J. (Mat.) 105; 4 L. T. 122; 7 Jur. (N. S.) 317; 9 W. R. 552. Referred to, *McCord* v. *McCord*, 1875, L. R. 3 P. & D. 241; *Gooch* v. *Gooch*, [1893] P. 105; *Symons* v. *Symons*, [1897] P. 171. See also *Holland* v. *Holland*, [1918] P. 273; *Hines* v. *Hines*, [1918] P. 364.]

This was a petition for dissolution of marriage, brought by the husband on the ground of the wife's adultery. The answer, among other things, alleged the adultery of the petitioner, which he, in reply, alleged to have been condoned. On proof of these facts a question arose, whether or no the discretionary power of the Court, under the 31st section of the Divorce Act, to refuse a decree if the petitioner has been guilty of adultery, is barred by the condonation of such adultery.

Mr. Mundell and Mr. Markham for the petitioner.

Dr. Spinks for the respondent.[1] The particulars of the case are fully set out in the judgment.

Cur. adv. vult.

*The Judge Ordinary* gave judgment: This was a petition for a dissolution of marriage on the ground of adultery committed by the respondent with the co-respondent. The answer denied adultery, alleged desertion by the petitioner, indecent assault upon a young female committed by petitioner, threat to injure respondent with an open knife, condonation of **[254]** adultery. The co-respondent did not appear. The replication traversed the allegations of the answer, and averred condonation of the adultery committed by the petitioner. The parties resided in the village of Brixworth, in the county of Northampton; and the evidence proved the state of morality there to be exceedingly bad. Every female witness called from that neighbourhood admitted that she had borne at least one illegitimate child, and it is

[1] The fourth paragraph of the answer alleged, that in or about the month of June, 1845, the said Edward Goode left his house at Brixworth, in the county of Northampton, where the said respondent was then living with him, without any reasonable cause, and deserted the said Esther Goode, etc. The replication simply took issue on this. At the hearing, evidence was offered on behalf of the petitioner, that he had reasonable cause for leaving the respondent.

Dr. Spinks objected to this evidence, contending that the replication, if such evidence was intended to be used, should have averred reasonable cause, instead of simply taking issue apparently on the fact of desertion.

*The Judge Ordinary*: In a court of common law it would be the correct mode of pleading, as in the case of actions for dismissing servants without cause; but in this Court, if the evidence satisfied me that there was reasonable cause, I should be bound to act on it.

necessary to examine the evidence on both sides with considerable jealousy and suspicion. Nevertheless, the main facts of the case upon which the judgment of the Court must be founded were established with reasonable certainty. The parties were married on the 28th of December, 1843, and had a child born to them within six months afterwards. They were then living in the house of the respondent's parents, but soon afterwards, upon some quarrel between them, the nature of which was not proved, the petitioner left that house and went to his father's. Soon afterwards he went to London, having made an offer to take respondent with him, but she refused to go. The petitioner, by the advice of an attorney's clerk, took two persons with him to be witnesses of this offer. It is plain that he did not expect her to accept it, and I have great doubts as to his wishing that she should. In London he formed a connection with a young woman named Mary Ann Barker, and by her had an illegitimate child born in 1846. In 1848 the respondent went to London and returned with her husband to Brix-**[255]**-worth and cohabited with him there. No evidence is given as to the circumstances under which the reconciliation between them took place. The precise time of her becoming aware of the petitioner's connection with Mary Ann Barker did not appear, but there was no doubt that she continued to cohabit with him after she knew it, and so condoned his offence. No evidence was given as to their mode of treating each other for a considerable period after their return to Brixworth; but it was proved that in 1857 she frequently associated with Richard Hamson, the co-respondent, and that this, amongst other things, gave rise to frequent quarrels between them, and sometimes to acts of violence on the part of the petitioner. In 1858 there was a very serious disturbance between them; the respondent called in a policeman for her protection, and he took away a pistol from the petitioner. At the same time the respondent charged her husband with having made an indecent assault upon a girl of fourteen years of age who was staying with them in the house. This was denied by the petitioner, and it is unnecessary to pursue the subject further, for I am not satisfied that the truth of the charge was established. The respondent soon after quitted her husband, contrary to his wish, and went to live at Northampton, and I am convinced by the evidence that she there committed adultery with Hamson, the co-respondent. This state of facts raises two important questions: first, whether I am at liberty to take into consideration the adultery committed by the husband, the wife having condoned it; secondly, whether, if it be taken into consideration, I ought, in the exercise of the discretion vested in the Court, to refuse to grant the prayer of the petition. Questions relating to petitions for dissolution of marriage are, for the most part, settled by the statute 20 & 21 Vict. c. 85. But it may be useful to inquire into the state of the law as administered by the Ecclesiastical Court in proceedings for divorce à mensâ et thoro. The only causes for which such a sentence was pronounced by that Court were **[256]** adultery and cruelty; and condonation by the party suing was a bar to the suit. So also a similar offence committed by the party suing might be pleaded in bar of the suit; this was sometimes called compensatio, sometimes recriminatio. Then arose the question, whether condonation by the party sued was an answer to such plea. In *Beeby* v. *Beeby*, 1 Hagg. 789, Lord Stowell intimated that in his opinion it would not be so; that a party suing for his wife's adultery, having been himself guilty of a similar offence, would not by condonation become rectus in curiâ, so as to be entitled to a decree. *Anichini* v. *Anichini*, 2 Curt. 210, is the only case that I am aware of where that doctrine has been controverted. There the wife sued for restitution; the husband pleaded her adultery in bar: she recriminated; and to her replication he rejoined condonation. The very eminent Judge who decided that case dissented from the opinion expressed by Lord Stowell, and held that a party might, under such circumstances, become rectus in curiâ, but did not, as I understand his judgment, hold that such a consequence would necessarily and as a matter of law result from condonation. At p. 218, after commenting on Lord Stowell's language in *Beeby* v. *Beeby*, he says: "It is difficult and dangerous to attempt to lay down any general rule; but I cannot go the length of saying that the adultery of the husband, followed by condonation, would debar him from a remedy against his wife under any circumstances which I can suppose." I apprehend, therefore, that the learned Judge did not mean to decide that condonation was a complete legal answer to the plea imputing adultery to the husband, but that, in such cases, the question is one to be dealt with by the Judge according to his discretion, taking into consideration the peculiar circumstances of each case.

Let us now see what provisions the Legislature has made for regulating the rights of suitors in this Court. Sect. 29 enacts, etc.,—"And shall inquire into any counter-charge which may be made against the petitioner." The 30th section is in **[257]** these terms:—"In case the Court, on the evidence in relation to any such petition, shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has, during the marriage, been accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then and in any of the said cases the Court shall dismiss the said petition." This leaves nothing to the discretion of the Court. If there has been connivance or condonation or collusion on the part of the petitioner, "the Court shall dismiss the petition." The first branch of the 31st section is the converse of this:—"In case the Court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the Court shall pronounce a decree declaring such marriage to be dissolved." This, however, is subject to the important proviso that follows:—"That the Court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery" (nothing is here said of condonation), "or if the petitioner shall in the opinion of the Court have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party of the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery." To some of the instances of misconduct here enumerated the doctrine of condonation is inapplicable, and they may certainly be taken into consideration, with whatever degree of patience or resignation they may have **[258]** been endured, and those to which it is applicable may, although condoned, have conduced to the adultery. The Legislature does not introduce the absence of condonation as a necessary ingredient in the matters to be dealt with by the Court according to its discretion, as in the first branch of the section. Where it was intended to make condonation a legal bar, the Legislature has said so, as in section 30. If in this clause it had been intended to prohibit the Court from taking into consideration offences which had been previously condoned, no doubt words to that effect would have been introduced. It seems plain to me that the Legislature confided to the judicial discretion of the Court all such matters as are described in the proviso, and with reference to them it seems to place the Court in the same position when dealing with the petitions for dissolution of marriage as the Ecclesiastical Court was in with regard to suits for divorce à mensâ et thoro. According to what I understand to have been the decision in *Anichini* v. *Anichini*, a counter-charge against a petitioner is not then as a matter of law barred by condonation, but with all the other circumstances of the case it is to be taken into consideration. It remains to be considered whether, under the circumstances of this case, I ought to decree a dissolution of the marriage. By the intercourse which the petitioner had with his wife before marriage, he must have taught her to think lightly of the value of chastity. After marriage, for some reason unexplained, he went to reside in London, and there formed an adulterous connection with the female named Barker, the duration of which was left uncertain; but from the evidence of a female witness who saw them together frequently in London, I assume that it existed for a considerable time. The circumstances under which he and his wife became reconciled were also left unexplained; nor was any account given of their married life for some time afterwards. Then we find them constantly quarrelling, and the petitioner not seldom guilty of acts of violence towards her. It was said that these acts were **[259]** in consequence of quarrels about Hamson—and there was some evidence to justify the assertion—but taking into consideration the former delinquency of the husband, in combination with all the circumstances that were proved respecting his subsequent mode of living with the respondent, I cannot think that he is one of the persons for whose benefit this Court was constituted: and in the exercise of the discretion vested in me by the 31st section, I dismiss this petition.

(Before the *Judge Ordinary.*)

BRODIE *v.* BRODIE. March 1, and April 22, 1861.—Petition for Dissolution.—Domicil.—Jurisdiction.—Practice.—Where a case has been in part heard before the Judge Ordinary and is adjourned for further proof and argument before the full Court, the facts proved before the Judge Ordinary must be proved again before the full Court.—Evidence of declarations made by the petitioner, accompanying acts done by him, is admissible to prove his intention of abandoning or acquiring a certain domicil. A bonâ fide residence of the husband in this country, not casual, or as a traveller, is sufficient to found the jurisdiction of this Court against the wife, who has committed adultery in Australia during such residence. Whether such facts would constitute the acquisition of a new domicil for testamentary purposes is another question.

[S. C. 30 L. J. (Mat.) 185; 4 L. T. 307; 9 W. R. 815. Referred to, *Manning* v. *Manning*, 1871, L. R. 2 P. & D. 226; *Wilson* v. *Wilson*, *ibid.* 344; *Le Sueur* v. *Le Sueur*, 1876, 1 P. D. 144; *Niboyet* v. *Niboyet*, 1878, 4 P. D. 18; *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517.]

Dr. Phillimore, Q.C., and Mr. W. Murray were counsel for the petitioner.

The facts of this case raised an important question as to the jurisdiction of the Court. The petitioner, George Sinclair Brodie, was a Scotchman by birth. He married the respondent, formerly Mary Payne Wood, an Englishwoman by birth, in Tasmania, in January, 1833. They lived together, first in **[260]** Tasmania and afterwards in Melbourne, until September, 1850, and had nine children. A separation by mutual consent then took place in consequence of a quarrel, and a deed was entered into under which the petitioner made an allowance of £156 a year. This allowance was afterwards increased to £250 a year. He left Melbourne with his five daughters in February, 1851, and arrived in London in June, 1851. He then went to Scotland and stayed there until June, 1852, when he returned to Melbourne. In June, 1853, he returned to Scotland, and stayed there until May, 1854. He then sold his house in Scotland and took up his residence in England. He continued in England until 1858. At the beginning of that year rumours reached him that his wife had been misconducting herself in Sydney, and partly for the purpose of inquiring into the truth of those rumours, and partly to attend to his pecuniary affairs, he went to Sydney. He there ascertained that his wife was living in adultery with Captain Ogilvie, against whom he brought an action for damages, but before it came to trial Captain Ogilvie died. In May, 1859, the petitioner returned to England and instituted this suit.

The marriage, cohabitation, and adultery were proved by the depositions of witnesses who had been examined in Tasmania and at Sydney.

*The Judge Ordinary*: At present you have only established that the petitioner's domicil of origin was Scotch, and that he acquired an Australian domicil. There you leave him.

Dr. Phillimore said, if the case was allowed to stand over, he would produce oral evidence to prove that the petitioner's present domicil was English.

*The Judge Ordinary* said it was a very grave question whether, after a husband and wife had cohabited for a long series of years in a foreign country, and had there separated **[261]** by mutual consent, and the husband subsequently came to England, he should be allowed to take advantage of the process of this Court to get a divorce. If he were called upon to decide the case upon the evidence as it now stood, he should decide against the petitioner.

The case was allowed to stand over for further evidence and for argument.

April 22.—(Before the Full Court.—*Judge Ordinary, Wightman, and Williams, JJ.*).

Dr. Phillimore, Q.C., stated that this was a petition for dissolution of marriage by George Sinclair Brodie, of Paddington, in the county of Middlesex, against his wife, residing in New South Wales. On the former hearing the Judge Ordinary was satisfied as to the fact of adultery.

*The Judge Ordinary*: But I think you must give the evidence again: the other members of the Court may not now be satisfied.

The evidence taken by commission was then read.

Dr. Phillimore: I feel some difficulty how to deal with the case. To prove the domicil in this country I must shew facts and intention. The petitioner alone can give primary evidence of the latter, he being alive; but by the general rule of the Court he cannot prove his own case. The question is, whether I can give secondary

evidence of intention, as in testamentary cases, where the testator is dead and the secondary evidence is the best that can be produced. I can prove, by the son of Mr. Brodie, declarations made by him.

By the Court: The son may be able to give a good deal of legitimate evidence. We had better decide the admissibility when the questions are asked.

**[262]** James Mackenzie Brodie examined: I am a son of the petitioner and a clerk in Mittofer's house, my father's agent. I was with my father in Melbourne; in 1848 myself came thence to Scotland, and was at school in Scotland for nearly three years. My father landed in England in June, 1851, and came to Edinburgh, where he took a house, which he retained for three years, and was then for a time at the Bridge of Allan. He brought all his children, but one son, with him in 1851. In 1852 he went alone to Melbourne and returned. In 1854 he took a house in Gloucester Terrace, Paddington. Two of my sisters were with him there; three others were at school at Brighton. He was in Gloucester Terrace till 1855; then in Craven Hill Gardens, Bayswater, till August, 1857; thence to Malvern. At these places he had furnished houses. About then I went to Cambridge. In the early part of 1858 my father went alone to Australia, his family remaining at Brighton. He returned in the spring of 1859, and afterwards was in Oxford Terrace; then bought a term of years of a house in Hyde Park Square.

The lease was put in, and the signatures of the vendor and purchaser proved.

By the Court: Declarations, accompanying acts, before suit moved, seem to us admissible.

In answer to questions by the Court, the witness further stated: The petitioner sold his house in Edinburgh, which he had bought in 1851, with the view of coming to reside in London. He said so at the time. I am not aware that he ever had other property in Scotland. He is in no business now. He is still the owner of property in Australia. Rents are remitted to him.

William Westgar examined: I was at Melbourne from 1841 to 1857. I knew Brodie, the petitioner, there; in November, **[263]** 1852, I purchased a sheep station from him; at that time I understood from him that he was selling off to return home and live in this country. I visited him in 1859 in Hyde Park Square.

By the Court: The question is whether the petitioner has acquired an English domicil; what sort of domicil must her husband have to make the wife domiciled here, she never having been in this country since the marriage?

Dr. Phillimore: I submit that enough has been proved to establish domicil for the purpose of founding jurisdiction; whether it would be sufficient for other, e.g. testamentary purposes, may be another question. Here is a bonâ fide residence in this country, with the intention of its being permanent.

By the Court: We say nothing as to what the effect of the evidence might be in a testamentary suit; we think that the petitioner was bonâ fide resident here, not casually, or as a traveller; after he became resident here his wife was carrying on an adulterous intercourse in Australia. He is, therefore, entitled to a decree nisi for a dissolution of his marriage.

(Before the *Judge Ordinary.*)

GRAY *v.* GRAY (and the Queen's Proctor intervening). April 16, 1861.—Petition for Dissolution of Marriage and Decree Nisi.—Intervention of Queen's Proctor.—Motion to take Petition off the File.—23 & 24 Vict. c. 144, s. 7.—Where, after a decree nisi for dissolution, the Queen's Proctor has obtained leave to intervene, and has pleaded an admissible plea, and **[264]** prayed that the petition be dismissed and the party or parties condemned in costs, the petitioner will not be allowed to withdraw from a full investigation of the matters alleged by taking the petition off the file.

[S. C. 30 L. J. (Mat.) 119; 4 L. T. 218; 7 Jur. (N. S.) 472. Affirmed, p. 266, post.]

This was originally a petition for dissolution of marriage at the suit of the wife by reason of the adultery and bigamy of the husband. No appearance had been given by the respondent, and on proof of the facts alleged in the petition, the Judge Ordinary, on the 17th of January, 1861, made a decree nisi for dissolution of the marriage; on the 20th of March the Queen's Proctor obtained leave of the Court to intervene, and on the 27th of March delivered the following pleas:—

1. That the said petitioner has been acting in collusion with the respondent,

Richard Thomas Clement Gray, for the purpose of obtaining a divorce contrary to the justice of the case. 2. That divers material facts respecting the conduct of the said petitioner and the said respondent have not been brought before the Court. 3. That, at the time when the said petitioner presented her petition for dissolution of marriage, she was and had been for some years previously and habitually committing adultery with Thomas Kendall, an omnibus proprietor. 4. That from the autumn of the year 1850, down to the middle of the year 1852, the said petitioner was in the constant habit of meeting the said Thomas Kendall at the Red Cow Tavern, Dalston, in the county of Middlesex, and of there committing adultery with him. Paragraphs five, six, and seven, contained similar charges, and the prayer was, that the Court would be pleased to refuse to make the said decree nisi absolute, and further, to dismiss the petition of the said Mary Louisa Gray, and to condemn her, and the said Thomas Clement Gray, or such of them as it shall see fit, in the costs arising from the Queen's Proctor's intervention. Upon this, the attorney for the petitioner gave notice to the Queen's Proctor, that he intended to move the Court by counsel, that the petition filed in this suit by the petitioner praying for a **[265]** dissolution of her marriage with the above-named respondent be taken off the file of the Court.

Dr. Wambey moved the Court accordingly.

The Attorney-General, Sir R. Bethell (Dr. Phillimore, Q.C., with him), contrà: As this was the first case which had arisen under 23 & 24 Vict. c. 144, s. 7, he felt it his duty to resist the present motion. The Queen's Proctor having filed pleas containing such allegations, he submitted that it would be contrary to the interests of public justice, that at this period parties should be able to withdraw from a full investigation of the matter, and to avoid a determination of the suit on the facts established by that intervention.

Dr. Wambey submitted that the object of the Queen's Proctor's intervention would be attained by the present motion, and it could hardly be for the interests of public morality, that more details than necessary in such cases should be exposed.

*The Judge Ordinary*: I am of opinion that I ought not to grant the present application. I think the interests of the public are largely concerned, that public morality is concerned, that a sham case founded on collusion should be fully exposed. I think the petitioner cannot be allowed thus to defeat this proceeding, taken under the direction of the Attorney-General. A further object of the Legislature probably was, that costs might be inflicted on one or other of the parties. I reject this motion; and make no order at present as to the costs of it.

**[266]** (Before the Full Court.—*The Judge Ordinary, Wightman*, and *Williams, JJ.*, on Appeal from the Decision of the Judge Ordinary.)

GRAY *v.* GRAY, and the Queen's Proctor intervening. June 3, 1861.—Decree Nisi for dissolution.—Intervention of Queen's Proctor.—Motion on behalf of Petitioner to take petition off the file.—23 & 24 Vict. c. 144, s. 7.—C., the wife, obtained a decree nisi for dissolution of her marriage, the husband not appearing, after which the Queen's Proctor intervened and pleaded collusion between petitioner and respondent, and alleged that the petitioner had herself been living in adultery, and prayed to dismiss the petition and condemn the parties, or one of them, in costs; whereupon the Judge Ordinary was moved on behalf of the petitioner to direct the petition to be taken off the file of the Court, which he refused to do, and it was held, on appeal to the full Court, that the Judge Ordinary was right in such refusal.—Quære, if the petitioner had prayed to dismiss her petition on payment by her of the costs incurred up to that time by the Queen's Proctor's intervention.

[S. C. 4 L. T. 478; 7 Jur. (N. S.) 783.]

This was an appeal from a decision of the Judge Ordinary, by which he refused to allow a petitioner who had obtained a decree nisi for the dissolution of her marriage to take the petition off the file of the Court after the Queen's Proctor had intervened, and pleaded collusion between the petitioner and respondent, and alleged the adultery of the petitioner. (Supra, p. 263.)

Mr. M. Chambers, Q.C., and Dr. Wambey, in support of the appeal. The petitioner is not in a position to deny the adultery alleged by the Queen's Proctor, but she cannot admit the collusion. It would be useless, however, for her to go on and contest this point, for if she succeeded on the latter point, the fact of her adultery

would disentitle her, it is presumed, to the relief she originally prayed. This being so, is it the meaning of 23 & 24 Vict. c. 144, s. 7, that the Court should oblige **[267]** a petitioner to go into such an investigation with the view to inflict a penalty in the nature of costs? It would seem that the object which the Legislature had in view when it gave the Queen's Proctor the power of intervening is answered by the defeat of the petitioner's original prayer.

By the Court: There seems to be this difficulty. If the petition is simply taken off the file, which is all the petitioner has asked to do, there will be nothing for the future to shew the nature of the proceedings. Again, the Queen's Proctor has alleged collusion as against the husband. Can the petitioner, by taking the proceedings off the file, hinder him from going on to prove that? Who is to pay the costs at present incurred by the Queen's Proctor's intervention? Are they at once to be thrown upon the public? We cannot condemn the husband in them, on the assumption that the wife admits collusion; and she has made no offer to pay the costs.

After consultation, the Court did not call upon Sir F. Slade, Q.C., and Dr. Spinks, who appeared for the Attorney-General.

*Wightman, J.*, said: I am of opinion that this application must be refused. The application simply was, that the petition should be taken off the file. It is, apparently, wholly in the discretion of the Court whether to permit such a step or not. The application might have been of another kind. The petitioner might have moved to have her own petition dismissed; and then the question would have arisen, on what terms, if at all, such application should have been granted. As the application stands, it proposes to leave the question of costs wholly undetermined. It is clear that the 7th section of the Act contemplated cases in which the parties to the suit might be condemned in the costs arising from the Queen's Proctor's intervention:—"And it shall be lawful for the Court to order the costs of such counsel and witnesses, and other-**[268]**-wise, arising from such intervention, to be paid by the parties, or such of them as it shall see fit, including a wife, if she shall have separate property; and in case the said proctor shall not thereby be fully satisfied his reasonable costs, he shall be entitled to charge and be reimbursed the difference as part of the expense of his office." In the present case the husband (the respondent) did not appear; but the Queen's Proctor intervened after the decree nisi, and on certain allegations, among which is one of collusion between the petitioner and the respondent, has prayed that the petition be dismissed, and that the parties, or such of them as the Court thinks fit, be condemned in the costs. Then the wife prays to have her petition taken off the file, and by her counsel says:—"I cannot deny the adultery, but I deny the collusion; but it would do me no good to prove this denial, for the suit, as far as I am concerned, is at an end on the admission of my adultery." This seems to have been a most proper case for the Queen's Proctor to have intervened—one in which a dissolution of the marriage would have been decreed under circumstances in which it ought not if it had not been for such intervention—just one of the cases the Act was passed to meet. Then, who is to pay? If the public is not to pay at once, how can it be decided whether the parties, or either of them, should pay without trying the fact of collusion. We cannot make the husband pay for this intervention on the mere admission of the other party that there has been collusion. I am of opinion that the Judge Ordinary did quite right in rejecting this application.

*Williams, J.*: I quite agree.

Judgment of the Court below affirmed.

**[269]** (Before the *Judge Ordinary.*)

DRUMMOND (commonly called Viscountess Forth) *v.* DRUMMOND (commonly called Viscount Forth), and the Queen's Proctor intervening. April 18, and May 8 and 15, 1861.—Wife's Petition for Dissolution.—Intervention of Queen's Proctor.—Adultery proved against Petitioner.—23 and 24 Vict. c. 144, s. 7.—To the wife's petition for dissolution by reason of the husband's cruelty and adultery he did not appear, but the Queen's Proctor obtained the leave of the Court to intervene, and pleaded collusion and adultery of the petitioner. At the hearing, petitioner's counsel objected to the right of the Queen's Proctor, under the statute, to plead anything except collusion, but the Court overruled the objection, and held that the Queen's Proctor might go on to prove adultery. Petitioner's counsel asked leave to change the prayer of the petition from dissolution to judicial separation,

which the Court refused. Evidence was then given of the cruelty of the respondent, and of the adultery of the petitioner subsequently to the filing of the petition, and the Court dismissed the petition, holding that a wife guilty of adultery was not entitled to petition in this Court on the ground of any matrimonial offence committed by the husband.

[S. C. 30 L. J. (Mat.) 177; 4 L. T. 416; 7 Jur. (N. S.) 762. Approved, *Otway* v. *Otway*, 1888, 13 P. D. 141. Referred to, *Synge* v. *Synge*, [1900] P. 205; *Hodgson* v. *Hodgson*, [1905] P. 239; *Everett* v. *Everett*, [1919] P. 301.]

This was a petition for dissolution of marriage, at the suit of the wife, on the ground of the husband's adultery and cruelty.

The parties were married in October, 1855, and lived together till the end of 1858. The petition charged adultery with various women, from September, 1859, to February, 1860, and many acts of cruelty during the cohabitation. The petition was filed on the 17th of March, 1860, and the respondent had not appeared. The Queen's Proctor had intervened under 23 & 24 Vict. c. 144, s. 7, and had pleaded that the petitioner and respondent were acting collusively, for the purpose of obtaining a divorce contrary to the justice of the case; that the respondent had filed no answer; and that since the **[270]** petition was presented, the petitioner had been living in adultery; and prayed to dismiss the petition, and that the costs should be paid by the parties, or one of them.

The petitioner, by her reply, denied the collusion and adultery.

Mr. K. Macaulay, Q.C., and Mr. Markham for the petitioner.

Mr. Serjt. Pigott and Dr. Spinks (with whom was the Attorney-General), for the Queen's Proctor.

Mr. Macaulay submitted that, under the language of the 23 & 24 Vict. c. 144, it was not competent to the Queen's Proctor to allege the adultery of the petitioner; all he could do was to allege collusion.

*The Judge Ordinary*: In that case the pleas should have been demurred to. As they are all traversed, I shall try them, and make a decree on all the circumstances of the case. If the parties are dissatisfied, it may be reviewed by the House of Lords.

Mr. Macaulay then opened the petitioner's case, in the course of doing which he stated that he was not in a position to establish the identity of Lord Forth in respect of the charges of adultery, which he therefore abandoned; and on the proof of cruelty, of which he had no doubt, he should ask for a decree of judicial separation, and as against that he should contend that the Queen's Proctor had no right to be heard.

Mrs. Capel, the mother of the petitioner, was then called, and proved the marriage.

On Mr. Serjt. Pigott rising to cross-examine the witness,

**[271]** Mr. Macaulay repeated his objection to the Queen's Proctor being heard in the present aspect of the case, and asked to amend the prayer of the petition by substituting judicial separation for dissolution.

*The Judge Ordinary*: I shall not at this stage allow any amendment. I think the Queen's Proctor, having intervened in a petition for dissolution of marriage, has a right to take part in the trial.

The cross-examination of Mrs. Capel elicited that since the spring of 1860, the petitioner had been living in adultery with Mr. Dering.

The petitioner's own evidence, corroborated by her mother's, established a gross case of cruelty.

Mr. Macaulay submitted that the cruelty was fully proved, and that the petitioner was entitled to a decree for judicial separation on that ground.

Mr. Serjt. Pigott suggested that, as a new question seemed to arise on this alteration of the prayer of the petition, the case should be adjourned for further argument, and it was so agreed.

May 8.—The case came on again for argument on the facts proved, namely, the cruelty of the respondent, and the adultery of the petitioner since the petition filed.

Mr. Macaulay and Mr. Markham for the petitioner.

The Attorney-General, Sir R. Bethell (Mr. Serjt. Pigott and Dr. Spinks with him), for the Queen's Proctor.

Mr. Macaulay said he must admit that the adultery of the **[272]** petitioner was proved; he should now ask to go further, and give evidence to shew the whole of the merits of petitioner's case as against her husband, and the whole of his demerits. The Court may consider whether, under very gross circumstances of conduct on the

husband's part, the petitioner should be debarred of the remedy and protection which she sought, viz. a decree for judicial separation. He should further contend that, under the present aspect of the case, and with reference to the terms of the 7th section of 23 & 24 Vict. c. 144, the Attorney-General had no right to be heard to argue against the decree for judicial separation; but that, if he had, he was only at liberty to prove collusion, in respect of which he was authorized to state, as far as counsel could be authorized to state facts, that no ground or pretence for a charge of collusion ever existed; none certainly had been proved.

The Attorney-General: It has been stated that there was no ground for the suggestion of collusion. This I beg leave to deny. I had ground for believing there was collusion, but not the means of proving it. If I had in this case, and whenever I shall have in any other, I wish it to be publicly understood that I would have prosecuted, and that I will prosecute, the parties in the Central Criminal Court. The position of the case is this:—Here is a petition for dissolution of marriage by a woman. She is shewn to have been guilty of adultery pending the suit; my application is, that the petition be dismissed. If it is to be treated as a suit for judicial separation, and the Court, under the 22nd section of the Divorce Act, is to give relief on principles and rules as nearly as may be conformable to those on which the Ecclesiastical Courts acted, the question will be, whether cruelty can entitle the wife to a decree, she having been guilty of adultery? It has been held that cruelty cannot be pleaded by the wife in bar to the husband's suit on the ground of her adultery (*Dillon* v. *Dillon*, 3 Curt. 92; and *Chambers* v. *Chambers*, referred to in *Dillon*, **[273]** and reported in 1 Consist. 452); but it does not seem to have been held that the wife's adultery would be no bar to her suit on the ground of the husband's cruelty. In the former case there are some notable remarks of Dr. Lushington bearing on the point:—"Now, on referring to the cases, I find it laid down in several of them that cruelty cannot be pleaded in bar to adultery. I myself so held in *Harris* v. *Harris*, 2 Hagg. 411; and on referring to my own note of the judgment, I find that I relied upon the doctrine of Lord Stowell in *Chambers* v. *Chambers*, where he expressly lays it down as a general doctrine that the wife cannot plead cruelty as a bar to divorce for her violation of the marriage bed. The reason he assigns for this is, that compensation can only arise where both parties are in eodem delicto, and that in cases of cruelty and adultery the delictum is not of the same kind. I candidly say, I entertain doubts whether the reason given is the most satisfactory that could be adduced, because if the effect arises out of the difference in the nature of the two offences, it follows, è converso, that where the wife has brought a suit on account of cruelty, the husband cannot plead her adultery in bar—a proposition which I am not aware has ever been laid down in these courts. Perhaps the more correct, because the more satisfactory reason may be, that if the husband has been guilty of cruelty before the wife is charged with having committed adultery, she might have had redress by proceeding for a separation before the time when the adultery was committed. No cruelty can, as Lord Stowell has said, justify the violation of the marriage bed." *Proctor* v. *Proctor*, 2 Consist. 292, is conclusive that the husband's adultery subsequent to the wife's, would bar his remedy by reason of her adultery.

Mr. Macaulay in reply.

*The Judge Ordinary*: As to permission to go into a new **[274]** case now, it is quite clear that that is out of the question. As to the other points raised, I will take time to consider them. Cur. adv. vult.

*The Judge Ordinary*: This was a suit by the wife for dissolution of marriage by reason of the adultery and cruelty of the husband. The respondent did not appear, but before the hearing, the Queen's Proctor, by direction of the Attorney-General, obtained leave to intervene, and pleaded. At the trial, Mr. Macaulay first questioned whether the Queen's Proctor had a right to plead anything but collusion. I thought he had, and that he was at liberty to prove the charge of adultery. Mr. Macaulay then asked leave to amend the prayer of the petition, by asking for a judicial separation instead of dissolution, with a view of contending that the Attorney-General would have no right to be heard unless it were a petition for dissolution. I thought that the party, having put the petition for dissolution on the file, could not be allowed to defeat the right of the Attorney-General by such an amendment. The case of adultery against the petitioner was made out by the cross-examination of her own witness, and the case stood over for further argument; and I, since that, have

taken time for consideration. The case now for my decision, assuming the preliminary points to have been rightly decided, is this: a petition for dissolution, evidence of cruelty, a case of adultery against the petitioner proved by the Queen's Proctor. It was argued that that was no answer to the wife's petition for cruelty. But I think that a wife guilty of adultery cannot be a petitioner in this Court on the ground of any matrimonial offence of the husband, and I dismiss this petition.

**[275]** (Before the Full Court.—*The Judge Ordinary*, *Wightman*, and *Williams*, *JJ.*)

BOYNTON *v.* BOYNTON. April 22, 1861.—Dissolution of Marriage.—Custody of Child.—Application of Money under Settlement, 20 & 21 Vict. c. 85, s. 35; 22 & 23 Vict. c. 61, ss. 4 and 5.—Costs.—When the wife succeeds in her suit against the husband, she will generally be entitled to the custody of the children; and where the husband takes an interest in the income of the wife's money under settlement, the Court will direct the application of such interest in favour of the mother or the child.

[S. C. 30 L. J. (P.) 156; 4 L. T. 258; 9 W. R. 620. Discussed, *Chetwynd* v. *Chetwynd*, 1865, 4 Sw. & Tr. 151; L. R. 1 P. & D. 39; *Wigney* v. *Wigney*, 1882, 7 P. D. 177.]

This was originally a suit for dissolution of marriage at the petition of the wife, by reason of adultery and cruelty. The case had been heard before a jury, who found a verdict for the petitioner, on which a decree of dissolution of marriage had been subsequently made.

The case now came before the Court on the mother's petition: first, as to the application of certain property under a marriage settlement; and, secondly, for the custody of the child.

Mrs. Boynton was entitled, under the will of her father, to about £19,000 stock. In July, 1849, Mr. Boynton had eloped with her, she being then a minor, and they were married at St. George's, Hanover Square. A post-nuptial settlement of her property was made, to the following effect:—Two-thirds of the income to the use of the wife for life, one-third to the husband, with benefit of survivorship respectively, and after the death of the survivor for the children. The trustees of the settlement had since the commencement of this suit had recourse to Chancery, and the property was now in the hands of the Accountant-General of the Court of Chancery, under order to pay the income according to the deed of settlement.

**[276]** On the 22nd of December, 1858, an interim order was made (1 Swab. and Trist. 324) for the custody of the child, a boy then about eight years old, by which he was placed under the care of Lady Boynton, Mr. Boynton's mother, and was at the time of the present application at school at Bridlington Quay.

Mr. K. Macaulay, Q.C., and Mr. T. Jones, for the mother, asked for the custody of the child, relying on the principle laid down in *Marsh* v. *Marsh*, 1 Swab. and Trist. 312, that this Court was not bound by the rules of the Common Law or Chancery Courts in such matters, but would do what was just and proper with reference to the circumstances of the suit, and that when a mother was entitled to the relief provided by law, she was not to purchase it at the price of losing the society of her children, which should fall upon the wrong-doer. As to the father's interest under the settlement, they asked for an order directing its application in favour of the mother during her life, and in case of her predeceasing Mr. Boynton, in favour of the child, as if Mr. Boynton were dead.

Dr. Spinks for Mr. Boynton: As to the custody of the child, in this case there is no sufficient reason to deprive the father of his common-law right; the child is near ten years of age. It was not a case of gross cruelty.

By the Court: We cannot discuss that now; you must take the cruelty and adultery as facts.

Mrs. Boynton has shewn very little interest in, or affection for the boy; has never seen him since the interim order in 1858. As to the interest under the settlement, the parties seem to have elected another remedy, by causing the money to be paid into Chancery. At all events, it would be harsh to deprive Mr. Boynton of his interest in the one-third, for **[277]** after sixteen years of age the boy will be at liberty, and may choose to go to his father, who will be liable for his maintenance and education.

*The Judge Ordinary*: My learned brothers desire me to say that they agree with me in the construction which I put upon the 35th section of the Divorce Act, in the

case of *Marsh* v. *Marsh*. The question is, what is "just and proper" as regards the custody of the child, under the circumstances of the case, and bearing in mind the interest of the child? We think it would not be just to leave the custody of the child in the father, when the marriage has been dissolved by reason of his misconduct, the wife not having been to blame. As to the settlement also, what he loses he loses by reason of his own fault; he ran away with a minor, and under pressure of some sort from her family consented to a post-nuptial settlement; it would be a strange result of the present state of the law, if he could retain the property which originally belonged to the woman, when he has so entirely failed of his duties as a husband. We think he must be deprived of his interest under the settlement. We direct that, till further order, what would be paid to him be paid to the mother, and in the event of his surviving her, the whole to the child. If in this case, as the fund has been paid into Chancery, an application to that Court is necessary, we presume it will carry out this direction. The custody of the child, till further order, to be with the mother, with provision for reasonable access for the father, and the child not to be taken out of the jurisdiction of the Court without leave. If necessary, the Court will settle the precise terms of the order. No order as to costs of this application, as she has the whole income.

**[278]** (Before the Full Court.—*The Judge Ordinary, Wightman*, and *Williams, JJ.*) WING *v.* TAYLOR (falsely calling herself WING). April 22 and 23, and June 3, 1861.—Suit for Nullity.—Intercourse before Marriage with Wife's Mother.—Affinity.—Marriage in a Vestry.—One Witness.—B. petitioned for a decree of nullity of marriage on the ground that he had intercourse with his wife's mother before the fact of marriage with his alleged wife, which intercourse he averred brought him within the prohibited degrees of affinity in respect of marriage established by the law of England.—But, on demurrer to this petition, the Court held that affinity could not be so constituted by the law of England, and that the 28th Hen. VIII. c. 7, had been repealed and not revived by any subsequent statute.—That a marriage solemnized in a vestry belonging to and abutting on the church was a good marriage.—That a marriage solemnized in the presence of one witness only is a good marriage.

[S. C. 30 L. J. (Mat.) 258; 4 L. T. 583; 7 Jur. (N. S.) 737. Referred to, *London County Council* v. *Dundas*, [1904] P. 13.]

This was a question arising on demurrer to a petition for a decree of nullity of marriage, filed by the man against the woman.

The petition stated—First, that a pretended marriage was, on the 14th of December, 1835, in fact illegally had, solemnized, and celebrated in the vestry-room belonging to and abutting on the parish church of the parish of Hedon, in the county of York, between the petitioner and Ann Taylor, spinster, falsely calling herself Ann Wing.

Secondly, that prior to the time of the said pretended celebration of the said pretended marriage, the petitioner had on divers occasions carnal connection with Mary Taylor, the natural and lawful mother of the said Ann Taylor, now falsely calling herself Ann Wing, at the Constable Arms, in Hedon aforesaid, being the residence of the said Mary Taylor; that at the time of the celebration of the said pretended marriage, the said Ann Taylor, now falsely calling herself Ann Wing, **[279]** was well aware that the petitioner had carnal connection with her said mother, Mary Taylor, as aforesaid; that by reason of the petitioner having had such carnal connection with the said Mary Taylor, the said mother of the said Ann Taylor, falsely calling herself Ann Wing, prior to the celebration of the said pretended marriage, the petitioner and the said Ann Taylor, falsely calling herself Ann Wing, were in law deemed to be, and in fact were at the time of the celebration of the said pretended marriage, within the prohibited degrees of affinity, and that the said pretended marriage was and is therefore null and void to all intents and purposes whatsoever.

Thirdly, that the whole of the ceremony of the said pretended marriage was performed and solemnized in the vestry-room belonging to and abutting on the said parish church of Hedon aforesaid; that the petitioner, the said Ann Taylor, falsely calling herself Ann Wing, William Wasse, clerk to the then rector of the said parish of Hedon, who was the only officiating minister at the solemnization of the said pretended marriage, and Samuel Wasse, who was the only credible witness present at

the said pretended marriage, and who was the only credible witness who signed the attestation thereof, were the only persons present at the solemnization of the said pretended marriage; that they were all present in the said vestry-room during the whole time of the pretended, etc.; that by reason of the premises the said pretended marriage was solemnized contrary to the Rubric, and to the provisions of the statutes in that case made and provided, and was and is therefore null, etc.

Fourthly, that after the solemnization of the said pretended marriage, the petitioner lived and cohabited with the said Ann Taylor, spinster, falsely calling herself Ann Wing, until the month of July, 1854, when he separated from her, and that he has since lived separate and apart from her.

Fifthly, that the petitioner discovered during the present month of January, 1861, for the first time, that the said pretended marriage was absolutely null and void.

**[280]** Prayer for decree of nullity of marriage.

Demurrer to this petition on the grounds, first, that the circumstances stated do not in law shew the petitioner to have been within the prohibited degrees of affinity to the respondent, so as to render their marriage void.

Secondly, that the circumstances stated do not shew that their marriage was celebrated contrary to the provisions of the Rubric or any statutes, so as to render their said marriage void.

Joinder in demurrer.

Dr. Spinks in support of the demurrer: The main question is, what are the prohibited degrees of affinity? The first statute with which we are concerned is the 25 Hen. VIII. c. 22, entitled, "An Act concerning the King's Succession," the 3rd section of which states certain prohibited degrees within which "marriages, albeit they be plainly prohibited and detested by the laws of God, yet, nevertheless, at some times they have proceeded under colours of dispensations from man's power, which is usurped, and of right ought not to be granted, admitted, or allowed," etc.

There is clearly nothing in the Act on which the present petition can be founded; it is presumed that the 9th and 10th sections of the 28 Hen. VIII. c. 7, are relied upon; they are as follow:—"Sect. 9. And furthermore, since many inconveniences have fallen, as well within this realm as in others, by reason of marrying within the degrees of marriage prohibited by God's laws, that is to say, the son to marry the mother, or the step-mother carnally known by his father, the brother the sister, the father his son's daughter or his daughter's daughter, or the son to marry the daughter of his father, procreate and borne by his step-mother, or the son to marry his aunt, being his father or mother's sister, or to marry his uncle's wife carnally known by his uncle, or the father to marry the son's wife carnally known by his **[281]** son, or the brother to marry his brother's wife carnally known by his brother, or any man married and carnally knowing his wife to marry his wife's daughter or his wife's son's daughter, or his wife's daughter's daughter, or his wife's sister.

"Sect. 10. And further to dilate and declare the meaning of these prohibitions, it is to be understood that if it chance any man to know carnally any woman, that then all and singular persons being in any degree of consanguinity or affinity, as is above written, to any of the parties so carnally offending, shall be deemed and adjudged to be within the cases and limits of the said prohibitions of marriage," etc.

The 11th section, referring to the 25 Hen. VIII. c. 22, prohibits all marriages within the degrees before rehearsed. This statute is not generally printed in the collection of the statutes, but these sections may be found in Gibson's Codex (A.D. 1761), p. 410. This Act is in part repealed by 1 & 2 Phil. & M. c. 8, s. 18:—"And also that part of the Act made in the said twenty-eighth year of the said king, entitled, 'An Act for the establishment of the succession of the Imperial Crown of the realm that concerneth a prohibition to marry within the degrees expressed in the said Act.'" The 1 Eliz. c. 1, re-enacts many of the statutes repealed by 1 & 2 Phil. & M.; but the 28 Hen. VIII. c. 7, is not expressly mentioned, and the 13th section declares, "that all other laws and statutes, and the branches or clauses of any Act or statute repealed and made void by the said Act of repeal made in the time of the late King Philip and Queen Mary, and not in this Act specially mentioned and revived, shall stand, remain, and be repealed and void," etc. The 28 Hen. VIII. c. 16, is re-enacted, and the 2nd section of that Act has some reference to the 28 Hen. VIII. c. 7. But it is submitted that the real exposition of the law of England in respect of the prohibited degrees is to be found in 32 Hen. VIII. c. 38, and it cannot be suggested that the mar-

[282]-riage in question could be held void under that Act. Since the date of these statutes I can find no trace of any decided case in which such a marriage has been held void.

As to the place and mode of celebration, it is not stated that the particular vestry-room formed no part of the church, and primâ facie the vestry is part of the church (*Wilson* v. *M'Math*, 3 Phill. 82). The 21st section of the Marriage Act, 4 Geo. IV. c. 71, may require two witnesses, but there is no enactment declaring that their absence shall make the marriage void.

April 23.—Dr. Tristram, contrà: The first question is, whether such affinity as will avoid a marriage springs from carnal connection, though not accompanied by marriage. I admit that I can find no decided case in the Ecclesiastical Courts directly in point, but I apprehend that a reference to the statutes and books will show that such affinity may be constituted by carnal connection without the fact of marriage. It is certain from the following authorities, that before the statutes of Henry VIII., both by the canon law and by the common law of England, a marriage such as the present might be avoided on the ground of the affinity of the parties: Sanchez, De Matrimonio, lib. 7, disputatio 64, tit. 1: "Ita affines, sunt consanguinei alterutrius conjugis alteri conjugi. . . . Est propinquitas personarum ex carnali copulâ, proveniens omni carens parantelâ. Et dicitur generaliter, ex copulâ, quia oritur ex copulâ licitâ vel illicitâ." Tit. 3: "Omnes autem consanguinei uxoris Petri, vel mulieris ab eo illicitæ cognitæ, sunt Petro affines in eo gradu in quo sunt consanguinei talis mulieris." Tit. 16: "Sexto infertur non audiendos esse quosdam Doctores asserentes ex copulâ illicitâ naturali non oriri affinitatem, sed solum ex copulâ conjugali. . . . Nec obstat . . . non oriri affinitatem quoad delationem hæreditatis vel tutelæ, secus quoad matrimonii [283] prohibitionem.[1] Tandem constat ex Tridentino, Sess. 24, de matrimonio, c. 4, oriri ex fornicatione affinitatem." [2]

In the note to the 380th section of Co. Litt. it is said: "There is a distinction to be understood, for there be two kinds of divorces; one à vinculo matrimonii, etc. Divorces à vinculo matrimonii are these: causâ præcontractus, causâ metus, causâ impotentiæ seu frigiditatis, causâ affinitatis, causâ consanguinitatis, etc. And I read in an ancient record, coram Rege, T. Pasch. 30 Ed. I. (*William de Chadworthe's Case*), that he was divorced from his wife, for that he did carnally know her daughter before he married the [284] mother, all which are causes of divorce preceding the marriage. . . . And it is further to be understood that many divorces that were in force by the canon law when Littleton wrote are not at this day in force, for by the statute 32 Hen. VIII. c. 38, it is declared that all persons be lawful (that is, may lawfully marry) that be not prohibited by God's law to marry, that is to say, that be not prohibited by the Levitical degrees."

---

[1] So natural consanguinity is nothing in respect to property, but in respect of marriage within the prohibited degrees it is equivalent to legitimate consanguinity arising from a legal marriage (*Reg.* v. *The Inhabitants of Brighton*, 5 (N. S.) L. T. R. 56; Q. B., June 26, 1861).

[2] The words are:—"Præterea sancta Synodus, eisdem et aliis gravissimis de causis adducta, impedimentum, quod propter affinitatem ex fornicatione contractam inducitur, et matrimonium postea factum dirimit, ad eos tantum qui in primo et secundo gradu conjunguntur, restringit: in ulterioribus vero gradibus statuit, hujusmodi affinitatem matrimonium postea contractum non dirimere."

So in the 'Reformatio Legum Ecclesiasticarum' (cited 1 Stephens's Eccl. Stat. 272), "Non solum in legitimis matrimoniis talem habent dispositionem qualem jam posuimus, sed eundem in corporum illegitimâ conjunctione locum habent; filius enim quo jure matrem non potest uxorem sumere, eodem, nec patris concubinam habere potest; et pater quo modo filii non debet uxorem contrectare, sic ab illâ se removere debet quâ filius est abusus; quâ ratione mater nec cum filiæ marito jungi debet, nec etiam cum illo congredi qui filiam oppresserit."

So in *Harrison* v. *Burwell*, Vaughan, R. 215. "Another alteration in this Act from the former is, that if any man carnally know any woman, all persons in any degree of consanguinity or affinity of the parties so offending, shall be adjudged to be within the said prohibitions, in like manner as if the parties so carnally knowing one another had been married. For example, if a man carnally know a woman, not marrying her, he is prohibited to marry her daughter or daughter's daughter, and *e converso*. In all other clauses this Act (28 Hen. VIII. c. 7) and the former of 25th are verbatim the same, and this Act is in force."

Upon a fair construction of 32 Hen. VIII., it is submitted that by the present law affinity may be constituted by carnal connection, without the fact of marriage (see *Mrs. Addison's Case*, Macqueen's Practice of Lords, p. 476; Swinburne on Sponsals, s. 18, 10; 2 Burns Ecc. Law, by Phill. p. 445). It might, indeed, be contended on high authority that sections 9, 10, and 11 of 28 Hen. VIII. c. 7, are still in force as forming part of the statute law of England. These sections were first repealed by 1 and 2 P. and M. c. 8, sec. 19: and although they were not revived by 1 Eliz. c. 1, totidem verbis, it has been said that they were revived by implication by sec. 10 of that statute, which expressly revived 28 Hen. VIII. c. 16, wherein (sec. 2) these sections are referred to as being in force. See 5 Com. Dig. Parl. R. 9 *a*:—"So, though the words are that no statute not expressly mentioned shall be revived, if thereby another statute is revived, which mentions it to be in force, as the statute 21 Hen. VIII. c. 13, of pluralities, being mentioned to be in force by the statute 25 Hen. VII. c. 21, which was revived by the statute 1 Eliz. c. 1; though it says that no statute repealed by 1 & 2 Phil. & M. stat. 8, shall be in force if it be not specially revived."

But it is not necessary for me to rest this part of the petitioner's case on this argument. The proposition, on which I mainly rely in support of it, is, that this marriage is to be deemed to be within the Levitical degrees referred to in 32 Hen. VIII. c. 38, s. 2, and is therefore void by 5 & 6 Wm. IV. c. 54. My argument is as follows:—By 32 Hen. VIII. c. 38, **[285]** s. 2, marriages within the Levitical degrees, or those prohibited by God's law, are invalid. This statute does not define what marriages are or are not within the Levitical degrees, or are or are not prohibited by God's law. This had been done by ss. 9, 10, 11 of 28 Hen. VIII. c. 7, which were then in force. At the time of the passing of 32 Hen. VIII. c. 38, the meaning of the term Levitical degrees was to be sought for, and would be the same as declared in 28 Hen. VIII. c. 7. When 32 Hen. VIII. c. 38 was revived by 1 Eliz. c. 1, it must have been revived with the same sense attaching to the term Levitical degrees as that which attached to it when it was originally enacted. In *R.* v. *Chadwick*, 11 Q. B. 205, it was clearly laid down that we are to look to 28 Hen. VIII. c. 7, ss. 9, 10, and 11, for the statutory exposition of the meaning of the term Levitical degrees in 32 Hen. VIII. c. 38. And the correctness of this principle of interpretation had been confirmed by the judgments of Lords Cranworth and Wensleydale, in the case of *Brook* v. *Brook*, recently decided in the House of Lords, 4 L. T. Rep. N. S. 97, 102. The point there was, how the law stood with respect to the marriage with a deceased wife's sister, which depends on the 9th section of 28 Hen. VIII. c. 7; but it seems impossible to separate the 9th and 10th sections. Lord Wensleydale's statement is very precise: "The state of the law appears to be thus: The two statutes in which the term Levitical degrees is explained are the 25 Hen. VIII. c. 22, where they are enumerated and include a wife's sister; and the 28 Hen. VIII. c. 7, in the 9th section of which are described by way of recital the degrees prohibited by God's law in similar terms, with the addition of carnal knowledge by the husband in some cases, and with respect to them the prohibition of former statutes was re-enacted. The whole of the Act 25 Hen. VIII. c. 22, was repealed by a statute of Queen Mary, and so was part of 28 Hen. VIII. c. 7, but not the part as to prohibited degrees; that part was repealed by 1 **[286]** & 2 Phil. & M. c. 8. But by the 1 Eliz. c. 1, s. 2, that Act was also repealed except as therein mentioned, and several Acts were revived, not including the 28 Hen. VIII. c. 7, no doubt because it avoided the marriage with Anne Boleyn. But by the 10th section, the 28 Hen. VIII. c. 16 (which in its 2nd section referred to marriages prohibited by God's laws as limited and declared in the 28 Hen. VIII. c. 7, or otherwise by Holy Scriptures), and all and every branches, words, and sentences in the several Acts and statutes contained, by the authority of this present Parliament, etc., shall be revived, and shall stand and be in full force and strength to all intents, constructions, and purposes. The question is, whether that part of 28 Hen. c. 7, which relates to prohibited degrees and describes them is thus revived? I think it is. But whether it is or not, the statements in the statute are to be looked at as a statutory exposition of the meaning of the term Levitical degrees, and that is the clear opinion of Lord Denman and Coleridge, J., in the case referred to."

As to the demurrer to the third paragraph of the petition, he admitted that there was a door opening from the vestry into the church, and he was then stopped in his argument by the Court.

Per Curiam: We are clearly of opinion to allow the demurrer as to the third and fourth paragraphs of the petition. We think the marriage was valid, though celebrated in the vestry, and in the presence of one witness only.

Dr. Spinks in reply as to the question of prohibited degrees. Cur. adv. vult.

*The Judge Ordinary*: This was a petition for a decree of nullity of marriage. The petitioner alleged that on the 14th of December, 1835, a pretended marriage was solem-[287]-nized between the petitioner, then a bachelor, and Ann Taylor, spinster, since falsely calling herself Wing; that before the time of the celebration of the said pretended marriage the petitioner had on divers occasions carnal connection with Mary Taylor, the natural and lawful mother of the said Ann Taylor, and that at the time of the celebration of the said pretended marriage this was known to the said Ann Taylor; that by reason of the said petitioner's having had such carnal connection with Mary Taylor, the said pretended marriage was wholly null and void; that after the said pretended marriage the petitioner cohabited with the said Ann Taylor until July, 1854, when he separated from her.

The petition also raised some questions as to the due celebration of the marriage, which it is unnecessary to mention now, as they were disposed of by the Court when the case was argued.

To this petition the respondent demurred, thereby admitting, for the purpose of the argument, the truth of the facts alleged. The question thus raised is of the utmost importance; for although it is alleged that the respondent knew that sexual intercourse had taken place between the petitioner and her mother, if in consequence of such intercourse the law holds the marriage null and void, it is immaterial whether the fact of such intercourse was known or not. If such be the law, the Court must pronounce a judgment in conformity with it, whatever be the consequences, one of which will obviously be that no marriage, however solemnized, can by any amount of care and caution be rendered secure against impeachment. It is difficult to imagine any state of things more injurious to the peace and happiness of families, and before the Court pronounces a judgment that would be attended with such a consequence, it should be most careful in examining the grounds upon which the petitioner claims to have his marriage declared null and void.

Very little is to be found in our law-books respecting marriage before the time of Henry VIII. In the ancient laws of [288] England, published by the Record Commissioners, among the laws of King Edmund, I find under the head "Of betrothing a woman," sect. 9, the following:—"Well is it to be looked to that it be known that they through kinship be not too nearly allied, lest that be afterwards divided which before was wrongly joined." In a note it is said, "The canons of the time had fixed this in the seventh degree." Among the laws of King Ethelred, title 6, council of Enham, of the ordinances of the Witan, sect. 12, is the following:—"And let it never be that a Christian man marry within the relationship of six persons in his own kin, i.e. within the fourth degree, nor with the relict of him who was so near in worldly relationship, nor with the wife's relation whom he before had had, nor with any hallowed nun," etc. Among the laws of Cnut is the following: "De Conjugiis prohibitis:" "—And we instruct and beseech and in God's name command that no Christian man ever marry in his own family within the relationship of six persons, nor with the relict of his kinsman who was so near of kin, nor with the relative of the wife whom he had previously had, nor with his god-mother, nor with a hallowed nun, nor with one divorced, let any one marry, nor any fornication any one commit," etc. In none of these is there any suggestion that affinity would be established by carnal knowledge without marriage. The Canonists indeed so held, as may be read in Sanchez, 'De Matrimonio.' At p. 154 of Constitutiones legatinæ Dom. Othoboni, there is the following note on the word consanguinitate: "Quæ est vinculum diversarum personarum ab eodem stipite descendentium carnali propagatione contractum; sed affinitas est proximitas personarum ex carnali coitu proveniens omni carens parentelâ." This may possibly mean that affinity is created by carnal intercourse alone, or by that and marriage; most probably the former is the true construction, but the definition is no doubt taken from the Canonists, and is no higher authority than Sanchez.

[289] In Co. Litt. 255, commentary on section 380, there is this passage:—"Divorces à vinculo matrimonii are these: causâ præcontractus, causâ metus, causâ impotentiæ seu frigiditatis, causâ affinitatis, causâ consanguinitatis, etc. And I read

in an ancient record, Coram Rege, Termino Pasch. 39 Ed. I. (*William de Chadworthe's Case*), that he was divorced from his wife for that he did carnally know her daughter before he married the mother, all of which are causes of divorce preceding the marriage." It is to be observed that Lord Coke does not state this to be the law when he wrote; and further on he says:—"And it is to be further understood that many divorces that were of force by the canon law when Littleton wrote are not at this day in force, for by the statute 32 Hen. VIII. c. 38, it is declared that all persons be lawful (that is may lawfully marry) that be not prohibited by God's law to marry, that is to say, that be not prohibited by the Levitical degrees;" assuming that none were prohibited by God's law from marrying who were not within those degrees. It has been observed that God's law prohibits other marriages besides those between persons within the Levitical degrees, e.g. causâ impotentiæ, but probably it will not be found that God's law prohibits any person from marrying by reason of consanguinity or affinity, save those within the Levitical degrees, and it is plain that the statutes 23 Hen. VIII. c. 7, speaking of the degrees prohibited by God's law, meant the Levitical degrees, for it proceeds to define what the Legislature meant by God's law, thus, "that is to say," and then it specifies the degrees mentioned and set down in the 18th chapter of Leviticus. The important observation arising out of this passage in Co. Litt. is, that he considered that the statute of 32 Hen. VIII. c. 38, gave the law upon this subject, which we take to be correct.

On the argument of this case it was contended that the statute 28 Hen. VIII. c. 7 is still in force, and that it in terms prohibited such a marriage as that now in question. In order [290] to settle this point, it is necessary to examine the various enactments on the subject of marriage, which followed each other in rapid succession during the reign of Hen. VIII. The first of them is the 25 Hen. VIII. c. 22, entitled "An Act concerning the King's succession." By the 2nd section it was enacted that the marriage of the King with the Lady Catherine should be deemed null and void, and his marriage with Queen Anne good. This was followed by a recital in these words:—"And furthermore, since many inconveniences have fallen, as well within this realm as in others, by reason of marrying within the degrees prohibited by God's laws, that is to say, the son to marry the mother or the stepmother, the brother the sister, the father his son's daughter or his daughter's daughter, or the son to marry the daughter of his father procreate and borne by his stepmother, or the son to marry his aunt, being his father's or mother's sister, or to marry his uncle's wife, or the father to marry his son's wife, or the brother to marry his brother's wife, or any man to marry his wife's daughter, or his wife's son's daughter, or his wife's daughter's daughter, or his wife's sister; which marriages, albeit they be plainly prohibited and detested by the laws of God, yet nevertheless they have at some time proceeded under colours of dispensations by man's power, which is but usurped, and of right ought not to be granted, admitted, or allowed; for no man, of what estate, degree, or condition soever he be, hath power to dispense with God's laws, as all the clergy of this realm in the said convocations, and the most part of all the famous universities of Christendom, and we also, do affirm and think." The statute then prohibited the solemnization of marriages between parties within those degrees; and enacted that parties theretofore married within those degrees and not then separated should be separated by the sentence of the ordinary. Then followed several sections relating to succession to the Crown; and the last was in these words:—"Provided always that the article in this Act contained concerning pro-[291]-hibitions of marriages within the degrees aforementioned in this Act shall always be taken, interpreted, and expounded of such marriages, where marriages were solemnized and carnal knowledge was had." If the question now to be determined had depended upon this statute, it would have been clear that marriage as well as carnal knowledge was necessary to create affinity so as to bring parties within the prohibited degrees, and it could not have been held that the law was still according to that which was decided in the ancient record in the time of Ed. I., mentioned by Lord Coke. Then came the 26th Hen. VIII. c. 2, prescribing an oath of allegiance.

The 28 Hen. VIII. c. 7, upon which the argument in support of the present petition was founded, repealed both the former Acts. This also was an Act "Touching the succession of the Crown;" it repealed the two statutes before cited; enacted that Queen Jane was the King's lawful wife; that the marriage of the King with the Lady Catherine was void, also the marriage with Lady Anne was void, and the issue

born of those marriages illegitimate; then followed a recital in these words:—"Furthermore, sith many inconveniences have fallen as well within this realm as in others, by reason of marrying within the degrees of marriage prohibited by God's laws, that is to say, the son to marry the mother or the stepmother carnally known by his father, the brother the sister, the father the son's daughter, or his daughter's daughter, or the son to marry the daughter of his father procreate and borne by his stepmother, or the son to marry his aunt, being his father's or mother's sister, or to marry his uncle's wife carnally known by his uncle, or the father to marry his son's wife carnally known by his son, or the brother to marry his brother's wife carnally known by his brother, or any man married and carnally knowing his wife to marry his wife's daughter, or his wife's son's daughter, or his wife's daughter's daughter, or his wife's sister." "And furthermore, to dilate and declare the meaning of these prohibitions, it is to be understood that if **[292]** it chance any man to know carnally any woman, that then all and singular persons, being in any degree of consanguinity or affinity as is above written to any of the parties so carnally offending, shall be deemed and adjudged to be within the cases and limits of the said prohibitions of marriage." It then prohibits all persons from marrying "within the degrees afore rehearsed," and enacts, that "if any persons have been theretofore married within any such degrees, and have been separated by the ordinary, such separation shall be held good, and any so married and not yet separated shall be separated by the sentence of the ordinary, and such separation shall be held good and effectual," etc. Then follow clauses settling the succession to the Crown, and enacting that it shall be treason to say that the marriage of the King with the Lady Catherine or the Lady Anne was good, or the Lady Mary or Lady Elizabeth legitimate.

In the same session another Act, c. 16, was passed, entitled "A Provision for Dispensations and Licenses heretofore obtained from the See of Rome." After reciting that the Bishop of Rome and his predecessors had theretofore exercised many usurped powers within the realm, it enacted "That all bulls, breves, faculties, and dispensations heretofore had and obtained of the Bishop of Rome shall from henceforth be clearly void and of no value," etc. "Yet notwithstanding it be enacted that all marriages had and solemnized within this realm, or in any other the King's dominion before the 3rd day of November in the 26th year of the King's reign, whereof there is no divorce or separation had by the ecclesiastical laws of this realm, and which marriages be not prohibited by God's law, limited and declared in the Act made in this present Parliament for the establishment of the King's succession or otherwise by Holy Scriptures, shall be by the authority of the present Parliament good, etc., as though no impediment of matrimony had ever been between them that have contracted and solemnized such marriages." **[293]** This statute did not prohibit any marriages, but rendered some unimpeachable, and was evidently intended to relieve parties from those prohibitions which had been invented by the See of Rome in order to extort money by granting dispensations, and which prohibitions were not warranted by God's law, and to protect those who had married after obtaining dispensation from the peril of having their marriages called in question in consequence of the enactment that all bulls, etc., theretofore obtained should be held void.

Then came the statute 32 Hen. VIII. c. 38, "For marriages to stand notwithstanding precontracts." The preamble recites that theretofore "the usurped power of the Bishop of Rome had always troubled the mere jurisdiction and regal power of the realm of England, etc., whereof yet some sparks be left." It then recites that upon pretence of precontracts not consummate, etc., marriages have been held void, and also by reason of kindred and affinity in certain outward degrees or carnal knowledge of any of the same kin which else were lawful, and not prohibited by God's law, and that thus no marriage could be secure, etc., and enacts "That from the 1st day of July next coming (1540) all and every such marriages as within this Church of England shall be contracted between lawful persons (as by this Act we declare all persons to be lawful that be not prohibited by God's law to marry), such marriages being contract and solemnized in the face of the Church, and consummate with bodily knowledge, etc., shall be, by authority of this present Parliament, judged and taken to be lawful, good, and indissoluble, notwithstanding precontract, etc., and that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees." This statute does not refer to or incorporate the 28 Hen. VIII. c. 7. It does not affect to say what marriages without the Levitical degrees are prohibited by God's law.

The case mentioned in First Inst. has been already noticed. **[294]** The same case is mentioned in Second Inst. in "an exposition upon the statute 32 Hen. VIII. c. 38, concerning what marriages be lawful and what not." The title of which chapter shows that Lord Coke considered that statute as settling the law on that subject.[1] In page 684, after quoting part of the preamble, he says:—"And now, at this day, men need not be at the charge and suit that Roger Donnington was, who, for that he had committed fornication before marriage with one that was of kin to his wife in the fourth degree, was driven to sue for a legitimation of his marriage." What the nature of the suit was is not stated. Further on he repeats the statement of *Chaldeworth's Case* mentioned in the First Inst.:—"Alice de Stircheley took to husband William de Chaddeworth, and after, at her suit, was divorced from him, and the cause of the divorce is expressed in the record, 'Et fuit causa divortii eo quod dictus William de Chaddeworth carnaliter cognoverat quandam filiam dictæ Aliciæ Stircheley antequam ipsam desponsavit.' By the Levitical degrees it is prohibited that a man shall not uncover the nakedness of his wife and of her daughter; and so it is of the rest of the degrees there prohibited."

Lord Coke neither expresses any opinion that the law then was in accordance with the decision in *Alice Stircheley's Case*, nor that the Declaratory Act of 28 Hen. VIII. c. 7, was then in force, but treats the rule given by 32 Hen. VIII. c. 38, as that which settled the law. The concluding paragraph of the chapter warrants an inference that Lord Coke did not consider that marriage after fornication with kin of the wife was contrary to God's law, unless it could be considered to be within the Levitical degrees. It is in these words:—"There be also other divorces which declare the marriage to be void, as a divorce causâ frigiditatis, where the party hath perpe-**[295]**-tuam impotentiam generationis, and causâ metus, sive duritiæ, also causâ impubertatis. These marriages are said to be prohibited by God's law, otherwise the statute of 32 Hen. VIII. would extend unto them;" and here he does not include in his enumeration such cases as that now before the Court.

This statute was repealed as to precontracts by the 2 & 3 Edw. VI. c. 23, but in all other respects confirmed. By the 1 Mary, sess. 2, c. 1, the 25 Hen. VIII. c. 22, was again repealed, together with so much of 28 Hen. VIII. c. 7, as affected the Queen's legitimacy. By the 1 & 2 Phil. & M. c. 8, the whole of the statute 28 Hen. VIII. c. 16, and all that part of the statute 28 Hen. VIII. c. 7, that concerneth a prohibition to marry within the degrees expressed in the said Act, and the 32 Hen. VIII. c. 38, were repealed. The statute 1 Eliz. c. 1, repealed the statute 1 & 2 Phil. & M. c. 8, and that of itself would have revived all statutes repealed by the latter, but it proceeds in express terms to revive certain statutes; and amongst others the statute 23 Hen. VIII. c. 16, and so much of the 32 Hen. VIII. c. 38, as was not repealed by the statute 2 & 3 Edw. VI. c. 23. Section 13 then follows in these terms:—"Be it further enacted, that all other laws and statutes and the branches and clauses of any Act or statute repealed and made void by the said Act of Repeal, made in the time of the said King Philip and Queen Mary, and not in this present Act specially mentioned and revived, shall stand and remain and be repealed and void in such like manner and form as they were before the making of this Act, anything herein contained to the contrary notwithstanding."

In *Hill* v. *Good*, Vaughan, 325, Vaughan, C.J., gave it as his opinion that notwithstanding this clause, the 28 Hen. VIII. c. 7, was revived by the revival of the 28 Hen. VIII. c. 16, although not specially mentioned, because the latter statute made void all marriages declared to be so by the 28 Hen. VIII. c. 7. But I do not find in 28 Hen. VIII. c. 16, any such en-**[296]**-actment. It saves from all question marriages solemnized before a certain day, and not prohibited by the 28 Hen. VIII. c. 7, but does not declare any to be void. Vaughan, C.J., further expresses an opinion that sections 9 & 10 of the 28 Hen. VIII. c. 7, were not repealed by the 1 & 2 Phil. & M. c. 8; but in Gibson's Codex, 496, that opinion is controverted, and we think with success.

Again, in Com. Dig. Parl. (R. 9 *a*), there is this passage: "So an Act which repeals a statute by which another was repealed will be a revivor of the statute which was repealed. So though the words are that no statute not expressly mentioned

[1] In the margin of "an exposition," Second Instit. p. 683, edit. 1797, are the words,—"See those degrees truly set down in the statute 25 Hen. VIII. c. 22 and 28 Hen. VIII. c. 7."

shall be revived, if thereby another statute is revived which mentions it to be in force, as the statute 21 Hen. VIII. c. 13, of pluralities, being mentioned to be in force by the statute 25 Hen. VIII. c. 21, which was revived by the statute of 1 Eliz. c. 1, though it says that no statute repealed by the 1 & 2 Phil. & Mary, c. 2, shall be in force if it be not specially revived." If the learned author of that Digest had considered that the statute 28 Hen. VIII. s. 3, c. 7, was also revived in the same manner by the statute of 1 Eliz. c. 1, by the revival of the 28 Hen. VIII. c. 16, he would probably have mentioned it. Moreover the statute 28 Hen. VIII. c. 16, refers to the statute of the same session, merely for the purpose of explaining what marriages are to be protected against all impeachment; but the statute 25 Hen. VIII. c. 21, has this clause respecting the prior statute 21 Hen. VIII. c. 13:—"Provided also, that this present Act, or anything therein contained, or any license or dispensation hereafter to be made by virtue or authority thereof, shall not extend to the repeal or derogation of the late Act 21 Hen. VIII. c. 13, made the beginning of this present Parliament for reformation of pluralities of benefices, and for non-residences of spiritual persons upon their dignities or benefices, nor to anything contained or mentioned in the said Act, nor that this Act nor anything to be done **[297]** by authority thereof, shall not be taken, expounded, or interpreted to give license to any person or persons to have any more number of benefices than is limited in the said Act, and that the same Act for pluralities and non-residences of benefices, and everything therein contained, shall stand good and effectual in all intents, according to the true meaning thereof, anything in this present Act, or any license or dispensation to be had by authority thereof, to the contrary notwithstanding." And this statute, together with some others, is revived by the 1 Eliz. c. 1, in these terms, that the Act specified, "and all and every branches, words, and sentences in the said several Acts and statutes contained by the authority of this present Parliament, from and at all times after the last day of this session of Parliament, shall be revived and stand and be in full force and strength to all intents, constructions, and purposes." By these words the whole statute was revived, and the 21st section was restored to full force, and that provided that the 21 Hen. VIII. c. 13, should stand good and effectual to all intents. The 28 Hen. VIII. c. 16, contains no such enactment with reference to the statute 28 Hen. VIII. c. 7. Again if the statute of 28 Hen. VIII. c. 7, is revived, there is nothing to limit that revival to any particular part; but it is impossible to suppose that it was intended to revive the whole, for it made it treason to say that the marriage of Hen. VIII. with the Lady Anne was valid, or that the Lady Elizabeth was legitimate.

This examination of the statutes has led us to the conclusion that the 28 Hen. VIII. c. 7, was repealed and has not been revived, and that the 32 Hen. VIII. c. 38, gives the rule by which we are to judge whether parties may lawfully marry or not; and that rule is,—"That all persons be lawful that be not prohibited by God's law to marry; and that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees." The prohibitions described in the 18th chapter of Leviticus seem **[298]** to us to assume that marriage is necessary to create the degree of affinity which makes a subsequent marriage unlawful on the ground of affinity; and Lord Coke, in his commentary on this statute, 32 Hen. VIII. c. 8, sets out a table of the prohibited degrees, and according to that table marriage is necessary to create the affinity which causes a second marriage to be prohibited. If the marriage in question is not within the Levitical degrees, is it otherwise contrary to God's law? No trace of any decision to that effect is to be found in our law-books, except the old record of *Alice Stircheley's Case* in the reign of Edward I., when "many divorces were in force by the canon law which were not in force when Lord Coke wrote."

In *Mrs. Addison's Case*, M'Queen's Practice of the House of Lords, 477, 594, Lord Thurlow, in supporting the bill for divorce, relied on the principle that by the affinity incident to the husband's criminal conversation with his wife's sister, he was in like manner barred intercourse with her relatives standing within the forbidden degrees of that affinity; but he did not support the proposition by any reference to statutes or decisions. Lords Eldon and Rosslyn said that Lord Thurlow had placed the case in a new light, and voted for the bill without expressly assenting to or dissenting from what Lord Thurlow had said; that case therefore can hardly be considered as an authority on the subject.

If the statute 28 Hen. VIII. c. 7, had been considered to be revived, or if the

statute 32 Hen. VIII. c. 38, had been capable of receiving the construction now contended for, it can hardly be doubted that some suits for nullity of marriage on such a ground would have been instituted long ago. The absence of any such case is in our judgment strong evidence of what has been the general opinion as to the state of the law on that subject, and we think that opinion sound. But even supposing the question to be doubtful, we should not think ourselves justified in putting for the first time upon **[299]** a statute passed above three centuries ago, such a construction as would expose marriages to the peril of impeachment upon allegations the falsehood of which it would be difficult to prove, and so render uncertain the status of many persons supposing themselves to have been lawfully married, and rendering the issue of such marriages liable to be bastardized upon an objection which at the time of marriage might be wholly unknown to either of the parents.

Demurrer allowed.

(Before the *Judge Ordinary*, on Motion.)

LATHAM *v.* LATHAM AND GETHIN. April 24, 1861.—Decree Nisi for Dissolution.—Alimony pendente lite.—To what period due.—A decree nisi for dissolution of marriage, if not appealed from, puts an end to the lis between the parties. Alimony pendente lite will not therefore be due after the date of the decree nisi; but where the husband moved to have the decree made absolute, he being resident in India, and it appeared that a sum of money was due to the wife on account of alimony pendente lite, the Court refused to make the decree absolute.

[S. C. 30 L. J. (Mat.) 163; 4 L. T. 308; 7 Jur. (N. S.) 219; 9 W. R. 680. Discussed, *Ousey* v. *Ousey*, 1875, 1 P. D. 60. Overruled, *Ellis* v. *Ellis*, 1883, 8 P. D. 189. Referred to, *Lewis* v. *Lewis*, [1892] P. 215.]

In this case a decree nisi for dissolution of marriage at the petition of the husband had been made, and the three months having elapsed,

Mr. Robert Pritchard now moved the Court on the usual affidavits to make the decree absolute.

Dr. Swabey: In this case a decree for alimony pendente lite was made, and a certain amount is now due. Mr. Latham **[300]** has been resident in India for some time, and there is no prospect of his return; if the Court makes the decree absolute, the woman will be without remedy for what is due to her under the order of the Court. This application does not depend upon the power of shewing cause against the decree nisi given by the 23 & 24 Vict. c. 144, s. 7, but upon the fact, that Mr. Latham is asking for a decree of dissolution, without having obeyed an order of the Court, made in the progress of the suit.

*Judge Ordinary*: I think what is due, under the order for alimony pendente lite, must be paid before the decree is made absolute. There may be a question as to the period up to which it is due. As I am of opinion that the respondent cannot, under the 23 & 24 Vict. c. 144, s. 7, shew cause against making a decree nisi absolute, in other words, that the lis between the parties is at an end when the decree nisi is made, it follows that the alimony, being in terms pendente lite, must cease when the decree nisi is made. Up to that date it should be paid, and I shall not make the decree in this case absolute at present.

**[301]** (Before the *Judge Ordinary*, on Motion.)

JESSOP *v.* JESSOP. May 1 and 8, 1861.—Petition for Dissolution at suit of Wife.—Negative Answer of Husband.—Intervention of Queen's Proctor.—Plea of Collusion.—Practice.—Where the Queen's Proctor obtains the leave of the Court to intervene, and pleads collusion between the petitioner and respondent, such plea is a good plea; but the petitioner is entitled to be acquainted with the character of the collusion intended to be charged, by way of specification or particulars.

[S. C. 30 L. J. (Mat.) 193; 4 L. T. 308; 7 Jur. (N. S.) 609; 9 W. R. 640. Explained, *Churchward* v. *Churchward*, [1895] P. 28.]

Dr. Phillimore, Q.C., moved the Court under the following circumstances:—This is a petition by the wife for dissolution of marriage, on the ground of the husband's adultery, cruelty, and desertion. The husband appeared and filed an answer, denying these charges; and the Court directed the cause to be heard by oral evidence; it stands No. 117 in the present printed list. The Queen's Proctor has obtained the leave of the Court to intervene under the direction of the Attorney-General. The 23

& 24 Vict. c. 144, s. 7, directs that "at any time during the progress of the cause, or before the decree is made absolute, any person may give information to her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or expedient; and if, from any such information or otherwise, the said Proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the Attorney-General, and by leave of the Court, intervene in the suit, alleging such case of collusion, and retain counsel and subpœna witnesses to prove it." In the present case the plea of the Queen's Proctor is simply that the petitioner and respondent are acting in collusion. **[302]** My motion on behalf of the petitioner is, that the plea be amended by stating the nature of the case. The words of the section seem to contemplate some particulars; and, considering the wide powers given to the Queen's Proctor, it may be necessary, in order that the Act should not become oppressive and unjust to suitors, that some such rule should be observed.

The Attorney-General (Sir R. Bethell) contrà: If I am called upon to define the facts which I am about to prove, I should rely upon the ordinary rule that evidence ought not to be pleaded; but, looking at the object of the statute, it would probably be defeated if the motion were to be complied with. As to injustice to suitors, it is submitted that the ordinary rules of proceeding, as between party and party, do not apply when the Legislature has entrusted certain powers to the Queen's Proctor, a public officer, to be exercised for the public interest, and not at his own discretion merely, but under the direction of the Attorney-General, and with the permission of this Court.

By the Court: The latter can hardly be considered an additional safeguard; for in accordance with the practice of other courts in analogous matters, I should certainly hold it sufficient if the authority of the Attorney-General were alleged, and should give leave as a matter of course.

May 8.—Dr. Phillimore in reply.

*The Judge Ordinary*: With reference to amending the plea, by stating evidence or the facts on which the collusion is supposed to be founded, it is quite out of question. As to oppression, I think the Legislature has guarded against that by putting it in the hands of a public officer. My difficulty is this: collusion is not, like condonation, a well understood term; it may be by keeping back evidence of what **[303]** would be a good answer, or by agreeing to set up a false case. I am in doubt whether the nature of the collusion ought not to be stated in general terms. I will take time to consider, for it is a matter of some importance. Cur. adv. vult.

May 8.—*The Judge Ordinary*: In this case I think it is by no means necessary to state the facts that are intended to be proved; but the character of the collusion pleaded should be given as by way of particulars; whether, for instance, it is meant that a sham case has been set up, or that the parties are acting in concert to prove a real one. I reject the application to amend the plea; the petitioner can then come before me on summons, and ask for specification.

(Before the *Judge Ordinary*, on Demurrer.)

BURROUGHS *v.* BURROUGHS. May 15, 1861.—Wife's Suit for Restitution.—Plea, reasonable suspicion of Adultery.—Demurrer.—Nothing can be pleaded in bar to a petition for restitution of conjugal rights but what would entitle the respondent to a sentence of judicial separation.

[S. C. 30 L. J. (Mat.) 186; 4 L. T. 274; 7 Jur. (N. S.) 610; 9 W. R. 680. Referred to, *Russell* v. *Russell*, [1895] P. 332; [1897] A. C. 399.]

This was a question arising on a plea in answer to a suit for restitution of conjugal rights, brought by the wife. The husband's answer alleged a reasonable cause of separation, "by reason, first, that the said A. M. F. B. has given the respondent just cause for a strong and reasonable suspicion that she has been guilty of adultery, inasmuch as she has, on divers occasions throughout the year 1860, against the wish and in spite of the remonstrance of the respondent, clandestinely taken **[304]** walks with, and received visits from a person named B. S., at her own house at S., in the county of ——, notwithstanding that she well knew that by reason of scandalous reports respecting her and the said B. S., the respondent had forbidden him to enter his house, or to speak to the said A. M. F. B."

The answer contained other pleas, alleging acts of adultery, and prayed to reject the prayer of the petitioner, and further to decree that the respondent may be judicially separated from the said petitioner.

Demurrer to the first plea, on the ground that a strong and reasonable suspicion of guilt of adultery is no bar to the decree of restitution of conjugal rights prayed in the petition.

Joinder in demurrer.

Dr. Swabey in support of demurrer. It will hardly be contended that a suspicion of adultery is sufficient to found a decree of judicial separation; but the prayer of the answer is twofold, and it will be said that the plea is sufficient to support the first branch of the prayer, namely, to dismiss the petition, though not ground for the further decree. It is submitted however that the real principle is, that nothing can be pleaded in bar to a suit for restitution but what would entitle the respondent to a judicial separation, or under the old system to a divorce à mensâ et thoro; for in such suits as these the 22nd section of the Divorce Act requires the Court to act as far as may be on the principles of the Ecclesiastical Courts. The principle was clearly established in the last century, *Baber* v. *Baber*, MS. note, Arches, A.D. 1727:—"B. calls on her husband in a cause of restitution of conjugal rights; the husband refused to take her home, and offered an allegation wherein, among other things, frowardness of temper, etc., he pleaded an elopement and discreditable way of living, and that they had for some time lived separately by agreement; that she had run very much in debt, which, if he took her **[305]** home again, he would be obliged to pay. The Chancellor of London rejected this allegation, and the Dean of the same opinion, because no act was laid for which the Court could separate." To the same effect is the case of *Holmes* v. *Holmes*, 2 Lee, 116, in which Sir George Lee's sentence was confirmed, on appeal, by the delegates. All cases since that date in which the principle has been discussed or referred to, when examined, shew that it has never been departed from in the final decision of any suit. In some cases, as in *Mortimer* v. *Mortimer*, 2 Consist. 310, the remarks of the learned judges may be explained by reference to the rules of evidence in those courts, by which they were forbid to pronounce a sentence on the uncorroborated evidence of a single witness (see *Evans* v. *Evans*, 3 N. C. 416), or to act on the uncorroborated confession of a defendant, however clear and undoubted (1 Card. Syn. 224, 307); in other words, judges have intimated that they might take into consideration an answer proved by such evidence, though the rule of law would hinder their acting on the allegations of a plaintiff so proved; but they have never said that the facts admissible in answer might be other than those on which, if proved by legal evidence, a positive sentence might have been founded. The admission of the allegation in *Molony* v. *Molony*, 2 Add. 249, led to no decision on the point of law. *Westmeath* v. *Westmeath*, 2 Hagg. 57, Sup.; *Dysart* v. *Dysart*, 3 N. C. 369; *Simmons* v. *Simmons*, 5 N. C. 330; *Moore* v. *Moore*, 3 Moore's P. C., were also cited.

It cannot be said that the legal principle is altered, because its application is enlarged by the fact that desertion for two years and upwards is by the statute a new ground for judicial separation, and as such might, it is presumed, be pleaded in bar to a suit for restitution. If the Court however feels that it has a discretion in the matter, it will consider the effect of putting an issue on such a plea before a jury, and the uncertainty it would introduce into the whole law relating to the matter.

**[306]** Dr. Spinks, in support of the plea: It must be admitted that a series of dicta on the effect of the principle contended for on the other side, are to be found in the reports of the Ecclesiastical Courts; but this Court is not bound by expressions found in cases. For instance, desertion would now be a good answer; and in *Mortimer* v. *Mortimer*, Lord Stowell certainly seems to have supposed that less might be sufficient as an answer than what would be required to found a positive decree. Great hardship may result if the principle is strictly maintained.

*The Judge Ordinary*: I think it would be very dangerous to introduce a new rule; the general maxim enunciated is very properly admitted by Dr. Spinks, and I think he has brought forward no sufficient grounds for departing from it. The demurrer must be allowed.

Demurrer allowed.

(Before the *Judge Ordinary.*)

COX *v.* COX. May 30, 1861.—Decree Nisi for Dissolution.—Cause shewn by Attorney-General.—Conduct of Suit.—Practice.—On motion to make decree nisi absolute,

the Attorney-General obtained leave to shew cause, on the ground that it had just come to the Queen's Proctor's knowledge that the business of the petitioner's suit had been chiefly conducted by the managing clerk of the attorney who had entered an appearance on behalf of respondent. Subsequently, on affidavits filed in explanation of the circumstances, the Court made the decree absolute, and made no order as to the Queen's Proctor's costs.

[S. C. 30 L. J. (Mat.) 255; 4 L. T. 450; 9 W. R. 924.]

Quære, right of respondent under such circumstances to be heard.

This was a petition for dissolution of marriage at the suit **[307]** of the wife, by reason of the husband's adultery and desertion. An appearance was entered on his behalf, but no answer, and the petition came on for proof, and a decree nisi was made on the 21st of January, 1861; on the 1st of May counsel for the petitioner moved to make the decree absolute, when the Attorney-General obtained leave to shew cause against the decree being made absolute, on the ground that it had come to the knowledge of the Queen's Proctor on the previous day that the proceedings on the part of the petitioner had been in fact conducted by the managing clerk of the attorney who had entered the appearance for the husband; no such person as Horatio Nelson Powell, the name on the record of the petitioner's attorney, being now to be found in Gray's Inn Square, where from the indorsement on the papers his office purported to be. Leave to shew cause was granted, and cause was now shewn against the decree being made absolute by Mr. Phipson, on behalf of the Attorney-General, on an affidavit sworn by the Queen's Proctor.

On the case being called,

*The Judge Ordinary* said:—According to the 21st rule (of the 22nd of November, 1860) a time should have been appointed for argument on the affidavits, but if all the parties are represented I am prepared to hear it.

The affidavit of the Queen's Proctor stated in substance that the petition was filed on the 9th of September, 1859, on behalf of Elizabeth Cox, of Warley Common, in the county of Essex, for the dissolution of her marriage with George Cox, in Sydney, N.S.W., and that the præcipe for citation was filed on the same day in the name of Horatio Nelson Powell, of 9 Gray's Inn Square; that respondent was then and since had remained at Sydney; that on the 11th of September, 1859, the citation issued, and was returned on the 31st of May, 1860, with a certificate of personal service on Cox, at **[308]** King Street, Sydney, on the 23rd of December, 1859, but that on the 10th of January, 1860, an appearance was entered for the respondent by Messrs. Pawle, Belfrage, and Asprey, of 7 New Inn, Strand, a date at which they did not and could not know that the citation had been served; that on the 10th of January, 1860, Charles Birch Crisp, who was then a clerk of the said Messrs. Pawle and Co., and acting as such at their office in New Inn, made an affidavit describing himself as of his private residence, and giving the addition of gentleman, to found an order for the examination, on behalf of the petitioner, of a necessary witness, who was then staying in Aldersgate Street, and was about to leave for Melbourne; that an order was obtained on the said affidavit, and the witness examined by Mr. Bushby for the petitioner, and cross-examined by Mr. Belfrage of the said firm on behalf of the respondent; that Charles Birch Crisp had almost throughout the suit conducted the proceedings on behalf of the petitioners, by attendances in the registry to obtain information as to the course of proceedings, and to file papers on behalf of the petitioner, he being all that time clerk of the respondent's attorneys; that Horatio Nelson Powell left this country in the autumn of 1860 for Australia.

In support of the decree nisi being made absolute, affidavits had been filed by Mrs. Cox, Mr. Pawle, Mr. Crisp, and Mr. Lovesy.

From these affidavits it appeared that Mr. Pawle had acted as the solicitor of Mr. Cox before he left England, and was intimate with both parties; that by his advice Mrs. Cox accompanied her husband to Australia in spite of previous misconduct on his part; that in May, 1857, in Australia, she obtained counsel's opinion at Melbourne with respect to the petition, and in consequence of that left for England, previously giving her husband notice in writing (as advised by counsel) of her intention of petitioning; that on her arrival in England she went to Mr. Pawle, who advised her to em-**[309]**-ploy Mr. Powell, of Gray's Inn; that Mr. Pawle received a letter from Cox in October, 1859, authorizing him to appear to the petition, but not instructing him to oppose it (this accounted for the appearance being entered before it could be

known that the citation was served); that Powell was a friend of Mr. Pawle's, new to London practice, and was in the habit of consulting Mr. Crisp, the latter's managing clerk, in the conduct of his business; that on Powell leaving the country for Australia, his business and all his papers were transferred to Messrs. Pawle and Co., who directed Crisp to place the petitioner's papers in the hands of Mr. Lovesy, who had not thought it necessary, as the case was ready for hearing when transferred to him, to alter the solicitor's name on the record.

On this state of facts, Mr. Phipson submitted that there was abundant ground for the intervention of the Queen's Proctor, and left the matter in the hands of the Court.

Dr. Deane, Q.C. (Mr. Bushby with him), for the petitioner.

Dr. Phillimore, Q.C., for the respondent.

By the Court: I have already intimated that it is not a case of collusion, and I am not sure what right you have to be heard.

Dr. Phillimore: As to costs, I apprehend. Under 23 & 24 Vict. c. 144, s. 7, the Court has the power to order the costs of the Queen's Proctor's intervention to be paid by the parties, or such of them as it shall see fit; and by the 15th rule (the 11th of January, 1860), a respondent having entered an appearance may be heard in respect, among other things, of any questions as to costs of suit.

**[310]** *The Judge Ordinary*: I am not at all surprised that the Attorney-General intervened; the mode in which the suit was conducted was likely to excite suspicion. I think the attorney's clerk was not justified in describing himself as he did in the affidavit; because no doubt the object was to conceal from the Court and its officers that he was acting on both sides. There seems, however, no ground of complaint against Mrs. Cox, and I do not think that Mr. Cox has acted irregularly in the matter. There is no ground for condemning him in the costs of the intervention. The Queen's Proctor's costs will therefore be costs of his office, and I make the decree for dissolution absolute.

(Before the *Judge Ordinary.*)

MILLS *v.* MILLS. POLLACK *v.* POLLACK AND DEANE AND M'NAMARA. June 4 and 7, 1861.—Evidence of Witnesses resident abroad taken under Commission.—Proof of Absence from Jurisdiction.—Practice.—Proof to satisfy the Court that a witness whose evidence has been taken abroad under a commission is out of the jurisdiction when the evidence is tendered, may be less stringent when the witness is resident abroad, than when the evidence has been taken of a witness going out of the jurisdiction for a temporary purpose; and where the affidavit to found the order for the commission had stated that the object was to examine A. B. resident abroad, and the summons was served on the co-respondents, the Court—Held, that the presumption was that the witness continued abroad, unless the contrary were shewn, and allowed the evidence to be used.

[S. C. 30 L. J. (Mat.) 184; 4 L. T. 479.]

Dr. Phillimore, Q.C., and Mr. Mundell, for Mrs. Mills, the petitioner, the husband not appearing, tendered evidence of **[311]** witnesses taken under commission. The 20 & 21 Vict. c. 85, s. 47, gives the Divorce Court the same power in respect of issuing commissions, etc., for examination of witnesses as the statutes 13 Geo. III. c. 63, and 1 Will. IV. c. 22, give the courts of common law. By sect. 10 of the latter Act no examination or deposition to be taken by virtue of this Act shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge that the examinant or deponent is beyond the jurisdiction of the Court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial.

*The Judge Ordinary*: I have always understood the practice to be, that when the evidence of persons permanently residing abroad has been taken under commission, but slight proof of their continuance abroad is required. The presumption rather is, that their residence abroad continues. It is different when a person about to go abroad for a temporary purpose is examined under commission or on account of illness. Then clear proof of the absence from the jurisdiction or of the continuance of the illness is required.

Dr. Swabey for the petitioner Mr. Pollack.

Mr. Merewether and Mr. O'Dowd for the co-respondent Deane.

Counsel for the petitioner tendered evidence of a witness taken under commission at Königsberg, in Prussia, and called a clerk of solicitor for petitioner, who produced a letter received by post with the Königsberg post-mark, and some date in May, 1861, purporting to be written to the solicitor by the witness. The clerk said he had inspected the signature of the witness to the deposition, and it appeared to be the same.

[312] *The Judge Ordinary*: He does not know the handwriting. It carries the matter no further. Parties should come better prepared on such points. I have been looking at the papers filed in this case, and I find that the affidavit on which the order for a commission was made states that the object of the commission was to examine a witness resident abroad, and the summons to attend on the application for the commission was served on the solicitors for both co-respondents. As they did not deny that the witness was then resident abroad, I must take it that she was so resident, and the presumption is, that she remains abroad till the contrary is shewn. I think this is sufficient to let in the evidence.

[313] JOHNSON *v.* WELDY.—April 24, 1861.—Practice.—Affidavit of Service on a Minor.—Guardian.—An affidavit that a minor was served with a citation in the presence of A., his guardian, should go on to shew how A. became his guardian.

[S. C. 30 L. (P.) 170; 5 L. T. 118.]

Dr. Spinks moved that administration of the effects of —— Weldy, deceased, should be granted to a creditor. The deceased died intestate, leaving a widow and one son, a minor. The widow had been personally served, and so had the son, W. H. Weldy, in the presence of Ann Hyde, his guardian. No appearance had been entered.

*Sir C. Cresswell*: The affidavit of service is insufficient: it states that the minor was served with the citation in the presence of Ann Hyde, his guardian; but it does not shew how she became his guardian. It must be amended so as to shew to the satisfaction of the Registrar how she became guardian. When that has been done the grant may issue.

[314] IN THE GOODS OF HENRY HART COLEMAN (deceased).—April 24 and 27, 1861.—Probate.—Erasure.—Where the name of one of the attesting witnesses to a will was written on an erasure, but it appeared that the will had been duly executed and attested, and that subsequently the attesting witness's name had been erased by the testator, and had at his request been re-written by the attesting witness, the Court, on motion, granted probate to the widow on affidavit that she and two infant children were the only persons entitled in distribution, and that notice had been given to the children.

[S. C. 30 L. J. (P.) 170; 5 L. T. 119.]

Henry Hart Coleman died, leaving a will, dated the 17th of August, 1854, whereof he appointed his wife sole executrix.

The two attesting witnesses proved the due execution of the will; part of the signature and address of one of the attesting witnesses appeared to have been written on an erasure; that witness, who, with the other, deposed to the due execution of the will, stated that he was accustomed to wear spectacles, but that he was without them when he attested the will; that a day or two afterwards he saw the testator, who told him that he had written his name and address very badly, and that he was ashamed of it; that the testator then scratched out part of his name and address, and told him to re-write it, and that he accordingly did so in the testator's presence.

Dr. Spinks now moved that probate of the will should be granted to the widow of the deceased. The will having been duly executed, is not invalidated by what was subsequently done (*Playne* v. *Scriven*, 7 N. C. 122). In that case the will was duly executed, but the name of one of the subscribed witnesses, a legatee under the will, was afterwards struck out to preserve her legacy; and a second, but imperfect, execution then took place. The will was held good on the first execution, as the subsequent erasure was without intention to revoke.

[315] *Sir C. Cresswell*: I doubt whether I ought not to give the next of kin and parties entitled in distribution an opportunity of contesting the will, if they think fit. In *Playne* v. *Scriven* the name of the attesting witnesses was struck through, but remained visible. In this case the testator erased it. If the signature had been cut off or the will burnt, it would have operated as a revocation. I think I ought not

to grant probate, unless the persons who would be entitled in case of an intestacy have notice of the application.

Dr. Spinks: The widow who applies for probate and her infant children are the only persons entitled in distribution.

*Sir C. Cresswell*: I must have an affidavit of that before I grant probate.

April 27.—Dr. Spinks renewed the motion on an affidavit that the widow and her two infant children were the only persons entitled in distribution, and that notice of the motion had been given to the next of kin (the two children).

*Sir C. Cresswell* granted probate.

IN THE GOODS OF SOLOMON MENDES DA SILVA (deceased). July 11, 1861.—Probate.—Conditional Codicil.—A codicil expressed to take effect only upon an event which does not happen, republishes a will to which it refers by date, and is on that ground entitled to probate.

[S. C. 30 L. J. (P.) 171; 5 L. T. 140. Approved, *In the Goods of Hugo*, 1877, 2 P. D. 74.]

The deceased in this case died, leaving a will bearing date the 18th of May, 1861, and a codicil dated the 23rd of May, 1861, expressed as follows:—"This is a codicil to the last will and testament of me, Solomon Mendes da Silva, formerly of **[316]** Jamaica, but now of Cheltenham, in the county of Gloucester, which will bears date May 18, 1861: Now I make this codicil to take effect only in case I survive my dear wife, Sarah Mendes da Silva, but not otherwise; therefore, in case I survive my dear wife, I give and bequeath," etc. The deceased died in the lifetime of his wife.

Dr. Spinks now moved for probate of the will and codicil to be granted to the executors named in the will. In the Registry the objection had been made that probate of the codicil could not be granted, as it was contingent upon the deceased surviving his wife, an event which had not happened.

*Sir C. Cresswell*: I think that the executors are entitled to probate of the codicil, as well as of the will; for although the codicil is conditional, it would, I imagine, have the effect of republishing the will, or of making the will valid, if it had not been duly executed.

I think, therefore, that probate should be granted.

Probate granted.

(NOTE.—But see Lord Hardwicke's remarks in *Parsons* v. *Lanoe*, 1 Ves., sen., 190.)

IN THE GOODS OF HUGH STACPOOLE (deceased). July 24, 1861.—Administration Bond.—Amount of Penalty.—20 and 21 Vict. c. 77, s. 82.—Where letters of administration were granted merely to enable a personal representative of the deceased to execute a formal release to the trustee under a marriage-settlement, the Court allowed the property to be sworn under £20.

[S. C. 30 L. J. (P.) 191; 5 L. T. 140.]

Hugh Stacpoole died in 1840. Upon his marriage a set-**[317]**-tlement was made of two sums of £10,411. 4s. 2d. and £1,400, the interest to be paid to his wife for life, and at her death the principal to be divided among the children of the marriage, and in default of children to go to such persons as the husband should by deed or will appoint. There were no children of the marriage. Hugh Stacpoole made his will in 1838, leaving various legacies of his own property, and appointing the trust property to a great many parties. He appointed William Henry Stacpoole, George Westropp, and Michael Stacpoole, his executors. They proved the will, paid the debts, and distributed all the property. They then died at various intervals, each leaving a will, which was proved in Ireland but not in England, their respective representatives being Emma Westropp, Jane Stacpoole, and Charlotte Harrison (formerly Charlotte Stacpoole).

The testator's widow died in 1859, and the surviving trustee under the settlement was willing to distribute the moneys standing in his name among the numerous appointees under the will; but was advised he could not do so safely without having a discharge from the representative of the testator.

Mr. Geary moved for letters of administration with the will annexed of the unadministered property of the deceased to be granted to Octavius O'Brian, an assignee of one of the appointees under the will, for the purpose of giving the trustee such discharge; and as the representative so appointed would not touch the money,

he moved under the 82nd section of the Act, that the Court would direct the administration bond to be for a nominal sum, citing *Re Gent*, 1 Swab. & Trist. 54.

*Sir C. Cresswell*: I think the property may be sworn at a nominal sum. The interest of the personal representative, as he will not touch the money, is surely nominal. Let him swear that the property to be administered is under £20, and that will obviate any difficulty.

[318] IN THE GOODS OF CHARLES WHISTON (deceased).—April 24, 1861.—Administration.—Practice.—Isle of Man grant.—In the Isle of Man, officers called "Sumners" are appointed in each parish by the Bishop of the diocese, whose duty it is (inter alia) to take upon themselves grants of administration, with the wills annexed, in the event of executors refusing to act, or being unable to give security to the Ecclesiastical Court of the diocese.—A. died in the Isle of Man, leaving a will, whereof he appointed executors.—The executors being unable to give security to the Ecclesiastical Court of the diocese, administration with the will annexed was then granted to B., Sumner for the parish in which A. died.—The executors having been cited and not appearing, the Court, upon an affidavit as to the circumstances under which the grant was made to B., and upon B.'s consent being filed in the Registry, granted administration with the will annexed to the residuary legatee.

[S. C. nomine *M'Cubbon* v. *Steele*, 50 L. J. (P.) 192; 5 L. T. 140.]

Charles Whiston, late of Douglas, in the Isle of Man, died on the 26th of March, 1860, leaving a will, bearing date the 4th of March, 1860, whereof he appointed John Steele and Edward Cain (the defendants) executors, and Sarah Cubbon (the plaintiff) residuary legatee. On the 20th of April, 1860, letters of administration, with the will annexed, were granted by the Archidiaconal Court of the Isle and diocese of Sodor and Man, to John Moore, Sumner of the deceased's parish, the executors not being prepared with pledges as required by the said Court. An official copy of the said letters of administration, under the hand and seal of the Archdeacon of the Isle of Man and diocese of Sodor and Man had been brought into the Registry. A citation had been issued by Sarah Cubbon, and served upon the executors, calling upon them to accept or refuse probate, or shew cause why letters of administration, with the will annexed, should not be granted to her. The executors had not appeared.

Dr. Spinks moved that letters of administration, with the said will annexed, of the personal estate and effects of the said [319] deceased should be granted to Sarah Cubbon, as residuary legatee.

*Sir C. Cresswell* directed that the motion should stand over in order that some explanation should be given as to the rights of the person to whom the Isle of Man grant was made, and that notice of the application by Sarah Cubbon should be given him.

July 24—Dr. Spinks now renewed the motion upon an affidavit of Samuel Harris, as to the rights of John Moore, under the Isle of Man grant, and upon John Moore's consent, that the grant should be made to Sarah Cubbon, having been filed in the Registry. The affidavit of Samuel Harris stated that he was Sumner-General for the diocese of Sodor and Man, and that he was appointed by the Bishop of the diocese; that he had a Sumner in every parish in the island, who acted as his deputies in their respective parishes, and that John Moore was his deputy for the parish of Braddon, in which parish the town of Douglas is situate; that it was his duty and the duty of the deputies to take upon themselves all disputed grants of administration of descendants' estates in the island, and also of administrations with the wills annexed, in the event of executors refusing to act, or neglecting or being unable to give security to the Ecclesiastical Court of the Diocese, or until the next of kin or parties beneficially interested in descendants' estates came forward to take out administration or take probate; that the executors named in the will of the said C. Whiston, deceased, not being prepared with pledges as required by the Ecclesiastical Court, administration with the will annexed was, at an Ecclesiastical Court holden in Douglas, granted to John Moore, in his capacity of Sumner of Braddon.

*Sir C. Cresswell* granted the motion.

Motion granted.

**[320]** (Before *Sir C. Cresswell* without a Jury.)

STAINES *v.* STEWART AND JONES.—November 6 & 7 and December 3, 1861.—Revocation of Will.—Evidence of Declarations of Deceased after alleged Act of Revocation.—Death of Plaintiff after Cause heard and before Judgment.—Practice.—Direct evidence of an act of revocation by the testator.—Moral character of the witnesses.—Inconsistency and improbability of their story. Defecit probatio.—On an issue as to the revocation of a duly executed will, evidence of declarations of the deceased (to the effect that he had made a will, but had destroyed it) subsequent to the date of the alleged revocation, was held to be inadmissible, as falling within the principle laid down in *Doe* v. *Palmer*, 16 Q. B. 747.—The plaintiff dying after the case had been argued before the Court but before judgment, the Court suspended its judgment till a personal representative of the plaintiff made himself a party to the record.

[S. C. 31 L. J. (P.) 10; 5 L. T. 457; 8 Jur. (N. S.) 440.]

This was a question as to the revocation of a will which was admitted to have been duly executed by M. W. Staines, the father of the plaintiff, on the 7th of October, 1858. The plaintiff, the only child of the deceased, had cited Messrs. Stewart and Jones, the executors named in the will, to propound the paper writing brought into the registry, and alleged by the plaintiff to have been revoked by the deceased, if they should think fit so to do. The case was heard before Sir C. Cresswell without a jury.

Dr. Deane, Q.C., Dr. Spinks, and Mr. Macnamara for the plaintiff.

Dr. Phillimore, Q.C., and Dr. Swabey for the defendants.

Evidence was given, as more fully stated in the judgment, of the cutting and tearing of the will by the deceased in August, 1860. In the following November he was in lodgings in Bristol, where he died under an assumed name on the **[321]** 16th of December, 1860. The lodging-house-keeper was produced as a witness on behalf of the plaintiff, and deposed that in a conversation which she had with deceased, the latter had stated that he had made a will, but had destroyed it.

Dr. Phillimore objected that this evidence of declarations of the deceased after the date of the alleged revocation was inadmissible. He relied on the principle laid down in *Doe dem. Shallcross* v. *Palmer*, 16 Q. B. 747, as applicable to the circumstances of the present case. On the whole case, he contended that the character of witnesses who deposed to the act of revocation, the inconsistencies of other points of their evidence with the facts of the case, and the improbability of their story, were such that the Court could not safely act on their uncorroborated testimony.

Dr. Deane, contrà.

Cur. adv. vult. as to the admissibility of this evidence and the whole case.

The evidence of Mr. Stewart, referred to in the judgment, was in substance as follows: "I am one of the firm of Lanfear and Stewart, solicitors, of 11 Abchurch Lane. I had known the deceased for some years. I was first professionally engaged for him in 1858; in that year his affairs were in considerable embarrassment. I was able to put them on a much better footing for him, and he expressed himself under obligations to me on that score. At that time he first told me of his son, the present plaintiff, who, he said, was leading a most extravagant and disreputable life, and he asked my advice as to the best mode of securing a provision for him. I advised an annuity deed, which was ultimately executed in April, 1859. In September, 1858, the deceased called at my office, and gave instructions for a will." [The instructions (produced in writing) gave all real and personal **[322]** estate to trustees, the income to be paid to the plaintiff by half-yearly payments, without power of anticipation. After his death, four legacies of £100, and the residue to two sons of Mr. Stewart. Mr. Stewart and the Rev. J. Jones, executors and trustees.] "The deceased wished that I should be residuary legatee. On those terms I refused to make the will. He then said there could be no objection to making my sons residuary legatees. A draft will was prepared from these instructions, which was for some time in deceased's possession. He returned it with a letter. It was then engrossed and executed at my office on the 7th of October, 1858, and remained in our possession till sent, by deceased's desire, to his address in Birchin Lane, on the 4th of April, 1860. On the 18th of April he acknowledged the receipt of it. This was the last that I heard of or from him till served with the citation in this suit on the 3rd of May, 1861."

Various letters from the deceased to Messrs. Stewart and Lanfear, commencing

the 23rd of August, 1858, down to the 18th of April, 1860, in which last he acknowledged the receipt of the will, were put in; they entirely corroborated Mr. Stewart's account of the will, of his connection with the deceased, and of the view which the latter took of his son's conduct. The letter of the 2nd of April, 1860, was in the following terms:—

"4 Birchin Lane, 2nd April, 1860.
"(Care of the Housekeeper.)

"Gentlemen,—Not having had any affairs to communicate to you during the last few months, of course I could not trouble you until I had succeeded in finding a purchaser for the house in the country, which is of no benefit to me, but, on the contrary, a loss of several pounds a year, as more than the receipts vanish in repairs.

"By a letter I received from Mr. P., about ten days ago, he acquainted me he fully expected he had found a buyer, and had agreed to the terms; however, not having subse-**[323]**-quently heard from him, I do not know whether I am to consider it sold or still in the market. If I do not hear again from Mr. P. in a post or two, I shall write to him again respecting an affirmative or negative reply, whereby the business may assume a tangible shape, and we shall know how to proceed.

"When I last called upon you, you informed me you had not received a letter from me, in which I requested you to send me Mr. Bagshawe's rent he had expedited to you, to Mr. Deacon's Reading Rooms, No. 154 Leadenhall Street, where I am a subscriber. On my return to the country I rated the man I employed pretty soundly for his negligence, but in spite of all he roundly asserted that he had executed my commission duly, and that, not being able to stop at the post-office in Charing Cross, he had carried it on to Lombard Street, as I told him to put it in the office there or at the former place, as most convenient to him, as he was obliged to go to the neighbourhood of both on other business. Under this impression of uncertainty, whether he had lost my letter or otherwise, I could not write to the secretary of the General Post administration as I wished to do, but, as you may suppose, I never employed this party afterwards.

"I do not know whether any of the documents in my possession are required, supposing the house should be sold. I hope not, as they were all sent to France several months ago, excepting only the accounts, which remain in the accountant's hands, who wished likewise for the vouchers, which were never delivered to me; probably some of them never came into your hands. There are many secondary papers I never saw; amongst others that are missing are those which relate to my application to the French Government for the liberation of Mr. T. from prison, called Mazas, in Paris, where he had been confined for the second time, which was a very troublesome and expensive business in its various forms. I suppose Mr. Mander—Henry, I think,—**[324]**—heir-at-law, whose chambers are in Lincoln's Inn, is the proper person to apply to for them, and any others he may have relating to the business. I have a right to all the papers they may have, as they have been paid for by me, as well as the first will made for T. by him. I have had a great deal of trouble in endeavouring to find an executor to the will in lieu of Mr. J. Two old friends I have irrevocably offended by proposing it to them; one of these to whom I wrote, of course honourably explaining the position and circumstances, in his reply to other subjects, took no notice whatever of my request—a sharp satire, indeed, for me; but indeed I was wrong, all considered, to request a gentleman of real worth and unblemished reputation to interest himself in a public document in which a man is concerned who has long been, and still is, on the black books, both of the English and French Governments.

"The other party to whom I applied verbally told me he had heard, through other persons, there was not in all Soho a greater blackguard than Mr. T., who was almost always intoxicated, and not seldom hooted by the boys in the street, who, when his hat fell off, would kick it about like a football, and pull him by his coat in derision. As I knew this statement to be a positive fact, I could of course offer no opposition, although I was heartily ashamed of asking so unseemly a favour. Of a certainty, my view in this quarter proved abortive.

"It is now more than two years since I saw Mr. J., and several more years—perhaps four at the least—since we ceased to correspond, for reasons this is not the place to state.

"I cannot, therefore, as a man of honour, with the least shadow of decency ask

Mr. J. to interest himself in my testament, which relates to a party I have some reason to believe he never heard of (certainly not from me), for as the wickedness I have to deplore commenced when he was very young, as threats of murder, etc. etc., I took care that no friend or relative I had should ever know from me that I **[325]** was even acquainted with him, or that there was such a person in existence. If, on the other hand, Mr. J. ever heard of him, he must likewise have heard of his character and propensities, of his having been expelled Mr. P.'s house some years ago for misconduct, etc.

"In either case I conceive it would be indecent, indecorous, and contrary to the usages of civil society, to think any more of Mr. J. in this respect, which causes me to blush that a man in so honourable a position in life as he is, popular in his neighbourhood, should by any casualty injure his legitimate views in life, or compromise an advantageous career, by ever coming in contact with a man who never, as far as I hear, did anybody any good, and whose whole happiness, or rather, misery, consists in the unrestrained licentiousness of his libidinous appetite. This unhappy victim, notwithstanding all that has been done for him, as far as I learn, so far from repenting of the past, still runs headlong, so to express it, to the gallows. Had he the least spark of gratitude, or was there the slightest chance of amendment, I should rejoice; but as it is, there is really no room for hope. In a few days I expect my French correspondent will arrive in England. Have the goodness to send my will, addressed to the care of the housekeeper, 4 Birchin Lane. I have several alterations in it to make. One of the parties is dangerously ill, and another has not been heard of upwards of a year and a half by any of his friends. I wish to lay the document before the gentleman in question, who is a man of standing; and possibly I may induce him to supply Mr. J.'s place: at all events, I will endeavour to do so. As he usually resides in France, the obstacle of Mr. T.'s sad propensities may not be injurious to him at a future period, as they certainly will be to any one so acting in this country.—I remain, Gentlemen, yours very truly,

"W. STAINES.

"Messrs. Lanfear and Stewart."

**[326]** Pending judgment the plaintiff died; and Mr. Heard, the solicitor mentioned in the judgment, proved his will as executor, but no further step was taken, and judgment stood over.

Dr. Deane, for the executor of the plaintiff, moved the Court to give judgment.

*Sir C. Cresswell*: It had been intimated to me that the plaintiff was dead, and I had therefore put the case aside. At present I don't know you. If there is a personal representative, he must become a party to the record.

This having been done—

December 3.—*Sir C. Cresswell* gave the following judgment:—In this case Theodore A. R. Staines cited William Stewart and the Rev. John Jones, clerk, to appear and support any interest that they claimed in the estate and effects of Matthew William Staines, deceased. The parties cited appeared and delivered a declaration, alleging that the deceased made his last will and testament bearing date on the 7th of October, 1858, and duly executed the same in the presence of two witnesses, etc. The plaintiff pleaded that the alleged will was not the will of the deceased, for that in or about the month of September, 1860, he destroyed it with the intention of revoking the same, and that he was then of sane mind. The defendants took issue on the plea, alleging the destruction of the will by testator.

The case came on for trial before me without a jury on the 6th of November, when Dr. Deane, for the plaintiff, opened the case, and called witnesses to prove the affirmative of the issue joined, viz., that the deceased in 1860 destroyed the will made in 1858, animo revocandi. For that purpose he called as a witness a young woman, Elise Plohn, a native of Hanover, who deposed that she became acquainted with deceased in **[327]** 1854, having been introduced to him by her brother-in-law, a German named Siebert, and from that time till his death she cohabited with him as his wife. Siebert, who keeps a greengrocer's shop in Dock Street, Ratcliffe Highway, had become acquainted with deceased in 1853 on a voyage from Hamburg to this country. It appeared by the evidence of Elise Plohn that they lived at various places; that in 1858 they were living at Peckham. The deceased had then assumed the name of Richard Broughton. That at that time he told her he had made a will, and in answer to her inquiry as to its contents, said that it was a will which Mr.

Stewart advised him to make; that he was not pleased with it because Mr. Stewart had driven him to make it without his wish; that Mr. Stewart had taken money enough of him, and he was determined it should not be the last (meaning as I conjecture the last will); that a few days after he sent her for the will to 4 Birchin Lane, that being the place to which he had desired letters and papers to be sent for him; that this was in February, 1858, and that she brought a parcel, and the envelope being shown to her identified it as that which she brought. In this she must have been greatly mistaken, for the will was not made till October, 1858, and it was not sent to 4 Birchin Lane, till the 5th April, 1860, when Mr. Stewart, in compliance with the testator's request, communicated by letter of the 2nd of April, enclosed it in the envelope produced, and sent it to 4 Birchin Lane. The address, etc., was written by one of his clerks. The letter from the testator of the 2nd of April was in these terms: (The learned Judge here read the letter printed above.) Elise Plohn further stated that, when she brought the will to deceased he did not open the envelope, and it was put away in the box with other things; that in 1860 they were living in Craven Place, Old Kent Road; that in July of that year she went to Germany, and returned on the 1st of August; that the deceased was at Craven Place ill, and attended by Mr. Hooper; that Mr. Hooper told him he had **[328]** a disease of the lungs, and advised him to make a will and have his affairs in order; that after Mr. Hooper left, deceased said he would go and travel, and leave Mr. Hooper; that afterwards he was lying in bed, and gave her the keys and told her to get the will out of the box, and she did so; that he told her to give it to him and a pair of scissors and he would cut it up; that she gave them to him, and he cut and tore it to pieces; that he said he did so because Mr. Stewart drove him to make it, and he did not like it. On cross-examination, she added that he said that Mr. Stewart had some papers of his, and he was obliged to make the will to get them from him. He said he had a near relation that the property ought to go to. He did not mention that he had a son. He told her she could have nothing from his land, but he would leave her some money. That when he had cut and torn it he gave it to her and desired her to burn it. There was a fire in the room close to the bed, and he could easily have thrown the paper into the fire himself as he lay in bed. That she said she had rather not burn it, as she might afterwards get into trouble about it, and he told her to do as she pleased, and she put it into the box again; that after he had cut the will he had got Siebert, who was there, to make an inventory of some plate, and take it to a pawnbroker's and raise money on it for the expense of his intended journey; that they left Craven Place on the 3rd of September, and went to various places, and at last to Dowry Square, Bristol, where he died on the 16th of December, 1860, and was buried in the name of Broughton, as he wished it; that he told her he took the name of Broughton in order that his lawyers might not know who he was, for they wrote to him and put him to expense; that after his death she came to London, and went to 4 Birchin Lane, and asked the housekeeper of the house if she knew anything of the affairs of the deceased; that the housekeeper told her she had heard deceased had a son, and advised her to consult a solicitor; that she went to a Mr. Heard, who **[329]** advertised for the son, and found him, and he instituted this suit; that she (witness) had never seen him.

Siebert was called, and gave the same account of the cutting of the will. On cross-examination he stated that he never heard of testator having a son, until that day in Court. He afterwards said that his sister told him a month or so before that the son had been advertised for; that he had never seen the son. The will and envelope were then put in. The will was attested by Mr. Lanfear, solicitor, 11 Abchurch Lane, London; Frederick J. Lee, clerk to Messrs. Lanfear and Stewart, 11 Abchurch Lane, London. Mary Ann Vowles, the woman in whose house he died, stated that on one occasion she was talking about her brother-in-law's death, when deceased said he had made a will, but had destroyed it.

Dr. Phillimore objected that this evidence was inadmissible according to the decision of the Q. B. in *Doe dem. Shallcross* v. *Palmer*, 16 Q. B. 747.

The first point to be determined, is with reference to the admissibility of the declaration attributed to the deceased by Mrs. Mary Ann Vowles. In *Doe dem. Shallcross* v. *Palmer*, 16 Q. B. 757, Lord Campbell, in delivering the judgment of the Court, said: "Declarations of the testator after the time when a controverted will is supposed to have been executed, would not be admissible to prove that it had been

duly signed and attested as the law requires; and for the same reason a declaration by the testator after the will was executed, that the alteration had been made previously, would be inadmissible." Now suppose the revocation set up in this case had been a revocation by a subsequent will, and an instrument had been produced and the factum disputed, according to the very terms of the judgment quoted above, the declaration of the deceased made after the alleged execution of the second will could not have been admitted to prove the due execution of it. If such declaration could not be received under such circum-[330]-stances, could it be received to prove not only the due execution of an instrument produced, but of one not produced; could it be admitted to prove that he had duly executed a will containing a clause revoking a former will? It seems to me that it could not. If the declaration of a testator that he had revoked a certain will by a subsequent will could not be received, on what ground could a declaration that he had revoked it in any other manner be received? It seems to me plain that a declaration that he had revoked by burning, by cancellation, by tearing, must stand on the same ground as revocation by another will, and that such declaration would be inadmissible. A vague declaration that he had destroyed a will, not saying by what means or for what purpose, is still more objectionable. I think, therefore, that I am bound to discard the declaration ascribed to the testator by Mary Ann Vowles.

I have then to consider the direct testimony of Elise Plohn and Henry Siebert, and the probabilities of the case on the one side and the other. If the direct testimony is credited, there is an end of the case set up by the defendants that they are executors under an existing will. Now, as to Elise Plohn, her avowed position is said to have been such as to detract greatly from her credit. On the other hand, it was said that an unfortunate attachment, such as she had formed, did not prevent her being a truthful witness, especially as she had no pecuniary interest in the destruction of the will. There is some force in that argument: a want of chastity is not always a ground for discrediting a witness. On that point each case must depend on its own circumstances.

In the present case I cannot but think the connection that existed between Elise Plohn was, on her part, a calculating sale of her respectability for what she could gain. Her attachment must have been to the property of the deceased, and not to his person; and I think that her position did affect her credit. It appeared by her own account that he was in the habit of telling [331] her that he would leave her money by his will. If that is so with regard to Elise, what must we think of Henry Siebert? The evidence left no doubt on my mind that he had procured for his sister-in-law the situation of mistress to the aged testator, thus showing an amount of calculating moral depravity which renders him in a great degree unworthy of credit. But supposing Elise Plohn to have had a design upon the old man's property, how could that supply a motive for destroying the will? It is sometimes very difficult to trace the motive which leads to any particular act; we are often left to conjecture. Here she would gain nothing directly by the destruction of the will; but if the will existed, the property would all go to persons from whom she could not expect any favour. She had no means of conferring any favour on them so as to entitle herself to any consideration in return. If she destroyed the will, and so enabled the son to obtain the property, she might at least have the hope of gaining something in return for the information that his father had died intestate. She might be influenced by a desire to thwart the wishes of a testator who had not fulfilled his promise to leave her money.

These considerations are sufficient to deter me from assuming as a fact in the cause that she could not have had any motive for destroying the will.

But let us see how far her story is consistent with truth or probability. She says that in February, 1858, she was sent for the will and brought it to the testator. I have already pointed out her mistake as to the date of this transaction. The will was not made till October, 1858, and was not sent by Stewart to the testator till April, 1860. She described him as being dissatisfied with the will from first to last, and as imputing to Mr. Stewart that he had driven him to make it. Probably at the time when she says she was sent for the will it was for the draft of the will, which he returned approved, and therefore the story of his being compelled to make it against his inclination is incredible, and Mr. Stewart's evi-[332]-dence, to which I will advert more particularly hereafter, and the letters written by the testator from time to time,

are entirely destructive of this account, and I must either conclude that the testator gave a false account to her (for which I can discover no reason), or she must have given a false account to the Court. In another respect also I find it difficult to credit her evidence. She stated that the deceased assumed the name of Broughton, in order that his attorneys, Lanfear and Stewart, might not know where he was, because they wrote to him and put him to expense. The evidence of Mr. Stewart showed that he always gave some address to which letters might be sent, and the letters produced show incontestably that a correspondence was maintained between them.

But further, it was agreed that the preservation of the pieces of the torn will was strong corroboration of the evidence of Elise, for that had she and Siebert torn it, there could be little doubt they would have burnt the fragments. I do not feel the force of that argument. The mere absence of the will would have raised a primâ facie presumption that the deceased had destroyed it. If the witnesses had then deposed that he burnt it, there would have been nothing but the absence of the will to confirm their statement, whereas they may have fancied that the production of the fragments would be considered as a corroboration of the statement that the testator cut and tore it. But again, Elise swore that when the deceased desired her to burn the fragments, she declined, saying that by so doing she might on a future day fall into trouble. It is possible, to say no more, that such an apprehension operated on her mind and caused the preservation of the will, although it was not torn by the deceased.

I will now examine Mr. Stewart's evidence, together with the letters that passed between him and the deceased. The evidence of Mr. Stewart as to the arrangement for the life annuity to the son, is strongly corroborated by the letters and by the execution of the deed in 1859. Up to that time no trace **[333]** of any dissatisfaction with the will was manifested. The subsequent letters show that the conduct of the son, which caused the making of that will, remained unaltered, and, which is still more important, the letters show adherence to it. Nearly two years after the date, he wrote about substituting another trustee and executor for Mr. Jones; but there is no trace of any desire to alter the will in any other respect. That satisfies me that the evidence of the woman Elisa Plohn on that subject could not be true. But it may be asked, why, then, did he send for the will in April, 1860? And does not that, at all events, raise an inference that he probably wished to destroy it? The letter asking for it precludes any such inference. From that it appears that he wanted to see it, because he thought a death had occurred which might render it necessary to alter some small bequest, and because he wished to show it to a friend whom he expected to come from France, and whom he thought of asking to act as trustee and executor, thus showing, to the very last, an adherence to the arrangement made by the will for his unhappy profligate son. This review of the evidence given, and the probabilities of the case, has led me to the conclusion that I cannot safely rely on the evidence of the two witnesses who deposed to the destruction of the will by the act of the testator. I am therefore bound to find the issue joined as to the fact of revocation in favour of the defendants.

No order as to costs—the pieces of the will to remain in the Registry till executors take probate.

December 10.—Dr. Phillimore, Q.C., moved the Court to decree probate, and to allow the testator's name in it to go with the alias of Broughton, under which name he had died and been buried.

Motion granted.

**[334]** IN THE GOODS OF JANE FORREST, deceased (on Motion). November 12, 1861. —Will.—Subscription.—Motion to omit name in Probate.—B. made her will in the presence of C. and D., who subscribed the same; subsequently E., an executor and legatee in the will, at the request of the testatrix, signed his name, to signify, as suggested, his acceptance of the executorship.—The Court rejected a motion praying to omit E.'s name in the Probate.

[S. C. 31 L. J. (P.) 200; 5 L. T. 689. Followed, *In the Goods of Hickman*, 1867, 16 L. T. 435.]

In this case the deceased had duly executed her will on the 3rd of December, 1857, in the presence of Henry Snowball and Thomas Ormston, and appointed William Thompson and Lionel Forster executors thereof. It appeared that subsequently Lionel Forster placed his name to the will at the request of the deceased,

by way of signifying his acceptance of the executorship; he was also a legatee under the will.

Dr. Spinks now moved for probate of the will, omitting the signature of Lionel Forster. *The Goods of Logan Mitchell*, 2 Curt. 916, I am bound to say, seems against the motion. In the present case, however, Forster's name was added after the due execution and attestation of the will.

*Sir C. Cresswell*: I cannot grant this motion. If I were to omit the name in the probate, the next of kin would be precluded from raising the question in a court of construction. If it be retained, Forster will still be at liberty to show that he was not a subscribed witness to the will.

Motion rejected.

**[335]** CLEVERLY AND ANOTHER *v.* GLADDISH. IN THE GOODS OF HENRY CLEVERLY, deceased (on Motion). January 21, 1862.—Administration de bonis non, with Will annexed.—Fund in Court of Chancery.—Sureties to Administration Bond dispensed with.—Amount of Estate.—Where the unadministered estate of a testator had been transferred to the Accountant-General of the Court of Chancery, and a bill had been filed praying for it to be administered by that Court, the Court decreed a grant de bonis non to the residuary legatee for life, without requiring her to find sureties to the administration bond.—The Court will not determine the amount under which an estate is to be sworn.

[S. C. 31 L. J. (P.) 53; 5 L. T. 689; 10 W. R. 265.]

Henry Cleverly died in October, 1806, leaving a will and codicil, whereof he appointed his wife and three others executors. The will was duly proved in the Prerogative Court by the widow and two of her co-executors. The remaining executor renounced probate, but survived the other three, and died in November, 1837, without having proved the will.

The deceased, by his will, devised and bequeathed his residuary real and personal estate to the executors and trustees of his will, upon trust, after paying certain annuities, to pay the annual income thereof to his daughter Elizabeth Cleverly (now Mrs. Gladdish) for life; and, in default of her issue, he gave the principal to the children of his brother Samuel Cleverly.

Alfred W. Cleverly and O. Cleverly, sons of the said Samuel Cleverly, had filed a bill in Chancery against Mrs. Gladdish and her husband for carrying the trusts of the will into execution, and for the purposes of that suit it was necessary that there should be a personal representative to the deceased.

Alfred W. Cleverly had accordingly cited Mrs. Gladdish to take a grant de bonis non with the said will and codicil annexed.

**[336]** Mrs. Gladdish had entered an appearance, and was desirous of taking the grant, provided she was not required to find sureties to the bond. The personal property of the deceased was sworn under £3500 in 1807, when his will was proved. His executors and trustees for many years after his death continued to carry on his business of a lime-merchant for the benefit of the estate; and on Mrs Gladdish attaining the age of twenty-three, when she became entitled to receive the income arising from the residue, the residue with the accumulation of the rents of the real estate and the profits derived from the business when invested in the funds, amounted to £21,252 New Three per Cents., which by an order of the Court of Chancery had recently been transferred from the names of the executors of the deceased into the name of the Accountant-General of the said Court, to the credit of the said cause.

Dr. Tristram moved the Court "to decree letters of administration de bonis non of the effects of the deceased with his said will and codicil annexed, to be granted to Mrs. Gladdish, as the beneficial residuary legatee for life, without requiring her to find sureties for the bond," which would be executed by her husband. The Court had power to dispense with sureties under the 81st section of the Probate Act. In this case, as the personal property had been transferred to the Accountant-General of the Court of Chancery, and would be administered by that Court, there was no risk of the estate being depreciated through Mrs. Gladdish's acts as administratrix, and therefore there could be no objection to dispensing with the usual sureties. The plaintiff who had cited Mrs. Gladdish to take the grant, would consent to the motion.

Mr. J. Salter, for A. W. Cleverly, consented to the motion.

*Sir C. Cresswell*: The property having been transferred [337] to the Accountant-

General of the Court of Chancery, no risk can accrue to it by my dispensing with the sureties. I will grant this part of the motion. There is another part of the motion according to the notice filed in the registry, asking the Court to direct that Mrs. Gladdish should swear the estate under £3500, which I cannot grant, as it is no part of my jurisdiction to determine the amount under which parties are to swear estates.

Dr. Tristram apprehended that this was a question which, if raised at all, could only be raised by the Stamp Office, and should be determined in the Court of Exchequer, and not here. He therefore did not ask for that part of the motion. The plaintiff asked that the order should direct the costs incurred by the plaintiff in issuing the citation and on this motion to be paid out of the estate. The defendant assented to it.

Decree.—Administration de bonis non with the will and codicil annexed granted to defendant, as residuary legatee for life. Bond to be given by her husband without sureties Costs incurred by the plaintiff in issuing the citation, and on the motion, also the defendant's costs, to be paid out of the estate.

ROBERTS *v.* ROBERTS. January 16 and 21, 1862.—Will.—Conditional.—Evidence of Adherence.—B. wrote a testamentary paper in January, 1859, "should anything happen to me on my passage to Wales, or during my stay." He returned in about a week, and died in October of the same year; the will remaining in his writing desk, and having been alluded to by him after his return.—**[338]** The Court held, that the paper was in terms conditional, and that since the Wills Act no evidence of "adherence" is admissible.

[S. C. 31 L. J. (P.) 46; 5 L. T. 689; 8 Jur. (N. S.) 220. Applied, *In the Goods of Porter*, 1869, L. R. 2 P. & D. 22; *In the Goods of Hugo*, 1877, 2 P. D. 73. Referred to, *In the Estate of Vines*, [1910] P. 149.]

In this case the deceased Robert Roberts, master mariner, died on the 4th of October, 1859.

On the 10th of January, 1859, he executed the following paper, immediately prior to starting on a voyage to the Welsh coast:—

"Liverpool, 10th Jan., 1859.

"This is to certify, I, Robert Roberts, master mariner, do leave in possession two bank books to my wife, named Emma Roberts; should anything happen to me on my passage to Wales, or during my stay, I leave all my goods, chattels, and all moneys, including two barometers, one ——, one eight-day chronometer, one clock, one sextant, one quadrant, also charts and navigation books. The one barometer is at Mr. Walker's, one chronometer and sextant and quadrant.

"ROBERT ROBERTS."

The widow propounded this paper as universal legatee therein named, and was opposed by the mother of the deceased, who pleaded undue execution; that the paper was not the last will and testament; that the will was only intended to operate on the contingency of an event which did not take place; that the widow was not universal legatee; but gave notice of not intending to examine witnesses.

The case was now argued by Dr. Wambey in support of the will.

By Mr. R. Pritchard contrà.

It appeared that the deceased returned from the voyage on which he was starting, to the Welsh coast, after about a week's absence. Evidence was tendered that in September, 1859, **[339]** he referred to the will, and on being told that it was still in the writing desk, said, "There let it remain." Cur. adv. vult.

The points argued are sufficiently stated in the judgment.

January 21.—*Sir C. Cresswell*: In this case three questions were raised. First, whether the instrument propounded was of a testamentary nature; secondly, whether it was in its terms conditional; and thirdly, whether, being in terms conditional, it was rendered by adherence a valid will, although the condition was not performed. As to the first point it may be doubtful what was left to the widow; but that is not the question. If a will, it must be admitted to probate, leaving the construction to another Court. I am of opinion that it is testamentary. Secondly, is it conditional? On that point I think the case of *Parsons* v. *Lanoe*, 1. Ves. sen. 189, is expressly in point, and that it is conditional. Thirdly, can it be rendered a valid will by adherence? There was evidence of adherence, but Mr. Pritchard contended that such evidence could not since the Stat. 1 Vict. c. 26, establish the will. It appears to me that his argument was well founded. The act of preserving the will cannot carry the case

further than a parol declaration respecting it. But if the will in terms is conditional, he could not by any parol declaration alter it. All the cases cited were before the Statute of Vict. In principle it is like the case of a will made by a married woman, without consent of her husband. Before the statute such a will might be established by a parol recognition after her husband's death; for it was considered as a republication, but no such operation could be given to it now. In *Parsons* v. *Lanoe*, Lord Hardwicke said: "The penning of the will then being so (i.e.) conditional, collateral or parol proof, cannot be taken into consideration, which would be dangerous, and what the Court, since the Statute of Frauds, is not warranted to do; for nothing will **[340]** set it up but some act done by him after that event to republish the will or defeat the conditions." That was a devise of realty. The same doctrine is now made applicable to all wills made under the Statute of Victoria. For these reasons I feel bound to pronounce against the document propounded.

(Before *Sir C. Cresswell* and a Special Jury.)

HAWARDEN *v.* DUNLOP. November 30, 1861.—Issues joined in Probate Suit.—Effect of Scotch Confirmation of Executor, 21 & 22 Vict. c. 56.—The finding of the commissary as to Scotch domicil, under 21 and 22 Vict. c. 56, ss. 9, 12, is conclusive evidence of the fact of domicil for the purposes of that act only (see sect. 17), i.e. for rendering it unnecessary to take an English probate in respect of assets in England; but it has no effect in determining any issues raised in a suit in this Court, which will proceed to try such issues, though a confirmation of the will in question be tendered for the seal of the Court.

[S. C. 31 L. J. (P.) 17; 5 L. T. 765. For proceedings in Chancery, see 2 Dr. & Sm. 155; 62 E. R. 580. Cf. p. 614, post.]

This was a question arising in a suit between Lady Hawarden, as sister and next of kin of Lord Elphinstone, who died in January, 1861, and George Dunlop, who propounded a will of the deceased of the 13th of February, 1854, in which he was sole executor and universal legatee. Inter alia, the defendant alleged that the deceased was at the date of the will domiciled in Scotland, and that the will was valid according to the law of Scotland.

To this the plaintiff pleaded:—1. That the will was not the will of the deceased. 2. That it was obtained by fraud. 3. That it was obtained by undue influence. 4. That the deceased was domiciled in England, and that the will was **[341]** not executed in accordance with 1 Vict. c. 26. 5. That, admitting the Scotch domicile, the will was invalid by that law.

These pleas were traversed and issue joined, which now came on to be tried by a special jury.

Proceedings to prove the will in Scotland had been taken by Mr. Dunlop, the defendant here, and the commissary had found by his interlocutor, that the deceased died domiciled in Scotland, and had confirmed Mr. Dunlop's nomination as executor, with full power, etc.

Mr. M. Smith, Q.C., Dr. Phillimore, Q.C., and Mr. C. E. Coleridge, for the defendant, before the jury were sworn, asked the Judge to direct the seal of the Court to be put to the Scotch confirmation of executor, which had been completed on the 27th of November instant. The 21 & 22 Vict. c. 56, s. 12, enacts, that when any confirmation of the executor of a person, who shall in manner aforesaid, be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England, shall be produced in the principal court of Probate in England, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary, finding that such deceased person died domiciled in Scotland; such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in England, as if probate of letters of administration as the case may be, had been granted by the said Court of Probate. The 9th section provides that the interlocutor of the commissary finding the domicil shall be conclusive evidence of the fact of domicil. The Court is merely ministerial in this matter; we produce the confirmation and claim the seal of the Court; the confirmation will then have the same force and effect as if probate were granted by this Court, and the finding of the commissary is conclusive of the domicil.

**[342]** Serjeant Shee, Mr. Anderson, Q.C., and Mr. Morgan Lloyd, for the

plaintiff: The interlocutor of the commissary is not final; there is an appeal from it, which, in fact, is asserted to the Court of Session; but however that may be, the 17th section of the Act already cited explains and limits the 9th, "Provided also, that any such statement and the interlocutor of the commissary finding that the deceased was domiciled in Scotland shall be evidence, and have effect for the purposes of this Act only."

Mr. M. Smith, in reply: There is no evidence of the alleged appeal before the Court.

*Sir C. Cresswell*: I think I ought not to order the seal of this Court to be affixed. At first the words of the 9th and 12th sections startled me a good deal; but the 17th section explains that the finding of the commissary shall be conclusive evidence of the fact of domicil for the purposes of this Act only—i.e. for rendering it unnecessary to have an English probate for assets here, but not to determine or affect questions in issue in this Court, which I shall certainly proceed to try.

Upon this ruling an agreement was come to between the parties; the Court put its seal to the confirmation by consent of both parties, and no further proceedings were taken.*

* [Reprinted from end of volume.] "At page 342, line 22, it is incorrectly stated, 'the Court put its seal to the confirmation.' That the Court should put its seal was one of the terms of the compromise; but the parties were unable to agree as to the effect to be given to these terms. See further stages of the same case, page 614."

ROGERS AND ANDREWS *v.* GOODENOUGH, AND ROGERS, ROGERS AND ROGERS intervening. January 15 and 16, 1862.—Wills.—Codicil.—Revival.—Revocation.—Costs.—B. made a will in 1858, another in 1859, appointing the same executors, and containing a general clause of revocation, whereupon the will of 1858 was burnt with consent of the testator. In 1860, B. wrote a **[343]** codicil, "It is my wish that this should be added as a codicil to my last will, made 1858." The executors propounded the contents of the will of 1858; certain legatees intervened, and, in fact, propounded the will of 1859; the next of kin opposed both wills.—Held, that the codicil of 1860 could not, by its reference to the will of 1858, give it validity as a will in writing to satisfy the requirements of Sect. 9 of the Wills Act, and that the codicil of 1860, containing no express intention to revoke, and not availing to set up an inconsistent will, did not in law, under the 20th section of the Wills Act, revoke the will of 1859. Probate of the will of 1859 and codicil of 1860. Costs of all parties out of the estate.

[S. C. 31 L. J. (P.) 49; 5 L. T. 719; 8 Jur. (N. S.) 391. Considered, *In the Goods of Steele*, 1868, L. R. 1 P. & D. 577. Followed, *In the Goods of Reade*, [1902] P. 75.]

This was a question as to the validity of certain testamentary papers of Joseph Goodenough, deceased, the history of which is given in the following declarations and pleadings.

The declaration stated that Joseph Goodenough, late of Godmanstone, in the county of Dorset, gentleman, deceased, who died at Godmanstone aforesaid, on the 13th of November, 1860, made his last will and testament, bearing date on the 30th of June, 1858, and therein appointed the said George Rogers and George James Andrews, executors. That the said will, after having been reduced into writing, was signed at the foot or end thereof by the said testator, in the presence of two witnesses present at the same time, to wit, George Olive and William Raynold, jun., who subscribed the said will in the presence of the testator. That the said testator was at such time of the full age of twenty-one years, and of perfectly sound mind, memory, and understanding.

That on the 15th of April, 1859, the said testator, being still of sound mind, memory, and understanding, duly made and executed another will bearing date upon the said day, wherein he also appointed the said George Rogers and George James Andrews executors, and whereby he expressly revoked all former and other wills. That the said will, bearing date upon the 30th day of June, 1858, was thereupon, by direction of the said testator, entirely destroyed and burnt.

That subsequent to the destruction of the said will, bearing **[344]** date on the 30th of June, 1858, the said testator made a codicil, bearing date on the 2nd of February, 1860, and commencing with the words following, to wit: "It is my wish that this should be added as a codicil to my last will, made the 30th of June, 1858."

That the said codicil having been written by the said testator himself, was signed

by him at the foot or end thereof, in the presence of two witnesses present at the same time, who subscribed the same codicil in the presence of the said testator, and whose names appeared thereon. That at the time of the execution of the said codicil, the said testator was of perfectly sound mind, memory, and understanding. That by virtue of the said codicil, the said destroyed will, bearing date on the 30th of June, 1858, was in law revived, and the said will bearing date on the 15th of April, 1859, was in law revoked, and the said will bearing date the 30th of June, 1858, and the said codicil bearing date on the 2nd of February, 1860, thereby became and now are the last will and testament and codicil thereto of the said testator.

That the paper writing now remaining in the Registry of this Court, annexed to the affidavit of scripts of the said George Rogers and George James Andrews, and marked with the letter A, contains certain instructions for a proposed codicil in the handwriting of the said testator, and the paper writing also now remaining in the Registry of this Court, annexed to the said affidavit of scripts, and marked with the letter B, contains the rough draft of the said will of the said testator, bearing date on the 30th of June, 1858, and was, in fact, a former cancelled will of the said testator, which, in pursuance of the instructions of the said testator, was altered as the same now appears. That the said will, bearing date on the 30th of June, 1858, and executed by the said testator as aforesaid, was, in fact, drawn from the said paper A, and the said paper B after it had been altered as aforesaid, and that the said paper A, and the said paper B after it had been altered **[345]** in pencil as they now appear together, contain the whole sum and substance of the last will and testament of the said testator, bearing date on the 30th of June, 1858.

This declaration was demurred to on behalf of the defendant, Stephen Goodenough, the only son of the deceased, on the ground that, though the will bearing date the 15th of April, 1859, was in law revoked by the codicil of the 2nd of February, 1860, yet the will of the 30th of June, 1858, was not in law revived by the said codicil.

George Henry Rogers, and Mary Goodenough Rogers, and Herbert Goodenough Rogers, by the said George Henry Rogers, his guardian, interested as legatees under both the wills, obtained leave of the Court to intervene, and pleaded as follows:—That the said will bearing date on the 30th of June, 1858, was not revived, and the said will bearing date on the 15th of April, was not revoked as alleged. And for a second pleading the now pleading parties say that the said will bearing date on the 15th of April, 1859, was not revoked as alleged, but was only revoked so far as it was inconsistent with the said codicil or with the said revived will, and they say that, in divers particulars, the said will bearing date on the said 15th of April, 1859, was consistent both on the said codicil and the said revived will, and that the said will bearing date on the said 15th day of April, 1859, and the said revived will and the said codicil, now are the last will and testament and codicil thereto of the said testator. And for a third pleading the now pleading parties as to the said demurrer of the said Stephen Goodenough, say that the declaration is good in substance.

This third plea of the interveners was struck out by order of the Court on motion of counsel on behalf of defendant on the 26th of November, 1861.

To these pleas the defendant replied:—First, that he takes issue on so much of the first plea as alleges that the will bearing date the 15th of April, 1859, was not revoked. Second, **[346]** that he takes issue on all the facts in the second plea alleged. Third, that the testamentary papers in the second plea mentioned are not now the last will and testament and codicil thereto of the said deceased.

Issues joined on behalf of interveners.

The codicil of 1860 was as follows:—

It is my wish that this should be added as a codicil to my last will, made the 30th of June, 1858. First, I give to my friend George Andrews's five sons, the sum of fifty pounds each, to be deposited in the savings-bank (immediately after my interment) for them until they come of twenty-one years of age; should either of them not live to that age, then the fifty pounds and interest thereupon to be divided amongst the other children, boys and girls, share and share alike, of my friend G. Andrews. I give my pony and carriage to Mr. Rogers, with harness, etc. I give twenty pounds to Mrs. Charles Hemming, and twenty pounds to Mrs. Andrews, that they may purchase some little ornament in remembrance of a sincere friend. I give my clock at the stair-head, and the two Bibles on the table in the passage, the little box of worked strawberries, and all the furniture in my present bedroom, to my

servant Mary Ann Sturmey. I give to Mrs. Newbolt, of Paulerspury, the two china urns in the drawing-room. I give to Joshua Orment, my servant, my boots, shoes, and the gun he uses in the yard. I request a hatband and gloves may be sent to the Rev. Mr. Newbolt, with gloves to Mrs. Newbolt, and gloves to Mrs. Charles Hemming, Mrs. Andrews, and the Miss Vestors, Mrs. Devenish; Mr. Phelps, hatband and gloves, with gloves to Mrs. Phelps, and a hatband and gloves to my friend and neighbour, Mr. Crane; and a further sum of £5 each to my servants Ann and Lucy Waygood, if in my service at my death. I give my Bath chair to Mrs. Baker; and my cottage now occupied by James Davies, I give to my **[347]** servant Mary Ann Sturmey for her life; at her death I give the said cottage to my nephew and godson, Herbert Goodenough Rogers.

"Signed, etc.

"Feb. 2nd, 1860."

It was admitted in argument that the names of Ann and Lucy Waygood occurred both in the will of 1859 and in the draft and instructions of the will of 1858.

The case was argued before the Court by—

Mr. Montague Smith, Q.C., and Dr. Spinks for the executors of the will of 1858: The question is, what effect has the codicil of 1860? It is clear that the testator did not mean to die intestate; he meant that there should be a will, and that this codicil should be a codicil to his last will. Does the knowledge of the testator that the will of 1858 was destroyed rebut the presumption of intention to revive that will? We submit that the reference to it by date is too precise. If it is a question of incorporation, we say that the testator intended to incorporate the substance of the will of 1858. The "intention to revive" required by the 22nd section of the Wills Act is satisfied by the revocation of the revoking instrument. It must be admitted that *Hale* v. *Tokelove*, 2 Rob. 318, and *Newton* v. *Newton*, the case recently decided in the Irish Probate Court, and reprinted in L. T. Rep. (Oct. 26 and Nov. 2, 1861,) [5 L. T. (N. S.) 218] are, as far as they go, against us.

The Solicitor-General (Sir Roundell Palmer), Dr. Deane, Q.C., and Dr. Middleton for the interveners: Our case begins where the last case ends. Admitting that the will of 1858 cannot be set up, the question is, whether the codicil of the will of 1860 can operate as a pure and simple revocation. On either of two grounds we are entitled to probate of the will of 1859: **[348]** first, the date of the 30th of June, 1858, is a mere falsa demonstratio, and legitimate evidence would be admissible to shew the mistaken reference; secondly, there is no independent intention of revocation. If the date is taken as necessarily attaching to the will of 1858, still there is no express intention to revoke; and if the codicil is not good to revive, how can it be to revoke? There are three classes of cases bearing on the present case to be considered—of the first, *Walpole* v. *Orford*, 3 Ves. 402, and *Walpole* v. *Cholmondeley*, 7 T. R. 138, are the principal; but there both wills were in existence at the death of the testator, and the codicil by its reference set up the earlier will inconsistent with the later. In the second class of cases there was no instrument to answer the description contained in the will which was capable of operating, and you must therefore admit evidence to make the words applicable to the real facts (*Lord St. Helens* v. *Marchioness of Exeter*, 3 Phill. 461, in note). To this class belongs also *Quincey* v. *Quincey*, 5 N. C. 154. The third class is, where the intention to revoke is conditional, and the deceased acted under a mistake either of law or fact (*Onions* v. *Tyrer*, 1 P. Wms. 345).

Dr. Phillimore, Q.C., and Dr. Swabey for the defendant: We, in fact, oppose both wills. As to the will of 1858, the 9th section of the Wills Act says, that no will shall be valid unless it shall be in writing and executed, etc.; but here is nothing in writing. In principle, it seems undistinguishable from cases of incorporation, where the rule requires that the instrument to be incorporated should have been in existence at the date of the executed instrument which incorporated it. The class of cases in which the substance or contents of testamentary papers are admitted to probate, are where a duly executed instrument has been lost, or wrongfully or unintentionally destroyed; for in cases of dependent relative revocation the law implies a want of intention on the part of the testator; but here, the will of 1858, after being revoked by that of 1859, was delibe-**[349]**-rately destroyed with the knowledge of the testator. As to the will of 1859, the reference by the codicil of 1860 to the will of 1858 is so unambiguous that the mere fact of its non-existence at the time of death, cannot distinguish it from the rule laid down in *Walpole* v. *Cholmondeley*, so as to admit parol

evidence. The reference to his last will of that date is a distinct declaration that the will of 1859 should not be his last will, and thereby revokes it. As to the doctrine of dependent relative revocation, there seems an entire absence in the circumstances of these wills of that relation between the acts of the testator on which that doctrine is founded.

Mr. Montague Smith was heard in reply: and Mr. George James Andrews was examined on behalf of the interveners, and proved that after the will of 1859 was executed, the will of 1858 was burnt in the deceased's presence and with his sanction; that the deceased afterwards told him he had some friends whom he wished to remember, and consulted him about making a codicil; and that he told the deceased how a codicil ought to be executed, and advised him to let him (Andrews) make it for him, and that the deceased said, no, he would do it for himself; that the date of the will to which it was to be a codicil was not mentioned, but that the deceased spoke of some bequests which were in the will of 1859, and not in that of 1858.

*Sir C. Cresswell*: There is great difficulty in some of the points argued in this case, and if I had to deal with all the questions which have been raised I should require time to examine the authorities; but the full and satisfactory arguments that I have heard enable me to dispose of it without any doubt in my own mind as to the decision that ought to be pronounced. One will was made in 1858 and another in 1859, and then the will of 1858 was actually destroyed, the will of 1859 having previously revoked it. A codicil was after-**[350]**-wards made in terms purporting to be a codicil to the will of 1858.

The first question is, whether the codicil could revive that will, assuming that the reference to it by date was correct, and that it was the intention of the testator that it should be so revived. That is a question to be determined by the Stat. 1 Vict. c. 26. When the instrument had been destroyed, it no longer existed either in law or fact; it did not exist as a will from the time when the second will was executed; it no longer existed as a written instrument, as a paper writing, from the time when it was burnt. Not being either a will or a writing, how could it again become a will? That question seems to be decided by the statute; the 9th section says, "that no will shall be valid unless it be in writing and executed in the manner hereinafter mentioned." It has been said that it could again become a will, because it was revived by the codicil; but it could not be revived in its original condition of a written instrument, and thus the very first thing required by the statute in order to make a will, cannot be satisfied. It appears to me that the expression "no will shall be valid" applies equally to an original will and a revived will. Two cases have been cited—*Hale* v. *Tokelove* and *Newton* v. *Newton*—and, undoubtedly in both of these the decisions proceeded on the assumption that a document which had once existed as a will, and which had afterwards been destroyed, could not be revived by any intention of the testator manifested in a subsequent codicil. It is said that *Hale* v. *Tokelove* is a case primæ impressionis: but the decision of the very learned person who pronounced that judgment, was considered by the learned Judge of the Prerogative Court in Ireland, and by him affirmed, as far as that part of the case went, without the least hesitation. Sitting in a Court of co-ordinate jurisdiction, I should hesitate a long time before I departed from a precedent thus established, even if my own judgment had not gone along with it; but, for the reason I have assigned, I think it perfectly plain, according to **[351]** the statute, that the will could not be revived. The ingenious argument in answer to that view of the case, was founded upon the 22nd section. That section provides that "no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and shewing an intention to revive the same." But Mr. M. Smith should add the words, "but any will however revoked may be so revived." I cannot go along with him in that construction, because it would violate the rules which the Legislature appear so cautiously to have laid down in the 9th section. I apply my opinion to a case where the will was destroyed by the testator, or in his presence, or with his authority and with his knowledge. I say nothing as to what would be the effect if the instrument had been destroyed without his knowledge. The question may arise on another day whether a person can revive an instrument, or rather the contents of an instrument, which no longer exists,—whether in that case the terms of the 9th section of the statute would be satisfied. My judgment is limited to the facts before the Court in

the present case. The next question, which has been so much urged by the Solicitor-General, relates to the effect of the codicil upon the will of 1859. Now, what is there to revoke that second will? Certainly nothing in the codicil. It must be revoked by another will. Again, I think the statute disposes of that question. The 20th section provides that no will or codicil, or any part thereof, shall be revoked otherwise than by marriage, or by another will or codicil executed in the manner required for the execution of a dispositive will, or by some writing declaring an intention to revoke the same, and executed like a dispositive will, or by the burning, tearing, or destruction thereof by the testator, or by some person in his presence and by his direction, with an intention of revoking the same.

Now, this codicil certainly does not in terms revoke the **[352]** will of 1859, nor does it in terms shew any intention to revoke that will. There might have been an implied declaration of such an intention if the codicil had contained dispositions of the property so at variance with that contained in the will, that no part of the will could take effect if effect was given to the codicil. But the codicil has no such operation; it does not dispose of the property in a manner inconsistent with the will of 1859; it only shews an unexecuted intention to revive the former will. I am not aware that such an unexecuted intention could by any possibility have the effect of revoking the second will.

For these reasons it is unnecessary to deal with the two more difficult points which have been raised—one as to the admissibility of evidence to ascertain the supposed mistake made by the testator in referring to the will of 1858, and the other as to the very difficult and interesting subject of dependent relative revocation. On the grounds I have stated I agree entirely with the judgment of Dr. Lushington in *Hale* v. *Tokelove*, and with that of the Judge of the Prerogative Court in the Irish case of *Newton* v. *Newton*,[1] and I think that the codicil could not have the effect of making that again a will which no longer had any existence either in fact or in law; and that the codicil, for the reasons I have stated, had no operation in cancelling or revoking the second will. I therefore pronounce for the will of 1859 and the codicil of 1860; the costs of all parties should be paid out of the estate.

**[353]** HER MAJESTY'S PROCURATOR-GENERAL *v.* SAMUEL WILLIAMS. IN THE GOODS OF MARY EMSLEY (Widow, deceased). January 21, 1862.—Interest Suit.—Receiver in Suit in Chancery in respect of same Estates appointed Administrator pendente lite.—In an interest suit between the Queen's Proctor and a defendant, asserting himself to be the lawful nephew of a deceased intestate, the Court appointed A. B., who had been made receiver in respect of the same estates in proceedings in Chancery, to be administrator pendente lite, on his affidavit that the estates in certain particulars would be benefited by being dealt with by a person clothed with such authority, and on consent of the parties to the suit.

[S. C. 5 L. T. 765.]

The deceased in this case, Mary Emsley, died on or about the 13th of August, 1860, intestate, a widow, and without children. An interest suit was commenced by Her Majesty's Procurator-General on behalf of the Crown, against Samuel Williams, asserting himself to be the lawful nephew and one of the next of kin of the deceased. The deceased at the time of her death was seized of or entitled to certain freehold, copyhold and leasehold estates, moneys, etc. In the Rolls Court, in a suit touching the estate of the said deceased, between the said Samuel Williams, plaintiff, and William Rose and Her Majesty's Procurator-General, defendants, Henry James Peachey had been duly appointed receiver of the rents and profits of certain freehold and leasehold estates of the deceased in the said order mentioned; and in another suit in the Rolls Court, touching the said estate, between Samuel Williams, plaintiff, and Her Majesty's Procurator-General, defendant, the said Henry James Peachy had been duly appointed receiver of the rents and profits of the real and leasehold estates, and to collect and get the outstanding personal estate pending the litigation in this court.

This appeared by the affidavit of Mr. Peachey, who further **[354]** stated that, as such receiver, he had had the offer for the purchase of certain of the leasehold property, subject to the approval of the Court of Chancery, which he considered

[1] Reversed in the Court of Appeal in Ireland [12 Ir. Ch. Rep. 118].

advantageous. That an action of ejection in respect of the said leasehold was pending for breach of covenant of repairs, to which he was advised there was no valid defence, but which he had not authority, as receiver, to compromise. That it would be for the benefit of the estate that certain sales of furniture should be made, and certain debts due to the estate recovered, for which purpose an administrator pendente lite was necessary; also that certain deeds, muniments of title and securities connected with the property of deceased were in the possession of the Queen's Proctor, who objected to part with them except to an administrator pendente lite.

Dr. Swabey moved the Court, on behalf of the said H. J. Peachey, to appoint him administrator pendente lite. Notice of the motion had been given to the Queen's Proctor and to the attorney of defendant, and there was no objection.

Motion granted.

IN THE GOODS OF JOHN WALKER (deceased), on Motion. January 28, 1862.—Will.—Attestation Clause.—Signature of Deceased.—Deceased read over an attestation clause containing his name, written by himself, in the presence of two witnesses, who subscribed their names.—Deceased then, on the opposite page of the paper, wrote some words, beneath which he added, "Attestation. John Walker, testator," and the names of two executors.—Held, that the deceased intended to give effect to his will by the signature of his name in the attestation clause.

[S. C. 31 L. J. (P.) 62; 5 L. T. 766; 8 Jur. (N. S.) 314. Applied, *In the Goods of Casmore*, 1869, L. R. 1 P. & D. 653. Referred to, *Burke* v. *Moore*, 1875, Ir. R. 9 Eq. 612. For a case where there was no attestation clause, see *In the Goods of Peverett*, [1902] P. 205.]

**[355]** In this case the deceased made his will on the 11th of June, 1860, the second page of which ended as follows:—

"And I hereby appointed two executors, John Walker and Lawrence Walker, of this my will, as witness my hand, this day, 11th June, one thousand eight hundred and sixty.

"Attestation.

"Signed and acknowledged by the said John Walker, the testator, who at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

"ADAM HEYWORTH.
"EDMUND JACKSON."

On the third page was written:—

"I give devise of property to executors in trust and to pay proceeds to testator's children, with provision for maintenance during minority of children.

"Attestation.

"JOHN WALKER, testator.
"LAWRENCE WALKER, } Executors."
"JOHN WALKER, }

From the affidavit of the surviving subscribed witness it appeared that Jackson and Heyworth were present together on the date of the will with deceased. That the deceased said, "This is my will, and I wish you both to witness it; I shall have to read part of it over as a matter of form, after which you will sign your name to it as witnesses." That he then read the words on the second page, as given above, down to "subscribed our names as witnesses"; that Heyworth and Jackson then signed their names at the end of the second page; that the deceased then wrote in their presence the words which appeared on the third page of the will; and that the whole of the writing, with the exception of their signatures, was in the deceased's own hand.

**[356]** Dr. Spinks moved the Court for probate: The reading over the attestation clause, in which is the deceased's name, was equivalent to an acknowledgment of that as his signature. What he wrote afterwards can be no part of the will, and is merely superfluous as regards the execution.

*Sir C. Cresswell*: I agree that the signature in the attestation clause must be taken from the circumstances alleged to be that by which the deceased intended to give effect to the will. What appears to have been written afterwards seems a sort of memorandum of what he thought he had done by the will.

Motion granted.

IN THE GOODS OF ALEXANDER STODDART (deceased), on Motion. February 22, 1862.

—Scotch Marriage Contract or Settlement.—Quasi Testamentary Indorsement. —B. and C., domiciled Scotch people, in contemplation of their marriage, entered into a contract or settlement in December, 1823, under which they had certain powers of appointment. On the fly-sheet of the settlement appeared what described itself as a codicil dated September, 1832, signed by B. and C., and attested by two witnesses. Below this, under date of 1st January, 1837, was an holograph of Alexander Stoddart, and signed by him, which purported to be testamentary. In 1855, deceased acquired an English domicil, which he retained till death.—On motion, the Court refused to grant letters of administration with the settlement and two writings annexed, as together containing the will and codicil thereto of deceased

[S. C. 31 L. J. (P.) 195.]

Alexander Stoddart, late of Barton Moss near Manchester, in the county of Lancaster, died there on the 10th of May, 1860. **[357]** He was born at Dumbarney, in the county of Perth, in Scotland, where he resided until about the year 1855, when he relinquished his Scotch domicil, and took up his residence in England. Prior to their marriage, to wit on the 23rd of December, 1823, the deceased and his then intended wife, Catherine Dewar, entered into a contract or settlement in contemplation of their said marriage.

It appeared by this contract that certain moneys and property were settled upon certain trusts therein declared, with power for the said deceased, and failing his so doing, for the said Catherine Dewar, in the event of her surviving him, by a writing under his or her hand, at any time in their respective lifetimes, to divide and apportion the said money amongst the issue of the marriage, as he or she should think proper; and failing such division, the same to be divided amongst such issue, and certain persons were appointed trustees.

The marriage was subsequently duly solemnized, and there had been issue three sons and one daughter, all of whom were living and had attained their majority.

On the fly-leaf of the said contract appeared three documents, all in the deceased's handwriting, of which the following are copies:—

"Since the foregoing pages were wrote, circumstances have occurred to make us, Alexander Stoddart and Catherine Dewar, add a codicil, wherein we cancel William Gardner, W. S. Edin and his heirs, James Condie, writer, Perth, heir of the late Mr. George Condie, and appoint Alexander Stoddart, of Ballendrick, John M'Laun, farmer, Wester Rhina and Catherine Dewar, should she survive her husband Alexander Stoddart.

"Viz.: that the whole effects heritable and personal shall, at the death of the longest liver, be equally divided amongst their children. Should Catherine Dewar survive her husband, Alexander Stoddart to have the interest of the whole during her lifetime, but should it be deemed advisable by **[358]** the trustees when our sons enter into business, each of them to get five hundred pounds at the age of twenty-three. Wrote by Alexander Stoddart, and subscribed by him, and the said Catherine Dewar, on the 19th day of September, eighteen hundred and thirty-two, before these witnesses, Alexander Comb and Thomas Scot, residing at Dunkirk.

"ALEXANDER STODDART.
"CATHERINE DEWAR.

"ALEXANDER COMB, Witness.
"THOMAS SCOT, Witness."

"1st Jan., 1837.

"Bought the land of Woodside for fifteen hundred and twenty pounds sterling; Laurence to have the offer of it at the same. Should he not incline to take it at the above sum, to be offered to the others; but should none of them be inclined to take it, in that case to be sold, and equally divided after their mother's death.

"ALEXANDER STODDART."
"Dunkirk, P.S., 28th August, 1845.

"Owing to a great deal of money being laid out on Woodside, to be given at what it may be reckoned worth at my death, who have withdrawn my brother's name for reasons here not necessary to explain.

"ALEXANDER STODDART.
"CATHERINE DEWAR."

Dr. Spinks now moved the Court to decree letters of administration, with the document dated the 19th of September, 1832, and the original contract or settlement, as together containing the last will and testament of the deceased, and the codicil dated the 1st of January, 1837, annexed, to Laurence [359] Stoddart and Alexander Stoddart, two of the lawful children of the deceased, on the renunciation of Catherine Stoddart, the widow of the deceased, there being no executor or residuary legatee named in either of the papers. There are affidavits as to deceased taking up his domicil in England, in 1854, and as to the document dated the 1st of January, 1837, being in deceased's handwriting. The first document, described as a codicil, executes the power of appointment contained in the settlement, and would embody it. The writing of the 1st of January, 1837, is holograph of the deceased before the Wills Act, and as such a good testamentary document.

By the Court: This writing does not relate to anything in the original settlement, nor to anything in that which the deceased calls a codicil, but to something bought since. How do you connect it with what went before?

Dr. Spinks: It is on the same document with that which is called a codicil; at least it ought to go to a court of construction.

*Sir C. Cresswell*: In 1837, the deceased, according to your statement, was domiciled in Scotland. You don't shew me that the document of which you ask probate would be a good testament according to Scotch law. I cannot grant this motion.

Motion rejected.

[360] IN THE GOODS OF LOUISA MORRIS, Widow (deceased), on Motion. January 28 and February 4, 1862.—Administration.—Guardian elected by Minors.—Testamentary guardian.—Practice.—A testamentary guardian of minor children is entitled to a grant of administration for their use and benefit, preferably to a guardian elected by the children. Grant made to the latter revoked, and a fresh grant made to the testamentary guardian.—Semble, where a general grant of administration is properly made, the practice is against revoking it, even with consent of the grantee, unless the grantee has become incapable by the act of God. Grants to creditors, however, are an exception to this rule.

[S. C. 31 L. J. (P.) 80; 5 L. T. 768.]

In this case the deceased died on the 31st of January, 1861, intestate. On the 11th of March in the same year letters of administration to her estate were granted to Edward Clutterbuck, the lawful uncle, one of the next of kin of and curator or guardian, duly elected by the four minor children of the intestate, for their use and benefit, and till one of them should attain the age of twenty-one years. The property was sworn under £450, consisting of furniture and other effects bequeathed by the will of her late husband, and which were supposed to form part of her estate. It was ascertained, however, in May, 1861, that the before-mentioned property did not belong to the estate of the deceased, but that a sum of £4000 Bank Annuities did belong thereto. It was therefore necessary that the amount of deceased's property should be re-sworn, further security given, and duty paid. Meantime the health of the administrator had become so impaired, that he was unfit and unwilling to continue the administration. The question as to the £4000 turned upon whether the widow had or had not made a certain election under her husband's will, and in respect thereof Colonel Clutterbuck had petitioned the Court of Chancery for directions.

[361] Mr. Kenneth Leith Sutherland, an executor of the will of the deceased's husband, and therein appointed testamentary guardian to the minor children, was willing to take out administration to the deceased, if the Court would revoke the grant of the 11th of March to Colonel Clutterbuck.

Dr. Deane, Q.C., moved the Court accordingly: The testamentary guardian is, by the practice of the Court, entitled in priority to the guardian elected by the minors. The present administrator has not intermeddled, and the whole proceeding was under a mistake. He referred to Coote's Probate Practice, 148 (2nd edit.), and cases there cited.

*Sir C. Cresswell*: Even with consent of the original administrator, is there any precedent for revoking a regular grant of administration, unless by the act of God the person has become incapable? As far as I understand, there is no instance in the registry where that has been done simply on account of age or infirmity.

Cur. adv. vult. as to practice in registry.

*Sir C. Cresswell*: The case * which has been looked up in the registry does not result in much—it is hardly in point. But here the original grant was made to a guardian elected by the minors; and it turns out that there was a testamentary **[362]** guardian under the father's will, who has a preferable right, and is now willing to take out administration. The revocation and fresh grant may therefore go as prayed.

IN THE GOODS OF JOHN GAUSDEN (deceased). December 24, January 28, and February 4, 1861-2.—Will.—Paper pasted on Parchment.—Signature at Foot or End.—Probate by Consent.

[S. C. 31 L. J. (P.) 53; 5 L. T. 767; 8 Jus. (N. S.) 180.]

In this case the will of the deceased was written by an illiterate hand on one side of a sheet of parchment. On the right-hand corner of the bottom of the parchment was pasted a piece of paper with a 2s. 6d. stamp impressed; the paper covered rather more than half the breadth of the parchment, but there would have been room at the left-hand corner of the bottom of the parchment for the names of the testator and attesting witnesses: in fact, these names were written on the paper pasted on as follows:—

"Of December, 1855,
"Signed by me, JOHN GAUSDEN 17th.
"THOS. STEPHENS, Wheelwright.
{ 2s. 6d. stamp. } "CHARLES STEPHENS, Wheelwright.
"SAMUEL LEWIS, Labourer."

From the affidavit of Mary Gausden, the executrix named in the will, and therein described as the wife of the deceased, and from the affidavits of the attesting witnesses, it appeared that the stamped paper was pasted on the parchment, before the execution of the will, in the presence of the deceased, and by the advice of the writer of the will, with the idea of giving greater validity to it; that nothing was written on that part of the parchment over which the paper was pasted; that the **[363]** paper itself was blank when the attesting witnesses were called in; and that the deceased in their presence wrote the date and his name as above given, and that they wrote their names and occupations with the intention of attesting his signature to the will.

December 24.—Dr. Swabey moved the Court to grant probate to the executrix therein named. He contended that the piece of paper so affixed as stated in the affidavits formed, in point of law, one piece of material with the parchment.

*Sir C. Cresswell*: I am not inclined to grant probate of this on motion—at least without citing those interested under an intestacy.

Motion to stand over.

January 28.—Dr. Swabey renewed the motion.—The consent of the father of the deceased to the grant of probate was filed, and, from his affidavit and that of the executrix, it appeared that her marriage was legally void by reason of affinity, so that the deceased had died a widower without child, leaving his father next of kin and solely entitled, etc. The property was small, and it would be very undesirable to expend it in a suit. Cur. adv. vult.

*Sir C. Cresswell*, after stating the facts as above, said: I have certainly felt a good deal of difficulty as to the effect of this intended execution, and I have bestowed much thought upon it. On the whole, especially as all parties interested consent, I think I ought to grant probate. Assuming that the parchment and paper were in the same condition when the names were written as they now appear, as I must assume on these affidavits, I think that it is a signature at the foot or end, within the meaning of the 9th section of the Wills Act. But if not so, I think, subject to the same assumption **[364]** as to facts, that it would be saved by the clause of Lord St. Leonards' Act which declares that "every will shall, so far only as regards the position of the

* In the case of Edward Hoare (T. T. 1833), referred to in "Coote's Practice," ubi supra, it appeared that a Mrs. French lent the intestate certain moneys, upon the security of a certain estate, which the intestate afterwards sold, or contracted to sell, to another person. Mrs. F. filed a bill against the purchaser, who eventually paid her the whole of the mortgage with interest. Between filing the bill and the receipt of the money, Mrs. F. took administration to the intestate on the renunciation of his widow and children (through their guardian). The Court made a new grant to one of the children after revoking the grant which had been made to the creditor.

signature of the testator, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will." I much wish, however, that the amount of property would have borne a suit and formal argument.

Probate granted.

GRIMWOOD *v.* COZENS AND OTHERS. April 20, 1860.—Codicil Dependent on Will.—Effect of Destruction of Will.—Intention of Testator.—Onus Probandi.—A codicil is primâ facie dependent on the will. Where a will and codicil to it have been in existence, and the will has been subsequently destroyed by the testator, the burthen of proof is on the party setting up the codicil, to shew that it was the intention of the testator that it should operate separately from the will; otherwise the presumption is that by the destruction of the will the codicil was revoked.

[S. C. 5 Jur. (N. S.) 497. Applied, *In the Goods of Greig*, 1866, L. R. 1 P. & D. 72. Discussed, *Black* v. *Jobling*, 1869, L. R. 1 P. & D. 689. Referred to, *In the Goods of Savage*, 1870, L. R. 2 P. & D. 80.]

Mrs. Kitty Grimwood, late of Maldon, in the county of Essex, widow, died on the 28th of December, 1857. On the 19th of August, 1853, she duly executed a will, in which she named her daughter Mrs. Elizabeth Richardson Cozens, together with Messrs. John and William Crick, executors and trustees. By this will she gave the whole of her real and personal estate to her trustees in trust for Mrs. Cozens for life, **[365]** and afterwards to be divided equally between Mrs. Cozens' children. On the 3rd of April, 1854, the deceased duly executed a codicil to her will in the following terms:—

"A codicil to the last will of me, Kitty Grimwood, of Maldon, Essex, widow:—

"I appoint my grandson Jeffery Grimwood Grimwood, to be an executor, and a trustee of my said will, in conjunction with the executors and trustees appointed thereby, and direct that my said will shall be read and construed as if the name of the said Jeffery Grimwood Grimwood had been inserted therein whenever the names of the executors or trustees appointed by my said will are therein named, or are referred to. I give all my printed books, pictures, and engravings, and also my best plate, to my said grandson Jeffery Grimwood Grimwood; an inventory of which plate I intend shortly to make in my own handwriting, and to enclose it in the same cover with my will and this codicil.

"Witness my hand this 3rd day of April, 1854.

"KITTY GRIMWOOD.

"Signed, etc., the 3rd April, 1854.

"WILLIAM CRICK, Maldon.
"WILLIAM FREEMAN, Maldon."

On the death of the deceased the above-mentioned will, after due search, could nowhere be found, and it was admitted by all parties that the deceased had destroyed it animo revocandi. The codicil was found tied up in a cover, with three unexecuted testamentary papers, which were in the handwriting of the deceased. The names of the attesting witnesses to the codicil were struck through, and on the back was written, "Mrs. Elizabeth Cozens and Mr. Jeffery Grimwood Grimwood, executors of this." The papers found with the will were to the following effect:—A letter without date. "My dearest Elizabeth,—When it shall please God to take me, I hope you will see to all the things I may leave behind. **[366]** Let dear Jeffery have the plate, books, and pictures, and give Elizabeth Keyes £200 for her own use, and to Robert Keyes £10, and to all his sisters £10 each, married or single, and what I leave besides do you take what you please; but I hope you will not let anything be sold by auction; what you do not like, give to my nieces; and what they do not like, change away for something they like better." Secondly, a paper dated the 15th of October, 1857:—"This is my last will and codicil, and I wish to have it complied with. My dear grandson Jeffery Grimwood Grimwood I leave my sole executor to pay all my little bequests. To his sister Augusta, my dear grandchild, and Catherine Whitehead, my great-grandchild, I leave £300 to each of them; and the £600 is in the Bank, which I take interest for; and the rest I leave to you and my dear child, your poor afflicted mother, to divide between yourselves. This is my wish and request." The third

was dated on the 29th of November, 1857 :—"My dearest Elizabeth,—I appoint you my executrix with my dear grandson, Jeffery Grimwood, whom I have appointed to be my executor jointly with you, to divide what I leave behind, to divide between you and him. I hope you will not let any one beside have anything to do with my affairs. If it please God to restore your health, you will be quite able to do it with dear Jeffery's assistance. I have destroyed all other wills or codicils. No one will have anything to do with what I leave but you and dear Jeffery; if any one of those I have left a legacy to dies, that share to come to you."

Mr. Jeffery Grimwood Grimwood applied for probate of the codicil, and Mrs. Cozens for letters of administration of the effects of the deceased (Mrs. Grimwood) as having died intestate. The grounds stated on behalf of Mrs. Cozens were, "that regard being had to the statements of the deceased in the unexecuted memorandum, dated the 29th of November, 1857, that she had destroyed all other wills or codicils, and [367] to the fact that the will dated the 19th of August, 1853, after diligent search and inquiry in and of all likely places and persons, could not be found, it might be presumed that the deceased destroyed the will with an intention to revoke the same; that the codicil dated the 3rd of April, 1854, being dependent on the said will, was also revoked by its destruction; and that the appearance and the contents of the codicil itself, and the contents of the memoranda of the deceased, shew that it was not the intention of the deceased that the codicil dated the 3rd of April, 1854, should operate as a substantive testamentary paper."

Dr. Deane, Q.C., for Mr. Grimwood, admitted that if the codicil were dependent upon the will, the destruction of the will would be, notwithstanding the 1 Vict. c. 26, s. 20, a revocation of the codicil; but he submitted that if the codicil had any separate operation, it would not be so revoked. The codicil before the Court was intended by the deceased to be a substantive testamentary instrument, and independent of the will.

Dr. Middleton, for Mrs. Cozens, maintained that the deceased executed the codicil as an addition to and dependent on the will; that when she destroyed the will, she intended to revoke the codicil, and believed that she had done so; and that that being so clearly her intention, a sufficient act had been done by the destruction of the will.

Dr. Tristram appeared for Messrs. Crick, two of the executors named in the will.

The cases cited were—*Barrow* v. *Barrow and others* (2 Lee, 335); *Plenty* v. *West and Budd* (1 Robert, 264); *Tagart and Bakewell* v. *Hooper and others* (1 Curt. 289); *Medlycott* v. *Assheton* (2 Add. 230); *In re Goods of R. Hadwell* (4 N. C. 400); and *Clogstoun* v. *Wallcott* (5 N. C. 623).

[368] *Sir C. Cresswell*: I think it has been established by the cases cited at the bar, that previous to the passing of 1 Vict. c. 26, a codicil was primâ facie dependent on the will, and that the destruction of the latter was an implied revocation of the former; and, moreover, that Sir H. J. Fust was of opinion that no alteration of this principle was made by the passing of the statute. The question, then, is entirely one of the intention of the deceased. Where a will and codicil have been in existence, and the will is afterwards revoked, it must be shewn, by the party applying for probate of the codicil alone, that it was intended by the deceased that it should operate separately from the will; otherwise it will be presumed, that, as the will is destroyed, the codicil is also revoked. In this case the codicil is entirely dependent on the will, and more particularly that portion of it which alone gives Mr. Grimwood authority to come here and make this application. What claim has he to be here except by favour of those words of the codicil, which have no meaning unless read with the will? I think the intention of the deceased may be pretty clearly ascertained from the papers before the Court. She intended to make another will. By the paper dated the 15th of October, 1857, she does not treat the previous appointment of Mr. Jeffery Grimwood Grimwood to be executor as operative. That paper is headed, "This is my last will and codicil," and by it she appoints her grandson her sole executor, as if she were so appointing him for the first time. The letter addressed to her daughter, without any date, makes no reference to the appointment of Mr. Grimwood as executor at all, but shews a desire that Mrs. Cozens should settle her affairs, and instructs her to "let dear Jeffery have my plate, books, and pictures," a direction quite unnecessary if the codicil was operative. The paper dated the 29th of November, 1857, addressed to the daughter, commencing—"I appoint you my executrix with my dear grandson, Jeffery Grimwood, whom I have appointed for my

exe-[369]-cutor," clearly refers to the paper dated the 15th of October, 1857, and to no other; and the indorsement on the back of the codicil,—"Mrs. Elizabeth Cozens and Mr. Jeffery Grimwood Grimwood, executors of this," must also point to the same papers. There is therefore nothing in these papers to shew that the deceased supposed the codicil to be still in operation. The fact of the striking through the names of the attesting witnesses, on the contrary, satisfies me, that she intended to revoke it. I refuse to grant probate of this codicil, but it is a case in which I think the costs of all parties should be paid out of the estate.

IN THE GOODS OF BETTY FARADAY, wife of Martin Faraday (deceased), on Motion. November 5 and 19, 1861.—Wife.—Protection Order.—Registration.—20 & 21 Vict. c. 85, s. 21.—B., a married woman, obtained a protection order for her property on the 12th of April, 1861; she made a will on the 19th, and died on the 24th of the same month. The order was not entered with the Registrar of the County Court till the 24th, being more than ten days after it was obtained.—Held, that the requirement of the statute as to the entry of the order with the Registrar is directory and not imperative, and, on affidavits from the executors that they were ignorant of the husband's place of abode, probate was granted, limited to the property acquired since the date of desertion.

[S. C. 31 L. J. (P.) 7; 7 Jur. (N. S.) 252.]

In this case Betty Faraday, wife of Martin Faraday, died on the 24th of April, 1861, leaving a will dated the 19th of April, 1861, whereof she had appointed her sons executors. On the 12th of April, 1861, the deceased obtained from the justices of the peace in the division of Bury, in the county of Lancaster, an order protecting her property and savings, etc., from her husband, his creditors, and persons claiming under [370] him, from the year 1832, when he had deserted her. The order was not registered in the County Court of Lancashire till a few hours before her death, on the 24th of April, being two days later than the time required by the 21st section of the Divorce Act, 1857: "A wife deserted by her husband may at any time after such desertion, if resident within a metropolitan district, apply to a police magistrate, or if resident in the country, to justices in petty sessions, or in either case to the Court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of after such desertion, against her husband, or his creditors, or any person claiming under him; and such magistrate, or justices, or Court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband, and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a feme sole. Provided, always, that every such order if made by a police magistrate or justice in petty sessions, shall, within ten days after the making thereof, be entered with the Registrar of the County Court within whose jurisdiction the wife is resident," etc.

Dr. Phillimore, Q.C., now moved for probate to the executors of the will. The words of the section requiring registration are directory and discretionary, not imperative (*Reg.* v. *Loxdale*, 1 Burr. 447; *Pearse* v. *Morrice*, 2 Ad. and E. 84).

*Sir C. Cresswell*: Suppose the woman had made a will and died before the expiration of the ten days, the order remaining unregistered at the time of death?

[371] Dr. Phillimore: I submit that the will would be valid. The power to make it depends upon the protection order, not on the registration.

*Sir C. Cresswell*: I am inclined to think so, but the probate must be special, setting out the circumstances; but I also think that the husband should have notice of the motion. If the executors have no knowledge of where he is, affidavits to that effects must be filed.

Dr. Phillimore renewed the motion on the affidavit of the executors to the effect that the husband's place of residence had not been known since his desertion in 1832, and that 1851 was the last year in which they had seen him, and that they had no means of ascertaining his present abode.

*Sir C. Cresswell* granted probate, limited to the property acquired by the deceased since the date of the desertion as fixed on the protection order.

IN THE GOODS OF GEORGE AUGUSTUS FREDERICK SMITH (deceased). November 19, 1861.—Administration de bonis non.—Doubt as to correctness of original grant.—In 1807, the Prerogative Court granted letters of administration with the will annexed to B. as substituted legatee, reciting that no executor had been named in the will, and that C., the universal legatee for life, had survived the testator, but died without taking administration. On application for administration de bonis non, a doubt arose in the Registry, on looking at the will, whether the property had not been given absolutely to C., and consequently whether the grant in 1807 was not incorrect.—**[372]** But the Court held that, after such a lapse of time, it would presume that the recital in the original grant was correct, and (there being no one before it having an interest and calling upon it to do so) would not go into the question of the construction of the will.

[S. C: 31 L. J. (P.) 187.]

This was an application for administration, with the will annexed, de bonis non, under the following circumstances:—

The testator died on the 16th of September, 1806, having made his will in the following terms:—"I give and bequeath to my dear and beloved mother Charlotte Smith, to the best of my knowledge and belief at present residing at Telford, near Farnham, in the county of Surrey, England, all my property, of whatsoever and every description, kind, and denomination, which I may now or at any time possess or have claim to on any account, having such full confidence in her goodness, affection, and regard to my wishes, as to believe and be persuaded that in the event of her surviving me she will at her own free will and accord make the same provisions from whatever property may fall to her on my account by virtue hereof, in favour of my dear and eldest sister Charlotte Mary Smith, and of my dear brothers Nicholas and Lionel Smith, as are hereafter expressed herein; and in case it should please Almighty God to take from me my dear and beloved mother, whereby the within provisions of this will respecting her become null and useless, I then and in such case do hereby will, publish, and declare, that I give and bequeath to my dear and eldest sister Charlotte Mary Smith, to the best of my knowledge and belief at present residing at Telford, near Farnham, in the county of Surrey, England, and to my dear brother Nicholas Smith, to the best of my knowledge and belief at present in the Civil Service of the Honourable East India Company, and to my dear brother Lionel Smith, to the best of my knowledge and belief at present a lieutenant-colonel in the 18th or Royal Irish Regiment of Foot, jointly to and equally among and between them, all my property of whatever description **[373]** which I may be possessed of now, or have any claim to hereafter. And I do hereby publish and declare it as my wish that any sum or sums of money that may devolve on my dear brother Nicholas Smith by virtue hereof, should be specifically appropriated to the use and service of my dear niece Lucena Smith, daughter of my dear brother Nicholas Smith, as long as she lives. In witness whereof, and to two other copies of this same tenor and date, I have hereunto subscribed my name and affixed my seal at Fort Amsterdam, in the colony of Surinam aforesaid, on this 10th day of June, in the year of our Lord 1806.

"GEORGE AUGUSTUS FREDERICK SMITH (L.S.)

"Signed, sealed, published, and declared by the said testator, as and for his last will and testament, in our presence, and at his request, and in the presence of each other, have hereunto subscribed our names as witnesses.

"J. GALLOWAY, Capt. 16th Regt.
"R. LYNCH, Capt. 13th Regt.
"SAML. WOOD, Lieut. 16th Regt."

The mother survived the testator a short time, and died intestate, without having taken out administration to the testator, and on the 19th of March, 1807, a grant of letters of administration, with the will annexed, was made to the said Charlotte Mary Smith by the Prerogative Court of Canterbury, as the natural and lawful sister, and one of the universal legatees substituted in the said will, having been first sworn duly to administer, no executor being named in the said will, and Charlotte Smith, widow, the natural and lawful mother and universal legatee for life named in the will, having survived the deceased, but died without taking out letters of administration, etc.

Charlotte Mary Smith intermeddled in the estate of the de-**[374]**-ceased, but died leaving part thereof unadministered; she left a will, of which Lucena Smith, as executrix, took probate in July, 1842. A sum of money under some proceedings in

Chancery had lately become due to the estate of the testator, and a personal representative was required to give a discharge; application was therefore made in the Registry for a grant, de bonis non, to Lucena Smith as a legatee for life, as to one third part of the residue of the said deceased's estate substituted in the said will. The Registrar objected that the original grant was improperly made; that the mother having survived the testator, the property vested absolutely in her, and the original grant should have been made to her representative. On the other hand, it was urged that the grant was properly made, as the terms of the will were such as a Court of Equity would hold to constitute a precatory trust, in favour of the sister and brothers, and that the mother had really no more than a life interest. (See 1 Jarman on Wills, p. 356, 3rd edit.)

The question now came before the Court on motion.

Dr. Swabey, after reciting the above circumstances, submitted that the first question was whether, after such a lapse of time, the Court would look behind a grant made by a competent Court, and which on its own recital was a proper one, there being no one before the Court having an interest and calling upon the Court to do so.

*Sir C. Cresswell*: I think that is the proper view to take of it. The cases on the interpretation of such terms run very fine, and I think I am not called upon now to question the propriety of the grant made by the Prerogative Court in 1807. The grant de bonis non may go as prayed.

**[375]** IN THE GOODS OF JOHN PARKER (deceased), on Motion. May 10, 1859.—Seaman's Will.—Informal Testamentary Paper.—1 Vict. c. 26, s. 11.—The deceased, who was master of a trading vessel, in the course of a voyage, arrived at Port Adelaide, from whence he wrote, and forwarded by post a letter, some sentences of which were testamentary. The vessel was subsequently lost at sea. —Held, that the deceased was a mariner at sea, and consequently that such a letter, being in the handwriting of the deceased, and testamentary, was entitled to probate.

[S. C. 28 L. J. (P.) 91; 5 Jur. (N. S.) 553.]

John Parker was the master and part owner of the ship called the "Rolling Wave." Accompanied by his wife, Ellen Parker, he sailed from Liverpool on the 3rd of July, 1857, bound for Adelaide, Australia, where he arrived on the 15th of October following. He afterwards sailed for Batavia and Hongkong, at which last place he arrived on the 22nd of February, 1858. The vessel, with the deceased on board, was afterwards despatched from China to Siam, viâ Macao. It left Macao on the 15th of March, 1858; it was never afterwards heard of, and was supposed to have gone down with the deceased and all hands on board. The usual period of the voyage between Macao and Siam, at that time of year, is eighteen days. Before leaving England, John Parker made a will, dated the 24th of June, 1857. By this he named Joseph Swan and William Royals, executors and trustees, and left to them all his property in trust, as regards two thirds, for purposes immaterial to the present question; but as to one third, to pay the income arising therefrom to his mother Ann Parker for her life, and then to transfer that portion absolutely to his niece Sarah Ann Parker. In case the latter died under age, that portion, on the death of the mother, was to go absolutely to his brother Richard Parker. The will then continued:—"Provided also, and it is my will, that in case my said wife **[376]** die in my lifetime, or we both die abroad or be drowned at sea, then I direct my said trustees, or the survivor of them, his heirs, executors, or administrators, or others, the trustees or trustee for the time being of my will, to stand possessed of the whole of the said trust-moneys and investment thereof, upon trust to pay thereout a legacy to . . . and to pay and divide the residue thereof unto and equally amongst such of my said mother Ann Parker, sister Sarah Parker, and brother Richard Parker, and my nieces the said Sarah Ann Parker, and Ellen Knowles and Alice Knowles, as shall be then living." During the stay of the deceased in Australia, he wrote the following letter to Mr. and Mrs. Swan, the latter being the sister of Captain Parker's (the deceased) wife:—

"Port Adelaide, November 23, 1857.

"Dear Brother and Sister,—Had you seen my poor wife cry last night, you would not have let her been so long without hearing from you. I am going to Singapore,

and I hope and trust you will have me safely insured. I inclose you a bill for £150, to present to the bank, to be placed to my credit, and an order on the bank for cash to defray expenses. In case of my ship being lost, and you never hearing more of me or my wife, recollect I have wages due from the 1st of May, £2, 10s. per cent. commission on £1400 outward freight, and outward passage money £7, 10s. I also send you vouchers to be preserved for me in case I live, or for you to settle my accounts if I die. Thinking, through not hearing from you, that something serious has happened, I have wrote to Royals. I beg of you, if you find any difficulty in getting this money, that you will see Mr. Flett, and he will be able to make it all right at the bank.

"Mem.—I desire, if it should please God to take me before I see you again, that you and Mr. Royals will prevent my brother Richard, or his children, from ever having a fraction **[377]** of my property after my mother's death; he is a great blackguard; he has distinctly refused to allow his mother a farthing. God bless you all. In great haste,

"Your brother and sister,
"J. and E. PARKER."

Directed:—"Mr Joseph Swan,
"Church Road,
"Higher Tranmere,
"Cheshire, England."

Post-mark:—"Adelaide, Nov. 23 1857."

There was no direct evidence that Captain Parker was on board his ship when he wrote this letter; but it is dated Port Adelaide.

Dr. Middleton submitted that the letter was testamentary, inasmuch as it varied the disposition of property made by the will of the deceased, and was intended to operate on his death, and that the deceased was a mariner at sea (*In the Goods of Lay*, 2 Curt. 375; *In the Goods of Milligan*, 2 Robert, 108); and as it was in the deceased's handwriting, the letter must be admitted to probate.

*Sir C. Cresswell*: The only difficulty I have is in granting probate to a letter, the larger portion of which is not testamentary. On the authority, however, of the last case referred to (*In the Goods of Milligan*), in which a similar document was admitted, I feel bound to grant the motion, and to decree probate of the will, and of the letter, dated Port Adelaide, November 23, 1857, as a codicil thereto, to the executors.

**[378]** CLARKSON *v.* WATERHOUSE. January 25, 1860.—A Married Woman.—Liability for Costs.—Practice.—Where a will was propounded by a married woman, and her husband had not been joined with her as a party to the suit, the Court having pronounced against the will, condemned the wife in the costs.

[S. C. 29 L. J. (P.) 136; 1 L. T. 415; 6 Jur. (N. S.) 326. Followed, *Morris* v. *Freeman*, 1878, 3 P. D. 67.]

This was a suit for the revocation of probate of the will of Jane Clarkson, which had been granted by the District Registry, at York, to her daughter, Mrs. Mary Waterhouse, the defendant. The probate had been called in by her brother, William Clarkson, the plaintiff, and she then propounded the will. The plaintiff filed a plea, alleging undue execution, upon which issue was joined.

The will, on the face of it, appeared to have been duly executed. The attesting witnesses were Elizabeth Bell, the daughter, and Elizabeth Bell, the granddaughter of the deceased. Elizabeth Bell the younger, at the request of Mrs. Waterhouse, made the usual affidavit of due execution, and probate in common form was thereupon issued at York.

On her examination in Court, she stated that this affidavit was untrue; that although she was present when the deceased signed the will, Elizabeth Bell the elder was not; that Banks, who had prepared the will, wrote her mother's name in the attestation clause, and that this was known to Mrs. Waterhouse when she asked her to make the affidavit. This statement was confirmed by Elizabeth Bell the elder.

*Sir C. Cresswell* pronounced against the will.

Dr. Swabey, for the plaintiff, applied for the defendant to be condemned in costs.

Dr. Spinks, contrà: Mrs. Waterhouse is a married woman. **[379]** The plaintiff has not made her husband a party to the suit; she is therefore not liable to be condemned in costs.

Cur. adv. vult.

*Sir C. Cresswell*: The defendant, Mrs. Waterhouse, acted with great impropriety in obtaining probate of a will at York, which she well knew had not been duly executed. Her niece, Elizabeth Bell the younger, evidently made the affidavit of due execution under some misapprehension; for I shrink from imputing to her that she wilfully swore what she knew to be false. On my pronouncing against the will, there arose a question of costs. I was disposed to grant them to the plaintiff, when Dr. Spinks interposed an objection that I could not do so, on the ground that Mrs. Waterhouse was a married woman, and that her husband had not been made a party to the suit. I have looked into the cases, and although I think it extremely probable that this neglect of the plaintiff will render fruitless the order I am about to make, yet I find that there is abundant authority in the Common Law Courts for my making an order for her to pay the costs. In *Newton and Wife* v. *Boodle* (4 Com. B. 359), the plaintiffs obtained a rule nisi for a new trial, which was discharged with costs against both the plaintiffs. The female plaintiff obtained a rule nisi to amend that rule by striking out so much of it as directed costs to be paid by her, on the ground that she being a married woman suing with her husband was not liable to costs. This rule so obtained by the wife was afterwards discharged, and the Court thought it ought to be discharged with costs. Then the question arose, who was to pay these costs? But the Court held, that the order for their payment ought to be made against the wife. If the wife has no separate property, I do not know that the order can be enforced; if she has separate property, there may be some mode of getting the costs from her.

**[380]** At all events, I shall pronounce an order that the defendant be condemned in costs.

BAKER *v.* BAKER. February 16, 1860.—Attachment.—Married Woman.—Administratrix.—An attachment will be granted against a married woman for non-compliance with a citation, calling upon her to file an inventory in the Registry of an estate of which she is administratrix.

[S. C. 29 L. J. (P.) 138.]

In December, 1858, the defendant took out letters of administration to the effects of her deceased husband. In 1859 she was served with a citation on behalf of his mother and sister, calling upon her to bring in an account, and to file an inventory of his estate and effects in the Registry. She had not obeyed the citation: after its service she remarried.

Mr. E. Ward moved for an attachment against her, or against her husband.

*Sir C. Cresswell*: You may take an attachment against the wife. I cannot grant one against the husband. He is responsible for her debts, but he is not responsible for her delinquencies.

Attachment granted.

IN THE GOODS OF CHARLES CLARKINGTON, deceased (on Motion). November 26, 1861.—Limited Administration ad colligenda bona.—Power of Administrator.—The Court, under special circumstances, made a grant to a creditor ad colligenda bona, limited to collect the personal estate of the deceased, to give receipts for his debts on the payment of the same, and to renew the lease of his business premises which would expire before a general grant could be made.—**[381]** The Court refused to include in the grant a power to dispose of the lease and goodwill of the business, or a power to carry on the business.

[S. C. 7 L. T. 218; 8 Jur. (N. S.) 84; 10 W. R. 14.]

Charles Clarkington, late of Nos. 246 and 248 Regent Street, photographic artist, died on the 28th of October, 1861, intestate, and leaving as it was supposed, no known relation.

The deceased's personal and only property consisted of the lease of the said premises in Regent Street, the benefit of the covenant to renew the said lease, certain furniture and fixtures, his stock-in-trade, the apparatus used in his business, and debts, due to him; altogether of the estimated value of £786. His liabilities far exceeded this amount; but as there was a prospect of realizing a considerable sum by the sale of the goodwill of his business, for the purchase of which several parties were willing to treat, it was expected that by the careful management of the estate, the assets, when realized, would be sufficient to pay his liabilities in full. The lease

of the business premises would expire on the 22nd December, 1861, and it was necessary that there should be an administrator appointed without delay, for the purpose of collecting the deceased's debts, of renewing the lease, and of making arrangements for the carrying on or sale of the business. A citation had been extracted from the Registry, against the next of kin of the deceased (if any), and all other persons in general to accept or refuse letters of administration of his effects, or to shew cause why the same should not be granted to Mr. Frederick Thorn, as a creditor. The citation had been served on the Queen's Proctor, and an abstract of it had been inserted in the "Times" newspaper of November the 19th. But as the grant could not be made to Mr. Thorn until thirty days after the service of the citation, the present application was made.

Dr. Phillimore, Q.C. (Dr. Tristram with him) moved the **[382]** Court for a grant of administration of the effects of the deceased to be made to Mr. Thorn, ad colligenda bona, limited to the collection of all the personal property of the deceased, and giving discharges for all the debts due to his estate on the payment of the same, with a power to renew the lease and to dispose of his business premises and of the goodwill of his business. *In the Goods of Mary Radnall*, 2 Add. 233, a grant had been made, which although not in the precise terms so extensive as the new one now asked for, yet after authorizing the administrator to collect the property and to give discharges for the debts, empowered him "to do what further was necessary for the preservation of the property." The Prerogative Court had also made a grant ad colligenda bona, *In the Goods of George White* (1832), limited to the sale of a ship, and to the protection of a cargo, and other matters relating thereto (not reported), Coote's Probate Practice, p. 114. There were affidavits filed by two creditors, who had claims on the estate to the amount of nearly £1000 in support of this application.

*Sir C. Cresswell*: I will make a grant limited to the collection of the personal estate of the deceased, with a power to the administrator to give discharges for his debts on payment of the same, and to renew the lease. I cannot go further. I am informed by the Registrar that there is no precedent in the Prerogative Court which would warrant me in giving the administrator a power to dispose of the premises and of the goodwill of the business.

Dr. Phillimore asked that the grant should include a power to the administrator to carry on the business.

*Sir C. Cresswell* declined to insert this power in the grant.

**[383]** (Before the *Judge Ordinary.*)

BUSBY *v.* BUSBY AND VINE. March 13, 1861.—Costs.—Attachment for Non-payment of.—Affidavit of Service of Order.—An attachment will not be granted for non-payment of costs pursuant to an order, unless a copy of the order be annexed to the affidavit of service.

[S. C. 30 L. J. (Mat.) 172; 5 L. T. 137.]

Mr. Searle moved for an attachment against the petitioner for non-payment of costs pursuant to an order of the Court.

*The Judge Ordinary*: A copy of the order served should be annexed to the affidavit of service. Until this is done I cannot grant an attachment.

Motion rejected.

BROCAS *v.* BROCAS. April 17, 1861.—Dissolution of Marriage.—Abatement by death of parties.—Practice.—A petition for dissolution of marriage abates on the death of the re-**[384]**-spondent, but the Court will not, on the application of the petitioner, order that the petition and affidavit in support be removed from the file.

[S. C. 30 L. J. (Mat.) 172; 5 L. T. 137.]

This was a suit by a wife for dissolution of marriage. The respondent did not appear. The petition came on for proof on the 19th of March, but, in consequence of the illness of the respondent, the hearing was postponed. Three days afterwards he died.

Dr. Spinks, for the petitioner, now moved for an order that the petition and the affidavit in support of it, should be taken off the file.

*The Judge Ordinary*: By the death of the respondent the suit abated. I think, however, that the petition should remain on the file.

Dr. Spinks asked for an order that the cause should be removed from the cause list.

*The Judge Ordinary*: On an affidavit being filed that the respondent is dead, the Registrar will remove it from the cause list, but I make no order.

Motion rejected.

STOATE *v.* STOATE. April 24, 1861.—Decree nisi for Dissolution of Marriage.—Right of Respondent under 23 & 24 Vict. c. 144, s. 7.—A respondent, against whom a decree nisi for dissolution of marriage has been pronounced, cannot shew cause against the decree being made absolute under Sect. 7 of 23 and 24 Vict. c. 144.

[S. C. 30 L. J. (Mat.) 173; 5 L. T. 138. Referred to, *Ousey* v. *Ousey*, 1875, 1 P. D. 60. Applied, *Harries* v. *Harries*, 1901, 86 L. T. 262.]

In this case a decree nisi had been pronounced for dissolu-**[385]**-tion of the marriage on the ground of the adultery of the wife. The respondent had appeared.

Dr. Swabey now moved that the respondent might be allowed, under Sect. 7 of the 23rd and 24th Vict. c. 144, to shew cause against the decree being made absolute. Under that section a respondent ought to be at liberty to shew cause against the decree nisi being made absolute, if material facts arise or come to her knowledge after the decree nisi has been pronounced.

*The Judge Ordinary*: The respondent has no right under that section to shew cause against the decree nisi being made absolute. She should have applied for a new trial. The motion must be rejected, and the costs of it must not be allowed against the husband.

Motion rejected.

ALEXANDER *v.* ALEXANDER. Decree for Restitution of Conjugal Rights.—Attachment for Disobedience.—Practice.—A husband who has been served with a decree in a suit for restitution of conjugal rights, ordering him to take his wife home, is bound to take the first step, by inviting her to return to him. If he does not, an attachment will be issued. If he has not appeared in the suit, notice of the motion for an attachment is not requisite.

[S. C. 30 L. J. (Mat.) 173; 5 L. T. 138; 9 W. R. 620. Referred to, *Weldon* v. *Weldon*, 1883, 9 P. D. 56.]

This was a petition by a wife for a restitution of conjugal rights. The husband did not appear, though personally served. On the 15th of January, 1861, the petition came on for proof before the Judge Ordinary, who made a decree for restitution **[386]** of conjugal rights. By the decree the husband was ordered, within a month after the service of the decree upon him, to take the petitioner home, and treat her with conjugal affection, and to certify to the Court at its next sitting after the expiration of the said month that he had done so, etc.

On the 16th of February, 1861, an office copy of the decree under the seal of the Court, was personally served on the respondent at Dinan, in France; but he had not taken the petitioner home.

Dr. Spinks, on behalf of the petitioner, now moved for an order that an attachment should issue against the respondent for disobeying the decree upon an affidavit of the petitioner that the respondent had neither by himself nor his agents had any communication with her since the service of the decree; that he had not taken her home, or made any offer to her of a home, and that she believed he had gone out of the jurisdiction of the Court for the purpose of defeating the proceedings. There were also affidavits of service of the copy of the decree, and that search had been made, but there was no entry in the book kept in the Registry for that purpose of a certificate that he had complied with the decree.

*The Judge Ordinary*: Has the respondent had any opportunity of taking his wife home? He is in France and she is in England. Should she not have tendered herself to be taken home; and, in analogy to the practice of the Ecclesiastical Court, should he not have had notice of this motion?

Dr. Spinks: He has not appeared, and therefore no notice is necessary. In the Ecclesiastical Courts the husband would have been pronounced in contempt, and the Court would then have ordered that a significavit to the Court of Chancery should issue.

*The Judge Ordinary*: I am informed by the Registrar **[387]** that in the Ecclesiastical Courts, when in a suit for restitution of conjugal rights a husband had been personally served with an order to take his wife home, it was not requisite that the

wife should make an offer to return home, but that the husband ought to have taken the first step by inviting her to do so. An attachment may therefore issue.

Attachment granted.

AFFORD *v.* AFFORD. May 25, 1861.—Costs.—Wife suing in formâ pauperis allowed Costs.—A wife suing in formâ pauperis for a dissolution of marriage, if she obtains a decree is entitled to costs.

[30 L. J. (Mat.) 174; 5 L. T. 138.]

This was a petition by a wife who sued in formâ pauperis for dissolution of marriage on the ground of adultery and desertion. The respondent did not appear. The petition now came on for hearing, and the Judge Ordinary having pronounced a decree nisi for dissolution of marriage,

Dr. Swabey asked that the husband should be condemned in costs.

*The Judge Ordinary*: I see no reason why the petitioner should not have her costs.

Decree nisi with costs.

**[388]** WHIELDON *v.* WHIELDON. May 30, 1861.—Permanent Alimony.—Children in Wife's custody.—Where a wife had obtained a decree of judicial separation, and the Court had ordered that she should have the custody of three children all under the age of seven, alimony pendente lite having been allotted on the assumption that the husband's income was £400 per annum, the Court allotted to the wife £160 per annum as permanent alimony; £100 for herself, and £20 per annum for each of the children.

[S. C. 30 L. J. (Mat.) 174; 5 L. T. 138.]

In this case a decree of judicial separation on the ground of adultery of the husband had been pronounced, and the Court had ordered that the petitioner should have the custody of the three children of the marriage, who were all under seven years of age.

Dr. Phillimore, Q.C., moved that permanent alimony should be allotted. Alimony pendente lite was allotted, the income of the husband being taken to be £400. The circumstance that the wife has the children to maintain should be taken into consideration.

Dr. Deane, Q.C., for the petitioner.

*The Judge Ordinary* allotted £160 as permanent alimony; £100 for the wife, and £20 for each of the children.

ASHLEY *v.* ASHLEY. May 30, 1861.—Practice.—Withdrawing Petition for Judicial Separation by Wife, and filing one for Dissolution of Marriage.—Wife's Costs.—The Court will allow a wife to withdraw her petition for judicial sepa-**[389]**-ration and file one for dissolution of marriage, if her proctor has not received from the husband her costs in the former suit.

[30 L. J. (Mat.) 175; 5 L. T. 139.]

This was a suit by a wife for judicial separation on the ground of cruelty.

Mr. E. Clarkson, on behalf of the petitioner, moved that Mrs. Ashley might be at liberty to withdraw her petition for judicial separation and file one for dissolution of marriage, on the ground of cruelty and adultery. The husband's adultery had only been discovered since the former suit was commenced.

*The Judge Ordinary*: Has the wife's proctor received her costs in the former suit?

Mr. Clarkson: No.

*The Judge Ordinary*: That being so, I will grant the application.

Motion granted.

POUNSFORD *v.* POUNSFORD AND BULPIN. June 10 and 12, 1861.—Dissolution of Marriage.—Damages.—Immediate Execution.—Order to pay Damages into Court.—The Court has no power to order immediate execution for the recovery of damages awarded against the co-respondent, and ordered to be paid to the petitioner, nor to order that such damages be paid into Court.

[S. C. 30 L. J. (Mat.) 188; 5 L. T. 139.]

This was a petition for dissolution of marriage, with a prayer asking damages against the co-respondent. The respondent denied the adultery. The co-respondent did not appear. On the 10th of June, 1861, the cause was tried by a jury, who

**[390]** found that the respondent had committed adultery, and assessed the damages at £500, and the Judge Ordinary, on the application of the counsel for the petitioner, who stated that the wife had separate property, and that the husband was without means, ordered that the damages should be paid to the husband.

Dr. Spinks (Mr. J. D. Coleridge with him) then applied for immediate execution against the co-respondent.

*The Judge Ordinary* said that he had no power to order immediate execution, but that the motion might be renewed.

Dr. Spinks now moved the Court to order immediate execution, and that the £500 should be paid into Court to abide the event of the suit upon an affidavit that the co-respondent was selling off his property, and was about to go abroad.

*The Judge Ordinary*: I do not see what power I have to make the order.

Dr. Spinks: If this had been an action for crim. con., immediate execution might have been granted.

*The Judge Ordinary*: I do not see what execution I could issue. I have only such power to enforce decrees as the Court of Chancery has.

Dr. Spinks: You have decreed that the damages should be paid to the petitioner.

*The Judge Ordinary*: Yes; that means when he can get them. I should be glad to assist the petitioner if I could, but I do not see that I can.

Motion rejected.

**[391]** CLOUT *v.* CLOUT AND HOLLEBONE. July 3, 1861.—Dissolution of Marriage on the ground of Wife's Adultery.—Access to the Children.—20 & 21 Vict. c. 85, s. 35.—After a decree nisi for dissolution of marriage on the ground of the wife's adultery, the Court will not order that she have access to the children of the marriage.

[S. C. 30 L. J. (Mat.) 175; 5 L. T. 130. Referred to, *Handley* v. *Handley*, [1891] P. 124.]

In this case, on the 8th of June, 1861, after a verdict of a jury, the Judge Ordinary pronounced a decree nisi for dissolution of marriage, on the ground of the adultery of the wife.

Dr. Wambey subsequently, on behalf of the respondent, asked the Court to order that she should have access to two children of the marriage. Cur. adv. vult.

*The Judge Ordinary*: This was an application on behalf of the wife against whom a decree nisi for dissolution of marriage had been pronounced, on the ground of her adultery, that she might have access to the children of the marriage. The application being of a novel character required some consideration. By the 4th section of 2 & 3 Vict. c. 54, which empowers the Lord Chancellor or the Master of the Rolls to order that a mother should have access to infant children, and if such children be within the age of seven years, to order that they be delivered to and remain in her custody until attaining such age, it is enacted "That no order shall be made by virtue of this Act whereby any mother against whom adultery shall be established by judgment in an action for criminal conversation at a suit of her husband, or by the sentence of an Ecclesiastical Court, shall have the custody of an infant, or access to any infant, anything herein contained to the contrary notwithstanding." I think that that enact-**[392]**-ment establishes a precedent that I ought to follow, and that when a wife has been proved guilty of adultery, I ought not to order that she have access to her children. I must therefore refuse to grant the application.

Motion rejected.

BENT *v.* BENT AND FOOTMAN. July 11, 1861.—Damages.—Dissolution of Marriage.—Provision for Adultress.—Custody of Children.—20 & 21 Vict. c. 85, ss. 32, 35.—On a decree nisi for dissolution of marriage on the ground of the adultery of a wife who on her marriage had a fortune of £1678, which was not settled, but was received by the husband, the Court ordered that the husband should settle £1000 upon trust that the interest be applied for the benefit of the wife so long as she conducted herself properly and remained unmarried, and that upon her interest ceasing the fund should be held in trust for the children of the marriage in equal shares, and that the £1000 damages awarded against the co-respondent, should be paid to the husband in lieu of the sum he would have to settle, and that the decree should be suspended until the settlement should be made.—

When a marriage is dissolved on the ground of the wife's adultery, the Court will not order that she have the custody of or access to the children of the marriage.

[S. C. 30 L. J. (Mat.) 176; 5 L. T. 139. Referred to, *Handley* v. *Handley*, [1891] P. 124.]

This was a petition for dissolution of marriage on the ground of the adultery of the wife. The petitioner claimed damages. The respondent and co-respondent denied the adultery. On the 3rd of July, 1861, these issues were tried before the Judge Ordinary by a jury, who found them in favour of the petitioner, and assessed the damages at £1000. The Judge Ordinary suspended the decree nisi, in order that application might be made as to the way in which the damages should be applied, and also as to the petitioner making some provision for the respondent.

**[393]** Dr. Phillimore (Mr. G. H. Cooper with him), on behalf of the respondent, now moved the Court—1st, under the 32nd section of 20 & 21 Vict. c. 85, to order the petitioner to secure to the respondent such gross sum of money, or such annual sum of money as the Court shall deem reasonable; 2ndly, under the 35th section, to order that the respondent should have access to the two elder children of the marriage, boys of the respective ages of seven and six, and that she should have the custody of or access to the youngest child, a girl aged five. The motions were grounded on affidavits, which stated that on the marriage, which took place in October, 1852, the respondent was possessed of the sum of £1678; that the petitioner had received this, and that no settlement of it had been made; that alimony pendente lite had been allotted at the rate of £48 per annum; that the respondent had no property or means of subsistence; that all intercourse between the respondent and co-respondent had ceased, and that the latter was residing with his wife. He submitted that it would be reasonable that a sum equivalent to the respondent's fortune should be settled by the petitioner, so that she might have the annual income thereof during her life, with a power to her to dispose of a portion of it. He referred to *Keats* v. *Keats and Montezuma* (1 Swab. & Trist. 358), and also asked that the respondent might have access to the two elder children, and the custody of, or access to, the youngest child.

Mr. Pulling (Dr. Deane, Q.C., with him), for the petitioner, said that the petitioner did not wish to deal harshly with the respondent, and would leave it to the Court to make such order as it thought fit. The petitioner, however, objected to the settlement proposed on behalf of the respondent, and would prefer that the interest on the sum of £1000 damages should be settled upon the petitioner for her life, and afterwards upon the children of her marriage. He also asked for an order that the £1000 damages be paid to the petitioner.

**[394]** *The Judge Ordinary*: I think the proper order to make will be, that the petitioner settle the sum of £1000 to be invested in the names of trustees, upon trust that the interest be applied for the benefit of the respondent so long as she conducts herself properly and remains unmarried, and that after her interest ceases, the fund be held in trust for the children of the marriage in equal shares; that the £1000 damages awarded by the jury be paid to the petitioner in lieu of the £1000 he will have to settle, and that the decree for the dissolution of the marriage be suspended until the settlement has been made. As to the respondent's application with regard to the children, I had occasion to consider the subject lately. I must decline to order that a wife who has been proved to have been guilty of adultery have access to, or the custody of, the children of the marriage.

Dr. Phillimore then asked that the petitioner be ordered to pay the respondent's costs of the motion.

*The Judge Ordinary*: The expense of the settlement must be paid by the petitioner; but I shall make no order as to the costs of the motion.

Order accordingly.

LEWIS *v.* LEWIS. July 3, 1861.—Dissolution of Marriage.—Renewal of Cohabitation after Decree Nisi.—Dismissing Petition.—Stay of Proceedings.—23 & 24 Vict. c. 144, s. 7.—Quere, whether the Court at the instance of the parties can Dismiss a Petition for Dissolution of Marriage after a Decree Nisi has been pronounced.—After a decree nisi for dissolution of marriage at the suit of the wife had been pronounced, the wife renewed marital intercourse with her husband, and informed her attorney that she did not wish any further proceedings to be taken in the suit.—**[395]** Upon an application by the husband to dismiss the petition, the

Court declined to accede to it, but said that, if both parties consented, it would order all proceedings in the suit to be stayed.

[S. C. 30 L. J. (Mat.) 199; 4 L. T. 772; 7 Jur. (N. S.) 831; Referred to, *Ousey* v. *Ousey*, 1875, 1 P. D. 56.]

This was a suit by a wife for dissolution of marriage, on the ground of adultery and cruelty. The respondent denied the charges, and also pleaded condonation.

March 11.—These issues were tried before the Judge Ordinary by a jury, and were found for the petitioner, and a decree nisi for dissolution of marriage was pronounced.

June 19.—Mr. Hannen moved that the decree nisi should be made absolute.

Mr. C. H. Hopwood, for the respondent, asked the Court to postpone making the decree absolute, to afford an opportunity of communicating with the Queen's Proctor upon an affidavit of the respondent, which stated, in substance, that since the decree nisi had been pronounced, the petitioner had condoned the misconduct charged in the petition, by renewing connubial intercourse with the respondent upon two occasions. It would be contrary to the policy of the Act to dissolve the marriage under such circumstances.

*The Judge Ordinary*: This affidavit shows no ground for the interposition of the Queen's Proctor. It states something that has taken place since the decree nisi was pronounced. I shall therefore not make the decree absolute until some inquiry has been made. Let the motion stand over till next Wednesday.

June 26.—Mr. Hannen, for the petitioner, read an affidavit made by the clerk to the petitioner's attorney, in which he stated that on the 19th of June last he wrote to the petitioner informing her what had taken place in Court on that day, and asking for an explanation, and that he afterwards called upon her, when she said that her husband's statement was true, and that she had **[396]** slept with him two nights consecutively; that she had forgiven him, and did not wish any further proceedings to be taken against him. Under these circumstances he should leave the matter to be dealt with by the Court as it may think fit.

Mr. W. Brandt, for the respondent, prayed the Court to dismiss the petition. Neither the 23 & 24 Vict. c. 144, nor the rules under it, provide for such a case. It is not clear that, if the Court abstains from action, the petitioner may not hereafter ask that the decree be made absolute. Until the decree is made absolute the position of the parties is analogous to that of parties divorced à mensa et thoro by the sentence of an Ecclesiastical Court, who were separated only until they should be reconciled. The wife, by renewing connubial intercourse, has disentitled herself from taking further proceedings in the suit.

*The Judge Ordinary*: What power have I to dismiss a petition at the instance of the petitioner after a decree nisi has been pronounced?

Mr. W. Brandt: If the Court has not power to dismiss the petition, it may retain it for the purpose of the suit, but dismiss the parties. The petitioner has obtained a verdict that her husband has been guilty of adultery and cruelty, and the Court knows that his misconduct has been condoned. The suit must be considered to be going on until the decree is made absolute

*The Judge Ordinary*: There is nothing to show that the decree nisi was not a proper decree. When it was pronounced the respondent's adultery and cruelty were proved, and there was nothing to show that the petitioner was not entitled to a decree. Cur. adv. vult.

*The Judge Ordinary* now said: This case is in a rather **[397]** singular position. The petitioner being entitled to a dissolution of her marriage, a decree nisi was pronounced. When the motion to make it absolute came on, the husband interposed, and stated that he and his wife had made up their differences, and had renewed matrimonial cohabitation, and therefore applied to have the petition dismissed. It appeared from an affidavit of the clerk to the attorney of the petitioner that he wrote to her, stating what had passed in Court, that she admitted the truth of her husband's statement, that she had forgiven him, and had since slept with him, and she desired that no further proceedings should be taken in the matter. Her attorney does not, however, appear to consent that the proceedings should be stayed. I doubt much whether after a decree nisi has been pronounced, I can dismiss the petition at the instance of either of the parties to the suit; but if the petitioner, either by her attorney or in person, applies to the Court, I will, at the desire of both parties, make

an order that no further proceedings be taken in the cause. All proceedings in the suit will then be stayed. I doubt whether the Court has power to dismiss a petition for dissolution of marriage after a decree nisi has been pronounced, except in the manner pointed out by 23 & 24 Vict. c. 144, s. 7, viz. at the instance of the Queen's Proctor or of a third person.

(Before the *Judge Ordinary*).

SMALLWOOD *v.* SMALLWOOD. November 12, 1861.—Judicial Separation.—Cruelty.—Personal Violence.—A single act of personal violence by the husband towards the wife, not producing any considerable injury to the person and not repeated, is not, though unwarrantable, sufficient to found a decree of judicial separation.—Lapse of time between the act complained of and the commencement **[398]** of the suit is not a bar to such a suit, but will weigh with Court in determining the character of the violence proved.

[S. C. 31 L. J. (Mat.) 3; 5 L. T. 324; 8 Jur. (N. S.) 63; 10 W. R. 65.]

This was a petition for judicial separation at the suit of the wife on the ground of cruelty.

The case was heard before the Judge Ordinary in the sittings after Trinity Term, and was conducted by

Dr. Twiss, Q.C., and Dr. Tristram for the petitioner.

Dr. Swabey for the respondent.

The only question was, whether the act of violence proved was legal cruelty. The result of the evidence is sufficiently stated in the judgment.

Cur. adv. vult.

November 12.—*The Judge Ordinary* gave the following judgment: This was a petition for judicial separation on the ground of cruelty.

The petition alleged that the parties were married in 1836; that in September, 1848, the respondent was guilty of cruelty by springing forcibly upon her, throwing her down, placing his hand on her throat, and nearly strangling her; that in consequence she withdrew from cohabitation with him, and always refused to renew it, although he frequently solicited her to do so. The respondent denied the cruelty alleged, and charged the petitioner with violence towards him; but the case turns upon the sufficiency of the evidence given in support of the petition.

The petitioner on her own behalf deposed that she married the respondent in 1836 without the knowledge of her friends, the respondent having some employment in the British Museum; that she was reconciled to her mother in the same year; that some money afterwards came to her, the greater part of which was lost by the respondent in various speculations; but the residue, £850, was settled upon her; that in 1842 her mother took a house for them at North End, Hampstead, where she opened a school, which prospered, and by the profits **[399]** of which she maintained herself and family; that in the autumn of 1848 the respondent became jealous of a medical man named Williams, who attended the children in the school, and he frequently taunted her with infidelity; that on one occasion, in September, 1848, he returned from a walk, called her into the drawing-room to him, and renewed his accusation of too great intimacy with Williams, which she denied; that he then took her by the throat, and, after shaking her violently, threw her on the ground against the drawing-room door; that a female servant hearing the noise rushed in, and he jumped out of the window; that she (petitioner) then became insensible. This servant died two years ago. That on coming to herself she sent for a neighbour, Mr. Tatham, to come and mediate or adjudicate between them; that he came and arranged that they should live separate, although under the same roof; that they continued to live in that way till November, 1848, when he went away and never came back to live there; that she continued to live there till September, 1849; that the school was afterwards broken up in consequence of the respondent having become bankrupt in the preceding month of August, which she considered he did on purpose to break up the school; that at Christmas, 1849, she went to her mother's house at the breaking up of the school for the holidays, on account of his interference and determination to break up the establishment; that after the bankruptcy Mr. Graham (her brother-in-law) took the school, and permitted her to conduct it, and that she had carried it on in that manner ever since, and by so doing had supported herself and her children.

Mr. Tatham, the person mentioned by the petitioner in her evidence, was called on her behalf, and proved that in the autumn of 1848 the respondent called upon him several times, and stated that he feared an improper intimacy existed between Mr. Williams and his wife. The witness assured him he did not believe it, and advised him not to mention it to any person, as it would injure the school, but to watch and ascertain whether **[400]** his suspicions were well founded or not; that he afterwards received a note from the petitioner, stating that her husband had treated her in a very violent way. In a quarter of an hour afterwards the respondent called and requested him, as a mutual friend, to come to his house, which he did. He there saw the petitioner alone; she was very indignant at the charge made against her, and said that unless her husband admitted its falsehood, she would have nothing more to do with him. The witness suggested that Mr. Williams should not continue to attend the pupils, in which she acquiesced. In the course of the conversation she said that the respondent attempted to strangle her, and that she was so much afraid of her life that she would go to her brother-in-law. But it did not appear that she ever did so. The witness then proceeded: "I saw him afterwards, and explained what had passed. He seemed satisfied with her determination to get rid of Williams's attendance. I told him what she said about his violence. He admitted that he had acted under great 'irritation at the time.'" About a fortnight afterwards the respondent called upon the witness in great excitement about a note addressed by Williams to the petitioner in terms which he considered too familiar—"My dear Mrs. Smallwood"—although there was nothing else objectionable in the contents of the note. The witness believed that the respondent did not remain at the house long after that time, but the transaction having occurred so long ago he would not undertake to speak precisely as to dates.

Mr. Graham, the petitioner's brother-in-law and trustee, was examined, but gave no evidence as to the violence. He believed that the respondent ceased to be an inmate of the house where the school was kept in September, 1848, but would not undertake to speak positively as to dates. He added, "I remember that she refused to live with him after his endeavours to calumniate her character."

In addition to this evidence some letters written by the respondent were put in, stating in strong terms his regret at **[401]** having injured his wife, and begging forgiveness. It is unnecessary to notice their contents particularly, for I think they must be taken to refer to an injury by unfounded accusations and not by violence.

It was contended for the respondent that after so long an interval between the alleged injury and the petition, the Court would not be warranted in founding a decree of judicial separation on such slight evidence. On the other hand, it was urged that the evidence would have been sufficient had the suit been instituted recenti facto, and must therefore be equally effectual now; and *Saunders* v. *Saunders*, 1 Rob. 549; *Lockwood* v. *Lockwood*, 2 Curt. 281; and *Smith* v. *Smith*, 2 Phil. 212, were cited as instances where the Court had interfered to protect a wife upon what might be deemed rather slender evidence of bodily injury. I cannot agree that the lapse of time is immaterial; if at the time there had been any serious apprehension of further violence on the part of the husband I cannot but suppose that means would have been found to claim the protection of the Ecclesiastical Court. Still I have no proof before me of any indirect motive for the present proceeding, and do not by any means treat the lapse of time as a bar.

I will therefore consider the case as if the transaction had been recent. The violence consisted of one act only. No blow was given. An altercation arose out of the husband's suspicions, and then he took her by the throat, shook her, and threw her down. It does not appear that any marks were left on the throat, or that she was rendered ill by the transaction. She told Mr. Tatham that she was afraid, and should go to her brother-in-law's house, but did not do so; nor does it appear that any complaint was made to that gentleman; and from his evidence, and that of Mr. Tatham, I infer that she refused further cohabitation with her husband, not on account of his cruelty, but on account of the unfounded accusation. The ultimate departure of the respondent from the house did not **[402]** take place until he again complained of undue familiarity on the part of Mr. Williams in writing to the petitioner.

That the conduct of the respondent was unwarrantable is true, but I have examined the cases referred to, and find in each of them not merely one violent act

committed under excitement, and not producing any considerable injury to the person, but repeated acts, furnishing such evidence of sævitia as warranted the Court in concluding that the wife could not cohabit in safety with such a husband, and was therefore entitled to the protection of the Court. It was candidly admitted by Dr. Twiss that those cases exhibit the minimum of evidence of cruelty upon which the Ecclesiastical Court ever founded a decree; the evidence in this case seems to me to fall short of that which the Court in each of those instances had before it; and I feel bound to reject the prayer of the petition, which must accordingly be dismissed.

(Before the Full Court,—*The Judge Ordinary*, *Keating*, *J.*, and *Wilde*, *B.*
Appeal from the *Judge Ordinary.*)

THOMPSON *v.* THOMPSON AND STURMFELLS. November 13, 1861.—Access to Children.—Jurisdiction of Court.—20 & 21 Vict. c. 85, s. 35.—Discretion.—The Court has power to make an order for access merely of one of the parties to a suit to the children pendente lite.—On appeal from an interlocutory matter, not touching the main issue in the cause, and resting in the judicial discretion of the Court below, the appellant must satisfy the Court of Appeal that the discretion of the Court below was altogether wrongly exercised.

[S. C. 31 L. J. (Mat.) 213; 5 L. T. 325; 7 Jur. (N. S.) 1207; 10 W. R. 96.]

This was an appeal from a refusal of the Judge Ordinary to make an order for access of the wife to the children pending suit. The petition was by the husband for dissolution of the **[403]** marriage by reason of the wife's adultery. The children of the marriage were two girls, aged respectively about two years and a half, and one year and a half. On the 30th of May, the original motion on behalf of the wife for access was made, and was adjourned for further affidavits from both parties as to the then circumstances till the 19th of June, when it appeared that the children were under the roof and in the care of the husband's mother, he being a man of small means, and his wife, of course, owing to the suit, being absent from his house. It appeared that the wife and her mother-in-law and sister-in-law were not on good terms, and high words, at least, had passed between them. It was suggested that if the mother had access to the children elsewhere, any quarrel or violence might be avoided. Under the circumstances,

*The Judge Ordinary* refused to make any order in the matter, intimating that it might be a question whether he had any power to make an order for access merely when no question as to the custody of the children was before the Court.

From this refusal an appeal was brought to the full Court. The particular circumstances of the case were of little or no interest, but the question of the power of the Court to make an order for mere access was decided in the affirmative.

Mr. Francis in support of the appeal.

Mr. Woolley contrà.

The Court directed Mr. Francis's attention to the question of an order for mere access.

Mr. Francis: The question depends on the wording of 20 & 21 Vict. c. 85, s. 35: "In any suit or other proceeding for obtaining a judicial separation, or a decree of nullity of **[404]** marriage, and on any petition for dissolving a marriage, the Court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree as it may deem just and proper with respect to the custody, etc., of the children, the marriage of whose parents is the subject of such suit or other proceedings," etc. It is submitted that under these words the Court has power to make an order for access merely; it is an incident to the general power given by this section, and especially where the custody of the children is in the hands of a third party.

*Keating*, *J.*: I am of opinion that there is no ground for interfering with the course adopted by the Judge Ordinary. As a question has been suggested whether the Judge Ordinary would have had jurisdiction to have made an order for mere access, I wish to state that it appears to me that he would have had such jurisdiction. I think Mr. Francis is right in the interpretation he puts on the words "with respect to the custody." The only other question here is, whether the course adopted by the Judge Ordinary, on the materials then before him, was wrong; because, unless we thought so, it is one of those interlocutory matters, not touching the main issue, so particularly

within the judicial discretion of the Court, that we should not be inclined to interfere; but we think he was perfectly right. The appeal must therefore be dismissed.

*Wilde, B.*: I am of the same opinion. I think the Judge Ordinary has power to make an order for access merely to the children pendente lite.

Appeal dismissed. Wife's cost of appeal not to be taxed against the husband.

**[405]** (Before the *Judge Ordinary* on Motion.)

BOULTON *v.* BOULTON AND PAGE. November 12, 1861.—Decree Nisi for Dissolution of Marriage.—Affidavits of Respondent disclosing material matter.—Practice.—When, on application to make absolute a rule nisi for dissolution at the suit of the husband, it appeared that affidavits had been filed by the respondent which alleged the husband's bigamy and conviction thereof, the Court refused to make the decree absolute, and directed the Registrar to inform the Queen's Proctor that such affidavits had been filed, and permitted the petitioner to file affidavits in answer.

[S. C. 31 L. J. (Mat.) 27; 5 L. T. 362; 10 W. R. 123.]

Mr. Staveley Hill moved, on the usual affidavits, that the decree nisi, pronounced in this case on the petition of the husband, on the 31st of May last, should be made absolute.

Mr. G. Francis read an affidavit sworn by the respondent to the effect that she had not appeared in consequence of having been told by the petitioner's attorney that it would be better that she should not do so, and that she had heard no more of the matter until she was served with the decree fixing the co-respondent with costs. She further alleged that the petitioner had been guilty of bigamy; that he had been convicted of that offence, and transported for seven years; and that, upon his return from transportation, he presented this petition. The learned counsel suggested that the decree should be postponed in order that the affidavit might be laid before the Queen's Proctor.

Mr. Staveley Hill submitted, that neither the respondent nor the co-respondent had any right to shew cause against making the decree absolute.

*The Judge Ordinary*: Does it require any act of the Court to make a decree nisi absolute? If you ask me to **[406]** make the decree absolute, I refuse to do so till this matter is satisfactorily explained. I shall direct the Registrar to give information to the Queen's Proctor that these affidavits have been filed, and the petitioner may be at liberty to bring in affidavits in answer to them.

GETHIN *v.* GETHIN, and the QUEEN'S PROCTOR intervening. November 12, 1861.—Petition for Dissolution at Suit of Wife.—No Answer.—Petition part proved.—Intervention of Queen's Proctor.—Practice.—The wife petitioned for dissolution; the husband made no answer; the hearing of the petition had been adjourned for further proof, pending which the Queen's Proctor intervened, and alleged the petitioner's adultery, who took issue thereon, and the Court allowed the proof of the original petition to be completed, and the issue as between the petitioner and Queen's Proctor to be set down for trial by a jury, retaining the same position in the cause-list as the original petition.

[S. C. 5 L. T. 363; 10 W. R. 122.]

This was a petition for dissolution of marriage by reason of the husband's adultery and desertion. The husband had put in no answer. The case came on for proof in the sittings after Trinity Term, and had been adjourned in order that the petitioner might have an opportunity of producing further evidence in support of her petition. Since the adjournment the Queen's Proctor had obtained leave to intervene, and had alleged that the petitioner had been guilty of adultery. Upon that allegation issue had been joined by the petitioner.

Dr. Spinks, for the petitioner, moved that she might be allowed to call the additional evidence in support of her petition before the Court without a jury, and then that the question raised between her and the Queen's Proctor might be tried by a jury. The questions raised by the allegations in **[407]** her petition and by the allegations of the Queen's Proctor were quite distinct. There is no issue on the original petition, either by the respondent or the Queen's Proctor.

Mr. Giffard, for the Queen's Proctor, opposed the motion, and submitted that the whole case ought to be tried before the same tribunal.

*The Judge Ordinary*: I think this application may be granted. The case stands in a different position from one in which issues had been joined on the petition, but the Queen's Proctor's part of the case must take the same place in the cause-list as the original case does. It must not go to the bottom of the list.

(Before the Full Court,—*The Judge Ordinary, Keating, J.*, and *Wilde, B.*
Appeal from the *Judge Ordinary.*)

HILL *v.* HILL. November 13, 1861.—Appeal from Decision of the Judge Ordinary refusing Rule Nisi for new Trial.—Wife petitioned against the husband for judicial separation by reason of his cruelty, and he took issue thereon. He signed a letter consenting to a decree on the suggestion of his solicitor, that if he did so, no evidence in support of the petition need be taken in Court. The issue came on for trial before the Judge Ordinary and a special jury, who found a verdict for the petitioner on her evidence and that of other witnesses on her behalf. The respondent's letter was also put in evidence. The Court affirmed, on appeal, the refusal of the Judge Ordinary to grant a rule nisi for a new trial on the representation that the respondent was led by the mistaken suggestion of his then solicitor to withhold evidence contradictory of the petitioner's evidence, by which his character as a gentleman and man of honour was affected.—**[408]** On an appeal the Court will only look at the same evidence and circumstances as were before the Judge appealed from.

[S. C. 31 L. J. (Mat.) 193; 5 L. T. 363; 7 Jur. (N. S.) 1206; 10 W. R. 194.]

Dr. Tristram in support of the appeal: This is an appeal from the decision of the Judge Ordinary, refusing to make a rule nisi for a new trial at the prayer of the respondent under the following circumstances:—Lieutenant Hill, the respondent, who had served in the Bombay Lancers, was married to the petitioner on the 17th of May, 1860; in the October of that year Mrs. Hill petitioned for a judicial separation by reason of her husband's cruelty. In November, 1860, Lieutenant Hill commenced a suit for dissolution of the marriage by reason of his wife's adultery with a man of the name of Wood. The petitions were served on the respective respondents on the same day. On the 17th and 18th of June, 1861, the petition for dissolution came on for trial before the Judge Ordinary and a jury, who returned a verdict negativing the adultery. On the 27th of June, the petition for judicial separation came on before the Judge Ordinary and a special jury; previous to that Lieutenant Hill had left England for France; his then solicitor, Mr. Finney, represented to him that, by signing a letter of consent to a sentence by default, a judicial separation would be made without any evidence being taken. In this, of course, Mr. Finney, was mistaken. Lieutenant Hill, however, wrote the following letter, which was produced at the trial:—

"My dear Sir,—I authorize you to consent to a decree against me in the suit my wife has instituted against me for a judicial separation, and that such a decree shall extend to the payment by me of the alimony already ordered to be paid her by me, with liberty to her to apply to increase the same if so advised, and that it shall also direct that the costs shall be paid by me.—Yours very truly,

"C. WILLOUGHBY HILL."

**[409]** Mrs. Hill, and other witnesses on her behalf, were examined, and the jury found a verdict affirming the cruelty. Lieutenant Hill is now anxious that a full investigation should take place by means of a new trial, and I have affidavits from himself and other persons negativing the facts deposed to by Mrs. Hill and her witnesses, which seriously affect his position as an officer and a gentleman.

By the Court: We can look at no new affidavits, we can only take the case as it was when the Judge Ordinary refused a rule nisi.

*Keating, J.*: I am of opinion that there is no ground for granting the rule. It appears that a suit was brought by Mr. Hill for a dissolution of his marriage, the issue raised by which was tried by a jury, who found a verdict for the respondent. There is no pretence for saying that Mr. Hill was not then fully represented. In the second suit for judicial separation by reason of his cruelty, the case was tried before a special jury, and Mr. Hill was again represented by counsel. The trial took the usual and ordinary course; amongst other evidence, a letter from Mr. Hill consenting to a decree was proved; it was cogent evidence on that issue, but it was not the only evidence. Mrs. Hill was examined and cross-examined, and, as the Judge Ordinary

has said, certain evidence of medical men taken in the former suit was read from the Judge's notes at the desire of Mr. Hill's counsel, to save expense. The verdict of the jury affirmed the cruelty alleged by Mrs. Hill What, then, is the ground of the present application; Mr. Hill suggests that his solicitor had informed him, that, if he wrote a letter to consent to a decree of judicial separation, it would have a particular effect, namely, of preventing evidence being taken on the trial, which it could not possibly have; and we are now asked to subject Mrs. Hill a second time to the painful exposure of the witness-box and **[410]** cross-examination. We think there is no pretence for so doing. The appeal must be dismissed.

*Wilde, B.*: I am of the same opinion. In substance the application is for a new trial, not on the ground that the decree to be founded on the verdict is contrary to justice, or that the respondent would be dissatisfied with the decree, for from his letter he was evidently willing to have a judicial separation; but the ground of the application is, that in the course of the proceedings evidence was given against him, affecting, as he alleges, his character as a gentleman and man of honour, which his attorney had advised him could not be given.

Appeal dismissed.

FISHER *v.* FISHER. November 12, 1861.—Decree for Dissolution at Suit of Wife.—Maintenance.—20 & 21 Vict. c. 85, s. 32.—The Legislature did not intend that a wife entitled to a dissolution of marriage should purchase it at the price of being left destitute; and where the circumstances of husband allow of it, the Court will direct a maintenance to be secured to the woman so long as she remains chaste and unmarried.

[S. C. 31 L. J. (Mat.) 1; 5 L. T. 364; 8 Jur. (N. S.) 103; 10 W. R. 122. Distinguished, *Gladstone* v. *Gladstone*, 1876, 1 P. D. 445. Referred to, *Kettlewell* v. *Kettlewell*, [1898] P. 142.]

This was originally a suit for dissolution of marriage at the petition of the wife. The issues were tried before the Judge Ordinary and a jury.

Dr. Phillimore, Q.C., and Mr. R. Pritchard for the wife.

Serjeant Shee and Mr. D. D. Keane for the husband.—Verdict was found for the wife, and on application for some permanent maintenance for her under 20 & 21 Vict. c. 85, **[411]** s. 32, the Judge Ordinary took time to consider the circumstances of the case and the proper course to be followed under the above section. Cur. adv. vult.

*The Judge Ordinary*: This was a petition by a wife for dissolution of her marriage on the ground of adultery, coupled with cruelty. In December of last year a decree nisi for dissolution of the marriage was pronounced.

The petitioner afterwards moved for a decree absolute, and for a provision in the nature of permanent alimony under the 32nd section of 20 & 21 Vict. c. 85. The matter stood over by consent, the respondent undertaking to submit his books to the inspection of some accountant appointed by the petitioner. This was accordingly done, and on the 25th of July the matter was brought on and witnesses were examined on both sides touching the property of the husband and the profits of his business. The clause upon which the Court is asked to proceed is in these terms:—"The Court may, if it shall think fit, on any such decree (i.e. decree declaring the marriage to be dissolved), order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money for any term not exceeding her own life as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable, and for that purpose may refer it, etc., and suspend the pronouncing of its decree till such deed shall have been duly executed." From this latter branch of the section, doubts have been suggested, whether the Legislature intended the provision to extend to cases where the wife is the petitioner; but in two or three instances the Court, when consisting of three members, treated it as applicable to such cases, and I cannot doubt that such construction was right, comparing this clause with the 45th, which enables the Court, when a divorce is decreed for adultery of the wife, to take from her any property to which she is entitled either in pos-**[412]**-session or reversion, and order it to be settled for the benefit of the innocent party or the children of the marriage. But whether the power is to be exercised or not is in the discretion of the Court, "if it shall think fit," and if it does think fit, the amount to be settled depends also upon the discretion of the Court, "so much as it shall deem reasonable."

Certain matters are, by the direction of the Legislature, to be considered by the Court in exercising this large discretionary power, viz. the fortune of the wife (if any), the ability of the husband, and the conduct of the parties. Beyond that, no assistance is given by the Legislature, no principle is stated or suggested as applicable to such a case. I have considered the practice of the Ecclesiastical Court in cases of divorce à mensâ et thoro, and the usual course pursued by the Legislature in cases of Divorce Bills, without being able to find, in what has been done in either tribunal, any effectual assistance.

I understand that in the Ecclesiastical Court, when a divorce was decreed at the suit of the husband, permanent alimony was not granted. When the wife was the complaining party, the Court granted permanent alimony; and something like a rule as to the proportion of the husband's income to be granted may be extracted from the reported cases. But there she remained the wife of the respondent, and in that character he was bound to maintain her. Alimony, either pendente lite or permanent, is a provision for a wife. In Parliament there have been several cases where it has been thought fit to provide for the maintenance of a delinquent wife after the dissolution of the marriage. Many cogent arguments have been urged against making such provision, nevertheless it may be taken to have been the practice of Parliament to make it; but such cases are inapplicable to the present. The husband elected to have the marriage dissolved, and to be again free from all marital obligations. He therefore was at liberty to take what he asked upon the terms offered.

It may seem hard that, having good grounds for electing to **[413]** be released from the marriage tie, he should be called upon to provide for the delinquent, but I am not now discussing that question, or the policy of making such provision. I merely point out that such cases differ from the present, the election being there made by the husband; but on another ground they are useless as precedents, for the provision made by the Legislature was not according to any rule or any given proportion of the husband's property. Very few Divorce Bills were passed at the instance of the wife, and I cannot find any one in which the husband was compelled to make provision for a wife, who elected to be divorced from him. In the present case the wife elects to have the marriage dissolved, and, although she had strong grounds for complaint, I cannot consider her as in a position at all resembling that of a wife divorced à mensâ et thoro. She might have been relieved from the necessity of living with her husband and have remained his wife, but her election was not to do so. Still, although she did so elect, having good grounds for complaint, the respondent may be considered as in some sort depriving her of her position, and the Legislature no doubt intended that she should not seek a remedy at the expense of being left destitute. Not being able to derive any assistance from the practice of Parliament or the Ecclesiastical Court, I must take upon myself the arduous duty of deciding what is reasonable in this case. I consider, then, that the wife ought not to be left destitute; on the other hand, I think it would not be politic to give to wives any great pecuniary interest in obtaining a dissolution of the marriage tie. The petitioner had no fortune of her own; the husband has some fortune and trading profits, but they are neither large nor certain. Under such circumstances I think I ought not to award more than a maintenance. It was stated by counsel that the parties had agreed that the daughter should remain with her mother and be maintained by her; I therefore take that into consideration.

**[414]** The next point is the period for which the payment to the petitioner shall be continued. Had she been divorced à mensâ et thoro, and had afterwards been herself guilty of adultery, she would have become liable to the loss of her alimony. If hereafter the petitioner should become guilty of immorality, it would be unreasonable to call upon the former husband to maintain her. Again, if she avails herself of the freedom conferred by the decree of this Court and marries again, it would be unreasonable to compel the former husband to maintain her.

I am therefore of opinion, that so long as the petitioner leads a chaste life and remains sole and unmarried and maintains the daughter, the respondent should pay her an annuity of £100 per annum, payable quarterly, at the four usual feasts; the first payment the next quarter-day after decree. In the event of the death or marriage of the daughter, to be reduced to £80. Deed to be prepared by conveyancing counsel to secure the annuity on such fixed property as respondent has, and by his covenant. Daughter to remain in custody of the mother until further order. Costs, except those of examining respondent's books, to be paid by respondent.

HEPWORTH *v.* HEPWORTH. November 12 and 26, 1861.—Wife's Petition for Dissolution.—Order on Husband to pay sum of money into Court to meet her Costs of Hearing.—Attachment.—Practice.—Where an order had been made on the husband, respondent, to pay into Court or give security for a sum of money to meet the wife's costs of the hearing, to be subsequently taxed, and such order was not obeyed, the respondent alleging on affidavit his inability to raise the money or give security, the Court ordered an attachment to issue **[415]** against him, but to lie in the registry for one week from the date of such order.

[S. C. 31 L. J. (Mat.) 18; 5 S. L. T. 365; 10 W. R. 195.]

This was a petition for dissolution of marriage, at the suit of the wife.

Dr. Wambey, for the petitioner, now moved for an attachment against the respondent for non-compliance with an order directing him to deposit £400 in the registry, or to find security for that sum, to meet the petitioner's costs of the hearing. The learned judge granted a rule nisi, and

Dr. Phillimore, Q.C., and Dr. Spinks, for the respondent, being ready to shew cause, opposed the application. Mr. Hepworth was a surgeon, with an annual income derived from his profession of £170, out of which he had two children to maintain. He had to pay £3 a month to Mrs. Hepworth by way of alimony. He had paid £92 to her solicitor for her costs in another suit, and he swore that he was unable to raise £400, or to find security for it, and that imprisonment would ruin him. He had been ordered to deposit £300 in the other suit. Practically, it was impossible for him to obey these orders. They cited *Walker* v. *Walker*, 1 Curt. 564. Again, the Court is asked to deprive Mr. Hepworth of his liberty for not paying or finding security for a sum of money for which he may never really be liable, for the costs may ultimately be taxed at £200 or £300 instead of £400.

*The Judge Ordinary*: The question is one of great gravity. The present system was adopted to relieve the husband from the necessity of paying the wife's taxed costs before the hearing, as was the old system; but if I cannot effect the security of the wife's proctor in this mode, I must recur to the old plan, have the costs taxed as they best can before the hearing, and make the husband absolutely pay the amount. I must take time to consider this question. Cur. adv. vult.

**[416]** *The Judge Ordinary*: This was an application for attachment against Mr. Hepworth, for not paying money into Court, or giving security therefor, to meet the wife's costs of trial, in pursuance of an order of the Court. He has filed affidavits in which he alleges his inability to raise the money or give security. The case cited from 1 Curt. was somewhat similar in its circumstances; but there the husband was the petitioner, and though Dr. Lushington refused to make the usual order for taxation, he, on the other hand, refused to fix any day for the hearing. Here the wife is the complaining party, and if the suit is stayed, of course the husband would take good care to keep it in that position. It has been urged that, as this is a suit for dissolution, and does not fall under the 22nd section of the Divorce Act, I have no authority to issue the attachment. I think, however, that the 32nd section of the Divorce Act warrants what I am about to do. The latter part of that section is as follows:—"And upon any petition for dissolution of marriage, the Court shall have the same power to make interim orders for payment of money by way of alimony or otherwise to the wife, as it would have in a suit instituted for judicial separation." I have before stated that the present practice was adopted with a view to relieve parties from the burdensome and inconvenient plan of taxation and payment before the hearing, when it is so difficult to form a correct judgment of what the actual costs will be. I can find no other method to secure the wife's proctor, and think that in the present case the reasonable course of proceeding will be to direct an attachment to issue, which, however, will lie in the registry for a week.

**[417]** BAWDEN *v.* BAWDEN. December 24, 1861, and January 14, 1862.—Petition for Dissolution.—Wife Respondent.—Lunatic.—The Court refused to allow a husband to proceed with a petition against his wife (who was a lunatic) for the dissolution of their marriage on the ground of adultery, alleged to have been committed by her previous to her lunacy.

[S. C. 31 L. J. (Mat.) 94; 6 L. T. 27; 8 Jur. (N. S.) 157; 10 W. R. 292.
Disapproved, *Mordaunt* v. *Moncreiffe*, 1874, L. R. 2 H. L. (Sc.) 374.]

This was a petition filed by the husband, for the dissolution of the marriage, on the ground of his wife's bigamy and adultery.

The petitioner was residing at Camborne, in the county of Cornwall. The respondent separated from him shortly after their marriage, and went to America, where she contracted, as was alleged, a bigamous marriage with a man of the name of John Ward, with whom she cohabited. She afterwards returned to this country, and becoming a lunatic, and her husband refusing to support her, became chargeable to the parish of Camborne and an inmate of the union workhouse at Redruth. She was now confined in the county lunatic asylum at Bodmin.

The citation and petition had been served upon her at the Redruth union workhouse in the presence of the master.

No appearance had been entered on her behalf.

Dr. Wambey moved the Court to appoint a curator or guardian ad litem to the respondent to protect her interests in the suit. The circumstances were peculiar, and he admitted that he could find no precedent for the application. In the Ecclesiastical Courts a suit for nullity of marriage had been allowed to be instituted by the committee of a lunatic under the direction of the Court of Chancery (*Portsmouth* v. *Portsmouth*, by his committee, 1 Hagg. 355); and a suit for divorce by the committee of a lunatic husband, on the ground of the wife's adultery (*Parnell* v. *Parnell*, 2 Consist. 169). In **[418]** *Barham* v. *Barham*, 1 Consist. 5, the Court had appointed a curator ad litem to enable a minor wife to sue her husband for a divorce. There was also the well-known case of *Beauraine* v. *Beauraine*, 1 Consist. 498, in which Lord Stowell appointed a father curator ad litem for his minor son, who was sued by his wife for a divorce. By the analogy of these cases, he submitted that it was competent to the Court to appoint a curator ad litem for the wife. Notices of the motion had been served upon the brother and sister of the respondent, who were her nearest relatives, and also on the overseers of the parish of Camborne.

Dr. Tristram appeared for the overseers of the parish of Camborne, who were desirous, if the Court allowed the suit to proceed, that the assistant overseer of the parish of Camborne (whose office was a permanent one) should be appointed curator ad litem for the wife, her nearest relations having declined to interfere on her behalf. It was clear that she should have some one to watch over her interests during the progress of the suit. The parish of Camborne, as she was chargeable on it, was interested in the result of the suit, and he submitted that a parish officer was the most proper person, under the circumstances, to be appointed guardian.

*The Judge Ordinary*: This case is very different from one where a lunatic is the petitioner. The motion raises a most important question, and I shall not decide it without further consideration and inquiry. I very much doubt whether I can allow the petition to proceed. Cur. adv. vult.

January 14.—*The Judge Ordinary*: The petitioner in this case is the husband, who prays for a dissolution of his marriage on the ground of his wife's bigamy and adultery. The respondent is proved by affidavit to be a lunatic. The question is, whether the petitioner should be allowed to proceed under the circum-**[419]**-stances. It will be a hard case upon the petitioner, if he is not allowed to do so. But it will also be a hard case upon the respondent, who is not able to take part in the proceedings, if he is allowed. I have made inquiry if there had been any case in the Ecclesiastical Courts under similar circumstances, which could be an authority for me in giving my decision. I am told by Dr. Bayford that there was one which he himself argued in the Court of Arches. It is not reported; but he recollects that the Court decided that a suit for divorce à mensâ et thoro could not be maintained against a lunatic. I cannot allow the petitioner to proceed in the present suit.

QUICKE *v.* QUICKE. November 18, 1861.—Petition for Dissolution.—Motion to proceed without Co-respondent.—Unless the petitioner can satisfy the Court on affidavit that he cannot or ought not to make a co-respondent, the 28th section of the Divorce Act is imperative that he should do so.

S. C. 31 L. J. (Mat.) 28; 5 L. T. 690; 10 W. R. 448. Discussed, *Jones* v. *Jones*, [1896] P. 165. Referred to, *Saunders* v. *Saunders*, [1897] P. 89.]

This was an application to proceed without making a co-respondent. The husband's petition stated a marriage in 1842; that in 1844 he was a prisoner in the Queen's Bench prison. "Thirdly, that very shortly after your petitioner was imprisoned as

aforesaid, the said Catherine Quicke prostituted her person, and has ever since continued to prostitute her person, and has been constantly visited by and committed adultery with persons other than and unknown to her husband, at her several residences, to wit, at No. 33 New Bond Street, at 16 Jermyn Street, at 19 Bolton Street, Piccadilly, all in the county of Middlesex; and at Lansdown Place, Brighton, in the county of Sussex."

The petitioner's affidavit merely stated that he had reason to believe as above stated.

**[420]** Dr. Spinks moved the Court to allow the petitioner to proceed without making a co-respondent.

By the Court: There is no affidavit that he does not know any one of the adulterers.

Dr. Spinks: The question is, whether under such circumstances a petitioner is bound to make a co-respondent.

*The Judge Ordinary*: The 28th section of the Divorce Act clearly intends that the adulterer should be made a co-respondent unless some special grounds are shewn for not doing so. You ought to shew that you are not able to allege an adulterer. If the petitioner is allowed to proceed without making a co-respondent, he gets rid of one person interested in defeating the suit by bringing forward all the facts of the case. Unless you can make such an affidavit as to satisfy me that there ought not to be a co-respondent, then the section requires one.

Motion rejected.

[See *Hook* v. *Hook*, 1 Swab. & Trist. 183.]

ZYCKLINSKI *v.* ZYCKLINSKI, on Motion. December 24, 1861, and January 14, 1862.—Petition for Dissolution.—Plea to the Jurisdiction.—Practice.—Wife filed petition for dissolution of marriage, which was served on the husband, who appeared absolutely, and obtained further time to answer. He filed an answer, objecting to the jurisdiction of the Court, by reason of his want of an English domicil, and the incapacity of the petitioner to institute a suit in her own name by reason of her infancy. On motion to take this answer off the file, the Court—Held, that it was too late for the respondent to raise such objection.

[S. C. 31 L. J. (Mat.) 37; 5 L. T. 690. Referred to, *Wilson* v. *Wilson*, 1871, L. R. 1 P. & D. 344.]

In this case Adelaide Kate Zycklinski had filed a petition, dated the 3rd of September, 1861, for dissolution of the mar-**[421]**-riage, which took place on the 27th of October, 1860, by reason of her husband's cruelty and adultery. An appearance was entered on behalf of the husband, and on summons in chambers further time was obtained on his behalf for answering the petition. On the 3rd of December, 1861, an answer was filed on his behalf, stating, first, that he was not amenable to the jurisdiction of the Court by reason that his domicil of origin was in Prussian Poland, that he had never abandoned that domicil or acquired any domicil in England sufficient to found the jurisdiction of the Court; secondly, that the petitioner was incapacitated in law from maintaining any suit in this Court either in person or by her attorney, by reason that at the time of the institution of the suit and the service of the petition she was and then remained an infant under the age of twenty-one years. And submitted to the judgment of the Court that he was not bound to answer to the said petition, and prayed to be dismissed from all further observance of justice herein.

Upon this, notice was given to the respondent's attorneys, that the Court would be moved on behalf of the petitioner to direct the above answer to be taken off the file, and to order the respondent, if he think fit, to file an answer to the merits of the case within three days.

Dr. Spinks moved the Court accordingly: It is too late for the respondent to raise such questions. He has appeared absolutely, and not under protest, and has twice obtained leave for further time to answer. As to the institution of the suit by a minor, it may be cured without a fresh citation and service (*Brown* v. *Brown*, 2 Rob. 302-5).

Dr. Swabey, contrà: Admitting that the more regular practice in the Ecclesiastical Court would have been to have appeared under protest, yet it is merely a question of form, by which the Court, in a suit for dissolution especially, is no way **[422]** bound. The plea to the jurisdiction is a substantial one, and is in time if it precedes other pleas. As to the second point, infancy is treated by Dr. Lushington, in *Brown* v. *Brown*, cited on the other side, as an incapacity to institute a suit. Cur. adv. vult.

*The Judge Ordinary*: I am of opinion that, as the respondent appeared absolutely to the petition, and obtained time to answer it, he is no longer in a position to avail himself of such pleas; he must answer to the merits.

SERRELL *v.* SERRELL AND BAMFORD. January 29 and 30, 1862.—Petition for Dissolution.—Answer setting up Impotency.—Practice.—Evidence.—A husband petitioned for dissolution of marriage, by reason of his wife's adultery. She denied the adultery, alleged nullity of marriage by reason of incurable impotency of the husband, and prayed for a decree of nullity. At the hearing, respondent's counsel claimed to go into the question of nullity first, but the Court—Held, that, as the wife had traversed, though argumentatively, the marriage alleged by the petitioner, the latter had a right to begin.—No examination of either of the parties by medical men under the order of the Court, and report thereupon, had been obtained, but, in support of the respondent's case, evidence of medical men as to examinations of the petitioner and respondent's persons during their cohabitation, was tendered and objected to; but the Court held such evidence to be admissible.

[S. C. 31 L. J. (Mat.) 55; 5 L. T. 691.]

This was a petition for dissolution of marriage at the suit of the husband, by reason of the wife's adultery. The petition alleged a marriage in 1844. No issue. Cohabitation, latterly, in Gloucester Terrace, Paddington, till the 8th of January, 1861, when it was alleged the wife left her home, **[423]** and subsequently adulterously cohabited with the co-respondent. Adultery was also charged at divers places in the latter part of 1860. The wife, in answer, denied that she was lawfully married to the said Dalton Haskoll Serrell. "For" she says that "at the time of the celebration of the said pretended marriage on the 5th of November, 1844, the said Dalton Haskoll Serrell was impotent, and unable to consummate their said marriage; that such impotency was then, and now is incurable; that notwithstanding the said Dalton Haskoll Serrell consulted divers medical men, and adopted divers remedies, he continued impotent, unable to consummate the said marriage; and that, although the respondent was apt and willing to receive the conjugal embraces of the said Dalton Haskoll Serrell, he never did consummate the said marriage, but that, down to the 8th of January, 1861, when the respondent ceased to reside with the said Halton Haskoll Serrell, she was and continued to be a virgin intact."

The answer further denied the adultery, and pleaded conduct conducing to adultery, if any. It prayed to reject the prayer of the petition, and asked for a declaratory sentence of nullity of marriage; or, in case the Court should decree dissolution, for an order to secure a gross sum of money, etc.

The co-respondent's answer simply denied the adultery.

The Court had directed the case to be heard before itself without a jury, and no order had been obtained for any examination of either of the parties by medical men and their report thereon.

Dr. Phillimore, Q.C., and Dr. Swabey for the petitioner.

Dr. Deane, Q.C., and Dr. Spinks for the respondent.

On the pleadings being opened, Dr. Deane claimed, on behalf of the respondent, to go into the question of the nullity of marriage before the petitioner's case was opened. He **[424]** referred to an *Anon.* case, Deane and Swab. 295, and cases there cited.

Dr. Phillimore, contrà.

*The Judge Ordinary*: I think that the respondent's answer is substantially a denial of the marriage which the petitioner alleges to have been a lawful marriage. The answer is argumentative in part—it states reasons why the marriage is not lawful; but I must treat it substantially as a traverse, and the petitioner has therefore a right to begin.

The petitioner's case was then distinctly proved.

Dr. Deane opened the respondent's case as one of undoubted impotency on the part of the husband.

William Henry Gardener was then sworn and examined on behalf of the respondent. He was a surgeon, and had been in the habit of attending Mr. and Mrs. Serrell at their house in Gloucester Terrace for the last six or seven years. Mrs. Serrell sometimes suffered from hysteria, nervous excitement, and general debility;

the symptoms seemed to sympathize with her womb. Symptoms sometimes indicated functional disturbance of the womb; not always. Could not, as a medical man, undertake to say what was the cause of those symptoms. Had often spoken to Mr. Serrell about these symptoms and about calling in a second opinion. A Dr. Lee was called in somewhere about December, 1859; He was present when Dr. Lee came, and talked with him about the case before he went to see Mrs. Serrell.

The witness was then asked, "Were you present at any examination by Dr. Lee of the person of Mrs. Serrell?"

Dr. Phillimore objected to the admissibility of such evidence. It is not competent to either party to offer inferior **[425]** evidence in such a matter. The Court and the party against whom such a charge is brought have a right to the report of medical men, agreed upon by the parties and approved by this Court, as to the condition of the parties at the time the charge is made. After a cohabitation with a de facto husband for sixteen years, and an admission in the answer that she is no longer a virgin intact, the woman setting up such a defence must be held to the strictest rules. If she has destroyed the usual and best mode of proof, she cannot, as against the husband, introduce inferior evidence.

Dr. Deane in support of the evidence: The distinction suggested as between primary and secondary evidence does not apply. The inspection of the parties by medical men under the order of the Court is not strictly primary evidence as contrasted with that which we now offer.

By the Court: Can you shew me any case where a woman, not in a condition to give the usual evidence from her own person, has gone into evidence of this sort, and obtained a decree of nullity? Could she complain of the grievance, being in the state in which she is?

Dr. Deane: Under the Divorce Act the Court is to act on the rules of evidence prevailing in Westminster Hall; at least this evidence is admissible, whatever conclusion upon it and the whole case the Court may finally come to, *H. falsely called C. v. C.*, 1 Swab. & Trist. 605. Cur. adv. vult.

January 30.—*The Judge Ordinary*: I have considered the question raised yesterday, and am not aware of any rule in Westminster Hall which would exclude the evidence tendered, and I am of opinion that I must admit it.

The examination of Mr. Gardner and Dr. Lee was then **[426]** proceeded with, but their evidence wholly failed to make out the respondent's charge, and her counsel admitted they could carry the case no further.

*The Judge Ordinary* animadverting strongly upon the conduct of parties in deceiving their professional advisers, and inducing them to set up a defence of such a nature, supported by such evidence, pronounced a decree nisi for dissolution of the marriage, and condemned the co-respondent in costs.

TURNER *v.* TURNER. January 21 and 28, 1862.—Judicial Separation.—Two Petitions filed.—Two Citations issued.—Entry of Appearance.—Practice.—A petition was filed and a citation issued on the part of a wife for a judicial separation on the ground of cruelty; neither this petition nor citation was served. The wife's solicitor, in consequence of fresh instructions, afterwards filed a second petition for a judicial separation, on the ground of adultery coupled with cruelty, and a citation issued thereon. The husband was served and entered an appearance in the second suit.—The Court directed the second suit to proceed.

[S. C. 31 L. J. (Mat.) 134; 5 L. T. 849; 10 W. R. 292.]

On the 16th of October, 1861, a petition for a judicial separation on the ground of cruelty was filed in the registry on behalf of Mrs. Turner, the petitioner in this case. A citation issued thereon, but neither the petition nor citation was served upon the respondent.

On the 26th of November, 1861, another petition was filed on behalf of Mrs. Turner, by her solicitor, in consequence of fresh instructions, for a judicial separation on the ground of adultery coupled with cruelty, and a citation issued thereon. This petition and citation were served upon the respondent, who entered an appearance thereto.

**[427]** The first petition had been filed by a clerk of Mrs. Turner's solicitor without his knowledge, and her solicitor filed the second petition on the supposition that the first one had not been filed. The citation which issued in the first suit could not be found.

Mr. Bushby, for the petitioner, upon these facts, moved the Court "to direct the petition filed in the second suit to be taken off the file, or to dismiss the same, and to direct a fresh citation to issue on the first suit."

*The Judge Ordinary*: You have got yourself into a difficulty. Perhaps the counsel for the respondent may consent to some course to help you out.

Dr. Tristram, for the respondent, did not oppose the motion, but would leave the other side to take their own course. Cur. adv. vult.

January 28.—*The Judge Ordinary*: I have considered this case. There were two petitions filed, and two citations issued by the petitioner for a judicial separation against her husband. The first petition and citation were never served upon him; the second petition and citation were served, and he has entered an appearance to this citation. The second suit must therefore proceed.

(Before the *Judge Ordinary*, on Rule Nisi for New Trial.)

MILLER *v.* MILLER AND HICKS. February 18, 1862.—Rule Nisi for New Trial.—Principles of Granting.—The Court will not grant a new trial on the ground that the verdict is [428] against the weight of evidence, unless it is dissatisfied with the verdict—That it might on the same evidence have come to a different conclusion itself is not sufficient.—Statement on affidavit that other evidence could be produced to the jury on a new trial is not sufficient, if such evidence could with reasonable diligence have been obtained before.

[S. C. 31 L. J. (Mat.) 73; 5 L. T. 850.]

This was originally the husband's petition for dissolution of marriage by reason of the wife's adultery. The issues raised were tried before the Judge Ordinary and a common jury, and a verdict found in favour of the respondent.

Subsequently Dr. Phillimore, Q.C., obtained a rule nisi for a new trial, and cause was shewn by

Serjeant Pigott and Dr. Wambey for the respondent, and by Mr. Bilton for the co-respondent.

Dr. Phillimore, Q.C., and Dr. Spinks, in support of the rule.

Cur. adv. vult.

*The Judge Ordinary*: This was an application for a new trial on three grounds:—1. That the judge at the trial was under a misapprehension as to what had been proved by one of the witnesses, and therefore did not lay a material part of the evidence before the jury. 2. That the verdict was against the weight of evidence. 3. On affidavits to the effect that additional evidence could be produced on a new trial.

The petition of George William Miller charged the respondent with having committed adultery with the co-respondent Hicks, and with divers persons unknown to petitioner. The respondent denied the adultery, and alleged condonation. The co-respondent denied the adultery imputed to him, and alleged condonation and collusion. At the trial the petitioner gave evidence to prove not only the adultery with Hicks the co-respondent, but also with one Benjamin Button. One witness deposed to having seen the act of adultery committed by the respondent and co-respondent. She was a young girl in the [429] service of the petitioner.[1] During Dr. Phillimore's reply for the petitioner, a discussion arose as to the evidence of that witness being corroborated as to the fact of Hicks being there. There the matter dropped, and I am not aware that anything more was said on the subject during the trial. The learned doctor left, as he says, that part of the case in the hands of the jury, appealing to them as judges whether the evidence of the girl was corroborated by Dow or not. If the judge said anything erroneously which can be supposed to have misled the jury, the verdict ought not to stand; but I apprehend that the supposed misconception had nothing at all to do with the corroboration on which the learned doctor was relying when the discussion arose, viz., the fact of her seeing adultery committed on the Friday night. The fact of his being seen there on that evening at six and nine by Dow was material, and there was no misapprehension so far. His being seen there on Sunday morning really had no bearing on the case, for it was admitted on all hands that Hicks was very intimate with Mr. and Mrs. Miller,

[1] The learned Judge here read the girl's evidence, but as this case is reported for the sake of the principles laid down under the second head, it does not seem necessary to go at length into the evidence under the first head.

and frequently at the house; and the manner in which the discussion terminated makes it impossible to treat this as a ground for disturbing the verdict.

I come now to the question, whether the verdict was against the weight of evidence; and here I think it right to make some remarks upon the principles by which the Court should be governed in dealing with such questions.

On the one hand, it was urged that a jury is the constitutional tribunal by which questions of fact are to be determined; and that their finding ought to be treated as conclusive, and that the Court cannot disturb it on the ground of its being against the weight of evidence, without usurping a jurisdiction that does not properly belong to it. On the other hand, it **[430]** was urged that in the Ecclesiastical Court there was always a right of appeal, first to the Court of Arches, and then to the Privy Council, and that this Court, if it does not recognize an absolute right to a second trial, should, at least, be very liberal in granting it.

I cannot adopt either view of the case. The difference between appeals from the Ecclesiastical Court and new trials is very obvious. In the former the evidence was all in writing and could not be varied; the Court of Appeal had the same materials and none other before it, as were submitted to the first Court; and the judge of the Court of Appeal was, in theory at least, assumed to be competent to form a more satisfactory judgment than the inferior tribunal. In trials before a jury it is scarcely possible to have a case tried a second time so dispassionately as the first: the parties become heated and excited by the contest; the evidence laid before a second jury may vary essentially from that which was submitted to the first; witnesses become, more or less, partisans in the cause; they may come prepared to baffle a cross-examination, and if on the first trial they have disclosed facts making against the party who called them, they may be altogether withdrawn; nor is there any reason to suppose that a second jury will be more competent than the first to form a sound opinion as to the effect of the evidence, unless something has occurred on the first trial to manifest either haste, or prejudice, or mistake. Nevertheless, I am far from acceding to the proposition that the finding of the jury ought to be treated as absolutely binding; a contrary rule has prevailed for more than two centuries, and, according to some opinions, much longer, and must now be deemed as settled law in Westminster Hall. The whole subject of setting aside verdicts of juries on questions of fact and granting new trials was fully discussed in the case of *Bright* v. *Eynon*, 1 Burr. 390; and 2 Kenyon's Notes, 53. In the latter report, at page 60, Lord Mansfield is made to say: "But it must be remembered that all pre-**[431]**-sumptions, arising either out of the evidence or from the nature of the question, must be construed favourably in support of the verdict; therefore, the judge certifying only that he thinks the weight of evidence was against the verdict, or that, if he had been on the jury, he should have been of a different opinion, this would not be a foundation for a new trial, as was lately determined in a case tried before Serjeant Willes (now C.B. of Ireland), and therefore it is proper that a special report should be made to shew the foundation of the judge's dissatisfaction, that the whole Court may judge whether it is well grounded or not." In many of the older reports cases may be found where the Courts of Westminster Hall have refused to set aside a verdict, although the judge, who tried the cause, said that he should have found a different one. And, according to the practice now prevailing, such a statement made by the presiding judge is not considered as a sufficient ground for a new trial. It is necessary that he should go further and say that he is dissatisfied, the word used by Lord Mansfield, which means something more than that he entertained a different opinion.

If, indeed, the jury during the trial shew any symptoms of passion, or if the evidence is so strong on one side that their verdict, in defiance of it, can only be referred to prejudice or misapprehension, it is right to set it aside in order that the calm and intelligent consideration of a jury may be obtained.

If such is the rule observed in the Common Law Courts of Westminster Hall, where four judges have to deal with the question, how much more cautious ought I to be, when sitting alone and unaided, as to exercising the somewhat arbitrary power of compelling parties to submit their causes to the judgment of a second jury. The learned counsel for the petitioner repeatedly pressed upon my consideration the importance of this case to his client. Unquestionably it is most important, but it is not less so to the respondent. I must not, therefore, allow that argument to control my judgment.

**[432]** The question then is, am I prepared to say that I am dissatisfied with the verdict? I cannot undertake to say what would have been my verdict had I been substituted for the jury; for I did not at the trial weigh the evidence under the sense of responsibility that rests upon a party, who is bound to decide upon the effect of it. No exception could be taken to the conduct of the jury during the trial. I observed no symptoms of prejudice, no haste or impatience; they withdrew to consider of their verdict, and it must be presumed that they calmly and deliberately weighed the evidence. Then, can it be said that the verdict is so contrary to the evidence that it must be ascribed to prejudice or misapprehension? There were some remarkable circumstances in the petitioner's case calculated to excite the observation and vigilance of the jury. The petition charged the respondent with having committed adultery at Margate in 1858, with a person unknown. Some evidence was given respecting her conduct at Margate, but it entirely failed to establish the charge made. Again, it was alleged that between the 1st of April and the 31st of August, 1859 (particularly on Tuesdays and Thursdays), Rosina S. Miller was frequently visited at her residence during the absence of the petitioner by divers men unknown to the petitioner, and that on divers of such occasions the said R. S. Miller then and there committed adultery. The only evidence tending to support that charge was a statement by Mary Dow, that "at Miller's house gentlemen often called and saw Mrs. Miller, and she would take them upstairs into the warehouse." That charge, therefore, fell to the ground, and it was very natural that the jury, when two such unfounded charges had been brought forward, should scan rather narrowly the evidence brought to substantiate the rest of the case. It was remarkable, too, that the name of Button (a man in the petitioner's employ, and with whom the respondent was said to have committed adultery) was not introduced into the petition, as in fairness it ought to have **[433]** been, for the greater part of the evidence related to her alleged indecent conduct towards him. It is true that one witness deposed to having seen an act of adultery committed by Hicks, the co-respondent, and Mrs. Miller; but pertinent observations were made upon her evidence, and I can well understand that the jury, notwithstanding that evidence, were left in a state of perplexity as to where the truth lay, and could not honestly say that they were convinced of the respondent's guilt, bearing in mind that they had the positive denial by Button of the truth of the evidence given as to him, and the solemn assertion of the respondent, which the petitioner for another purpose gave in evidence, that she was innocent of the offence imputed to her and Hicks. The petitioner was in this case, as in others, bound to prove the affirmative; and if he failed to do so to the satisfaction of the jury, they were bound to find against him.

I cannot say that I am dissatisfied with the verdict—I cannot even say that I should have found to the contrary of it, and therefore cannot, on the ground of its being a verdict against the weight of evidence, send the parties to a new trial.

The third ground for the application remains to be considered, viz., that further evidence set forth in affidavits could be laid before the jury on a second trial. That may be disposed of in a few words. All the evidence so set forth, which is of the least importance, might, by the exercise of reasonable diligence, have been obtained before the last trial. Some of such evidence (e.g. of the petitioner's children) had been obtained, but the counsel for the petitioner, in the exercise of what I cannot but think a most wise discretion, abstained from laying it before the jury. I cannot, therefore, disturb the verdict on this ground.

The result is, that the rule for a new trial must be discharged.

**[434]** FLETCHER *v.* FLETCHER (on Motion). February 11, 1862.—Alimony pendente lite.—Husband on Leave of Absence from Bengal for Six Months without Pay.—No Income or Property.—Where a husband, being a master pilot in Her Majesty's Bengal Pilotage Service, on six months' leave of absence without pay, was in the receipt of no income, and was possessed of no property whatever, the Court refused to allot to the wife alimony pendente lite.

[S. C. 31 L. J. (Mat.) 82; 6 L. T. 134; 10 W. R. 448.]

This was a question arising on a petition for alimony pendente lite. The husband (who had petitioned the Court for a dissolution of his marriage on the ground of the alleged adultery of his wife) was a master pilot in Her Majesty's Bengal Pilotage Service, with an admitted income, when on full pay, of £540 per annum. In his

answer he deposed, that in order to institute this suit he had applied for, and obtained leave of absence from the Government of Bengal, without pay, for six months, from the 2nd of October, 1861, to enable him to proceed to England on urgent private affairs. He also stated that he was possessed of no property or money, nor was he in the receipt of any present income whatever, and that he was entirely dependent on his friends for his support, and for the means of carrying on this suit.

Dr. Tristram moved for alimony pendente lite to be allotted to the wife. Alimony was allotted out of the annual income of the husband. According to the husband's answer, he had lost half of his annual income during the past year; but this was no reason why the wife should not have alimony awarded to her out of the income he received during the other six months of the past year. Upon this principle a professional man, if he had made no profits during the six months immediately previous to filing his answer, might claim **[435]** exemption from alimony pendente lite, although he had made a large income during the first six months of the year.

Dr. Spinks, contrà, was stopped by the Court.

*The Judge Ordinary*: The case of the professional man is not analogous to the present case. The husband swears that he has no property whatever, and that he is at present in the receipt of no income. He has no funds out of which he could pay alimony, if I were to allot it. I shall therefore refuse to allot alimony pendente lite.

SYMONS *v.* SYMONS AND PIKE. March 18 and 25, 1862.—Dismissal of Petition on Motion of the Respondent and Co-respondent—Notice of abandonment of Petition by Petitioner.—Affidavit of service of notice of Motion.—Costs.—Practice.—Where a notice was given by the petitioner's solicitor to the solicitors of the respondent and co-respondent of the abandonment of the petition, the Court, on a motion made on the part of the respondent and co-respondent, supported by an affidavit of service of notice of motion on the petitioner's solicitors, dismissed the petition and condemned the petitioner in the respondent's and co-respondent's costs.

[S. C. 31 L. J. (Mat.) 84; 6 L. T. 163; 10 W. R. 449.]

Henry Symons, the petitioner, had filed a petition for the dissolution of his marriage on the ground of the respondent's alleged adultery with the co-respondent, and praying for the condemnation of the co-respondent in the costs of the suit. The respondent and co-respondent had filed answers, amongst other things denying the adultery, and on the 26th of January, 1862, the solicitor for the petitioner served a notice in writing on the solicitors for the respondent and co-respondent, stating **[436]** that the petitioner abandoned his petition for the dissolution of his marriage, and for the payment by the co-respondent of the costs of the suit.

Dr. Tristram now moved the Court on behalf of the respondent and co-respondent to dismiss the petition, and to condemn the petitioner in the respondent's and co-respondent's costs.

*The Judge Ordinary*: It is a serious matter dismissing a petition. I cannot do so unless the petitioner appears by counsel to consent to the motion, or unless you have an affidavit of service of notice of this motion on his solicitors.

Dr. Tristram: His solicitors have been served with notice of motion, but I have no affidavit of service.

*The Judge Ordinary*: The motion must stand over for an affidavit of service.

March 25.—Dr. Tristram renewed the motion upon an affidavit of notice of service of the motion on the petitioner's solicitors. As the petitioner had allowed upwards of seven weeks to elapse since service of his notice to abandon the petition without taking any steps to procure its dismissal, he submitted he had good grounds for making this motion on behalf of the respondent and co-respondent.

*The Judge Ordinary*: I dismiss the petition, and condemn the petitioner in the respondent's and co-respondent's costs.

**[437]** DAVIES *v.* DAVIES AND DALBY. March 25, 1862.—Attachment.—Non-payment of Costs.—Service of Office Copy of Order for Payment of Costs.—Practice.—The Court will not grant an attachment for non-payment of costs unless the original order for payment has been served upon the party liable by shewing the

same to him.—Where the original order has been filed in the registry, the Court, upon an affidavit of facts, will direct it to be delivered out for the purpose of service.

[S. C. 31 L. J. (Mat.) 104; 6 L. T. 163; 10 W. R 447.]

This was a motion for the attachment of the petitioner made on behalf of the proctor for the respondent (the wife) for non-compliance with an order of the Court for the payment of £45, 6s. 1d., being the amount of the wife's taxed costs up to the hearing.

The original order for the payment of these costs had been annexed to an affidavit which was filed in the registry. An office copy of the order had been served upon the petitioner, but the original order, being in the registry, had not been shewn him.

Dr. Tristram moved for an attachment against the petitioner for non-payment of these costs.

*The Judge Ordinary*: The petitioner has not been shewn the original order for the payment of costs. Until this has been done, the order cannot be said to have been served upon him. Upon an application being made to the Court founded upon an affidavit of these facts, it will direct the original order to be delivered out to the respondent's proctor, to enable him to serve it on the petitioner.

(Before the *Judge Ordinary.*)

[438] DEMPSTER *v.* DEMPSTER. November 22 and December 3, 1861.—Wife's Petition for Dissolution.—Cruelty and Adultery.—Condonation.—Where, on an unopposed petition by the wife for dissolution by reason of the husband's cruelty and adultery, it appeared that after the cruelty, which was proved to have taken place, the wife had continued to cohabit with her husband, in ignorance, however, of the adultery which had then in fact taken place, though it did not come to her knowledge till afterwards, the Court was inclined to hold that cruelty condoned under such circumstances would, in effect, revive upon the subsequent knowledge of the adultery and action taken thereupon; that the wife's acquaintance with the husband's delinquencies of every sort may be a branch of the condition on which all condonation depends; but that under sects. 30 and 31 of 20 & 21 Vict. c. 85, the petitioner was clearly entitled to a decree nisi.

[S. C. 31 L. J. (Mat.) 20; 5 L. T. 433; 8 Jur. (N. S.) 44. Discussed, *Bernstein* v. *Bernstein*, [1893] P. 292.]

This was a question arising on the proof of an unopposed petition by the wife for dissolution of marriage on the ground of the husband's cruelty and adultery.

Dr. Phillimore, Q.C., and Mr. Pritchard conducted the petitioner's case. It appeared that the husband had been guilty of cruelty and adultery, but that the wife had continued to live with him after the cruelty proved, and also after the adultery had in fact been committed, though she was then ignorant of any adultery. On this state of facts,

Cur. adv. vult. as to the petitioner's right to a decree nisi.

December 3.—*The Judge Ordinary*: This was a petition by the wife for a dissolution of her marriage, on the ground of adultery coupled with cruelty. The respondent did not appear to the citation. The petitioner gave evidence which, in my opinion, established both adultery and cruelty. The cruelty if it had stood alone, would have been condoned by subsequent cohabitation. No act of adultery was proved to have been com-[439]-mitted after that cohabitation ceased; but the wife never knew of any prior act until after that time.

This state of facts raised two questions, one of which, as far as I know, is new, and the other has never been expressly and in terms decided, viz. whether the wife, by cohabitation with her husband, condoned his cruelty, he having also been guilty of adultery, which was not then known to her; and secondly, whether condonation of the cruelty would deprive the wife of her right to a dissolution of the marriage. On the hearing I was inclined to hold that, as the wife continued to cohabit with her husband after the cruelty proved had been committed, it was thereby condoned; but, on further consideration, I entertain great doubts as to the soundness of that opinion.

The language of the learned Judges presiding in the Ecclesiastical Courts has not been very precise or uniform on this subject. In *Turton* v. *Turton*, 3 Hagg. Eccl. Rep.

351, Dr. Lushington is reported to have said, "I take the doctrine to be perfectly true as laid down by the learned Dean of the Arches, in *Durant* v. *Durant*, that in order to form a legal condonation there must be a complete knowledge of all the adulterous connection, and a condonation subsequent to it." Again, in *Bramwell* v. *Bramwell*, 3 Hagg. 629, the same learned Judge said: "Condonation, however, has been set up; but this condonation is not only conditional in the eyes of the law, as all condonations are, but it is specially so; and a question might arise, as in the case of *Durant* v. *Durant*, whether, at the time Mrs. Bramwell forgave the offences of her husband against her, the whole of them were known to her, for it was in that case laid down by the highest authority, that condonation only takes effect upon a full knowledge of all the guilt. . . .

"It is not, however, in my view of the case, necessary to inquire whether any part of this early adultery has been condoned; still less whether the condonation applied to all **[440]** the adultery, for, assuming that the condonation was complete, and extended to all the previous adultery, under what circumstances, and on what conditions, was it given, and what was the duty of the husband, and what was his conduct afterwards?" Now this latter paragraph raises a doubt whether he was of opinion that no part of a husband's delinquencies could be condoned unless all was known, or whether he meant that condonation of the part known would be unavailing, as that which was at the time unknown, and therefore remained uncondoned, would suffice to sustain the suit. Adverting to *Durant* v. *Durant*, 1 Hagg. 733, the case cited by Dr. Lushington, I find this passage on the subject of condonation: "To establish condonation of that third adultery, and thereby to bar her of her remedy, there must be proof that she was aware of her husband's renewed misconduct, for the mere fact of subsequent cohabitation does not imply forgiveness nor operate as a bar, unless knowledge of the adultery shewn." If that is the passage referred to in *Turton* v. *Turton* and *Bramwell* v. *Bramwell*, and the doctrine in these two cases is not meant to go beyond the former decision, it still leaves it an open question whether condonation of one adultery can be effectual, although another adultery had been previously committed, which at the time of the alleged condonation was not known. If the dicta cited from *Turton* v. *Turton* and *Bramwell* v. *Bramwell* are to be taken literally, they dispose of the question; but if they are to be construed with reference to the facts of those cases, and with reference to *Durant* v. *Durant*, they seem to me to leave it an open question, whether adultery by a husband with A. may not be condoned, although he had previously been guilty of adultery with B., which at the time of the alleged condonation was unknown to the wife.

Adverting to the acknowledged principle that all condonations are conditional, and that any subsequent delinquency is a breach of the condition, why should it not be held that **[441]** another branch of the condition is, that the wife has been made acquainted with all her husband's delinquencies, and that, if she has not, the right to complain of that which has been condoned shall revive, the condonation having been, in a manner, obtained under false pretences? It may be said that the case of adultery differs from that of cruelty and adultery, and that the whole of the cruelty being known, may be well condoned, although nothing is known of the adultery. But the same is true of adultery with A. and B.; the whole of the delinquency with A. may be known. The reasons above suggested are, therefore, as applicable in the one case as the other.

But it seems to me unnecessary to express any decided opinion on this point; the words of the statute point out the judgment that I ought to pronounce on the whole case. Sect. 29: "Upon any such petition for the dissolution of a marriage, it shall be the duty of the Court to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to, or conniving at, the adultery, or has condoned the same." I read this on account of Dr. Phillimore's contention that, in the absence of any plea of condonation, I was not called upon to take notice of it. The learned Judge Ordinary then adverted to the provisions of sects. 30 and 31, and said: I am satisfied that the case of the petitioner has been proved, and I do not find that the petitioner has been in any way accessory to, or conniving at, the adultery complained of, nor that she has condoned the adultery, nor that the petition has been presented or prosecuted in collusion with the respondent. The petitioner is therefore entitled to a decree nisi for the dissolution of her marriage.

**[442]** IN THE GOODS OF MATTHEW LEESE (deceased), on Motion. February 11, 1862.—Two Testamentary Papers.—Appointment of Executors.—No Revocation.—In February, 1859, L. duly executed a testamentary paper, whereof he appointed W. Leese, E. Knight, and John Wright, executors. In October, 1860, he made another testamentary paper, disposing in a different manner of his personal property, but not affecting realty, which was dealt with by the first paper; of the second paper he appointed the same W. Leese and Thomas Devall, executors.—Held, that the second appointment of executors was no revocation of the first appointment, and that, as the bare nomination of executors entitles a paper to probate, leave should be reserved, on the second set of executors taking probate of the two papers as together containing the last will and testament of the deceased, to the first set of executors to come in and prove.

[S. C. 31 L. J. (P.) 169; 5 L. T. 848. Not applied, *In the Goods of Lloyd*, 1872, Ir. R. 6 Eq. 348. Followed, *In the Goods of Andrew*, 1873, 42 L. J. P. 38; 28 L. T. 238; 21 W. R. 391; *In the Goods of Griffith*, 1872, L. R. 2 P. & D. 457.]

In this case, Matthew Leese duly executed a "last will and testament" on the 24th of February, 1859, by which he bequeathed and devised all his personal and real estate to William Leese, Edward Knight, and John Wright, upon certain trusts therein expressed, and of which he appointed the said William Leese, Edward Knight, and John Wright, executors.

**[443]** On the 7th of October, 1860, the deceased duly executed the following testamentary paper:—

"This is the last will and testament of me, Matthew Leese, late of Sandon, in the county of Stafford, but now of Newcastle-under-Lyme, in the said county, gentleman. I direct that all my just debts, funeral and testamentary expenses, be paid by my executors hereinafter named. I give to my sister, Harriet Devall, £50, and Sampson Devall, £10, and subject thereto I give and bequeath all and singular my personal estate and effects unto my three daughters, share and share alike, to be paid to them on their respectively attaining the age of twenty-one years; and I appoint Thomas Devall and William Leese, of Sandon Wood, executors of this my will; in witness whereof," etc.

Dr. Spinks moved for probate of these two instruments, as together containing the last will and testament of deceased, to be granted to the executors appointed in the second paper.

*Sir C. Cresswell*: The first will disposes of personalty and realty, and contains an appointment of executors; the second will deals with the whole of the testator's personalty and so far, therefore, puts an end to the first will, which, if it operated only as a devise of realty, would not be entitled to probate; but the second will does not revoke the appointment of executors contained in the first, and the mere appointment of executors entitles a paper to probate. The executors of the second will are entitled to ask for probate of the first as well as of the second will. They may take it, leave being reserved to the executors under the first will to come in and prove.

Dr. Spinks submitted that, though the appointment of additional executors might not be a revocation of other executors appointed by an earlier paper, yet that where one of the original executors—as here William Leese—is re-appointed **[444]** with a new co-executor, it amounted to a revocation of the first set of executors.

*Sir C. Cresswell*: If so, I am inclined to think that the executors under the second will would, in the present case, be entitled only to probate of that will. The motion had better stand over to allow inquiry to be made as to the practice in the registry.

Cur. adv. vult.

February 18.—*Sir C. Cresswell*: In this case, Dr. Spinks suggested that the re-appointment in a testamentary paper of later date of one of the executors of a former will with a new co-executor, amounted to a revocation of the appointment of executors in the first testamentary paper; I have looked in vain for any authority for saying that such a nomination would operate as a revocation of the appointment of the first set of executors. In this case, therefore, if the executors of the second paper take probate of the two papers, leave must be reserved to the executors of the first paper to come in and join in probate.

IN THE GOODS OF THOMAS COLLIER (deceased), on Motion. February 18, 1862.—Executor out of Jurisdiction.—Limited grant under 38 Geo. III. c. 87, and Probate Acts.—Personal Representative of Legatee.—The Court will make a limited grant to the personal representative of a legatee, the executor being out of the jurisdiction, though the legatee only is mentioned in 38 Geo. III. c. 87.

[S. C. 31 L. J. (P.) 63; 5 L. T. 849. See *In the Goods of Campion*, [1900] P. 13.]

In this case, Thomas Collier died on the 17th of April, 1852, leaving a will, wherein William Smith Richards and John Briggs were appointed executors, who duly proved the will in the Consistorial Court of Chester. Richards died in **[445]** February, 1861, and Briggs left the country for Australia more than seven years ago, and has not since been heard of.

The deceased, by his will, among other things, bequeathed legacies of £50 each to Robert and John Collier, his grandsons, on their attaining the age of twenty-one years, with interest, etc. Robert Collier came of age in November, 1860, but died in October, 1861, without having received the legacy. The whole of the estate had been dealt with under the will except a sum of £118, 11s. 9d. standing in the name of the deceased in the Manchester and Salford Bank, set apart to meet the above legacies.

The present application was to grant a limited administration with the will annexed to Samuel Collier, the father of the legatee Robert Collier, the said Samuel Collier having taken out letters of administration to Robert Collier.

Dr. Swabey moved the Court accordingly. The case falls within the principle of the following Acts, though it may not be literally within the terms of the Act first cited:—By 38 Geo. III. c. 87, it is enacted, "That at the expiration of twelve calendar months from the death of any testator, if the executors or executor to whom probate of the will shall have been granted, are, or is then, residing out of the jurisdiction of his Majesty's courts of law and equity, it shall be lawful for the Ecclesiastical Court which hath granted probate of such will, upon the application of any creditors, next of kin, or legatee, grounded on affidavit hereinafter mentioned, to grant such special administration as hereinafter is also mentioned," etc. This administration was limited to exhibiting a bill in equity. By the Probate Act, 1857, sect. 74, it is enacted that, "The provisions of an Act passed in the 38th year of his late Majesty King George III. c. 87, shall apply in like manner to all cases where letters of administration have been granted, and the person to whom such administration shall have been granted, shall be out of **[446]** the jurisdiction of her Majesty's courts of law and equity." By the Court of Probate Amendment Act, 1858, sect. 18, it is enacted that, "The provisions of an Act passed in the 38th year of George III. c. 87, and of the Court of Probate Act, shall be extended to all executors and administrators residing out of the jurisdiction of her Majesty's courts of law and equity, whether it be or be not intended to institute proceedings in the Court of Chancery," etc. The only question seems to be, whether the personal representative of the legatee is not entitled to a limited grant under these statutes, as well as the legatee mentioned in the Act of Geo. III.

*Sir C. Cresswell*: I think the case comes within the spirit, if not the letter, of the Act. You may take the administration with the will annexed, limited to deal with the sum set apart to meet the two legacies.

BRANDRETH *v.* BRANDRETH AND WIFE. March 11, 1862.—Suit for Revocation of Probate.—Defendant to deliver Issue and move for Directions as to mode of Trial.—Rules 23 and 24 (1857).—Issue to Assizes.—Affidavit.—Practice.—In a suit for revocation of probate the defendant propounding the will should deliver the issue, and move for directions as to mode of trial.—The Court will not direct an issue to the assizes except upon an application supported by affidavit.

[S. C. 31 L. J. (P.) 153; 6 L. T. 335; 10 W. R. 672. Applied, *Jackson* v. *Braithwaite*, 1890, 63 L. T. 231.]

This was a suit instituted by the plaintiff as one of the next of kin of Thomas Brandreth (the deceased), for the revocation of a probate granted by the Prerogative Court of Canterbury of the will, and one codicil thereto, of the said Thomas Brandreth, on the 17th of April, 1857. The defendants had brought **[447]** the probate into the registry in obedience to the usual citation, and then propounded in a

declaration the will and codicil, of which probate in common form had been granted, together with two other codicils to the will. The plaintiff had filed pleas to the declaration, alleging undue influence, fraud, and incapacity, to which the defendants had replied on the 22nd of February last, and delivered the issue on the same day. On the 1st of March they gave notice to the plaintiff of their intention to take the directions of the Court as to the mode of trial.

Dr. Wambey, on behalf of the defendants, moved the Court to direct an issue to be tried before the judge of assize, by a special jury, to be holden in Liverpool, in and for the southern division of the County of Lancaster.

Dr. Spinks, contra: There are two objections to this motion. The issue has been delivered, and the motion for directions as to mode of trial is made by the defendants. But by Rule 22 (1857) the issue is to be delivered by the plaintiff, and by Rule 23 the plaintiff, and not the defendant, within a certain time, is to move the Court for directions as to the mode of trial.

*Sir C. Cresswell*: In a suit for revocation of probate the plaintiff is only plaintiff nominally. The defendant is really so, by propounding the will. I have already decided in chambers that the defendant in these suits is the proper person to deliver the issue and move for directions as to the mode of trial. I adhere to that decision.

Dr. Spinks: The next objection to the motion is, that the defendants do not state upon affidavit any reason why the cause should be tried at the Liverpool assizes instead of in this Court. I apply for it to be tried in this Court.

**[448]** *Sir C. Cresswell*: I cannot grant an application to send an issue to the assizes where there is no affidavit in support of the application. The cause must therefore be tried in the Court of Probate.

IN THE GOODS OF JAMES WHITE SAWTELL (deceased), on Motion. March 18, 1862.—Appointment of Executor.—Misdescription.—20 & 21 Vict. c. 77, s. 73. —Where an aged testator gave instructions that William George, of 4 Finsbury Square, watchmaker, should be his executor, and, on the death of the testator, it appeared that neither he nor his family knew any one of that name, and that no such person could be found or heard of at that address, the Court granted letters of administration, with the will annexed, to one of the residuary legatees, there being no appointment of an executor willing and competent to take probate.

[S. C. 31 L. J. (P.) 65; 6 L. T. 395; 10 W. R. 782. Referred to, *Hewson* v. *Shelley*, [1914] 2 Ch. 18.]

James White Sawtell, formerly of 16 Brunswick Place, City Road, died on the 27th of January, 1862, at the age of seventy-six, leaving a will of the 24th of January, 1862. By the will, which was duly executed, he divided all his property, with the exception of two small legacies, amongst his nephews and nieces, and he appointed as his executor William George, of No. 4 Finsbury Square, watchmaker. The will began with the words, "This is the last will and testament of me, James White, of No. 16 Brunswick Place," and in the attestation clause the testator was again described as "James White." The signature was written in a very scrawling, illegible manner, and the deceased had made his mark beneath it.

From the affidavit of John Jones, clerk to Mr. Mills, solicitor, it appeared that, on the morning of the 24th of January, Louisa Middlebrook, the daughter of the landlady of the house **[449]** where the deceased was lodging, called at the office of Mr. Mills, in Brunswick Place, and requested Jones to come immediately to No. 16 Brunswick Place, for the purpose of making the will of an old gentleman (without mentioning his name), who was lodging there, and who had driven it off until the last moment, and who, she was afraid, would not long survive. That Jones, accordingly, at once went to No. 16 Brunswick Place, and was, by the said Louisa Middlebrook, shewn into the bedroom of the deceased (without his name being mentioned), and, from him, took down in writing the following instructions for making his will: —namely, "James White, of No. 16 Brunswick Place, City Road, gentleman, "—nephews and nieces all the residue of my estate, £50 to Mrs. Middlebrook, £20 to Louisa Middlebrook.—William George, of No. 4 Finsbury Square, watchmaker, executor." That the said deceased, though very aged and infirm, and speaking with great difficulty, appeared perfectly to understand what he was doing, and on Jones asking him whether the said William George, whom he had appointed as his executor, was the occupier of the house, No. 4 Finsbury Square, he replied that he was not,

but only a lodger; and with reference to the two legacies to Mrs. and Miss Middlebrook, he asked Jones's opinion as to what he should leave them, they having had a great deal of trouble with him and having been very attentive, to which Jones replied that it was a question for himself, and also depended upon his means, when he stated there was plenty, and ultimately decided upon the legacies of £50 and £20 mentioned in his will; and on Jones requesting him to furnish him with the names of his several nephews and nieces, he said he could not then recollect them. That Jones, immediately upon receiving the above-mentioned instructions, returned to Mr. Mills's office, and handed the same to Mr. G. Lockyer, another of Mr. Mills's clerks, who at once prepared from the instructions written down the will in question; that Mr. Lockyer and **[450]** Jones then proceeded to No. 16 Brunswick Place, for the purpose of getting the will executed, and upon being shewn into the bedroom of the deceased, found Mrs. Middlebrook there, whom the deceased requested to withdraw; Jones then read over the said will to him, which he appeared to understand; and on being asked whether it was in accordance with his wishes, he expressed his approval thereof; and Louisa Middlebrook, on being called, came into the testator's room, and assisted him to sit up in bed for the purpose of signing the will; and upon a pen being placed in his hand he affixed his signature thereto, but which appeared so unlike the name of James White that it was thought expedient for him to affix his mark to such will, which he accordingly did, and the will was then duly attested by George Lockyer and Jones, and the said deceased requested Jones to take his will to Mr. Mills's office for safe custody.

George Lockyer and Louisa Middlebrook had also made affidavits confirming Jones's statement respecting the execution of the will.

There were other affidavits proving the identity of James White Sawtell with the James White named in the will, and showing that no such person as William George, of 4 Finsbury Square, was known to the deceased, or to any of his friends and relatives, and that no one could be discovered in any respect answering to the description of the executor contained in the will.

All the next of kin of the deceased, and the persons entitled in distribution, who were also the residuary legatees, had filed a consent to the grant of administration with the will annexed being made to Samuel Francis Brough, one of the nephews and next of kin, and residuary legatees.

Mr. R. Searle moved for a grant of administration with the will annexed to S. F. Brough. The appointment of an executor, who did not exist, was no appointment. The grant might **[451]** therefore be made to the residuary legatee, and the appointment of an executor having been inserted under a mistake, might be omitted from the will annexed to it.

*Sir C. Cresswell*: I cannot take such a liberty with the will as to omit the appointment. As all the parties interested consent, I will make the grant as prayed, the person having died "leaving a will affecting personal estate, but without having appointed an executor thereof willing or competent to take probate."

IN THE GOODS OF MARY WEIR (wife of PETER WEIR), (deceased), on Motion. March 11 and 25, 1862.—Protection Order for Wife's Earnings.—Minor Children.—Guardian.—Administration.—Where the wife had obtained a magistrate's order protecting her property and earnings, since April, 1851, and died intestate, leaving minor children, the Court granted administration to the uncle of the children, elected by them guardian for that purpose, though the husband was alive.

[S. C. 31 L. J. (P.) 88; 8 Jur. (N. S.) 393.]

In this case, Mary Weir died intestate, leaving her husband her surviving. On the 22nd of March, 1860, she obtained an order from one of the metropolitan magistrates protecting all property, earnings, moneys, and chattels acquired by her since the 5th of April, 1851, when her husband, Peter Weir, had deserted her. On the 30th of March, 1860, the order was duly entered by the Registrar of the Bloomsbury County Court, and remained in force at the time of Mary Weir's death. The deceased also left two sons between the ages of fifteen and twenty-one years, who had, by an instrument under their hands and seals, elected William Gill, their lawful uncle, to **[452]** be their curator or guardian, for the purpose of taking out letters of administration of the personal estate and effects of the deceased, for their use and

benefit, and till one of them shall attain the age of twenty-one years. The uncle was willing to act, and had made the usual oath, but the registrar wished the opinion of the Court to be taken as to whether the father's right to the guardianship of the children was ousted by the protection order. The last sentence of the 21st section of the Divorce Act, 1857, is: "If any such order of protection shall be made, the wife shall, during the continuance thereof, be, and be deemed to have been, during such desertion of her, in the like position in all respects with regard to property and contracts, and suing and being sued, as she would be under this Act, if she obtained a decree of judicial separation." The 25th section enacts that, "in every case of judicial separation, the wife shall, from the date of the sentence, and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire, or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a feme sole; and, on her decease, the same shall, in case she die intestate, go as the same would have gone if her husband had been then dead; provided that if any such wife should again cohabit," etc. The 26th section declares that, "whilst judicially separated, the wife shall be considered as a feme sole for the purposes of contract, suing and being sued," etc.

Dr. Waddilove moved the Court to decree letters of administration of the deceased to the guardian elected by the minor children, for their use and benefit, etc.

*Sir C. Cresswell*: The difficulty is, whether the words of the Act meet the case. Could infant children, while the father is alive and willing to act, elect a guardian ad litem? The motion may stand over.

**[453]** Dr. Waddilove renewed the motion. He cited, *In the Goods of John Ewing*, 1 Hagg. 381, the marginal note of which is: "Administration durante minoritate of children in the East Indies decreed to the uncle, resident in Ireland, he giving full justifying security. The grandfather, to whom, as next of kin, the grant would naturally pass, being upwards of eighty, and also resident in Ireland." In that case the uncle was nominated guardian by the Court. It seems an authority for passing over, under certain circumstances, the person ordinarily entitled.

*Sir C. Cresswell*: The grant may pass as craved.

IN THE GOODS OF LETITIA LOVEGROVE, Spinster (deceased), on Motion. March 18 and 25, 1862.—Mutual Will.—Survivor.—Probate.—B. and C., sisters living together, executed a testamentary paper to the effect that the survivor should have all that remained of their property at the death of the first deceased, and that at the death of survivor it should be divided amongst certain relations. C. survived B., and died without having altered or revoked such paper, and the Court granted administration with the will annexed, as the last will and testament of C.

[S. C. 31 L. J. (P.) 87; 6 L. T. 131; 8 Jur. (N. S.) 442. Referred to, *In the Estate of Heys*, [1914] P. 193.]

In this case the deceased, Letitia Lovegrove, died on the 18th of June, 1881, leaving the following testamentary paper:—

"Peckham, January, 1858.

"We, Hannah Lovegrove and Letitia Lovegrove, at present living at No. 8 Pitt Street, Peckham, being desirous that, as we are now living mutually together upon the joint savings of each other, at the death of either, whichever it **[454]** may please Almighty God to take first, the survivor should have all that remains, and we further desire that at the death of the last survivor, should there be any money left at her decease, we wish it to be divided between our nephews and niece hereinafter named.

"William Brown, son of our eldest sister, Lucy Brown, residing at Stubbing House, Bisham, near Maidenhead, Berks, to have double the amount of any of the next named, and we further desire the remainder to be equally divided between our other nephews and niece; namely,—

"John Lovegrove, }
"William Lovegrove, } Residing at No. 4 Martha Street, Camberwell.

"Lydia Roffe, residing at Nunhead, Peckham, whose receipt shall be a sufficient discharge, children of our eldest brother, Stephen Lovegrove.

"Charles Lovegrove, son of our brother, James Lovegrove, residing at Burghfield Common, near Reading, Berks.

"Joseph Lovegrove, residing at No. 1 Triangle, Southampton Street, Camberwell.

"William Lovegrove, residing at No. 1 Denmark Road, Camberwell, sons of our brother, Charles Lovegrove; and we further desire our household furniture and other effects to be divided as follows:—

"William Brown to have the silver watch, two teaspoons, one tablespoon, Life of Christ, Pilgrim's Progress, Dr. Hawker's Portions, tea-chest.

"Charles Lovegrove—The trunk as packed and directed.

"John Lovegrove—One pair sheets, one blanket, the small chest of drawers with brass handles, and deal table, washhand stand, jug and basin, pair of pictures.

"William Lovegrove, son of Stephen—One pair sheets, one blanket, one bed, one mattress, one mahogany dining-table, garden tools, small nest of four drawers.

'Joseph Lovegrove—Two silver teaspoons, one pair sheets, one blanket, mahogany chest of drawers with knobs, two armchairs.

**[455]** "William Lovegrove, son of Charles—Two silver teaspoons, one pair sheets, one blanket, one bed-chair, two pillows.

"Lydia Roffe—One pair sheets, one blanket, small mattress, four flat-irons, Italian iron; and we further desire that Elizabeth Ash receive £5, provided she is with us or either of us at the death of the last survivor, and that she divide the above-mentioned goods.

"Signed in the presence of each other and of both the undersigned.

"HANNAH LOVEGROVE, × her mark.

"LETITIA LOVEGROVE, × her mark.

"Witnesses,

"MARY NICHOLSON, × her mark.

"ELIZABETH ASH."

From the affidavit of John Lovegrove, it appeared that Hannah Lovegrove died in April, 1858. At the death of Letitia the property consisted of £200 Consols, which had stood in the joint names of the two sisters, but Hannah had been "made dead" in the Bank books, and furniture of the value of about £5.

Dr. Swabey moved for letters of administration with the will annexed, as the last will of Letitia Lovegrove, spinster, to be granted to John Lovegrove, her lawful nephew and one of her next of kin, and one of the persons entitled to the residue of her personal estate undisposed of by the said will. In *Hobson* v. *Blackburn and Blackburn*, 1 Add. 274, it appears that a similar paper was proved as the will of Joshua Hobson (who was in that case the first of the mutual testators who died), he having died without having altered or revoked his part thereof. In the present case the survivor has died without altering or revoking her part of the document, which is, whatever its effect may be, her will.

*In the Goods of Stacey*, Deane 6, and *In the Goods of Joseph Raine*, 1 Swab. & Trist. 144, were also cited. Cur. adv. vult.

**[456]** *Sir C. Cresswell.*—I think in this case the precedent cited warrants the grant prayed.

IN THE GOODS OF AUGUSTUS TURRELL (deceased), on Motion. March 4, 1862.—Double Probate.—Refusal to produce Probate and account of Estate.—Citation against Executor.—Practice.—Where an executor had proved a will (power being reserved to his co-executors to come in and prove it), upon his refusal to produce the probate and an account of the estate in respect of which it had been granted, so as to enable a co-executor to prove the will without payment of probate duty, the Court directed a citation to issue against him.

[S. C. 31 L. J. (P.) 170; 6 L. T. 162; 10 W. R. 430.]

Augustus Turrell died in May, 1861, at Hampton Court, leaving a will, whereof he appointed his sons, Samuel Turrell, Adolphus Turrell, James Turrell, and Thomas Cross, executors.

On the 4th of June, 1861, Samuel Turrell alone proved the will in the principal registry, power being reserved to the other executors to come in and prove thereafter.

James Turrell, one of the other executors, was now desirous of proving the will. For that purpose he had been sworn as an executor to an official copy of the will under seal of the Court, but in order to obtain the usual free mark or stamp to exempt him from paying probate duty, the Inland Revenue Office at Somerset House required the production of the probate granted to Samuel Turrell, with a memorial

setting forth the nature and amount of the property in respect of which such first probate was granted.

Several applications had been made to Mr. Samuel Turrell for the production of the first probate, and to furnish the account, as required by the Inland Revenue Office, without [457] effect. Notice had also been given to him in writing, that, if he persisted in refusing to comply with the application, proceedings would be taken against him in the Court of Probate.

Dr. Tristram moved the Court to direct a citation to "issue, calling upon the said Samuel Turrell to bring in the probate, with an account of the personal estate and effects of the testator, in respect of which such probate was granted." If the motion was not granted, great inconvenience and expense would accrue to the testator's estate.

*Sir C. Cresswell*: The estate is a small one. There is no reason why it should be put to the expense occasioned by the payment of probate duty twice over. I will grant the motion.

Dr. Tristram asked for Mr. Samuel Turrell to be condemned in the costs of the motion. His refusal to comply with the requirements of the Inland Revenue Office was unreasonable.

*Sir C. Cresswell*: I shall make no order condemning him in costs until he has complied with the citation; and I will then hear what he has to say on the subject.

IN THE GOODS OF SARAH WHITE, Widow (deceased), on Motion. March 11, 1862. —Administration.—Parties entitled resident in Georgia.—No Communication between England and Georgia by reason of the Blockade.—Property not perishable.—73rd Section of Probate Act.—A. died in England intestate, leaving two children, the only persons en-[458]-titled to her effects, who were resident in Georgia. She left money in the Funds and in a savings-bank, a small sum due to her, and a little furniture:—The Court refused to make a grant to B., her nephew, for the use and benefit of her children, although communication with her children from England was cut off by reason of the blockade of the southern ports of the States, on the ground that the property was not perishable, and that there were no special circumstances to justify the Court in departing from the ordinary practice.

[S. C. 31 L. J. (P.) 161; 6 L. T. 162; 10 W. R. 430.]

Sarah White, late of Millpond Street, Bermondsey, in the county of Surrey, died on the 22nd of January, 1862, a widow, and intestate, leaving Sarah Ann Aust, widow, and William Dover Maccaw, her natural lawful and only children, and the only persons entitled to her personal estate.

Sarah Ann Aust and William Dover Maccaw were resident in the State of Georgia, in America, and in consequence of the civil war at present waging between the Northern and Southern States, and the blockade of the ports of the Southern States, there was, during the present aspect of affairs, no reasonable prospect of being able to communicate with them from this country. The present estate of the deceased consisted of £36, 11s. 9d. in the Southwark Savings-Bank, £150 Consols, £20 money owing to her, and furniture of the value of £10.

Henry William Cridland, a nephew of the deceased, who had been on very intimate terms with her for many years past, and who had consented a day or two before her last illness to be sole executor of a will she contemplated making, and was with her at the time of her death, had, in the absence of her children, made arrangements for and paid the expenses of her funeral (£17, 6s.). There was a sum due to her medical attendant, which was the only other claim against her estate. The deceased's nearest relation, resident in this country, was a sister, who declined to interfere in her affairs.

Dr. Spinks moved for a grant of administration of the personal effects of the deceased to the said Henry William Crid-[459]-land for the use and benefit of Sarah Ann Aust and William D. Maccaw during their residence from this country, or until they or one of them should apply for and procure letters of administration of the effects of the deceased, on his exhibiting an inventory and giving justifying sureties. The children of the deceased had no attorney or agent in this country.

*Sir C. Cresswell*: Have you any authority for the grant prayed?

Dr. Spinks submitted that it might be made under the 73rd section of the Probate Act.

*Sir C. Cresswell*: That section is not applicable to this case. There are no special

circumstances to justify me in making the grant under it. The property of the deceased is not perishable: it consists of money in the Funds and in a savings-bank, bearing interest. I don't see that there is any occasion for me to depart from the ordinary practice and make a fresh precedent in this case.

HARRIS AND ANOTHER *v.* BRADBURY AND HALLADAY. March 25, 1862.—Attachment.—Married Woman condemned in Costs.—No separate Property.—Where the Court had condemned the defendants in costs, and had made an order upon them for the payment of the same, it refused to direct an attachment to issue against them for non-compliance with that order, on their stating on affidavit that they were married women and had no separate property.

[S. C. 31 L. J. (P.) 86; 6 L. T. 163; 10 W. R. 447.]

The plaintiffs in this case propounded the will of Jane Goodman deceased, dated the 18th of August, 1859, as the executors named therein.

**[460]** The defendants (Mrs. Bradbury and Mrs. Halladay) contested the validity of this will on several grounds. The Court pronounced for the will, and condemned the defendants in costs. The plaintiff's costs were taxed at £78, 7s. 2d., and an order for the payment of those costs had been made upon the defendants, who had failed to comply with the order.

Dr. Spinks moved the Court to direct an attachment to issue against the defendants for non-payment of the costs.

Dr. Wambey contrà: I have affidavits from both of the defendants stating that at the time of the commencement of the suit they were and still are married women; that their husbands are living within the jurisdiction of the Court, and that they have no separate property. This, I submit, is a sufficient answer to the motion. If the plaintiffs had wished to have secured themselves in respect of costs, they should have made the husbands parties to the suit.

*Sir C. Cresswell* (to Dr. Spinks): Have you any answer to make to this?

Dr. Spinks: I don't ask the Court to attach the defendants for non-payment of the costs, but for disobedience to an order of the Court, which is equivalent to a contempt of Court.

*Sir C. Cresswell*: At common law a capias may go against a married woman for costs, but upon proof that she has no separate property she is entitled to her discharge. I can only enforce an order of this Court in the same manner as orders are enforced by the Court of Chancery. Is there any instance of a married woman having been attached by order of the Court of Chancery for non-payment of costs?

Dr. Spinks: I am not aware that there is any such instance. **[461]** There are instances of married women being attached in Chancery for failing to comply with other orders of Court.

*Sir C. Cresswell*: I reject the motion.

Dr. Wambey asked for the plaintiffs to be condemned in the costs of the motion.

*Sir C. Cresswell*: I cannot condemn the plaintiffs in costs.

IN THE GOODS OF FRANCIS OWSTON (deceased), on Motion. March 4 and April 16, 1862.—A Deaf and Dumb Testator.—Will.—Instructions given by Signs.——Requisites of Affidavit.—Where a testator, who was deaf and dumb, made his will by communicating his testamentary instructions to an acquaintance by signs and motions, who prepared a will in conformity with such instructions, which was afterwards duly executed by the testator, the Court required an affidavit from the drawer of the will, stating the nature of the signs and motions by which the instructions were communicated to him, and ultimately refused to grant probate on motion.

[S. C. 31 L. J. (P.) 177; 6 L. T. 368; 10 W. R. 410. Referred to, *In the Goods of Geale*, 1864, 3 Sw. & Tr. 431.]

Francis Owston, a labourer, who died on the 6th of January, 1862, was deaf and dumb, and could neither read nor write. On the 7th of January, 1857, he sent for Robert Bradley, an acquaintance of forty years' standing, and who was able to communicate with him by signs and motions, to assist him in making his will. Robert Bradley went over to his house, when he instructed him, by means of signs and motions perfectly understood by both of them, that he wished to leave his property to his nephew, Richard Mosey Owston, subject to a proviso that he should allow his,

the testator's, wife a suitable allowance. Robert Bradley then inquired of the testator, **[462]** by signs and motions, if he wished to leave anything to any one else, and he gave him to understand he did not. Norwood Lawson, since deceased, a schoolmaster, was present, and wrote out the will according to these instructions. Robert Bradley then read over the will, and by signs and motions explained it to the testator, who expressed to him by signs and motions that he perfectly understood it, and that it was in accordance with his wishes. The testator then made his mark to the said will in their presence, but they did not attest it.

Afterwards, on the same day, Owston Rounding, a nephew of the testator, and who was able to communicate with him by signs and motions, and Mary Cooper, being together present with the testator, the testator acknowledged his mark in their presence, making Owston Rounding to understand that it was his will which he had so signed with his mark, and that he wished him to attest it, whereupon they both subscribed their name to it in the testator's presence. These facts were verified by affidavit.

Dr. Spinks moved for probate of the will to be granted to Richard Mosey Owston, the sole executor named therein.

*Sir C. Cresswell*: This is a very singular case. Robert Bradley does not state the nature of the signs by which he communicated with the testator, whether he conversed with his fingers or not. It does not appear that he was habitually conversant with deaf and dumb people. I shall require a further affidavit of the nature of the signs and motions with which Bradley communicated with the deceased before I grant the motion. I should like also to have the consent of the party entitled in the event of intestacy. Let the motion stand over.

April 16.—Dr. Spinks renewed the motion on the following further **[463]** affidavit of Robert Bradley:—"That my late father was the occupier of a farm at Thornholme, in the county of York, comprising about 400 acres of land, for nineteen years, and after leaving that farm removed to Wetwang, in the same county, and occupied a farm there for eleven years, and that the said Francis Owston, the testator, who was deaf and dumb, was a labourer in the employment of my said father at Thornholme and Wetwang for a period of twenty-five years, namely, from the year 1814 to the year 1840, and during part of that period resided in the house of my said father. That the said testator used to take me to Burton Agnes School when I was a child, and from seeing him daily for upwards of twenty years I learnt to converse with him by signs and motions, making letters on the palm of my hands, and by the deaf and dumb alphabet. That all my brothers and sisters could also understand and converse with him by signs and motions, but none of them so well as I could. That while the said testator was in the employ of my said father, he (the said testator) taught me to plough, to shear sheep, and to play at whist, he being a very good whist player. That I frequently sent him on numerous errands, and frequently sent him into my father's fields to fetch up a particular horse, and he has gone away alone and brought back without any other means of information than the signs and motions which I had used. That when I marked with the finger on the palm of the hand the name of any person the said testator was acquainted with, he knew it directly, and would give me to understand that he did so by making signs indicative of the trade or business of such person. That the said testator could and did also converse with me by these signs and motions, and give me information as to my grandfather, and told me his age. That when I attended at the house of the said testator to interpret for him on the making of his will, as mentioned and set forth in my affidavit, sworn herein on the 12th of **[464]** February, 1862, the said testator used both signs and letters on his hand: he made signs indicating that all his money, furniture, and everything he possessed, was to be given to his nephew, Richard Mosey Owston, who was then present, and marked his said nephew's initials on his hand, putting his finger in his mouth, which was a sign that the person he referred to was a relation. The said Richard Mosey Owston had attended to the said testator's business matters for some time, and was present at the testator's request, and the testator pointed to him as the person he wished to have all his property. That the said testator had separate signs or marks for gold, silver, and copper; for gold he touched his neckerchief, silver his shirt, and copper the buttons of his coat. He used all these signs, touched most of the furniture, and gave me, by aid of the marks and signs, to understand they were all for his said nephew. When I replied to that effect, he understood at once, and

expressed himself satisfied. That I am informed (and believe it to be true) that the only personal estate of which the said testator died possessed, consisted of his household furniture (of trifling value) and the sum of £50 due on note. And I further make oath and say, that the said testator was a widower at the time of his death, and left no issue, and that the next of kin of the said testator at the time of his death were his brother, Richard Owston, the said Richard Mosey Owston, Margaret, the wife of Stephen Cowson, and Jane, the wife of William Duggleby, the three children of his deceased brother, Michael Owston, Jane Fairgray and Clarkson Owston, the two children of his deceased brother John Owston, Michael Raymond and Mary Ann Raymond, the two surviving children of his deceased sister Phillis Raymond, and Owston Rounding (one of the attesting witnesses to the said testator's will) and Mary Butcher, the two children of his deceased sister Hannah Rounding, all of whom I am informed, and believe, reside in different parts of the country. That **[465]** none of the relations of the said testator, during the time I knew him, ever noticed or visited him except the children of his deceased brother Michael and the said Owston Rounding, and that the said testator always expressed great regard for his said nephew, Richard Mosey Owston, who had attended to his wants for some years."

*Sir C. Cresswell*: I cannot consider this as a sufficiently satisfactory account of the method in which the instructions of the deceased are said to have been taken. I am not inclined to let probate of this paper pass on motion, at least without the consent of the next of kin.

Motion rejected.

DYKE (QUEEN'S PROCTOR) *v.* WILLIAMS. IN THE GOODS OF MARY EMSLEY (deceased). July, 1861.—Queen's Proctor's Suit.—Legitimacy.—Practice.—In a plea of legitimacy, in answer to the Queen's Proctor's declaration of bastardy, the steps of the pedigree must be set out, but it is not necessary to plead that a marriage was solemnized at a particular time and place, and that certain issue was born after the date of the marriage.

[See further p. 491, post.]

This was a question arising on the following pleadings:—

The declaration of the Queen's Proctor stated that Mary Emsley, late of Grove Road, Mile End, in the county of Middlesex, deceased, died on the 13th of August, 1860, intestate; that the said Mary Emsley was a bastard, and died a widow, without having any lawful issue.

To this Samuel Williams, by Richard Chapman King, his attorney, pleaded:—1. That Mary Emsley, late of Grove Road, etc., who died on the 13th of August, 1861, a widow and intestate, was not a bastard. 2. That the said Mary **[466]** Emsley was the legitimate child of Samuel Williams and Mary his wife. 3. That the said last-mentioned Samuel Williams and the said Mary his wife had issue one other lawful child only, namely, Samuel Williams, who died in the lifetime of the said Mary Emsley, to wit, on the day of ———, leaving him surviving the said Samuel Williams, the defendant, Elizabeth Gotz, wife of ——— Gotz, Abraham Williams, and Joseph Williams, his natural and lawful and only children, and only next of kin.

This plea was objected to by

Dr. Spinks, on behalf of the Queen's Proctor: Such a plea should allege the time and place of the marriage of the parents and the birth of the respective persons after marriage.

Dr. Wambey: The plea is a sufficient traverse of the declaration, and a sufficient statement of the interest of the party claiming relationship. Cur. adv. vult.

*Sir C. Cresswell* (after stating the declaration and plea): This was an application to cause the defendant to set out the particulars of the marriage; but looking at the 9th and 11th forms for contentious business (1857), which give the declaration and plea in an interest cause, I think the plea is sufficient.

DYKE (QUEEN'S PROCTOR) *v.* WALLIS AND OTHERS. February 25 and April 16, 1862.—Queen's Proctor's Suit.—Legitimacy.—Practice.—The pedigree of parties claiming to be related to a deceased intestate, as against the Queen's Proctor's allegation of bastardy, must be set **[467]** out, but it is sufficient to aver that B. was the legitimate child of A. and his lawful wife, without stating the time or place of the marriage, or the name of the wife, or the date of the birth of B.

[S. C. 31 L. J. (P.) 97; 6 L. T. 227; 8 Jur. (N. S.) 417; 10 W. R. 631.]

This was a question on the pleadings in an interest suit. The declaration stated that Sophia Bellis, otherwise Sophia Capell, late of 43 Woburn Place, in the county of Middlesex, died at the said place on the 14th of January, intestate. That the said deceased was a bastard, and died a widow, without leaving any issue.

To this Henry Wallis, James Wallis, and Mary Ann Moir, widow, by Edward Lewis Hooper, their attorney, pleaded:—1. That they deny that Sophia Bellis, otherwise Sophia Capell, who died on or about the 14th of January last, the deceased in this cause, was a bastard. 2. That the said deceased died intestate, a widow, without child, parent, brother or sister, uncle or aunt, nephew or niece, cousin german, or cousin german once removed, leaving them, the said Henry Wallis, James Wallis, and Mary Ann Moir, widow, her lawful second cousins and next of kin.

Dr. Spinks moved to amend the plea by setting forth the defendant's pedigree, so that issue may be properly joined.

Dr. Swabey: This is not a suit between two private persons asserting relationship to the deceased, but between the Queen's Proctor for the Crown, who alleges a case of bastardy, and the defendants, who claim to be related. In such case the most general evidence of relationship is sufficient; and in *Stote* v. *Tyndall*, 2 Sir G. Lee, 394 (cited 1 Wms. Executors, 379), Sir George Lee decided that it was not necessary to set out a pedigree.

Cur. adv. vult

February 25.—*Sir C. Cresswell* said: The case cited by Dr. Swabey last week is not exactly in point. The Crown there denied Mr. Stote's relationship, but did not allege that the de-**[468]**-ceased was a bastard. The present case seems to me to depend upon whether the assertion of bastardy by the Crown is enough to throw the burden of proof on the parties claiming as relations and denying the bastardy. I feel some difficulty on this point, and the case must stand over to see whether any light can be thrown on it from any cases of which the papers may be found in the registry.

March 4.—*Sir C. Cresswell*: The Queen's Proctor has succeeded in finding a precedent exactly in point, shewing that the party coming in and setting up a claim against the Queen's Proctor must state a pedigree. The plea must be amended accordingly.

The plea, as amended in compliance with this order of the Court, contained the following additional paragraphs:—

3. That Thomas Millist, by his lawful wife Mary, had legitimate issue, besides other children, two daughters, respectively named Ann and Sarah.

4. That the said Ann Millist became the lawful wife of Frank Capell; that Francis Godman Capell was the legitimate son of the last-mentioned marriage; that Sophia Bellis, otherwise Sophia Capell, the deceased in the cause, was the legitimate daughter of the said Francis Godman Capell by his lawful wife.

5. That the said Sarah Millist became the lawful wife of John Rickernell, and had, besides other issue, a legitimate daughter named Mary, who became the lawful wife of Isaac Wallis, of which last-mentioned marriage the said Henry Wallis, James Wallis, and Mary Ann Moir, the defendants in this cause, are legitimate issue.

Whereupon the Queen's Proctor gave notice of motion to amend the fourth paragraph of the plea, by setting out when, where, and to whom, Francis Godman Capell, the alleged father of the deceased, was married, and the date of the deceased's birth.

**[469]** Dr. Spinks moved the Court accordingly.

March 25.—Dr. Swabey, in support of the sufficiency of the plea, referring to *Mayo* v. *Brown*, 2 Sir G. Lee, 391, contended that the defendants were now called upon to state in plea more precise circumstances and particulars than it might be necessary for them to prove to establish the legitimacy of the deceased. The Queen's Proctor, at least, could be entitled to no privilege beyond an ordinary suitor.

Cur. adv. vult.

April 16.—*Sir C. Cresswell*: This was a motion for an order on the defendants to amend their plea by setting forth the particulars of the pedigree by which they claimed to be the second cousins of Sophia Bellis, deceased. The Queen's Proctor had declared that Sophia Bellis, alias Capell, was a bastard. The defendants traversed that allegation, and in an amended plea set out a pedigree making Thomas Millist the common ancestor—alleging that he left two daughters, and traced their descent from one of them; then averring that the other, named Ann, married F. Capell; that F. G. Capell was the lawful issue of that marriage; and that Sophia Bellis, alias Capell, was the lawful daughter of F. G. Capell and his wife.

The application was that the defendants should state when, where, and to whom Francis Godman Capell was married, and the date of the birth of the deceased Sophia Bellis, alias Capell. In support of the motion, the papers in a cause of *Her Majesty's Proctor* v. *Thorn and Walker* were produced, where, in an allegation brought in for the defendants, a marriage between A. and B., the parents, was averred, but no precise time or place was fixed. It was also urged that the Queen's Proctor, on behalf of the Crown, could have no motive for desiring to take any unfair advantage, and only wished for an opportunity of ascertaining whether his claim on behalf of the Crown was well founded, without incurring, or causing the defendants to incur, any unnecessary expense. **[470]** On the other hand, I was referred to a case in the second volume of Sir G. Lee's Reports, *Mayo* v. *Brown*, at p. 391, as an authority justifying the general form of plea used in this case.

I think that I must treat the Queen's Proctor in the same manner as any other suitor, and that, if the pleading would be sufficient in answer to a declaration by another suitor, it will suffice against him. The case cited is not precisely in point, but much resembles this. Brown had taken administration to Lady Mayo's mother. She alleged that Brown was not the lawful husband of the deceased, and cited him to bring in his administration. He denied that Lady Mayo was the deceased's legitimate daughter. She propounded her interest, alleged that her mother married Whitgift Aylmer, and that she was the issue of the marriage, but did not fix the factum of the marriage, nor the year in which it took place, nor the year in which she was born, but pleaded circumstances from which a marriage and her legitimacy might be inferred; and from the evidence given Sir G. Lee pronounced for her interest, "notwithstanding there was no actual proof of the marriage of her father and mother, or of the time of her birth." This sort of pleading would not now be allowed, for it is pleading evidence; but the evidence would be admissible to prove legitimacy, and the decision of Sir G. Lee is an authority for saying that legitimacy may be established by circumstantial evidence, without actual proof of the marriage of the parents or the birth of the issue. That being so, I think I cannot call upon the defendants to fix the factum of the marriage, or the time of it, or of the birth of the issue. As at present advised, such would have been my decision if the question had been raised on demurrer, when it might have been questioned on appeal; but, on motion, certainly I cannot order the defendant to amend his plea, as desired by the Queen's Proctor. I am not prepared to say that evidence may not be given that would justify the Court or a **[471]** jury in finding that the deceased was the legitimate daughter of Francis Godman Capell, although there may not be actual proof of the factum of the marriage, or of the time of the birth of the deceased, or of the maiden name of her mother; and, therefore, I think the defendants must be allowed to allege, in general terms, that the deceased was the legitimate daughter of Francis Godman Capell.

Adverting to counts of real actions, I may observe that in writs of right the claimant was bound to shew that he was heir, and how he was heir, but marriages were not stated. Thus it sufficed to say that from A. B. the estate descended to C. D., his son and heir, and from him to E. F., his son and heir, and so forth (see *Dumsday* v. *Hughes*, 3 B. & P. 453). I can find no sufficient reason for requiring more in such cases as the present. The motion must therefore be rejected.

IN THE GOODS OF CHARLES LORIMER (deceased), on Motion. May 20, 1862.—Executors, acting and non-acting—Executor of acting Executor—20 & 21 Vict. c. 77, s. 79—21 & 22 Vict. c. 95, s. 16.—On the death of an executor, without having either renounced or taken probate, the executor of the survivor of two acting executors becomes the personal representative of the original deceased.

[S. C. 31 L. J. (P.) 189; 6 L. T. 612; 10 W. R. 809.]

In this case the deceased died in May, 1844, leaving a will, in which he appointed Thomas Oliverson, James A. Forshaw, and Thomas Morris trustees and executors, and his wife, Hannah Lorimer, residuary legatee during widowhood, with a power of appointment by will over the whole estate and effects in the event of her not marrying again. Probate was granted by the Consistory Court of Chester in June, 1844, to Forshaw and Morris, power being reserved to Oliverson. Forshaw and **[472]** Morris acted under the will and died, leaving part of the estate unadministered. Morris, the survivor of the two, died in July, 1860, leaving a will, whereof he appointed certain executors, one of whom, George Marsden, proved the will. Thomas Oliverson died

in 1861, having in his lifetime neither renounced probate nor obtained any grant to be made to him.

Hannah Lorimer died a widow, leaving a will and codicil, whereof she appointed Bailey and Chalmers her executors and residuary legatees in trust, who took probate in 1859. In the will and codicil, Hannah Lorimer directed the trustees or trustee for the time being of the will of Charles Lorimer to pay or transfer all the property over which she had a power of appointment by virtue of the will of Charles Lorimer, to Bailey and Chalmers, her executors.

The unadministered effects of Charles Lorimer consisted of a sum of £5405, standing to the credit of his executors, Forshaw and Morris, in the Bank of Liverpool. The bank declined to pay the money until a grant of letters of administration de bonis non should be made, and Marsden, the executor of the surviving acting executor of Charles Lorimer, would take no steps to compel the bank to pay the money to him, being advised that he was not the personal representative of the said Charles Lorimer.

The 20 & 21 Vict. c. 77, s. 79, enacts that "Where any person, after the commencement of this Act, renounces probate of the will of which he is appointed executor or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor."

The 21 & 22 Vict. c. 95, s. 16, enacts that "Whenever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor **[473]** named in a will is cited to take probate and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor."

Dr. Swabey now moved the Court to grant letters of administration with the will annexed of the unadministered estate of Charles Lorimer to Bailey and Chalmers, the executors of Hannah Lorimer. The Court will probably reject the motion, as the case apparently cannot be distinguished from that of *The Goods of Robert Noddings* 2 Swab. & Trist. 15, where a surviving executor, to whom power had been reserved, having been cited and not appearing, the Court held that the executor of an acting executor was the personal representative of the original testator. The present case falls under another clause of the same 16th section, but the principle must be the same. There is an inaccuracy in the report of *The Goods of Robert Noddings*, where the Court is reported to have said: "The executor of the acting executor seems to be the proper representative of the original testator, and the grant will be made accordingly." The effect of that case being that the executor of the acting executor is the representative of the original testator, no grant de bonis non was necessary, and none in fact was made. This inaccuracy may have had some share in the view taken by the advisers of the Liverpool Bank in the present case.

*Sir C. Cresswell*: I see no reason to doubt that, under the sections of the Probate Acts referred to, the executor of the surviving acting executor becomes, upon the death of the non-acting executor, the personal representative of the original testator. I must reject this motion.

**[474]** IN THE GOODS OF PETER FRANCIS M'CABE (deceased), on Motion. May 27 and June 3, 1862.—Wills and Codicils.—Destruction of later Will.—Reference to and Confirmation of Testamentary Papers by duly-executed Letter.—C. made a will on the 30th of April, 1857, in which he devised to H. a freehold house for life, and the residue of his real and personal estate to B. C., making H. and B. C. executors. In September, 1857, he made a codicil "to my last will of the 30th of April, 1857," by which he left H. £200 in addition to the devise in the will, and left other specific money legacies. On the 13th of February, 1858, he made another codicil referring to his will of 1857, and bequeathed a leasehold house and the furniture therein to H., and otherwise confirmed his will. On the 3rd of June, 1858, he made a will identical with that of 1857, except the substitution of F. C. for B. C.; at the same time he re-executed the codicil of September, 1857, which then purported to be a codicil "to my last will, dated the 3rd of June, 1858." On C.'s death in March, 1862, the will of April, 1857, and the two codicils were

found in an envelope sealed and indorsed by C., "sealed the 13th of June, 1860, P. F. M'C." The will of 1858 was not forthcoming, though it had been in testator's possession. There was evidence tending to shew that before the beginning of 1860 deceased intended to exclude F. C. and reinstate B. C., and that he had destroyed the will of 1858. In June, 1860, deceased wrote a letter to H. confirming what he had already done by will for her, which letter was signed by him and attested. The Court granted probate of the last will of C., as contained in the letter and the papers found in the sealed envelope.

[S. C. 31 L. J. (P.) 190; 6 L. T. 474; 10 W. R. 848.]

The deceased in this case died on the 8th of March, 1862, at Hastings. After his death an envelope was found amongst his papers, sealed with his own seal, and indorsed as follows, in his own handwriting:—"Sealed 13th June, 1860. P. F. M'C." This envelope contained three testamentary papers:—

1. "This is the last will and testament of me, Peter Francis M'Cabe, late of Hastings, in the county of Sussex, but now **[475]** of Hawkhurst, in the county of Kent, physician. In the first place, I direct all my debts, funeral and testamentary expenses to be paid. And I give and devise all that my messuage or tenement, with the buildings and appurtenances thereunto belonging, situate and being No. 43, in Wellington Square, in the parish of St. Mary in the Castle, in Hastings aforesaid, unto Hannah Blake, my housekeeper, for the term of her life, for her own sole and separate use, free from the control, debts, or engagements of any husband she may marry, she keeping the same in good repair, and insuring the same from fire. And, subject to the said last-mentioned devise, I give, devise, and bequeath all my real and personal estate whatsoever unto and to the use of my nephew, William Bernard M'Cabe, his heirs, executors, etc.; and I appoint the said William Bernard M'Cabe and Hannah Blake executor and executrix of this my will; and I hereby revoke all other wills by me at any time heretofore made, and declare this to be my last will and testament. In witness whereof (duly executed), 30th April, 1857."

2. "This is a codicil to the last will and testament, dated the third day of June,[1] one thousand eight hundred and fifty-eight, of me, Peter F. M'Cabe, of Hawkhurst, in the county of Kent. I give to my faithful friend and housekeeper, Hannah Blake, in addition to the disposition made in my will, two hundred pounds, as a token of gratitude for her care and attention to me in various illnesses. I give to Margaret M'Cabe, widow of my lamented brother, Dr. James M Cabe, fifty pounds, and in case of her death to be divided between those of her sons most requiring it. I leave to E. M'Cabe, son of my late brother, Edward M'Cabe, fifty pounds. I leave to William Swan, son of the late William Swan, of the Navy Pay Office, three hundred pounds. I leave leave to the then parish priest of Arran-quay Chapel, for **[476]** the benefit of the poor of his parish, fifty pounds. In witness my hand this * third day of June, 1858."

(Duly executed and re-executed.)

3. "This a codicil to the last will and testament of me, Peter Francis M'Cabe, of Hawkhurst, in the county of Kent, physician. Whereas, I have by my will, dated the thirtieth day of April, 1857, given all my personal estate unto my nephew, William Bernard M'Cabe, absolutely; and whereas I have lately taken the lease of a house and premises called Mill-hill Lodge, situate on the West Hill, in the parish of St. Clement, in Hastings, in the county of Sussex. Now I hereby give and bequeath all my interest in and to the said premises and the lease thereof, and all the furniture and household effects belonging to me which shall be therein at my decease, unto my housekeeper, Hannah Blake, her executors, administrators, etc. And in all other respects I confirm my said will, as witness whereof, etc., this 13th day of February, 1858 (duly executed)."

From the affidavits of Hannah Blake and Mr. Shorter, solicitor, of Hastings, the following facts appeared:—

That deceased was in the habit of speaking to Hannah Blake about his affairs, and had from time to time mentioned to her the substance of the above papers. That in the early part of 1858, Francis Frederick M'Cabe, son of William Bernard M'Cabe, mentioned in the above papers, visited the deceased at Hastings, soon after which

---

[1] 30th April, 1857. This date was erased, and the above date interlined.

* day of September, 1857. Erased and interlined as above.

the deceased told Mrs. Blake that he intended to make an alteration of his will in favour of the said Francis Frederick M'Cabe; that on the 3rd of June, 1858, deceased called at Mr. Shorter's office, and produced the will dated the 30th of April, 1857, and Shorter, from his instructions, prepared a draft will, which was an exact copy of the will of 1857, except the substitution of the names Francis Frederick M'Cabe for those of William Bernard M'Cabe, as the residuary devisee, legatee, and executor **[477]** thereof; and a fresh will was on that day duly executed in accordance with such draft; this draft was kept by Mr. Shorter, and was now before the Court: it revoked "all other wills by me at any time heretofore made"; at the same time the deceased produced the codicil (paper No. 2 above), and requested Mr. Shorter to witness the re-execution of it, which was accordingly done; the deceased then left the office, taking with him his new will, the re-executed codicil, and the will of April, 1857; no allusion was made to the codicil of the 13th of February, 1858.

In the year 1859, Thomas Frederick M'Cabe again visited deceased, subsequently to which a coolness appeared to grow up between them, and, some time between the month of June, 1859, and the beginning of 1860, the deceased took some papers out of his desk, in the presence of Mrs. Blake, tore up one about the size of a sheet of foolscap, and threw the pieces on the fire, saying, at the same time, "I think William Bernard M'Cabe will be a better friend to you than Francis Frederick M'Cabe, and he shall have nothing to do with you or my property." In the month of May, 1861, the deceased told Mrs. Blake that he was about to go to Ireland and that he should write a letter to her confirming his will. Accordingly, on the 1st of June, he handed to Mrs. Blake the following letter, in his own handwriting: "West Hill, 1st June, 1861.—Dear Mrs. Blake,—As I contemplate taking a journey to Ireland, I don't wish, at my time of life and state of health, leaving anything unsettled that I think I ought to arrange. I have already made a will, in which I left to your use and perfect enjoyment my freehold house and furniture during the full period of your life. I now write this in confirmation of what I have already done, to prove to you that there has not been the least change in my intentions towards you since the time of my making my will. I have placed the deed of the house in your own keeping." Mrs. Blake suggested it should be witnessed by two **[478]** persons, or that it would be of no value; the deceased on this went out, and, as appeared by another affidavit, signed this letter, which was duly attested and subscribed by two witnesses; on his return he gave the letter to Mrs. Blake, who kept it. After careful search, no other testamentary papers were forthcoming on deceased's death, except the above.

A proxy of consent from Francis Frederick M'Cabe was filed.

Dr. Swabey moved the Court for probate of the last will and testament of deceased, as contained in the letter of the 1st of June, 1861, the will bearing date the 30th of April, 1857, the re-executed codicil, and the codicil of the 13th of February, 1858. On the facts proved, the letter of the 1st of June, 1861, must be taken as referring to the will of the 30th of April, 1857, and the case falls within the principle laid down by the Judicial Committee in *Allen* v. *Maddock*: "When there is a reference in a duly executed testamentary instrument to another testamentary instrument by such terms as to make it capable of identification, it is necessarily a subject for parol evidence, and when the parol evidence sufficiently proves that in the existing circumstances there is no doubt as to the instrument, it is no objection to it that by possibility circumstances might have existed in which the instrument referred to could not have been identified." As to the re-executed codicil, it must be admitted that primâ facie it is revoked by the revocation of the will to which it describes itself to be a codicil; but from the cases it would seem that this presumption is easily rebutted, and there is nothing conclusive in the description, "codicil to my will, bearing date the 3rd of June," etc. (*Tagart* v. *Hooper*, 1 Curt. 289; *R. Hallowell*, deceased, 4 N. C. 400; *Clogstoun* v. *Walcott*, 5 N. C. 623). Here the re-executed codicil is not, as regards its contents, dependent on the will to which it professes to be a codicil; an independent effect might be given to all its bequests. Again, both **[479]** papers were in the custody of deceased. If there is no direct proof of the destruction of the will of the 3rd June, 1858, the presumption is that it was destroyed by deceased animo revocandi; while the fact that he carefully preserved the codicil is beyond all doubt. On this view of the slight nature of the connection between the codicils and their respective wills, it may be more difficult to uphold the codicil of the 13th of February; but, on principle, if a codicil is so connected with a will that the

revocation of the will is the revocation of a codicil, it would seem that the revival of the will would be the revival of the codicil. Here the codicil of February, 1858, would seem to have been revoked by the general clause of revocation in the will of the 3rd of June, 1858, apart from any revocation of the will of April, 1857.

Cur. adv. vult.

June 3.—*Sir C. Cresswell*: In this case I think it must be taken that the will of June, 1858, was destroyed by the deceased, with intention of revoking it, at the time when he seems to have had something of a quarrel with the great-nephew; and I think there is sufficient to shew that the will of 1857, and the two codicils, which were found after the deceased's death, sealed up in an envelope, were the testamentary papers which the deceased intended to confirm by the letter of the 1st of June, 1861. Probate may therefore go as prayed.

THORNCROFT AND CLARKE *v.* LASHMAR. May 28 and June 3, 1862.—Testamentary Papers.—Paper on the face of it not testamentary.—Burden of proof.—Costs.—Where a person claims probate of a paper signed and attested, but not on the face of it clearly testamentary, the burden of proof is on that person to satisfy the Court that it was executed animo testandi.—**[480]** Where a legal question fairly arises on the papers of a deceased person, the Court will order costs of the losing party to be paid out of the estate.

[S. C. 31 L. J. (P.) 150; 6 L. T. 467; 8 Jur. (N. S.) 595; 10 W. R. 783.]

In this case Thorncroft and Clarke propounded the will and codicil, bearing date respectively on the 25th of January, 1860, and the 13th of June, 1861, of Samuel Weller, late of Brighton, as the executors therein named.

Lashmar, by his plea, admitted the validity of the will and codicil, and further alleged that, on the 6th of July, 1861, the said Samuel Weller, deceased, having an intention to make a second codicil to his will, directed the said George Lashmar to write on paper the words and figures following, to wit:—"July 6, 1861. To Mr. George Lashmar. I hereby offer you the situation of collector and overseer of my property, at a salary of £3, 3s. per week, with house-rent to the amount of £25 a year, and all rates and taxes clear. I hereby further wish that the said George Lashmar shall continue in the aforesaid office with the same salary as aforesaid after my decease, and same allowances." The plea further alleged due execution and capacity in the usual terms.

Plaintiffs' replication denied the due execution of the paper of July 6; denied that it was a second codicil of the will of the deceased; denied that deceased intended the said paper writing to operate as a testamentary instrument. Issue was joined on the replication, and the case was now heard before Sir C. Cresswell.

Dr. Phillimore, Q.C., and Dr. Wambey, for the plaintiffs.

Dr. Middleton and Mr. Fitzhugh for the defendant.

From Lashmar's evidence it appeared that he was Mr. Weller's son-in-law, and for four or five years before his death had looked after and collected the rents of certain leasehold and freehold houses, which were the bulk of Mr. Weller's property, **[481]** at a salary of £3, 3s. per week, £25 for house-rent, and his rates and taxes paid. Lashmar had expressed dissatisfaction at the precariousness of the employment as depending on Mr. Weller's life, who was towards eighty years of age. On the 6th of July, Mr. Weller sent for him and said, "I hear from Mr. Thorncroft that you are dissatisfied with your situation. Mr. Thorncroft is going to Mr. Payne to get another collector to do it for less money. I am sorry it should go out of the family; go down to Mr. Thorncroft, and tell him to stop Payne from getting another person." Lashmar went out, and in the course of the morning returned with the paper of the 6th July, written partly in the handwriting of a clerk of Thorncroft and partly in his own, as far as "rates and taxes clear," and told Mr. Weller that he had written to Thorncroft, accepting the situation. Weller said,—"I wish you to be my collector when I am gone. You have four children; I should be sorry to see you out of work at your time of life." Lashmar asked whether the situation was to continue at the same salary, and on Weller's answering, "Yes; just the same as now," Lashmar added to the paper the sentence, "I hereby further wish," etc. Miss Weller, a niece, who was present, asked Lashmar whether she was wanted as a witness. Lashmar said "Yes," and that he should like to have a witness out of the house besides her. He fetched a man named Barrow, who was unable to read or write, and ultimately

Mr. Travis, an innkeeper, came, who, after some talk with Mr. Weller, asked him the nature of the document, and read it carefully over to him. Mr. Weller said that was his intention: the paper was signed and attested. Lashmar said,—"I consider this document worth £1000"; to which Weller said,—"I am very glad of it; I hope you will live to enjoy it many years."

On cross-examination it appeared that Lashmar's previous appointment had been noted in a book, which note had been signed or witnessed by Miss Weller and a servant girl then in the house, but not signed by Mr. Weller; that when the will **[482]** and first codicil were read after the funeral, Lashmar said nothing about the paper now propounded as second codicil.

Mr. Travis confirmed Lashmar's evidence as to what took place after he (Travis) came into the room.

On behalf of the plaintiffs, Mr. Somers Clarke, solicitor, of Brighton, deposed that he had acted as deceased's solicitor for several years before his death; that deceased first spoke to him about a will shortly before the date of the will of January, 1860; that in the end of October, 1861, deceased sent for witness and told him he wanted to make by codicil a certain provision for his niece, Lucy Weller. Witness said he thought that in the will was a provision nearly to that effect, but that he would look at his will and let him know. Witness found that such a provision was in the will, and wrote to that effect. Witness had the custody of the original will and codicil of the 13th June, 1861, appointing him one of his executors. In October deceased said nothing about having made another testamentary paper after the 13th of June, 1861.

On this state of facts, Dr. Middleton contended that the paper of the 6th of July, 1861, ought to be included in the probate. First, a benefit is conferred by it; secondly, the benefit is dependent on the death of the writer; thirdly, it was the writer's intention that the paper should continue to operate after his death (*Passmore* v. *Passmore*, 1 Phil. 316). As to the introductory portion, either it gives a direct benefit or it does not. I should contend that it does not, that it is merely an offer; but if the first part must be taken as conferring an immediate benefit, I rely on the case of *Doe dem. Cross* v. *Cross*, 8 Q. B. 714, of which the marginal note is: "P. being in India in 1840, executed the following instrument, attested by two witnesses: 'Know all men, etc., that I make E. my lawful attorney for me and in my name, and to my use, to ask, demand, etc., or receive the possession of, or produce of, or rents of the freehold of, etc.; and I do empower her, the said E., to hold and retain all proceeds of **[483]** the said property for her own use until I return to England and claim possession in person; or, in the event of my death, I do hereby, in my name, assign and deliver to the said E. the sole claim to the before-mentioned property, to be held by her during her life and disposed of by her as she may deem proper at the time of her death. At the same time I wish it to be understood that I claim all right and title to the said property on my arrival in Great Britain, when the term of the said E.'s occupancy shall be considered at an end. In witness, etc.' The instrument was acted on as a power of attorney by E. Afterwards P. died in India, without returning to Great Britain, and left E. surviving: Held, that the instrument operated on P.'s death as a devise to E."

By the Court: In the present case the paper directs that Lashmar is to continue in the same office; it seems, therefore, important to determine what the nature of the office was. Was it for life, or durante bene placito?

Dr. Middleton: The extent and value of the bequest may be more properly a question for a court of construction.

Dr. Phillimore, Q.C.: In this case there is nothing to shew that the deceased had any intention of executing a testamentary paper. I admit that no form or special language is necessary, if a will was intended. Thus the language may become of importance in order to ascertain intention. This paper is an appointment to an office, to discharge certain duties and receive a salary. There is no gift or benefit apart from this office; nothing on which a paper in the nature of a will can operate. Whether, as an agreement or contract, it is binding on the executors to continue Lashmar in the office is another question, which cannot be decided in this Court.

Cur. adv. vult.

**[484]** *Sir C. Cresswell*: In this case, in which Dr. Middleton asked me to include in the probate the letter of the 6th of July, 1861, I have looked at the cases cited, and have considered them with reference to the circumstances of the present one, and

I am of opinion that it is not a testamentary paper. When a paper is not clearly testamentary on the face of it, the burden of proof is on those who assert that the deceased intended it to operate as a testamentary paper (*Griffin and Amos* v. *Ferrard*, 1 Curt. 96; *Coventry* v. *Williams*, 3 Curt. 787). And in *Passmore* v. *Passmore*, Sir John Nicholl laid stress on the intentions of the writer to be gathered from the instrument itself. The paper now before the Court is not testamentary on the face of it. The appointment was to continue after death the same as in the writer's lifetime; if it commenced in his lifetime, it would not be revocable; that there were two witnesses is of no importance, for a previous appointment had been witnessed in a similar way. The case of *The Goods of Mundy*, 2 Swab. & Trist. 119, which was referred to, was the case of a death-bed request to take effect after death. In *Doe dem. Cross* v. *Cross*, the instrument was clearly divisible into two parts, and the latter part was capable of taking effect as a will. I pronounce against the title of this paper to probate.

Dr. Middleton asked for defendant's costs to be paid out of the estate. It was a mere legal question arising from the papers left by the deceased (*Pearce* v. *Pearce*, 3 N. C. 150).

*Sir C. Cresswell*: I think that may be so.

**[485]** IN THE GOODS OF MICHAEL COURT (deceased), on Motion. January 14, 1862.—Will.—Inaccurate Language.—Probate.—C. by will left the rest of his property, etc., "unto my wife Betsy Court, and my son Michael Court, as whole and sole executrix"; and the Court held that the widow and son were both entitled to take probate.

[S. C. 31 L. J. (P.) 61; 6 L. T. 658; 8 Jur. (N. S.) 142; 10 W. R. 809.]

In this case the deceased, Michael Court, left a will containing the following clause:—"I leave the rest of my property, farming utensils, furniture, and all debts owing to me, unto my wife Betsy Court, and my son Michael Court, as whole and sole executrix."

Dr. Spinks now moved the Court to grant probate to the widow and the son. There can be little doubt that it was the intention of the testator that both the widow and the son should have the grant.

*Sir C. Cresswell*: I should guess that he intended it. The difficulty is, whether he has said it. He does not seem to have understood the meaning of the words he was writing. He talks of "provoking all former wills," instead of "revoking."

Dr. Spinks: Omitting the word "executrix," the rest of the will would make them executors according to the tenor. He may have thought executrix was the plural of executor.

*Sir C. Cresswell*: I think he meant the two, and they may take probate conjointly.

**[486]** RATCLIFFE AND ANOTHER *v.* BARNES. January 16, 1862.—Verdict of Jury.—Caveat.—Probate.—Costs.—A next of kin, though not cited to see proceedings, and not having intervened, if in fact cognisant of a suit between the executor of a will and other next of kin, ending in the establishment of the will, is not at liberty in any way to oppose probate of such will being taken; and where, on a verdict, the Court had pronounced for a will, and a next of kin so situated had entered a caveat, the Court directed probate to issue in spite of the caveat, and condemned the next of kin in costs.

[S. C. 31 L. J. (P.) 61; 6 L. T. 658; 8 Jur. (N. S.) 313. Referred to, *Young* v. *Holloway*, [1895] P. 90.]

The plaintiffs were the executors of the will of Joseph Barnes; and the defendant, John Barnes, was the son of the said Joseph Barnes. A sister of the defendant had entered a caveat, and the executors had propounded the will. Several pleas had been pleaded in opposition to the will. Issue was joined on those pleas. The issues were tried under an order of this Court before Martin, B., and a jury at the Liverpool assizes, and a verdict was returned in favour of the will. An application for a new trial was made and rejected, and the Court had pronounced for the will.

The plaintiffs then applied for probate, when they were met by a caveat entered by the defendant, a brother of the defendant in the previous suit. The plaintiffs thereupon filed an act on petition, praying that probate might pass notwithstanding the caveat, and that the defendant might be condemned in costs. It was admitted that defendant was cognisant of the former suit, and had assisted his sister in the conduct of it.

Dr. Middleton, for the plaintiffs: According to the practice in the Prerogative Court, when a will was propounded by an executor, all the next of kin who were cognisant of the proceedings were bound by the decree, whether they had been **[487]** cited to see the proceeding or not (*Newell* v. *Weeks*, 2 Phill. 224; *Bell* v *Armstrong*, 1 Add. 372).

Dr. Phillimore, Q.C., and Dr. Spinks for the defendant: The general rule is, that next of kin are not bound, unless they have been cited to see proceedings; and if that rule is not to prevail, there is no use in citing them (*Colvin* v. *Fraser*, 1 Hagg. 107) [Sir C. Cresswell: Might not the defendant have intervened in the first suit?] Unquestionably. [Sir C. Cresswell: Then he had both knowledge of the suit and the opportunity of making himself a party to it if he pleased, and therefore he cannot have been injured. If he could not have come in without being invited, that would have been a different thing. If he chose to keep out of the suit, and to fight it at the expense of another person, in order to avoid liability to costs, he does not now come very gracefully before the Court. The general principle, as I collect it, is this, that where a party has had full notice, and has had the opportunity of availing himself of the contest, he will be bound by the decision.[1] That was a mere dictum, but the express decision of a very learned Judge (Sir John Nicholl), who had much more experience that I ever shall have in such cases, and I can hardly imagine a case where the rule could ever be applied, if not in this case.] The plaintiffs have chosen to omit taking the ordinary precaution of citing all parties interested to see proceedings, and they have therefore waived their right to object to one of those parties coming in now. By the Probate Act, 20 & 21 Vict. c. 77, ss. 61-3, it is expressly provided that the heir-at-law shall not be bound unless cited, and the same rule ought to apply to the next of kin.

*Sir C. Cresswell*: There is another section (29) which provides that the practice of the Prerogative Court shall be adopted by this Court, except where it shall be altered by that **[488]** Act, or by the rules and orders. It would be splitting hairs to attempt to distinguish this case from the case decided by Sir J. Nicholl. Probate must issue notwithstanding the caveat, and the defendant must be condemned in costs.

(Before *Sir C. Cresswell*, on Motion.)

In the Goods of William Benbow (deceased). July 8, 1862.—Will.—Codicil. Citation of parties interested under.—Practice.—B. died on the 27th March, 1862, leaving a will dated the 17th of April, 1860, whereof he appointed two executors; there was also a paper purporting to be a codicil dated the 26th of March, 1862. The executors, believing this not to be a true codicil of the deceased, asked for a citation on the legatees interested under it, calling on them to propound and prove it if they thought fit. The Court refused to issue this citation, but suggested that the executors might proceed to prove the will in solemn form, and cite the next of kin and the legatees under the alleged codicil to see the will proved.

[S. C. 31 L. J. (P.) 171; 6 L. T. 659.]

The deceased in this case died at Ryde, in the Isle of Wight, on the 27th of March, 1862, leaving a duly executed will of the 17th of April, 1860, whereof Thompson and Hess were executors; also a paper purporting to be a codicil to his will, the said paper bearing date the 26th of March, 1862, and disposing of the bulk of the property in a different manner from the will. The executors under the will did not believe this to be a true codicil of the deceased, and were anxious to prove the will alone, and, to avoid any question arising hereafter, prayed a citation to the legatees under the codicil, calling upon them "to propound and prove the said pretended codicil in solemn form of law, if they or either of them should think it to their interest so to do, or otherwise to shew cause why probate of the said will only should not be granted to the executors therein-named."

**[489]** Dr. Phillimore, Q.C., moved the Court accordingly.

*Sir C. Cresswell*: For the citation you ask there appears, after careful search, to be no precedent whatever, and it seems strange for the executors to call on any other person to propound testamentary papers. But the executors may proceed to prove the will in solemn form, and cite the next of kin and the asserted legatees under the codicil to see that will proved, which, I suppose, will effect the same object.

---

[1] See *Newell and King* v. *Weeks*, 2 Phill. 224.

IN THE GOODS OF WILLIAM HENRY BERNARD (deceased). April 29 and May 6, 1862. —Affidavit in Foreign Parts.—Description of Deponent.—Practice.—When an affidavit sworn before a notary in foreign parts is tendered, it must appear that none of the British authorities authorized by 18 & 19 Vict. c. 42, were resident in such place.—Unless the addition of the person making an affidavit wheresoever is inserted, it cannot be read in the Court of Probate.

[S. C. 31 L. J. (P.) 89; 6 L. T. 726.]

Dr. Spinks moved for a grant of administration on presumption of the death of W. Henry Bernard.

*Sir C. Cresswell*: One of your affidavits is insufficient. It is sworn before a notary in America, and it does not appear that there is not a British consul or vice-consul, etc., at the place where it was sworn. There is also a defect in another of the affidavits; the description of the deponent is not given in it. It must be resworn.

Dr. Spinks: I trust your Lordship will not think it necessary that the latter affidavit should be resworn, as it will entail the delay and expense of sending it to America. The 46th rule of the rules for the principal registry in non-con-**[490]**-tentious business is, "The addition and true place of abode of every person making an affidavit is to be inserted in it." That rule does not in terms make an affidavit, in which the addition, etc., of the deponent is not stated, inadmissible. By the 18th rule, "No affidavit will be admitted, etc., in the jurat of which there is an interlineation or erasure." The difference in the language of these rules seems to shew that the omission of the addition, etc., of the deponent is not a fatal defect in the affidavit.

*Sir C. Cresswell*: I will consider the matter.

Cur. adv. vult.

May 6.—*Sir C. Cresswell* now said, although it may sometimes seem very hard to require that prescribed forms be adhered to, I think it better to adhere to them. The affidavit must be resworn.

[*Note.*—21 & 22 Vict. c. 95, s. 31, enacts that, "In cases where it is necessary to obtain affidavits, declarations, or affirmations, to be used in the Court of Probate, from persons residing in foreign parts out of Her Majesty's dominions, the same may be sworn, declared, or affirmed before the persons empowered to administer oaths, under the Act of 6 Geo. IV. c. 87, or under the Act of 18 and 19 Vict. c. 24; provided that in places where there are no such persons as are mentioned in the said Acts, such affidavits, declarations, or affirmations may be made, declared, or affirmed before any foreign local magistrate or other person having authority to administer an oath."]

(Before *Sir C. Cresswell* and a Special Jury.)

**[491]** DYKE (H.M. PROCURATOR-GENERAL) *v.* WILLIAMS. IN THE GOODS OF MARY EMSLEY, widow (deceased). July 19, 20, and 21, 1862.—Allegation of Bastardy. —Claim of Relationship.—Burden of Proof.—Admissibility of Evidence.—Where an issue is raised between the Crown alleging the bastardy of, and parties claiming to be related to, a deceased intestate, the burden of proof is on the parties setting up the relationship. In such a case evidence of declarations made by a deceased person, other than the deceased in the cause, is inadmissible, unless the relationship is proved aliunde; but evidence of declarations made by the deceased in the cause is admissible.

[S. C. 31 L. J. (P.) 157. Followed, *In re Parton; Pearson* v. *Attorney-General*, 1885, 53 L. T. 707.]

In this case the Queen's Proctor, on the part of the Crown, alleged, in his declaration, that Mary Emsley, late of Grove Road, Mile End, in the county of Middlesex, deceased, died on the 13th of August, 1860, intestate. That the said Mary Emsley was a bastard, and died a widow, without leaving any lawful issue.

The defendant, Samuel Williams, pleaded:—1. That Mary Emsley, late of Grove Road, Mile End, in the county of Middlesex, deceased, who died on the 13th of August, 1860, a widow and intestate, was not a bastard. 2. That the said defendant is the natural and lawful nephew of the said Mary Emsley, and one of her next of kin. 3. That the said Mary Emsley was the legitimate child of Samuel Williams and Mary his wife. 4. That the last-mentioned Samuel Williams and the said Mary his wife had issue one other lawful child only, namely, Samuel Williams, who died in the lifetime of the said Mary Emsley, to wit, on the 10th of August 1830, leaving him

surviving, the said Samuel Williams, the defendant, Elizabeth Gotz, wife of ——— Gotz, Abraham Williams, and Joseph Williams, his natural and lawful and only children, and next of kin.

**[492]** Issues joined and taken on these pleas now came on for trial by a special jury.

Mr. K. Macaulay, Q.C., Mr. Boden, Q.C., and Dr. Spinks for the Crown.

Mr. O'Malley, Q.C., Dr. Wambey, and Mr. Bevir for the defendants.

Counsel for the defendants opened the case, and called witnesses, and were followed by counsel for the Crown who examined witnesses in support of the declaration of illegitimacy.

On the third day counsel agreed that Williams the defendant had established his case.

The following points as to admissibility of evidence were raised during the trial:—

Samuel Williams, the defendant, deposed:—"My mother spoke to me about her marriage with my father." Question, "Did she tell you when she was married?"

Objected to by Mr. Macaulay: This is not within the exception as to admissibility of evidence of declarations made by deceased persons, in matters of pedigree. Here it is proposed to give a narrative of a fact; but if it were within the exception, it must be first shewn that the declaration was made by a member of the family, which is the very point in dispute and intended to be proved by the question itself.

Mr. O'Malley, in support of the question, cited 1 Taylor on Evid. 3rd edit. 528.

*Sir C. Cresswell*: I am of opinion that, this being a step towards establishing a marriage, which marriage must be established before the woman's declarations can be evidence, her declarations to place herself in that position are inadmissible.

**[493]** Joseph Biggs, a witness on behalf of the Crown, deposed to his knowledge of the deceased, etc., "she did not say much to me about her relations." Question, "What did she say to you about her relations?"

Mr. O'Malley objected, referring to the previous ruling of the Court.

*Sir C. Cresswell*: I said that the relationship between the deceased and the person making the declaration must first be established. Here the declaration tendered was made by the deceased herself. I am of opinion that the question may be put.

Evidence was then received of declarations of the deceased that in talking of her will she several times said, "I have no one that I care about, and it will all go to the Crown."

CRISPIN *v.* DOGLIONI. December 17, 1861.—Testamentary Suit.—Issues.—Mode of Trial.—20 & 21 Vict. c. 77, s. 35.—The Court has the power to direct issues of fact to be tried before itself by a jury, reserving issues of law arising out of the pleadings in the same suit to be tried by itself alone.

This was a testamentary suit. The defendant was one of the surviving residuary legatees under the will of Henry Crispin, deceased. The defendant claimed to oppose the will, and in pursuance of an order of Court, had filed a declaration, setting forth his interest to be admitted so to do. To this the defendant had pleaded.

By the pleadings several issues were raised. One of them **[494]** only was a question of fact, viz., whether the plaintiff was the natural son of Henry Crispin; the others were questions of law.

Mr. Hannen, for the plaintiff, now moved the Court to order that the issues should be tried before the Court.

Dr. Spinks, for the defendant, asked that the issue of fact might be tried before the Court by a special jury, and the issues of law before the Court itself.

*Sir C. Cresswell*, after referring to the 20 & 21 Vict. c. 77, s. 35:—"It shall be lawful for the Court of Probate to cause any question of fact arising in any suit or proceeding under this Act to be tried by a special or common jury before the Court itself," etc., directed that an issue, "Whether the plaintiff was the natural son of Henry Crispin" should be tried by a jury before the Court, and the remaining issues by the Court.

IN THE GOODS OF MATTHEW COTES WYATT (deceased), on Motion. March 18, 1862.—Will.—Codicil.—Mistaken Reference in Codicil.—Revival of prior Will.—Alterations.—Probate.—A. executed a draft will in April, 1847. In May, 1847,

he executed an engrossed will. In September, 1854, he executed a codicil purporting to be a codicil to his last will of April, 1847. It was supposed that he really intended it to be a codicil to the will of May, 1847. The draft will contained interlineations and cancellations in the testator's handwriting in ink and pencil. Both wills were in the handwriting of the same person, who deposed that he copied the engrossed from the draft will. The engrossed will agreed with the draft will as altered in ink, but not as altered in pencil:—**[495]** Probate decreed of the draft will of April, 1847, including the alterations in ink, in so far as they agreed with the will of May, 1847, together with the codicil of 1854, but not those in pencil.

[S. C. 31 L. J. (P.) 197; 6 L. T. 694; 10 W. R. 783. Referred to, *In the Goods of Lady Truro*, 1866, L. R. 1 P. & D. 204.]

Matthew Cotes Wyatt died on the 3rd of January, 1862, leaving three testamentary instruments: namely, a will dated April 28, 1847, with certain interlineations and cancellations, some in ink and some in pencil; another will, dated May 3, 1847; and a codicil, purporting to be a codicil to the will of April 28, 1847, dated Sept. 1854, and which was executed on the 8th or 9th of September in that year. It appeared that the testator in the year 1847 had requested a friend of his (Mr. John Sheringham), then a retired solicitor, and who died in his lifetime, to prepare him a draft will, which he accordingly did. On the 26th of April, 1847, a copy of this draft will was made at the office of Mr. George Adams, of the Middle Temple Lane, law stationer, by the direction of the testator, as appeared by an entry in his books by G. Macdonald, who was then in Mr. Adams's employ. This copy the testator duly executed on the 28th of April, 1847, in the presence of two of his clerks, Mr. Thomas Evitt and William James Chambers.

On the 3rd of May, 1847, the will of the 28th of April was engrossed at Mr. Adams's office by the direction of the testator, and the said G. Macdonald, who made the engrossment, stated on affidavit that, to the best of his belief, he copied the engrossment from the will dated the 28th of April, 1847.

Upon a comparison of the engrossment with the former will, it appeared that it corresponded with the former will as altered by the interlineations and cancellations in ink, but not as altered in pencil. It appeared by the affidavit of Mr. Evitt, one of the attesting witnesses to the first will, that from the manner in which it was executed neither of the attesting witnesses could see whether it then contained any interlineations or cancellations.

**[496]** In September, 1854, the testator executed a codicil written by himself, and commencing thus:—"I write this as a codicil to my last will and testament, made in the year 1847, and signed on the 28th of April in that year, and witnessed by Thomas Evitt, of Champion Grove, Camberwell, and William Chambers, of No. 30 Upper Seymour Street, Portman Square."

After the death of the testator, the codicil and engrossed will were found in a wooden box, which had generally been in the custody of his bankers, and the draft will of the 28th of April, 1847, was found in a drawer wherein he kept draft leases, deeds, and agreements. The rough draft from which the first will was copied could not be found.

Dr. Tristram moved the Court for probate of the draft will dated the 28th of April, 1847, as altered in ink, but not as altered in pencil, with the codicil, to be granted to H. L. Sharp and W. Ellis, two of the executors named in the will. There might be grounds for suggesting that the testator intended the codicil to be a codicil to the second will: but, assuming that he made a mistake in the reference, it was so precise that he apprehended, after the previous decisions, it would be useless to ask the Court for probate of the second will.

*Sir C. Cresswell*: Certainly, I could not grant probate of the second will. How do you propose to shew that you are entitled to ask for probate of the first will as altered in ink?

Dr. Tristram: Macdonald, in whose handwriting both the wills are, says that to the best of his belief he copied the second one from the first one; and, on comparing them, it will be found that the second will agrees with the first as altered in **[497]** ink, but not as altered in pencil. The alterations in ink must therefore have been made prior to the 3rd of May, 1847 (the date of the execution of the second will), and so must have been in existence when the codicil was executed in 1854.

*Sir C. Cresswell*: I will grant probate of the draft will of April the 28th, 1847, including the alterations in ink, in so far as they agree with the engrossed will of the 3rd of May, 1847, together with the codicil of September 1854.

LEE CLARKSON *v.* MARGARET CLARKSON AND OTHERS, AND THOMAS CLARKSON (Heir-at-law) intervening. May 28 and June 11, 1862.—Testamentary Papers.—Destruction without Intention to Revoke.—Probate of Draft.—B. duly executed a will in August, 1857; in July, 1859, he executed another will, purporting to revoke the will of 1857; in a suit respecting the validity of the will of 1859, the Court of Probate pronounced against the validity of such will. The draft of the will of 1857 was then propounded, and it was proved that after the execution of the will of 1859, B. had called for the will of 1857, and after appearing to read it had torn it up, saying, "It is of no use now, I have another." Most of the above facts were admitted on the record, and the Court held that there was no proof of the destruction of the will of 1857 with intention to revoke, so as to satisfy 1 Vict. c. 26, s. 20, decreed probate of the draft thereof, and ordered the costs of all parties to be paid out of the estate.

[S. C. 31 L. J. (P.) 143; 6 L. T. 506; 10 W. R. 781. Referred to, *Beardsley* v. *Lacey*, 1897, 67 L. J. (P.) 35; 78 L. T. 25; 14 T. L. R. 140.]

In this suit the plaintiff, as nephew and one of the next of kin of William Clarkson, deceased, cited Margaret Clarkson, the widow, and others interested as legatees, to propound the draft of the will of the said William Clarkson, bearing date the 28th of August, 1857, if they should think it for their interest so to do, etc.

**[498]** The defendants' declaration alleged, first, that a will of the 28th of August, 1857, of which Margaret Clarkson was an executrix, was duly executed, etc.

2. That on the 4th day of July, 1859, the said testator made and executed a will of that date, now remaining in the registry of this Court, purporting to revoke thereby the said will of the 28th of August, 1857; but the same was not in fact thereby revoked, inasmuch as the said will of the 4th of July, 1859, was, on the 25th of July, 1861, by a decree of this honourable Court, made in a certain cause of *Clarkson* v. *Clarkson and Johnson*, pronounced to be null and void in law.

3. That the said testator a few days after having so in fact executed the said will of the 4th day of July, 1859, verily believing the said will of the 28th of August, 1857, to be revoked thereby, tore the said last-mentioned will, and put it in the fire, and destroyed the same.

4. That the paper-writing marked C. annexed to the affidavit of scripts of Lee Clarkson, made and filed in the said last-mentioned cause of *Clarkson* v. *Clarkson and Johnson*, and now remaining in the registry of the Court, is, with the alterations in black and red ink, the true and original draft of the said will of the said testator made and executed on the 28th of August 1857, and that the said will of the 28th of August, 1857, so as aforesaid in fact destroyed, was a transcript from the said true and original draft as altered in black and red ink.

The plaintiff's plea admitted the truth of the first and second paragraphs of the declaration; joined issue on the third paragraph; and as to the fourth paragraph of the declaration, without admitting or denying the averments therein contained, submitted the same to the judgment of the Court.

Thomas Clarkson, the heir-at-law intervening, filed several pleas, and the plaintiff and intervener gave notice that they intended only to cross-examine the witnesses produced by defendants.

**[499]** The case now came on for hearing before Sir C. Cresswell.

Dr. Deane, Q.C. (Dr. Tristram with him), for the plaintiff and intervener.

Dr. Phillimore, Q.C., for the defendant.

The evidence given at the hearing is sufficiently stated in the judgment.

Cur. adv. vult.

June 11.—*Sir C. Cresswell*, after referring to the pleadings as above stated, proceeded to say:—This case came on for trial before the Court, without a jury, on Wednesday, May the 28th, when it was proved by Mr. Smith, the solicitor who prepared the will of the 28th of August, 1857, and his clerk who copied it for execution, that it was copied exactly from the draft propounded.

The only other witness examined was Margaret Clarkson, widow of deceased, who gave the following evidence:—"I remember the will in question being brought down

a few days after the will of 1859 was signed. He asked me to go upstairs and fetch it down (it had been in the custody of witness). I fetched it down, and gave it to him. He said, 'Read it.' I said, 'No; put on your glasses, and read it yourself.' He put them on, and looked as if he were reading it. He said, 'It is of no use keeping this now I have another.' He tore it in pieces, and put it in the fire. After he had burnt it, he said no more to me about it." Being cross-examined, she said,—"He made the last will in consequence of a quarrel with Lee Clarkson; after that, he said many times, that Lee Clarkson should have nothing from him. I was always anxious that he should leave his own relations something. He answered, 'I never will; they never worked for it.'" The affidavit of scripts, made in the former cause, was admitted by Dr. Deane, and put in evidence by the defendants.

The course taken by the parties in pleading, and by their **[500]** counsel as to the production of evidence, has left the Court in a somewhat singular position with regard to the question to be decided. It is admitted on the record that the testator signed a will in July, 1859, and that it purported to revoke the will of the 28th of August, 1857. The ground on which the Court held the last will to be void is not stated, nor was any evidence as to the execution of that will laid before the Court. No evidence was given as to the destruction of the will of 1857 by the testator, save that of the widow, who at the same time put into the mouth of the testator a reason for destroying it. I know not how I can accept one part of that evidence and reject the other.

If I reject the whole, there is no proof that the will of 1857 was destroyed by the testator; if I adopt the whole, it was destroyed by him, not for the purpose of revoking it, but because he supposed it had been already revoked.

According to the statute 1 Vict. c. 26, s. 20, a will may be revoked by the burning, tearing, or otherwise destroying the same by the testator, with the intention of revoking the same. The act done without the intention is ineffectual. Here the intention was wanting, for, according to the evidence, he imagined that the revocation had been already accomplished; and because it had been accomplished, and not for the purpose of accomplishing it, the act of destruction was done. For this reason I pronounce for the draft propounded; but under the very peculiar circumstances of the case, I think that the costs of all parties should be paid out of the estate.

**[501]** THOMAS *v.* CROWTHER (BY JOSEPH HOWE, her Guardian). November 5 and 19, 1861.—Will.—Issues directed to be tried in a County Court.—Jurisdiction of a County Court as to Costs.—Motion for Attachment.—Personal Service of Orders.—Practice.—Where the issues raised in a suit for proving a will in solemn form have been directed to be tried by the Judge of a County Court, and are found by him against the will, upon a certified copy of his decree being filed in the Principal Registry, the Judge of the Court of Probate will pronounce against the will, and decide any questions as to costs.—Where an order has been made for payment of costs, the Court will not grant an attachment for non-payment of them without an affidavit of personal service of the original order on the party to be attached.

[S. C. 10 W. R. 861. Referred to, *Morris* v. *Freeman*, 1878, 3 P. D. 68.]

In this case a paper-writing, purporting to be the last will and testament of William Crowther, late of Halifax, in the county of York, who died on the 30th of September, 1846, had been proved in the Exchequer Court of York, in 1850, by the deceased's widow Betty Carter, as the relict and usufructuary legatee for life, the executors having renounced. Betty Carter having died, leaving part of the deceased's personal property unadministered, a caveat was entered on behalf of the defendant Hannah Crowther, spinster, against issuing a grant in respect of the effects of the deceased, which was warned by the plaintiff, and an appearance was thereupon entered on behalf of the defendant, as the lawful grandchild and one of the persons entitled in distribution to the personal estate of the deceased. The defendant being a minor, the Judge on summons directed this appearance to the caveat to be amended, for the purpose of an appearance being entered for the defendant by Joseph Howe, her guardian duly elected, which was accordingly done. The alleged will of the deceased was propounded in a declaration by Mary Thomas, who was a daughter and one of the parties entitled to the residue, and her husband **[502]** William Thomas, who was one of the attesting witnesses to it. To this declaration the defendant filed pleas denying (1) that the paper-writing propounded was the will of the deceased, and

(2) denying its due execution. Upon these pleas issue was joined. The Judge directed the questions of fact raised upon these pleadings to be tried before the Judge of the County Court at Halifax, in the County of York, and for that purpose ordered the record and other documents filed in the cause to be transmitted to the Judge of the said County Court. The case was tried by the Judge of the County Court, who pronounced against the will on both issues. A certified copy of the decree of the Judge of the County Court had been filed in the Principal Registry.

November 5.—Dr. Tristram, on these facts, moved the Court to pronounce against the alleged will, and to condemn the plaintiff and her husband in the costs of the suit. Applications had been made to the Judge of the County Court to condemn the plaintiff in costs. This he declined to do, on the ground that his jurisdiction was limited by section 54 of the Probate Act, to the issues transmitted to him to try, and that any application on the question of costs should therefore be made to the Court of Probate. As the plaintiff had set up a will which was, by the finding on the first issue, a forged instrument, her husband, who was joined with her in the suit, and was one of the attesting witnesses to it, must have been cognizant of the fraud, and ought therefore to be condemned in the costs.

*Sir C. Cresswell*: Before making any order as to costs, I will refer to the Judge of the County Court who tried the case. Cur. adv. vult.

*Sir C. Cresswell*: I have communicated with the Judge of the County Court at Halifax on this case. He has no doubt that the will was a forgery, and that the plaintiff and her hus-**[503]**-band knew it was a forgery. I pronounce against the will, and condemn them in the costs.

The defendant's costs were taxed by one of the registrars of the Court of Probate at £39, 17s. 3d., and the Judge made an order upon the plaintiff Mary Thomas to pay these costs to the defendant's proctor, within seven days after the date of the order.

Dr. Tristram moved for an attachment for non-payment of these costs against William Thomas (as husband of the plaintiff), on affidavits of non-payment of the costs, and of a personal demand on Mary Thomas and her husband William Thomas, for the payment of the above costs on or before the 25th of March, and a personal service of notice that in the event of the costs not being paid on or before that day, the Court would be moved for an attachment against William Thomas, the husband of the plaintiff, for such non-payment.

*Sir C. Cresswell*: It does not appear that the original order for the non-payment of these costs has been personally served on the plaintiff and her husband. Until this is done I cannot grant an attachment.

The original order was afterwards personally served upon the plaintiff Mary Thomas and her husband William Thomas, by shewing it to them, and leaving with each of them a copy.

Dr. Tristram renewed the motion for an attachment against the husband.

*Sir C. Cresswell*: The husband is not included in the terms of the order. The order is for the plaintiff Mary Thomas to pay the costs. There is no order for payment of them on William Thomas, the husband, against whom you ask an attachment.

**[504]** Dr. Tristram: The suit is entitled *Thomas* v. *Crowther*, as it was commenced by Mary Thomas alone, but the husband afterwards became a party to it, as the declaration was filed in the joint names of his wife and himself. He thereby must be taken to have sanctioned and to have made himself liable for his wife's acts, in attempting to establish the will.

*Sir C. Cresswell*: Has he had notice of this motion?

Dr. Tristram: Notice has been given to the plaintiffs' Proctor, who filed the declaration.

*Sir C. Cresswell*: You may take the attachment.

(Before *Sir C. Cresswell* and a Special Jury.)

WHITE *v.* WHITE AND CATO. February 19, 1862.—Pleading.—Plea of undue Influence.—Plea of Fraud.—Practice.—Where it is intended to invalidate a will on the ground of fraud, or of circumstances tantamount to a charge of fraud, there should be a plea on the record alleging that the execution of the will has been obtained by fraud. A plea of undue influence is insufficient to let in a charge of fraud against the party propounding the will.

[S. C. 31 L. J. (P.) 215.]

Frances Ann White, the plaintiff, and widow of the deceased, propounded the will of Edward White, as the sole executrix named therein. The defendants, who were the daughters and the only children of the deceased, filed two pleas thereto:—1st, That the deceased, at the time of the execution of the will, was not of sound mind; and 2nd, That the will was procured from the deceased by the undue influence of the plaintiff, or of other persons acting in her and under her directions.

[505] Sergeant Shee, Dr. Phillimore, Q.C., and Dr. Tristram, for the plaintiff.

Mr. Macaulay, Q.C., Dr. Swabey, and Mr. Barrow, for the defendants.

The plaintiff's witnesses having been examined,—

Mr. Macaulay, in opening the case of the defendants to the jury, stated that the deceased, at the date of the will, was a very old man, with a failing memory and a mind subject to fits of irritation. The plaintiff, as he should contend, in order to induce the deceased to exclude the defendants from participating in his testamentary bounty, instilled into his mind false and delusive notions respecting their conduct towards him. The title-deeds to a portion of the deceased's property had been some time before the date of the will required by the defendants to enable them to carry out an arrangement, which they had undertaken, for the purpose of relieving the deceased from certain charges upon his property. For this purpose these deeds were handed over to the defendants by the plaintiff herself, in the presence and with the knowledge of the deceased. The circumstances under which they had been handed over were, at the time when he executed this will, doubtless forgotten by the deceased, and he then charged the defendants with having stolen his title-deed from him. This false and delusive notion was instilled into or fostered in his mind by the plaintiff. Again, shortly before his death he had been served with a writ, as he imagined, at the instigation of the defendants. The plaintiff had instilled into his mind the delusive notion that when he was served with this writ, he had been arrested. His mind was in such an enfeebled and irritable state as to make him incapable of resisting these delusive notions, when pressed upon him by his wife, and it was under this species of undue influence that the will had been executed.

[506] *Sir C. Cresswell*: It occurred to me, during the course of your cross-examination, that you intended to make a case of fraud against the plaintiff. There is a plea of incapacity, and a plea of undue influence on the record, but there is no plea of fraud. If you intend to charge the plaintiff with having obtained the execution of this will by instilling into the mind of the deceased false and delusive notions respecting the conduct of the defendants, this is tantamount to a charge of fraud, and you should have placed on the record a plea charging her with having obtained it by fraud.[1] I am always unwilling to allow justice to be defeated by technical objections, and I will therefore, if you ask me, give you leave to amend the record by adding a plea of fraud; but the amendment must be made subject to an adjournment, if desired by the plaintiff, and to the defendants paying the costs of the day.

Mr. Macaulay, Q.C., said, if such was the opinion of the Court, he should withdraw the charge of fraud rather than put his clients to the expense and inconvenience of an adjournment.

IN THE GOODS OF CHARLES WILLIAM PECK (deceased). March 21 and April 4, 1860.—Administration.—Presumption of Death.—Immediate Grant.—Sec. 73 of Probate Act.—A., a bachelor, who had gone to Australia, had not been heard of for seven years. His father died intestate about two years and five months before the expiration of the seven years. No personal representation had been taken out to the father. It being uncertain whether the deceased died before or after his father, the Court granted administration of his effects to his sister as one of his next of kin, under the 73rd section of the Probate Act.

[S. C. 29 L. J. (P.) 95. Followed, *In the Goods of Harling*, [1900] P. 60.]

[507] Charles William Peck left England in 1849, for California; from thence he went to the Sandwich Islands, and subsequently to Australia. From each of these places he communicated by letter with his father. The last letter received from him by his father was dated "Port Adelaide, South Australia, Sept. 15, 1852." Since the receipt of this letter his family had received no tidings whatever of him. Letters had been written to him by his father and sister, addressed to Port Adelaide, which had

[1] See *Boyse* v. *Rossborough*, 6 House of Lords Cases, 2.

been returned to them indorsed "unclaimed advertised letters"; inquiries had also been made for him in Australia without result.

The deceased's father died on the 4th of April, 1857, intestate, and the deceased himself was believed to have died unmarried.

March 21.—Dr. Swabey moved for a grant of administration to the personal effects of the deceased, to be made to Isabella Frances Peck, as his sister and one of his next of kin, and to permit her to make oath that he had died in or since 1852.

*Sir C. Cresswell*: Has any representation been taken out to the father?

Dr. Swabey: I am instructed that none has been taken out.

*Sir C. Cresswell*: The presumption is that Charles W. Peck was dead at the end of the seven years from the time when he was last heard of. But the difficulty you have to contend with is, that there is no legal presumption as to the date of his death. He may have died at any time within the seven years, and his father may have survived him; and if his father survived him, his representatives would be entitled to the grant. If there is any personal representative of the father, and his consent to the grant is obtained, the difficulty will be removed. There should be an affidavit as to whether **[508]** there is or is not any personal representative of the father: if there is, notice of this application should be given to him; if there is not, the only way of getting out of the difficulty will be by making the grant under the 73rd section of the Probate Act.

Dr. Swabey renewed the motion, upon an affidavit that no personal representation had been taken out to the father of the deceased, and that the deceased himself had died intestate.

*Sir C. Cresswell*: As there is no means of deciding whether the deceased died before or after his father, I think it is a case in which I may cut the knot by having recourse to the 73rd section of the Probate Act. I will make the grant under that section.

IN THE GOODS OF WILLIAM GEORGE SMITH (deceased). December 17, 1861.—Administration.—Presumption of Death.—Grant of Administration to Mother of Deceased under the 73rd section of the Probate Act.—When the father of the deceased had deserted his wife twelve years ago and gone to Australia, and had not been heard of for seven years, the Court refused to presume that he had died at any given period within the seven years. But, under the circumstances, granted administration of the effects of his son, who had died within the seven years, to the mother, under the 73rd section of the Probate Act, without requiring her first to take out administration to the father.

[S. C. 31 L. J. (P.) 182; 7 L. T. 193; 10 W. R. 586. Followed, *In re Benham's Trust*, 1867, L. R. 4 Eq. 420.]

William George Smith, a master mariner, died on the 7th of August, 1858, at Hongkong, a bachelor and intestate. He had been absent from England since 1852, the year in which he obtained his majority. By the will of his uncle **[509]** Joseph Sladen, who died in August, 1855, he was entitled to a legacy of £100, which, in consequence of his prolonged absence from this country, had never been received by him. William George Smith left his natural and lawful mother, Katherine Smith, and one sister, Katherine Anna Smith, him surviving, the only persons supposed to be interested in his personal estate. His father, William Sladen Smith, left England in 1849 for Australia. From the time of his arrival in Australia up to the year 1854, he kept up an occasional communication by letter with his wife in this country. She received her last letter from him on or about the 14th of October, 1854, which was in the following terms:—

"Sanunda, July 9th, 1854.

"Dear Katherine,—It is now July 9th, and I have received no letter or intimation from Captain Thomas, of Port Adelaide, of any parcel or otherwise. I forbear to express *any more* my feelings on my sad and heartbroken state. I have been *very very* ill, and have been staying a week with a friend of one of my digging companions, a German, from Holstein, but return to the north to-morrow; am afraid I shall be obliged to leave, as, from continued excitement of mind, and being in a state of deep melancholy, I feel getting worse—I cannot get rid of dysentery. If I do, I shall go at once to the diggings again and join my friends, that is to say, if I am able; if not, I shall *leave for home*, so that, my movements being uncertain, do not write to me

after the receipt of this, as I may pass the letter at sea. I have made up my mind, should I reach England in safety, not to *know*, see, or have any communication or connection whatever with any one whom I formerly knew. No, nor will it be for long, should I be spared, that I will breathe the atmosphere of that polluted city, where dwell those who foully and cruelly and cowardly slandered me behind my back. I have nothing more to say, finding **[510]** it useless to repeat my wishes. I am still your affectionate husband, W. S. SMITH."

"P.S.—From the Hill River Close, I sent letters during the months of February, March, April, and May. I wrote to you, Lewis, and Atkin, all to the care of Lethbridge and Mackrell, not knowing your address. I posted a newspaper yesterday, dated July 1st, and shall post another next Saturday; but when you receive this letter, write no more, as most likely I shall be on my way home."

Since the receipt of this letter she had never heard from nor been able to obtain any information concerning him. She had written in 1860 to a Mr. Joseph Martyn, a solicitor, practising at Geelong, in the colony of Victoria, who was an intimate friend of her husband, and received from him a statutory declaration to the effect that he last saw him in 1852; that he was then leading a dissipated and vagrant life; that he had heard nothing of him since, although he had made numerous inquiries for him.

Dr. Tristram moved the Court "to decree letters of administration to the effects of William George Smith, to be granted to Mrs. Katherine Smith, his natural and lawful mother and next of kin." The only difficulty was in passing over the father, who was entitled to the property and grant, if he was living on the 7th of August, 1858, when the deceased died. It was now upwards of seven years since he had been heard of. The statement in his last letter, that he was suffering from dysentery; that he felt he was getting worse; that if he did not get better he should leave for England—coupled with the fact that no further tidings had been received from him, —was evidence sufficient to lead to the presumption that he had died before his son (*In the Goods of Elizabeth How*, 1 Swab. & Trist. 53). But if the evidence was insufficient for this **[511]** purpose, the grant might be made to the mother under the 73rd section of the Probate Act. (*In the Goods of Charles William Peck, deceased*: see ante, 506.)

*Sir C. Cresswell*: The evidence, I think, is not sufficient to entitle me to presume that the husband died before the son. From some curious expressions used by him in the letter, it is possible that he may have had reasons for not writing again to his wife. You may, however, take the grant under the 73rd section of the Probate Act.

**[512]** WOODGATE (Committee of Taylor) *v.* TAYLOR. June 7, 1861.—Judicial Separation.—Suit by the Committee of a Lunatic.—The committee of a lunatic may maintain a suit for judicial separation on the ground of the adultery of the wife of a lunatic.

[S. C. 30 L. J. (Mat.) 197, n.; 5 L. T. 119. Referred to, *Mordaunt* v. *Moncreiffe*, 1874, L. R. 2 H. L. 2 Sc. & D. 380.]

This was a petition by Francis Woodgate, the committee of the person and estate of Skinner Taylor, a person of unsound mind, on behalf of the said Skinner Taylor, praying for a judicial separation on the ground of the adultery of Ann Jenner Taylor, the wife of the said Skinner Taylor.

The petition alleged a marriage on the 10th of July, 1847, and cohabitation; that by an inquisition taken on the 12th of May, 1854, and which inquisition was duly enrolled of record, the said Skinner Taylor was found to be a person of unsound mind, so that he was not sufficient for the government of himself, his manors, messuages, lands, tenements, goods, and chattels. That the said inquisition had never been traversed, and that the said Skinner Taylor continued to be and still was a person of unsound mind. That by an order of the Lords Justices, dated the 27th of May, 1859, the petitioner was appointed and had become and continued and still was, sole committee **[513]** of the person and estate of the said Skinner Taylor. The petition then alleged that the respondent had, in 1857, 1858, and 1859, committed adultery with H. Knapman; and that by an order of the Lords Justices, dated the 2nd of March, 1860, it was ordered that the petitioner should be at liberty to take steps to obtain a decree of judicial separation between the said Skinner Taylor and Ann Jenner Taylor.

The respondent in her answer denied the adultery.

June 8.—The issue raised was tried before the Judge Ordinary by a jury. The jury found that the respondent had been guilty of adultery, and the Judge Ordinary pronounced a decree of judicial separation.

Mr. Hawkins, Q.C., and Mr. Archibald for the petitioner.

Dr. Phillimore, Q.C., and Mr. D. D. Keane, for the respondent.

HITCHCOCK *v.* HITCHCOCK. June 12, 1861.—Practice.—Dismissing Petition after Verdict of Jury.—Rule 45.—When a verdict has been found for the respondent, the Court will not dismiss the petition until the month allowed by the rules for moving for a new trial has elapsed.

[S. C. 30 L. J. (Mat.) 198.]

This was a suit by a wife for dissolution of marriage on the ground of adultery and cruelty.

The respondent denied these charges, and the issues so raised were tried before the Judge Ordinary, by a jury, on the 23rd of May, 1861, when the jury found both issues in favour of the respondent.

Dr. Spinks, on behalf of the respondent, now moved that the petition should be dismissed.

**[514]** Dr Swabey contrà: The application is premature, for the petitioner may, under the 45th rule, move for a new trial at any time within a month from the day on which the cause was tried. Until that period has elapsed, the petition ought not to be dismissed.

*The Judge Ordinary*: I think, if the petition were dismissed, that a new trial could not afterwards be granted, and therefore, until the time allowed by the rule for moving for a new trial has elapsed, the petition ought not to be dismissed.

Motion rejected.

HEPWORTH *v.* HEPWORTH. July 25, 1861.—Practice.—Postponing Trial.—Notice of Motion.—The Court will not postpone the trial of a cause on the application of one of the parties, if no notice of the motion has been given to the other party.

[S. C. 30 L. J. (Mat.) 198.]

This was a suit by a wife for dissolution of marriage. Issue had been joined, and the case had been set down for trial by a jury.

Dr. Wambey, on behalf of the petitioner, now asked that the cause might be placed at the bottom of the list.

*The Judge Ordinary*: Notice of the motion has not been given to the husband; I must therefore reject it. I cannot postpone the trial of the cause on an ex parte application.

Motion rejected.

**[515]** HILL *v.* HILL AND WOOD. July 25, 1861.—Practice.—Dismissing Petition after Verdict.—Rule 45.—A motion to dismiss a petition after a verdict for the respondent should be supported by an affidavit that no application for a new trial has been lodged in the registry.

[S. C. 30 L. J. (Mat.) 198.]

This was a suit for dissolution of marriage by reason of the wife's adultery.

The respondent and co-respondent filed answers denying the adultery.

The issues raised were, on the 17th and 18th of June, 1861, tried before the Judge Ordinary by a jury, who found them against the petitioner.

Mr. Hannen, on behalf of the respondent, now moved the Court to dismiss the petition.

*The Judge Ordinary*: An affidavit has not been filed that no application for a new trial has been lodged in the registry. Without such an affidavit I cannot dismiss the petition.

SHAW *v.* SHAW. November 12, 1861.—Wife's Petition on ground of Cruelty.—Husband's Answer.—Justification for his using Force.—Pleading.—Where, in answer to the wife's petition on the ground of cruelty, the husband alleges such conduct on the part of the wife as justified him in the use of force, the answer should state generally the nature of the wife's conduct, but need not go into dates or other particulars.

This was the wife's petition for a judicial separation, on the ground of cruelty. The husband filed an answer, the second paragraph of which was as follows:—"Respondent further **[516]** saith that if at any time he had used any force whatever towards the said Jane Sabina Shaw (the petitioner), such force was rendered necessary by the conduct of the said Jane Sabina Shaw herself."

Mr. H. Bullar now moved for an order that the answer should be reformed, by stating the nature and description of the wife's conduct referred to in the second paragraph, with dates and other particulars. As it stands, the answer simply amounts to a plea, "I was justified in what I did." That is not sufficient.

Dr. Spinks contrà: The respondent is not bound to furnish dates and other particulars. The conduct referred to in the second paragraph is conduct at the time when he is charged to have been guilty of cruelty. No evidence can be given by the respondent of the wife's conduct on any other occasion. As to the nature of the wife's conduct, habits of provocation and exaggeration may be pleaded generally in answer to a charge of cruelty (*Wallscourt* v. *Wallscourt*, 5 Notes of Cases, 121).

*The Judge Ordinary.*—The respondent is not bound to give the dates and other particulars. He can give evidence of the wife's conduct on such occasions only as the wife proves violence to have been used by him, and she must know what she is going to prove. She has therefore ample notice of the occasions on which she will be called upon to explain her own conduct.

As to the nature and description of the petitioner's conduct, I think that she will suffer no inconvenience from a general statement in the answer, that the husband was justified in what he did by her conduct on those occasions, provided he alleges generally, without going into particulars, what her conduct was. But he should allege such conduct or **[517]** matters as, if proved, would justify violence. At present it is impossible to say what is the nature of the conduct to which he refers. It may be conduct, e.g. drunkenness or insolence, that would afford no justification for his using force, and such as, if pleaded for that purpose, would make the plea bad on the face of it; or it may be conduct that would afford him a justification. The answer must be reformed to that extent, but not beyond.

SHAW *v.* SHAW. December 17, 1861.—Intimidation of Witnesses.—Contempt of Court.—The use of threatening language to a person who is likely to be a witness in a suit, with intention of preventing that person from coming forward to give evidence, is a contempt of Court.

[S. C. 31 L. J. (Mat.) 35; 6 L. T. 477; 8 Jur. (N. S.) 141. Followed, *Bromilow* v. *Phillips*, [1891] W. N. 209.]

This was another application made by the wife in the above case.

Mr. H. Bullar, on behalf of the petitioner, moved for a rule calling on the respondent to shew cause why he should not be committed to prison, or otherwise dealt with according to law, for contempt of Court, in intimidating Maria Dowman, and sending an offensive letter to Mrs. Stewart, for the purpose of preventing them from giving evidence as witnesses in the cause, and why the respondent, at the time of shewing cause, should not attend the Court in person.

From the affidavit of Maria Dowman, it appeared that she had been in the service of Mr. Shaw from August till December, 1860; that she had witnessed many acts of cruelty on the part of Mr. Shaw towards Mrs. Shaw, and given full details thereof to Mrs. Shaw's proctors, and had been informed by them that she would be called to give evidence on behalf of Mrs. Shaw at the hearing. That on November 26, 1861, Mr. **[518]** Shaw called at her master's residence, and insisted upon seeing her; that he said, "What have you got to say about me?" and that she replied, "I have nothing to say to you." That he afterwards said, "Do you know that you have been unlawfully assisting Mrs. Shaw to take things out of my house clandestinely, and to get her away? I shall summons you. And what business had you to interfere in Mrs. Shaw's affairs?" That she then said that she thought Mrs. Shaw was an injured woman, and that she had seen him strike her on many occasions; upon which the respondent said, "You are a liar, and a base liar, and I can prove it; and I will prosecute you, and bring fifty witnesses to prove that you are perjured." That on his leaving he said, "Very well, your evidence is very good if there is no other tale to be told; but I have plenty of witnesses against that. That's what I want to know. I shall give you six months for perjury." That during the whole of the

interview, the respondent was violent and bullying in his manner; that his conduct was so violent that the deponent expected every moment he would use personal violence towards her.

It also appeared that the respondent had written to Mrs. Stewart an abusive and insulting letter; that Maria Dowman and Mrs. Stewart were material and necessary witnesses to prove the petitioner's case, and would be called at the hearing.

The respondent filed an affidavit stating that he had been advised by the person who attended to the suit on his behalf, that he ought to procure the evidence of all the servants who had lived with him whilst he lived with his wife; that in pursuance with this advice he had called upon Maria Dowman; that in the course of the interview she stated that he had struck his wife on December the 8th, 1860; that he told her he had not done so, and other witnesses denied that he had; that she persisted in her statements, whereupon, knowing the charge to be untrue, he felt angry and excited. He in substance admitted that he had made use of the language attri-[519]-buted to him, but denied that he had used it with the intention of intimidating Maria Dowman, or of attempting to influence her as to the evidence she should give; that he did not write the letter to Mrs. Stewart with a view to intimidate her, or to prevent her from giving evidence, but in answer to some observations Mrs. Stewart had on a previous occasion made to him in the course of a conversation he had with her.

Mr. H. Bullar in support of the motion: The general principle is to be found in 4 Steph. Black, 292, 4th edit.; *Lechmere Charlton's* case, 2 Myl. and Cr. 316; *Littler* v. *Thompson*, 2 Beav. 129. The respondent's conduct is clearly a contempt of Court.

Dr. Deane, Q.C. (Dr. Spinks with him), shewed cause in the first instance: Mr. Shaw's conduct may have been very unwise and very undignified, but the question is, whether it is a contempt of Court? In the cases cited the persons dealt with were either the Judge himself or persons concerned and known to be concerned as witnesses already in Court.

By the Court: What difference is there in principle between those cases and the present, if what he said was said with the intention of intimidating witnesses about to depose? There can be no doubt the respondent, in a violent passion, threatened a person who knew some of the facts of the case, that, if she gave evidence, she should be indicted for perjury.

Dr. Deane: His conduct is hardly open to that construction.

By the Court: He says, "That is a lie, and if you swear it I will give you six months for perjury." What other construction can you put upon it?

Dr. Deane: He denies that he intended to intimidate. As [520] to the letter to Mrs. Stewart, the respondent, when he wrote it, could not have known that she would be a witness, therefore there is no contempt of Court. If the Court thinks that his conduct is a contempt of Court, the ends of justice will be met by refusing to make the order, and leaving Mr. Shaw to pay the costs. He acted under the influence of excitement, and without premeditation.

Mr. Bullar in reply.

*The Judge Ordinary.*—There can be no doubt that the respondent went to Maria Dowman with the intention of intimidating her from giving evidence at the hearing, and that by his conduct towards her he has been guilty of a contempt of Court. I hope that what I have said will be a warning to him to abstain from writing to, or having any communication with the petitioner's witnesses for the future, and that the ends of justice will be answered by my discharging this rule, on payment of costs by Mr. Shaw.

CLARK *v.* CLARK AND BOUCK. November 19, 1861.—Dissolution of Marriage.—Damages.—20 & 21 Vict. c. 86, s. 33.—C. obtained a decree nisi for dissolution of marriage and damages assessed at £250. On motion to make the decree nisi absolute and to direct application of damages, the Court directed all the petitioner's interest in the damages to be assigned by him to a trustee for the use of the only child of the marriage, and in case of the child's death under twenty-one and unmarried, for the use of the petitioner, and suspended the decree till such assignment should be made.

[S. C. 31 L. J. (Mat.) 61; 6 L. T. 639; 10 W. R. 810.]

In this case the husband petitioned for dissolution of marriage, and prayed damages against the co-respondent.

**[521]** On the 15th of June, 1861, a decree nisi was pronounced upon the verdict of a jury, who assessed the damages at £250.

Mr. C. H. Hopwood now moved the Court to make the decree absolute, and also, under the 33rd section of 20 & 21 Vict. c. 85, to direct in what manner the damages should be applied. There was issue of the marriage, one child.

*The Judge Ordinary*: The damages must be assigned to a trustee on behalf of the child. If the child die under the age of twenty-one and unmarried, they will go to the petitioner, and the decree absolute will be suspended until the assignment has been executed.

Mr. Hopwood stated there was no prospect of the damages being paid.

*The Judge Ordinary*: The petitioner must assign all his interest in them.

In the order the assignment of damages was directed to be settled by one of the conveyancing counsel of the Court of Chancery.

DICKENS *v.* DICKENS. January 24, 1862.—Alimony and Costs.—Attachment.—20 & 21 Vict. c. 85, s. 52.—Where a party is in custody under an attachment for non-payment of costs, etc., and it is desired to charge a second attachment upon him, the Court, in accordance with the practice of the Court of Chancery, will, upon motion, direct a writ of habeas corpus to issue to the person having custody of the party; and on the appearance of such party, he will be charged under the second attachment.

[S. C. 31 L. J. (Mat.) 59.]

This was originally the wife's petition, on which she had **[522]** obtained a decree for judicial separation and for permanent alimony, and the husband had been committed to the custody of the keeper of the Queen's Prison, under an attachment for the non-payment of the arrears of such alimony. Upon motion on a previous day an order was made for a further attachment for the petitioner's taxed costs, and for further arrears of alimony; and a writ of habeas corpus had issued to bring up the respondent for the purpose of charging him with the second attachment.

Mr. Aspland now stated that the party was present, and he moved in pursuance of the practice of the Court of Chancery, as prescribed to this Court by the Divorce and Matrimonial Causes Act, 20 & 21 Vict. c. 85, s. 52, that he might now be charged under the second attachment.

*The Judge Ordinary* ordered accordingly.

ALEXANDER GRANT (now deceased) *v.* HARRIET SOPHIA GRANT AND BOWLES AND PATTISON. July 1 and 8, 1862.—Petition for Dissolution.—Decree Nisi.—Death of Petitioner.—Abatement of Suit.—Post-Nuptial Settlement.—G. obtained a decree nisi for dissolution against his wife, and died before it could be made absolute. The petition prayed the Court to deal with a post-nuptial marriage settlement; and the guardian of the minor children of the petitioner prayed to be allowed to intervene for the purpose of making the decree nisi absolute, and of obtaining an order of the Court in respect of the settlement.—The Court held that the suit had abated by the death of the petitioner, and that no other party had any right to move in the matter.

[S. C. 31 L. J. (Mat.) 174; 6 L. T. 660. Referred to, *Stanhope* v. *Stanhope*, 1886, 11 P. D. 106.]

This was originally the husband's petition for dissolution of his marriage by reason of the wife's adultery; the petition also prayed the Court to deal with the provisions of a post-nuptial **[523]** settlement. No appearance was entered by the respondent. The petition was heard, and a decree nisi made on the 31st of January, 1862; on the 19th of March, before the decree nisi could be made absolute, the petitioner died at his then residence in the Island of Jersey, having by his will, dated February, 1862, appointed H. E. A. Young and another executors; Young alone proved the will of the petitioner, and had also, in accordance with the local law of Jersey, been appointed guardian to his three infant children. The post-nuptial settlement was in favour of the respondent during her life, and afterwards of the children.

Dr. Phillimore, Q.C., now moved the Court to allow the children by their guardian to intervene to get the decree nisi made absolute and to obtain an order to vary the provisions of the post-nuptial settlement. By 22 & 23 Vict. c. 61, s. 5, "the Court, after a final decree of nullity of marriage, or dissolution of marriage, may inquire into

the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property, settled either for the benefit of the children of the marriage or of their respective parents, as to the Court shall seem fit." This statute is earlier than the one which introduced the decree nisi and the decree absolute. Under the section quoted, it is submitted that, on the decree being made, a third party with distinct interests, viz. the children of the marriage, is introduced, without whom the Court has held that it has no power under the section to deal with the settlement for the benefit of either of the parties to the marriage. Are these interests affected by 23 & 24 Vict. c. 144, which directs that the decree shall be a decree nisi for not less than three months?

Dr. Deane, Q.C., contrà: The suit abated by the death of **[524]** the petitioner, and the Court has no power to do what is asked.

*The Judge Ordinary*: I think the suit abated by the death of the petitioner. I think the children have no claim at all under the section referred to, unless the father makes the claim for them. However, as it is a matter of importance, I will take time to consider. Cur. adv. vult.

July 8.—*The Judge Ordinary*, after stating the facts and referring to the sections cited, said:—I am of opinion that the authority to deal with the settlement does not arise till after the final decree; i.e. as the law now stands, till after the decree nisi is made absolute. The suit abated by the death of the husband; there is an end of the matter, and I can do nothing more.

Motion rejected.

LATOUR *v.* LATOUR AND WESTON (the Queen's Proctor intervening). November 19, 1861.—Decree Nisi for Dissolution.—Intervention of Queen's Proctor.—Adultery of Petitioner.—20 & 21 Vict. c. 85, s. 31.—Where, on the intervention of the Queen's Proctor, after a decree nisi on the ground of the wife's adultery, it was proved that the petitioner, subsequent to his wife's adultery and a sentence of divorce à mensâ et thoro, obtained by reason of such adultery, had himself been adulterously cohabiting with a woman, the Court rescinded the decree nisi, dismissed the petition, and condemned the petitioner in the costs of the Queen Proctor's intervention.

[Affirmed, except as to order for costs, 1864, 10 H. L. Cas. 685; 11 E. R. 1193 (with note). Referred to, *Evans* v. *Evans*, [1906] P. 133; *Hines* v. *Hines*, [1918] P. 368.]

The petitioner, General Latour, prayed for a dissolution of **[525]** his marriage with the respondent on the ground of her adultery with George Miles Weston.

The respondent appeared, but did not answer; and the co-respondent did not appear. The parties were married in 1826, in 1832 they went to live at Boulogne, and the petitioner was there imprisoned for debt. In November, 1833, his wife eloped with Mr. Weston, and afterwards lived in adultery with him at various places. In 1834 the petitioner brought an action against Mr. Weston, in the Court of Common Pleas, and obtained a verdict with £1500 damages. In 1838 he obtained a decree of divorce à mensâ et thoro in the Ecclesiastical Court, on the ground of his wife's adultery. The present petition was filed in April, 1859, and the leave of the Court to prove it by affidavit was obtained. The cause was heard on the 18th of April, 1861, and the Judge Ordinary pronounced a decree nisi for the dissolution of the marriage.

On the 6th of June, 1861, Her Majesty's Proctor, by leave of the Court, intervened and pleaded, first, that the said petitioner had been acting in collusion with the respondent for the purpose of obtaining a divorce contrary to the justice of the case; secondly, that divers material facts respecting the conduct of the petitioner and the respondent had not been brought before the Court; thirdly, that at the time when the petitioner presented his petition he was, and had been for about twenty-five years prior thereto, cohabiting with a female other than the respondent, and habitually committing adultery with her at divers places, and particularly at the Queen's Bench Prison, in the county of Surrey; at a house situate on Bromley Common, in the county of Kent, and also at a house situate No. 5 Homesdale Place, Bromley, in the county of Kent, where the said petitioner and the said female are still cohabiting as man and wife.

The Court afterwards made an order that particulars should be furnished by Her Majesty's Proctor of the material facts referred to in the second paragraph of this plea; and on the **[526]** 31st July, 1861, Her Majesty's Proctor filed a statement that

the material facts were those which were more particularly set forth in the third paragraph. Affidavits were afterwards filed in support of the allegation in the third paragraph. No affidavits were filed by the petitioner. The case came on for hearing before the Judge Ordinary.

The Attorney-General (Sir W. Atherton) and Dr. Spinks, on behalf of the Queen's Proctor, moved for a decree reversing the decree nisi of the 18th of April, dismissing the petition for a dissolution, and condemning the petitioner in the costs of the intervention. The affidavits filed by the Queen's Proctor conclusively established the facts alleged by him.

*The Judge Ordinary* called upon the counsel for the petitioner.

Dr. Phillimore Q.C., (Mr. Thompson Chitty and Mr. Holt with him), for the petitioner: I cannot deny that the charge of adultery against the petitioner is established; the question is, whether the Court should exercise its discretion by dismissing the petition? The petitioner's wife eloped as long ago as November 1833, and the petitioner immediately took the preliminary steps to obtain a divorce à vinculo from the Legislature, by bringing an action of crim. con. against the adulterer, and by obtaining a divorce à mensâ et thoro from the Ecclesiastical Court. He was not able to proceed with his private Act of Parliament for want of money; his attorney having absconded with the £1500 damages obtained from Mr. Weston. When this Court was established he took proceedings, and produced the clearest evidence of his wife's adultery, and satisfied the Court as to the reasons for the delay in the proceedings. It now appears that after his wife's adultery, he formed an acquaintance with another woman, and he has lived with her as his wife up to the present time. **[527]** In construing the discretionary clause in the Divorce Act, 20 & 21 Vict. c. 85, s. 31, the state of the law previous to the passing of that Act should be taken into consideration. The old law was that, however bad might have been the wife's conduct, if the husband had ever on any single occasion been led astray by his passions, he could not obtain a remedy for his wife's misconduct. The Legislature has given this Court a discretion in order to relax the strictness of the old law. If ever that discretion ought to be exercised in favour of the husband, it is in a case like this, where his conduct has not been abandoned and profligate, but he has formed a connection with a woman after obtaining a divorce à mensâ et thoro, and has lived faithfully with that woman up to the present time, and has had issue by her. His misconduct therefore cannot have conduced to that of his wife. It will be a great hardship to refuse the relief he prays, and the interests of society will in no way be injured by granting it.

The Attorney-General in reply: It would be very dangerous to lay down the rule, that the petitioner's adultery is no bar to his obtaining a divorce. The fact of adultery continuing for many years and going on at the present time is not controverted. With regard to costs, the petitioner's adultery is no doubt a material fact, and ought to have been brought before the Court. As it was suppressed by the petitioner, he ought to pay the costs incurred by the Queen's Proctor in bringing it before the Court.

*The Judge Ordinary* asked whether there was a statement in the affidavits that the petitioner had no means of proceeding in the House of Lords?

The Attorney-General: There is no such statement.

Dr. Phillimore said it was to be inferred from the facts, that **[528]** his attorney had absconded with the £1500 damages, and that he had for many years been in prison for debt.

*The Judge Ordinary*: That falls very far short of showing that he could not have proceeded with a Bill in Parliament, if he had retrenched his expenses.

I am now called upon to deal with this case at the instance of the Queen's Proctor, and Dr. Phillimore has asked me to put a construction on the 31st section of the statute, and to say by what rule I am to be guided in the exercise of the discretionary power given me by that section. The only rule that I can give is, that I will form a judgment, according to the best of my ability, of the circumstances of each case that is brought before me, endeavouring, as far as I can, to act upon the principles which have been recognized in the Ecclesiastical Court, and which have guided that Court in former times, when it decided questions of this sort.

General Latour has asked for a divorce on the ground that his wife has been living many years in adultery, and it appears that he himself has been living in adultery during the greater part of the same period. I cannot believe that either General

Latour, or any legal adviser whom he consulted, could by possibility have entertained an opinion that that was not a most material matter for the Court to consider in dealing with his case. General Latour proved the case of adultery against his wife, and the Court was left totally in the dark as to the other fact. It had no means of ascertaining from the evidence brought before it, whether he was to be deemed a person for whose benefit this Act was passed. I cannot entertain a moment's doubt that he is not. I presume the Legislature introduced the clause giving a discretionary power to the Court in order to meet the case of some temporary lapse from purity of conduct on the part of a married man, which might have happened years before, and might have been, as Dr. Lush-**[529]**-ington expressed it, comparatively venial; but where a man for years and years chooses to take the remedy in his own hands, and says, "I cannot live with my own wife, therefore I will live with a woman who is not my wife; I was contented to live in that way for twenty years before this Act of Parliament was passed, and I ask you now to give me an opportunity of marrying that woman"; —I am not casuist enough to consider this as any great palliation of his conduct.

I cannot say, sitting in this seat, that a man is licensed to live in adultery with another woman, because his wife has deserted him. He was not entitled to do so before this statute was passed; but he continues to do so to this day, notwithstanding the statute. I think that I should put a most strange construction upon this Act, and shew that I was unfit to be trusted with the discretionary power that the Legislature has vested in me, if I did not hold that there is in this case a sufficient ground for refusal of the divorce.

Then comes the question as to costs. I cannot help supposing from his affidavit that General Latour has never received payment of the damages, although he did not choose to take upon himself to state that he never had the means of proceeding in the House of Lords for a divorce. I am quite satisfied that both he and his advisers must have known that the matter now introduced into the case was most material matter to lay before the Court. He chose to abstain from laying it before the Court, and he must therefore pay the expenses incurred by the Queen's Proctor in doing that which ought to have been done before.

The decree nisi will be reversed, the petition dismissed, and General Latour condemned in the costs of the Queen's Proctor.

**[530]** MARRIS *v.* MARRIS AND BURKE (the Queen's Proctor intervening). January 21, 1862.—Petition for Dissolution.—Intervention and Pleas of Queen's Proctor. —Connivance.—No blindness and weakness on the part of the husband, short of an actual willing consent beforehand to the wife's adultery, will constitute connivance, so as to bar his title to a dissolution of marriage by reason of the wife's adultery.—Quære, whether, in conducting a suit on behalf of the Queen's Proctor intervening, the Attorney-General can claim any privilege as in Crown cases.

[S. C. 31 L. J. (Mat.) 69; 5 L. T. 768. Referred to, *Waterhouse* v. *Waterhouse*, [1893] P. 286.]

This petition came before the Court on the intervention of the Queen's Proctor. The petition alleged a marriage in 1850, and cohabitation at Sheffield, Manchester, Sleaford, and Nottingham; that on the 17th of July, 1860, the respondent left the petitioner's house in Nottingham in company with Burke, and adulterously cohabited with him during the rest of that year, and subsequently thereto. To this petition the respondent appeared, but did not answer; the co-respondent did not appear. On the 15th of May, 1861, the Judge Ordinary directed the petition to be proved by oral evidence before the Court. On the 16th of November, the Court gave leave to the Queen's Proctor to intervene, and directed that the trial of the cause should be stayed till further order. To the petition the Queen's Proctor pleaded—first, that the petitioner was acting in collusion with the respondent to obtain a divorce contrary to the justice of the case; secondly, that Annie Marris did not commit adultery with William Burke; thirdly, that if adultery was committed, the petitioner was accessary to, consenting to, and conniving at, such adultery; and prayed to dismiss the petition and condemn petitioner in the costs of the Queen's Proctor's intervention. The petitioner took issue on these pleas, and on the 21st of January the Court ordered, on the motion of the intervener, that the petitioner should be in attendance at the hearing. The case now came on for hearing on these pleadings.

**[531]** Mr. W. Cooper conducted the petitioner's case.

The adulterous cohabitation of the respondent and co-respondent at Liverpool and Manchester in the early part of 1861 was proved, and the handwriting of petitioner and respondent and co-respondent in certain letters.

The following letters in Burke's handwriting were read:—

"Thursday, July 5th, 1860.

"I have only just got yours forwarded from ———, only just time to catch the post; been hard at work all day; be sure and write by return. I will send a long letter; cannot say when I shall be nearer. Sunday could go anywhere to meet you. Should like to be at Harrogate. God bless you, is the constant prayer of your William.

"Friday and Saturday—Talbot Hotel, Bradford.

"Sunday, unless I hear from you to meet somewhere, Beecroft's Hotel, Leeds. I am going to have a hot bath to-night. I shall finish work about four or five o'clock on Saturday."

(Addressed) "Mrs. B. Williams, Post Office, Nottingham."

"Talbot Inn, Bradford, July 6th.

"I will be at Beecroft's Hotel, Leeds, on Sunday, and back again here on Tuesday. I will go to Skipton on Monday, and be sure and write if you cannot come. The Leeds house is a nice quiet place. I have just finished my day's work. Don't know when I shall get as far as Nottingham; every place seems to me the same now—desolate, very desolate; yet I keep up my spirits well. I will be in Leeds to-morrow night as well as Sunday. Your WILLIAM.

"Be sure and write by return."

(Addressed) "Mrs. B. Williams, Post Office, "Nottingham."

**[532]** "White Swan Hotel, Halifax, July 11th, 1860.

"Yours to Bradford reached me just as I was starting for here this morning. I sent you a small note on Monday morning, as I was obliged to leave and had to work two towns on that day (Skipton and Keightley). I have been very busy all day, and just finished (half-past eight o'clock), by selling all my crinoline bonnet patterns to one man. Be sure and write to me. I will be at the George, Huddersfield, until Friday morning; will wind up the week by coming to Nottingham on Saturday. I could hardly credit my senses when I read your note this morning. I had courage enough to open it—the subject which contained all my hopes and fears. I trust all will be amicably arranged. My thoughts upon the subject you are already in possession of, and I will never swerve. But Saturday and Sunday we can devote to the arrangements of our future. God bless you!—I am hurried for the post.

"Yours as ever, WILLIAM.

"I will write by the next post."

(Addressed) "Mrs. Marris, 6 Clyde Villas, "Welford Road, Nottingham."

The Attorney-General (Dr. Spinks with him), for the Queen's Proctor, stated that his intervention was founded on information that Marris had not only consented to his wife leaving his house and going to Burke, but had desired that she should do so, and had made arrangements therefor. Beyond certain letters, the handwriting of which was already proved, he should rely on the examination of the petitioner, if the Court thought fit to have him examined.

A letter was then read, dated "Tuesday, ten o'clock.—I went to Warsen Gate yesterday. Felt disappointed there was no note or message for me; just had your whereabouts. The important question is finally settled, and the article is wait-**[533]**-ing your claim. I have not felt so happy for years as now. Come, or write to me what you wish me to do; better telegraph." So far was in Mrs. Marris's handwriting. On the opposite side of the paper was the following, in Mr. Marris's handwriting:—"It will be better to attend to this matter first thing." The envelope was addressed in Mr. Marris's handwriting, "Mr. W. Burke, of Nottingham, Talbot Hotel, Bradford, Yorkshire," and bore postmarks of Nottingham, July 10, 1860; of Bradford, Yorkshire, July 11, 1860.

The other letters referred to were as follows, from Mrs. Marris to her husband:—

"July 18th, 1860, Wednesday morning.

"Your very feeling note just received, but in mercy do not make my child try to hate me, if you do, you will be as great a sinner as I am. If I could have thought

that you was deceiving me in this of all circumstances of my life, I should not have been in the position I am at this time. You said you advised me as the dearest of brothers; you was the first I have ever had, and I shall never wish for another. There is nothing in the house I wish for; make the best home you can for my poor cats: I cannot even forget them in this my day of trouble. I feel my child will be taken care of, and she is a sacred trust. The I O U which Mr. Holroyd holds of yours has been destroyed, and as a parting gift to the dear one I brought into this world, I give it to her, also a Bible, which I know you will teach her to use more than her mother has done. I am going to Hull to-night. A letter to the Post Office will find me. Direct Mrs. Annie. And now farewell, and I pray that your future life will be as happy as I have made your past wretched. I am as miserable as I deserve to be; I cannot close my eyes or see a child but my own one is before me. Oh be merciful, and let me see her. What is all this world to me without her? and if I never prayed before, I have done so this last three days. If **[534]** you had said, 'Annie, which will you give up?' I should not have hesitated one moment. How could a mother part with her child that she has suckled and watched over all through her life? and God above knows how well I loved her. The hours of trouble I have had when she has been ill or away from me! You know it has been almost idolatry. The roses you gave me I have got, and will keep as the last memento of the garden where you and I and the dear one has passed many happy hours. The dear little strawberry bed which I gave you looked so nice yesterday. One thing I have to ask you: send me one of the peas her dear little hand planted, and when I die it shall be buried with me; and if I am never to see her again, may this be my last day in this world. Do not send that letter to Emma. It is impossible for me to be his wife for the next six months; he would make me that this moment if the law would allow him. Before you advised me as you did, you should have ascertained the position I should be placed in. If you will let my darling come, will you take her to Fily for two or three weeks, and I give you my word she shall not see, no more will I, the one that has been the cause of all. Will you send my hat?"

(Addressed) "Mr. Marris,
"Midland Dining Rooms."
"Sunday morning, October 14th, 1860.

"Oh, William, my husband, father of my child, forgive your unhappy Annie, or I shall be lost in this world and the one to come. I have dreamed the last two nights that you had taken me to your heart again. How happy I felt then it would be impossible to tell, and how wretched to find it only a dream! William, my husband, I was faithful to you many long years—would to God I had kept so! I passed the churchyard yesterday where our dear first-born laid. I prayed to God to watch over his dear sister and **[535]** their father, and forgive their unhappy mother for the great sin she has done. William, forgive me, or I die. God grant that this, my last prayer, may reach your heart. I have wrote my first letter to my child, hoping she will get it on her birthday. To be parted from her on that day more than all others, it seems to me now more than I shall be able to bear. William, let your birthday gift to her be her mother's forgiveness. If I live, I will prove worthy the gift you give her. You know how much I love her. What a dear little tender plant when first brought into this world! How we watched, day and night, over our little precious one! This is Sunday—just such an one when we stood together by her bed, with our hearts too full to speak, watching the dear little sufferer, and you lulled her to sleep by dropping cold water on her hand.

"Oct. 21.—I had wrote this far when I was taken ill. Thank God I am better; but how cruel whoever copied that letter for my child to write to me. It was the first I had ever wrote to her, and may God forgive them, for I never can. I am guilty, I know; no one can condemn me more than I do myself; but do you not think you are equally guilty, when you prayed on your knees for your wife to go and live a life of wickedness, for that it was, and that you did."

(Addressed) "Mr. Marris, Walcot Fen, near
"Timberland, Sleaford."
"Sunday, April 7, 1861.

"I was very much surprised in receiving a copy of a declaration made by you in the Divorce Court, and much more so at the plea you there set forth. Now, I appeal to your own sense of honour whether I have or have not acted strictly as you

requested me. I will leave it to the Court to decide whether, after you went down on your knees and begged and prayed for me to leave you, and **[536]** promising so faithfully to get all done quietly, and that publicity would be avoided by your getting a divorce on the ground of incompatibility or mutual consent. All this you urged upon me, at the same time expressing your fervent wish and desire that I should leave you, and that both you and I would be much happier apart. You also accompanied me to the train and took my ticket, that I might go to make what arrangement I could for the future. This and other evidence can I bring forward to prove that you have been a party to everything in connection with our separation. I cannot and will not consent to a divorce on the ground which you have rested your plea; any other ground you please; and I have letters that will prove in any Court what part you have taken in the affair, and also that I have acted strictly in accordance with your wishes and as you desired me; and my leaving you was only brought about by your constant and repeated solicitations that I should do so for both our sakes, and after your repeated promise to be unto me as a brother; and in your letter to me you even addressed me as your dear sister. What view the Court will take remains to be seen, my leaving you at your own request—indeed, repeated requests. The view I think they will take will be that it has been a deep-laid plot on your part to get rid of me. Consider well before you proceed further in the case, whether if even you should succeed, which is doubtful, would it be well to drag the name of your child's mother before the public in such a manner. For your love to her, be merciful and spare her unhappy mother, and do not try to crush me more than you have already done. You took my child, home, name, friends, and I had not one single penny in my pocket when I left you. God above knows how much I have suffered. I did not expect you to persecute me any more. On my knees I ask you now not to proceed any further in the matter, but let me remain in seclusion and quietness. I am trying to be useful, and hope to gain, by my own industry, a little resting-place; **[537]** but if you carry out what you have begun, you will find one for me, and that is, my grave. I will not interfere with you in any way. Let my child write to me. Surely this cannot be asking too much. William, if you had committed sins, however deep, I would not have kept your child from seeing or writing to you. My own dear one, she wrote to me this morning, and sent me a book-mark, and poor as I am at this moment, not all the wealth in this world could buy them from me. I will wait until Tuesday night to hear from you. I am still at Birmingham, so you had better send to me there. I cannot write any more now, but I have a volume on my mind and my heart is full.

"ANNIE."

(Addressed) "Mr. W. Marris, Messrs. Bovias, Green, and Graham, St. Paul's Churchyard, London.

"April 7, 1861."

The petitioner was then examined by the Attorney-General, and gave the following evidence:—"It was not so much as a week after the 10th of July that my wife went to Doncaster; I accompanied her to the station at Nottingham, took her ticket, and paid her fare. She returned the following night. On that occasion she did, to my knowledge, intend to meet Burke at Doncaster, with her mother, who lived at Sheffield. I made no arrangements as to where she was to sleep that night. I did not know at that time that indecent familiarities had taken place between Burke and my wife."

A memorandum in petitioner's handwriting, signed by Mrs. Marris, in the following words, was here shown him:—"I, Annie Marris, do hereby agree that I will henceforth give up all correspondence whatever, either writing or personal interviews, with Mr. William Burke, or any one of the family, according to the wish of my lawful husband, and I vow that I will fully carry out his wishes in these matters.—Witness my handwriting this 7th day of June, 1860. ANNIE MARRIS."

**[538]** "I remember that. I had heard that he had been writing to her, and that he had been seen at my house when I was away. I had not at that time seen any letters. I had heard of their being together elsewhere than at my house during my absence; that was at Wilford Grove, about two miles south of Nottingham, walking about there; there is an avenue of trees. That was probably before the memorandum of the 7th of June. I had heard of their being in the same bedroom at the Stag and Pheasant at Leicester; say, in December, 1859. I had a place of business at Leicester; Burke was manager there; and she went once or twice a week to Leicester to bring

home money, and used to pass the night there. Before she went to Doncaster, I don't think I communicated with my wife's mother; I only knew from what my wife said that her mother was to be there. She lived with me at Nottingham till the Saturday following, six or seven days after the 11th of July. On my wife's return from Doncaster, I ascertained from her that she had met Burke; she told me she had slept in Doncaster, but not where; don't remember to have asked her where, or where Burke slept. After memorandum of 7th of June till she left we had words about Burke." [The Attorney-General here referred witness to the letter of 7th of April, 1861.] "I never expressed a desire that we should live apart; she asked me whether she should give me up or him; I said, 'If you can't give him up, you must give me up; if, after living ten years together comfortably, the thread of affection is so thinly woven, the sooner it is broken off the better.' At first she said she could not give him up, then she said she could not give me up, and would remain with me; this was two or three days before she left me. I did not say that if she left me I would arrange a divorce quietly, on the grounds of incompatibility of temper, or mutual consent. I remember nothing of the sort. Might or might not have been said; I can't swear. I told her (after she left, she wrote to me) **[539]** that I could no longer look upon her as a husband, but that, as a brother, I would advise her the best I could. I don't remember addressing her as sister." [The witness was referred to the letter of 18th July, 1860.] "I had not desired her to leave my house, or advised her to do so. I had said nothing about advising her as a brother up to that time; at least, have no recollection of it."

The letter of 14th and 21st of October was here read by the Attorney-General.

"I did not tell her to leave, only that she must give up him or me; at last of all I did not desire her to leave."

The letter of Tuesday, ten o'clock, was then put into witness's hand, and he was asked what he meant when he wrote, "It will be better to attend to the matter first thing." "I don't know, I have forgotten all about it; that is all I can say about it." [In answer to questions by the Court:] "I don't know whether I read first what my wife had written; there was only one question then to be settled, that is, of our parting. I suppose by the 'article is only waiting your claim,' she meant herself."

Examination continued: "I heard Burke was at Nottingham after my wife went to Doncaster; my servant went to fetch him from Grantham; she told me her mistress sent her; he came to my private garden; I don't know whether to my house, I was not at home. She left on the Sunday, in the morning; from my house she went elsewhere in Nottingham. I was sleeping in the town, not at home. I saw her on the Monday. I slept at home on the Sunday night; she was not there; don't remember whether I saw Burke on the Monday; perhaps I did on the Tuesday passing in the street; I did not speak to him, he and my wife were passing in a cab. I have seen my wife in London a good deal from time to time since the suit began."

In answer to questions of Mr. Cooper, the petitioner deposed as follows:—"When first married we lived at Sheffield, **[540]** a few doors off where Burke's mother and sister lived; there was visiting and intimacy between the families; this continued till we went to Nottingham, in September, 1858. At Christmas, 1858, Burke was out of a situation and came to us on a visit; nine or ten months after that he was in my employment. In November, 1859, I opened a branch shop at Leicester; Burke was sole manager for me there. I failed in March, 1860. I might have been up to London after that. Some time in December, 1859, I heard an ill report of my wife from my brother-in-law; by the General Post Office in London. On my return to Nottingham the same night I talked with my wife; I told her that I had heard that she and Burke had been seen together in a bedroom. She said it was a mistake, it was his sister (who was in my employ at that time, and boarded and lodged at the Stag and Pheasant, at Leicester, as well as Burke, at that time). Nothing more was said. She satisfied me by that explanation; we lived on as before. I first found some letters which aroused by suspicions. Six or seven months after that, three or four days before she went, I found three letters in her bosom, and asked her the meaning of them; she acknowledged it was not right and asked me to forgive her; she said there was nothing beyond the letters, that things had gone no further. The memorandum of the 7th of June was made because I did not like the family or Burke about the place and had discharged him. My wife was fond of going to see him at her mother's, who then lived at Nottingham, and from the losses at Leicester, upwards

of £400,—through his neglect, as I considered,—I wished to have the intimacy broken off entirely. I told her this; she had promised before. I said I had taken her word and could take it no longer. I then wrote the memorandum, and she signed it. As to the visit to Doncaster, she asked leave to go and see her mother; at first she said she wanted to see Burke. I strictly **[541]** objected; then she wanted to see her mother—had made arrangements to see her. I said, 'If you are going to see your mother, I cannot object; if you are going to see Burke for the purpose of seeing him only, you must not go; if you do go, you won't have a home to come back to on your return.' She came home on the Sunday night. I asked her, had she seen her mother? She said 'No; she was from home. I don't think I did anything wrong. We had two beds at the hotel.' I don't remember what I said, nothing in particular. She made a full statement on the Thursday before her leaving. Between the Sunday and that Thursday I remember no words about the matter. It was late at night before we went to bed; I took his portrait out of her pocket. I was feeling for some letters. I had found the letters the day previous. I asked her what it meant. She said, 'That is mine; you have no business with it, and tried to get it out of my hand. She said she loved him a great deal more than me; that she had one little treasure of his yet, and showed me a ring on her wedding finger. I asked her where my wedding ring was. She said, 'At the bottom of the Trent.' She said he gave her that ring the first time he took liberties with her, on the 23rd of July, 1859. After that I asked her to go to bed. She went to bed, and I remained on the sofa. Next morning I went to see her relations at Sheffield, and asked them to advise me. They said, 'Never go near her again.' I returned to Nottingham at 8.30, and found her and Burke gone to the garden."

Mr. Cooper then recalled Birmingham, a witness examined by him in support of the petition, who now, with respect to the letter of the 7th of April, 1861, deposed: "I recollect that letter being written at my house at Manchester; it was partly read out to me by Mrs. Marris, after she wrote it. The letter was written by Mr. Burke, and copied by **[542]** her. I saw both the papers. I don't know what has become of the original."

The Attorney-General expressed a doubt as to the course to be pursued in addressing the Court.

*The Judge Ordinary*: Unless you claim the privilege of a Crown case, which is a matter for consideration, you should comment on your own evidence, and I shall hear Mr. Cooper in reply.

The Attorney-General then addressed the Court.

Mr. Cooper was heard in reply.

*The Judge Ordinary*: In this case I am of opinion the petitioner has established the charge of adultery against the respondent and co-respondent.

The Queen's Proctor traversed the adultery, and as to that he is defeated. The case, then, depends upon whether there was connivance to bar the petitioner's claim to the usual remedy. That the Queen's Proctor should have been advised to intervene can surprise no one, for evidence more approximating to proof of connivance, without absolutely touching it, can hardly be imagined. The husband was all but criminally weak; to the branch shop at Leicester, which Burke managed, the wife went over once or twice a week to collect the money, and was allowed to pass the night there. At one time he heard a rumour of the respondent and co-respondent having been seen together in a bedroom. An explanation was given by the wife, and it does not appear whether he took any steps to ascertain the truth of it. The result so far is, that he was very weak; but I do not think that he intended his own dishonour. More than once he remonstrated with her. There is no proof of any connivance up to the time when the letter of 10th of **[543]** July was written. It must have been known to the petitioner; and if from it I must infer that he was a willing and consenting party to the adultery between his wife and Burke, there is an end to the case. It appears that he had discussed with her the impropriety of this intimacy; that he found letters in her bosom. The only evidence that throws any light on the expression, "the important question is settled," is, that the husband had told her she must choose between Burke and himself. The words in his handwriting, "It will be better to attend to this matter first thing," I cannot construe as a willing consent that adultery should be committed; it seems rather an unwilling consent: "she has made up her mind, and is determined to leave me; so the sooner she goes the better."

By connivance I understand that the husband so behaves himself as to give a willing consent to the act, though he need not be an accessary before the fact. The letters written by her are important; those written not long after she left express the deepest regret and sorrow, whereas in that written after the suit was instituted she asserts that all was done at his desire, and so on. Birmingham, however, proved that that letter was written by Burke, and copied by her to send to her husband; and the contrast of the letters in tone and expression is striking, the object of the last being, plainly enough, to screen the co-respondent from costs. Comparing the letter of the 10th of July with the evidence in the whole cause, I do not think that the petitioner connived at his wife's guilt. He is therefore entitled to a decree nisi for the dissolution of his marriage, and with costs against the co-respondent.

**[544]** BURROUGHS *v.* BURROUGHS. February 1 and 5, 1862.—Wife's Petition for Restitution. — Husband's Answer alleging Adultery. — Right to Begin. — Competent Witnesses.—Practice.—When the wife's petition for restitution of conjugal rights is heard before the Court without a jury, her counsel have a right to begin, though the substantive issue may be raised on the husband's answer. In such a suit the husband is a competent witness in support of his answer alleging the wife's adultery; for the Court on his evidence might refuse the decree of restitution, though it could not make a decree for judicial separation. —There being cross-issues of adultery in the husband's petition for dissolution standing for trial before a jury, the Judge Ordinary suspended his judgment until these issues were disposed of.

[S. C. 31 L. J. (Mat.) 56; 5 L. T. 771. Applied, *Blackborne* v. *Blackborne*, 1868, L. R. 1 P. & D. 566.]

This was a suit for restitution of conjugal rights brought by the wife against the husband. The petitioner alleged the marriage, cohabitation to a certain date, and the husband's refusal to cohabit since that date. The answer denied that the husband had at any time without just cause refused to permit the wife to live and cohabit with him, "for he says that he hath a just and reasonable cause for separating himself from her by reason" that she has, on divers occasions, committed adultery. The wife's reply denied the adultery, and the case now came on for hearing before the Judge Ordinary without a jury.

Dr. Phillimore, Q.C., and Dr. Swabey, for the petitioner.

Sir Fr. Slade, Q.C., and Dr. Spinks for the respondent, after the pleadings opened, claimed to begin, the proof of the substantial issue, viz. the wife's adultery, being on the respondent. *Cherry* v. *Cherry*, 1 Swab. & Trist. 319, seems directly in point.

*The Judge Ordinary*: That case was tried before a jury, **[545]** and the only issue on the record was cruelty. Here the case comes before me on the whole petition. The petitioner must prove the marriage, etc., in the usual course, and must therefore begin.

Dr. Phillimore then opened the petitioner's case, and the petitioner and other witnesses were then called to prove marriage, etc.

Sir F. Slade opened the respondent's case as to the petitioner's alleged adultery, and called Thomas Proctor Burroughs, the respondent, as a witness.

Dr. Phillimore objected. Upon the wife's suit for restitution is engrafted by the husband's answer and its prayer (which asks for a decree of judicial separation by reason of the wife's adultery, as well as to reject the prayer of the petitioner) a suit by reason of adultery; and in this the husband is not competent as a witness (14 & 15 Vict. c. 99, s. 4). I abstained from asking the wife any question bearing on this issue; my learned friends, of course, had the opportunity of cross-examining her.

*The Judge Ordinary*: I observed that you did; but I think I must hear the husband's evidence. I presume it would be competent to answer a petition for restitution by pleading adultery, and merely praying to reject the petition without asking for a decree of judicial separation; then I might refuse the decree for restitution on the husband's evidence, though I could not on such evidence make a decree of judicial separation.

The respondent's evidence, and that of the other witnesses on his behalf, was then taken, and witnesses on the part of petitioner called in reply.

**[546]** A petition by the husband for dissolution of his marriage by reason of the

wife's adultery (*Burroughs* v. *Burroughs and Silcock*), in which the wife's answer charged adultery against the husband, being on the list of cases to be tried before a jury,—

*The Judge Ordinary*, at the end of the present case, said: I shall reserve my judgment till the issues raised in the suit for dissolution are disposed of by the jury, and say nothing which might prejudice that trial.

PEARSON *v.* PEARSON (on Motion). February 4, 1862.—Order for payment of costs. —No Indorsement of Amount on Writ.—Practice.—On the 8th of May, 1861, an order was made for attachment to issue against the respondent for non-payment of taxed costs, and the respondent was subsequently confined in Chester gaol under the attachment.—Held, that it was too late, in January, 1862, to move to set aside the attachment on the ground that the amount of costs to be paid was not indorsed on the writ, the allocatur and order for payment having been previously served upon the respondent.

[S. C. 31 L. J. (Mat.) 102.]

This was an application on behalf of the respondent to set aside an attachment for irregularity, and to discharge the respondent from custody under the said attachment.

The suit was originally the wife's petition for dissolution of marriage. On the 6th of February, 1861, an order was made for the taxation of petitioner's costs, which, on the 15th of that month, were taxed at £32, 18s. 2d. By an order of the 27th of February, the said sum was ordered to be paid by the respondent to Messrs. Routh, Rowden, and Stacey, the petitioner's solicitors, within a week after service.

**[547]** On the 8th of May, 1861, an order was made for an attachment to issue against the said respondent for contempt in not paying the costs, and the attachment issued under which the respondent was arrested and placed in Chester Castle.

The attachment was not indorsed with the amount of costs for the non-payment of which it was issued, nor did the amount of costs appear in the body of the writ, which was the irregularity complained of.

Dr. Spinks moved the Court accordingly: Nothing is brought to the knowledge of the sheriff or the party as to what sum the latter is to pay. By section 52 of Divorce Act, the Court has the same power to enforce its orders as the High Court of Chancery has. In 1 Dan. Ch. Prac. 357, it appears that an ordinary contempt in process may be cleared by doing the act required and payment to the other party of costs incurred by the non-performance, but the rule in Chancery is never to put the seal to the attachment till the amount to be paid is indorsed (2 Dan. Ch. Prac. 811).

Mr. John C. F. S. Day, contrà: In this case the defect, supposing it to be one, is a mere irregularity. The arrest was on the 15th of May, 1861—it is now too late; and the respondent was not prejudiced, for he must have known the amount. [By the Court: What is the rule as to its being too late to complain of irregularity when the liberty of the subject is in question?] As to that, *R.* v. *Burgess*, 8 Ad. & Ell. 275, seems to be in point. As to the amount to be paid, he could not have been released by paying the amount indorsed, as he must have paid the costs of attachment as well.

Dr. Spinks: Here the irregularity complained of is of the very essence of the writ. Cur. adv. vult.

*The Judge Ordinary*: This was an application on be-**[548]**-half of the respondent to be discharged from custody in consequence of an irregularity—viz. that the writ of attachment was not indorsed with the amount to be paid. The party, however, had full notice; he was served with the allocatur and order of Court; there was, therefore, no real want of information; if he had desired to pay the sheriff and found any difficulty, he might have applied to the Court; but he is too late now in applying to be discharged on a mere irregularity—for it is a mere irregularity; the attachment itself is good.

RE THE PETITION OF JOHN AUGUSTUS SHIEL BOUVERIE. February 18 and 25, 1862. —Legitimacy Declaration Act, 21 & 22 Vict. c. 93.—Mode of Trial.—The Court will, generally, at the request of either party to a petition under the above Act, direct issues raised to be tried by a jury.

[S. C. 31 L. J. (Mat.) 79; 6 L. T. 692; 10 W. R. 811.]

This was a petition under the Legitimacy Declaration Act. The parties cited to

see proceedings pleaded that the petitioner was not the legitimate son of his parents, and that the marriage of his parents was invalid.

Mr. T. Jones, for the petitioner, moved that the issues might be tried before the full Court without a jury.

Mr. Matthews, for the parties cited, moved that the issues might be tried by a special jury.

Mr. Leigh, for the Attorney-General, left the question to the Court.

*The Judge Ordinary*: Personally, I am in favour of trial by jury. I have not the least objection that a jury should [549] take the responsibility of deciding issues of fact, especially where questions of credit are involved. Cur. adv. vult.

*The Judge Ordinary*: I have considered this question, and acting upon the principle I have always acted upon, that where there is no special reason to the contrary, and either party wishes for a jury, a jury should be granted, I shall grant the motion for a jury in this case, as I do not find that there is such a state of circumstances as would lead me to suppose that it is a case which a jury could not properly try. Some cases of this kind involve complicated questions, and the examination of a variety of documents. But where it is a simple question of fact, *e.g.* legitimate or not, access by the husband or not, there is no reason why the parties should not have a jury. If there is a jury at all, either party is entitled to a special jury if he comes in time.

HARDING *v.* HARDING AND LANCE. February 25, 1862.—Taxation of Wife's Costs.—Practice.—Costs of application for further time to answer, etc., on behalf of the wife, will, as a general rule, not be taxed against the husband. Nor costs of a motion for the husband to attend and be examined on the wife's petition for alimony, and his answer on oath thereto, where the result of his examination is to establish the truth of his answer on oath.

[S. C. 31 L. J. (Mat.) 76; 6 L. T. 692; 10 W. R. 811.]

Dr. Wambey, on behalf of the wife, the respondent, moved for a rule nisi to review a taxation of costs in a suit for dissolution by a husband. His first objection was, that the registrar had not allowed the wife the costs of an application for time to answer.

[550] *The Judge Ordinary*: The costs of such an application should certainly be disallowed. It was rendered necessary by her own laches. On questions of this kind I rely on the experience of those who are more skilled than I am in the practice of the Ecclesiastical Courts. It has been reported to me by one of the registrars that the costs of summonses for time are never allowed, unless it can be shown that, owing to some laches on the other side, further time was necessary, and that in the Ecclesiastical Courts the wife's proctor's charges for obtaining further time were never allowed.

Dr. Wambey next objected to the registrar's taxation, that the costs of a motion for the attendance of the husband to be examined upon his answer to the petition for alimony had not been allowed, although the husband had been ordered to attend, and had been examined.

*The Judge Ordinary*: You asked me to have the husband examined; and, as I thought his answer a very extraordinary one, I ordered him to attend; but, after hearing his examination, I thought he had made out his case.

Dr. Wambey: It was a complicated answer, tending to lead us to believe that he had property other than he had disclosed in the answer.

*The Judge Ordinary*: I cannot grant a rule. The registrars must act upon some principle, and they cannot take into consideration the circumstances of each case. If it is sought to make a case an exception to a general principle, the application ought to be made when the case is before the Court, without the expense and trouble of a motion to review the taxation. If the answer was insufficient, the wife might have been justified in applying for an order that he should file a further and fuller answer; and according to the prin-[551] ciple adopted in the registry, she might have been entitled to the costs of that application. But here she exercised the power of rather an inquisitorial character, of having the man here and cross-examining him. Having failed to make out her case by the cross-examination, she cannot have the costs. The taxation of the registrar is quite right.

Rule refused.

BOULTON *v.* BOULTON AND PAGE (the Queen's Proctor intervening). March 18, 1862. —Decree Nisi.—Intervention of Queen's Proctor.—Pleading.—Mode of Trial.—23 & 24 Vict. c. 144, s. 7.—Rules of 22nd November, 1860.—If the Queen's Proctor intervenes by leave of the Court, pleads to the petition, and the petitioner replies, whereby issues are raised on the record, the Court will not generally allow such issues to be decided by affidavits; but if the Queen's Proctor, under the first branch of sect. 7 of 23 & 24 Vict. c. 144, as one of the public, enters an appearance and shows cause against a decree nisi being made absolute, he may proceed to file affidavits under rule 18, and on those and counter-affidavits, if filed, the question raised may be argued under the direction of the Judge Ordinary.

In this case the husband petitioned for a decree of dissolution; no appearance was entered by the respondent or co-respondent; and, on proof of the allegations in the petition, a decree nisi was pronounced on the 31st of May, 1861.

On the 12th of November, 1861, the Court was moved to make the decree absolute, but the application was not granted; and, by direction of the Judge Ordinary, the papers in the case were sent to her Majesty's Proctor, who thereupon intervened and pleaded. The petitioner replied to the allegations in the Queen's Proctor's plea, and issue was joined on them. The Queen's Proctor then filed affidavits in support of his plea, and the petitioner filed affidavits in answer.

**[552]** Dr. Spinks (for the Queen's Proctor) moved that the cause might be heard on the affidavits on Tuesday next.

*The Judge Ordinary*: But there is an issue joined upon the plea. There has been some misapprehension with regard to the practice in cases where the Queen's Proctor intervenes. There are two courses open to the Queen's Proctor. He can either intervene by leave of the Court and plead, or he can intervene as one of the public, under the first branch of the section, and show cause on affidavit under the 18th rule. Here he has intervened and pleaded under the 16th rule, and filed affidavits to show cause under the 18th rule.

Dr. Spinks stated that the same course has been taken in this as in the previous cases. In *Rogers* v. *Rogers*, where the Queen's Proctor intervened after the decree nisi, issue was joined upon his allegations, and the case was tried by affidavits.

*The Judge Ordinary*: There must have been some misapprehension on the subject. If the Queen's Proctor intervenes under the latter part of the section, he must then, under the 16th rule, take a part in the pleadings; but if he shews cause as one of the public, he is then "to file affidavits setting forth the facts on which he relies," and "the party in the cause in whose favour the decree nisi for a dissolution of marriage has been pronounced may within eight days after delivery of the affidavits, or within such further time as may be allowed by the Court, file affidavits in answer, and shall forthwith give notice of his having done so." Then, by the next rule, "the questions raised on such affidavits shall be argued at such time as the Judge Ordinary may appoint, and if he thinks fit to direct any controverted questions of fact to be tried by a jury, the same shall be settled and tried in the same manner and subject to the same rules as any other issue **[553]** tried in this Court." Now that the papers are before me, I cannot shut my eyes to the fact that there is an issue joined on the record. I therefore reject the motion to hear the questions raised argued on the affidavits on Tuesday next.

FORSTER *v.* FORSTER AND THOMAS. February 25 and March 4, 1862.—Alimony.—Policy of Insurance.—The general rule in estimating the husband's income for the purposes of alimony is, that he is not entitled to deduct sums paid by way of premium to maintain a policy of insurance on his life; but where the policy was under settlement for the benefit of his wife and children after his death, and the premium was deducted and paid over to the office by his employers, the Court allowed him to deduct the amount of such premium in estimating his income.

[S. C. 31 L. J. (Mat.) 84; 6 L. T. 693; 10 W. R. 810.]

This was a question arising on a wife's petition for alimony pendente lite, in a suit by a husband for dissolution on the ground of adultery.

The husband, in his answer to the petition for alimony, alleged that in the year 1857 his employers agreed to increase his annual salary, which was then £400, by the sum of £300, upon condition that he would insure his life for a specified sum for the benefit of his wife and children; that he did insure his life for that sum, and

that, in pursuance of the agreement with his employers, he had made a settlement of the insurance for the benefit of his wife and children after his death, and his employers had since deducted and continued to deduct £165, the amount of the premium, from his annual salary, and to pay it over to the insurance office.

Mr. D. D. Keane for the wife: The husband is not entitled to deduct the £165 a year. *Harris* v. *Harris*, 1 Hagg. 351, is conclusive that it was the invariable rule of the Eccle-**[554]**-siastical Courts not to allow deductions for premiums upon life insurances.

Mr. R. Searle for the husband: The general rule laid down in *Harris* v. *Harris* is not applicable to this case. The reasoning there was, that the policy at any time was capable of being converted into money; but this policy is not under the husband's control. He can derive no benefit from it, and he is obliged to pay the premiums.

March 4.—*The Judge Ordinary*: The husband is, I think, in this case, entitled to deduct the annual premiums from his income, and I allot alimony subject to such deduction.

(Before the *Judge Ordinary* and a Common Jury.)

GRAY v. GRAY (the Queen's Proctor intervening). March 13, 1862.—Decree nisi.—Queen's Proctor's intervention.—Collusion.—Evidence.—On the trial of an issue of collusion, arising on the Queen's Proctor's intervention, in a petition to which the husband had not appeared:—Held, that the statements made by the husband, not in the presence of the wife, were inadmissible as evidence on the issue before the jury:—Held, that the petitioner, the wife, could not be called as a witness, either under 14 & 15 Vict. c. 99, or 16 & 17 Vict. c. 83.—Quære, Whether the Court has power to give costs against the Crown on a verdict adverse to the Queen's Proctor being found?

This was originally a petition for dissolution of marriage, at the suit of the wife, by reason of the husband's bigamy and adultery. The respondent never appeared to the petition, which was heard on oral evidence before the Judge Ordinary, on the 17th of January, 1861, when a decree nisi for dissolution was made, and the respondent condemned in costs. On the 20th of March the Queen's Proctor obtained leave to inter-**[555]**-vene, and on the 27th of March filed the following pleas:—1. That the said petitioner has been acting in collusion with the respondent for the purpose of obtaining a divorce, contrary to the justice of the case. 2. That divers material facts respecting the conduct of the said petitioner and the said respondent have not been brought before the Court. 3. That, at the time when the said petitioner presented her petition for dissolution of her marriage, she was, and had been for some years previously, habitually committing adultery with Francis Kendall, an omnibus proprietor.

The fourth, fifth, sixth, and seventh paragraphs specified places and times of adulterous cohabitation; and concluded with a prayer that the Court will be pleased to refuse to make the said decree nisi absolute, and, further, to dismiss the petition of the said Mary Louisa Gray, and to condemn her and the said Richard Thomas Clement Gray, or such of them as it shall see fit, in the costs arising from the Queen's Proctor's intervention.

On the first and second paragraphs the following particulars were delivered by the Queen's Proctor to the petitioner's solicitor.

The following is the nature of the collusion set forth in the Queen's Proctor's plea in the above suit:—That the said Richard Thomas Clement Gray, the respondent, was aware that the petitioner was living in a state of adultery as charged in the Queen's Proctor's plea, and, nevertheless, collusively agreed with the petitioner not to defend the suit, in order that she might obtain a divorce.

And the following is the nature of the material facts referred to in the second paragraph of the Queen's Proctor's plea:—That the petitioner had been for many years, and still was, living in a state of adultery, as charged in the Queen's Proctor's plea; and was, at the time of filing her petition, cohabiting with Thomas Kendall, at 14 Tyssen Terrace, Dalston Lane, Hackney; and, in order to conceal that fact, and to **[556]** deceive the Court, caused herself, or allowed herself, to be falsely described in her petition, and the affidavit accompanying the same, as resident at No. 7 Hardinge Street, Wellington Street, Upper Islington.

The petitioner's answer to these pleas denied that she had been acting in collusion with the respondent for the purpose of obtaining a divorce contrary to the justice

of the case; admitted that she had committed adultery with Kendall, as charged; denied that any other material facts had been withheld from the Court; alleged that she had no separate property, and submitted that she ought not to be condemned in the costs arising from the intervention of the Queen's Proctor, nor in any part thereof, as prayed by the Queen's Proctor.

The issue of collusion now came for trial before the Judge Ordinary and a common jury.

Dr. Wambey, with him Mr. M. Chambers, Q.C., opened the pleadings.

Sir F. Slade, Q.C. (Dr. Spinks with him) stated the case on behalf of the Queen's Proctor.—This was originally the wife's petition for dissolution of marriage, by reason of her husband's bigamy. The husband knew that the wife had been living in adultery, but he did not answer the petition, or even appear to the citation. In 1850 Mr. Gray brought an action for crim. con. against Kendall, which was settled. He afterwards married a Miss Addams.

Witnesses were then called on behalf of the Queen's Proctor.

Beesant, clerk to Mr. Eyre, 32 Poultry: Know Ritchard Thomas Clement Gray. In 1850 he gave me instructions to issue a writ against Kendall for crim. con. On the 9th of December writ issued. After that, Gray told me he had procured the writ to be served.

**[557]** Mary Ann Addams deposed: I know Gray, the respondent in this petition. Became acquainted at Gravesend in 1852. He said he was a single man, paid me courtship, and we were married in 1853 at the registrar's office at Mile End. About six months after Mrs. Gray called, said Gray was her husband, and that she had had children by him.

By the Court: You have to prove that the parties to this record are acting in concert in respect of this petition. What was said seven years ago to or by Gray does not seem to have much bearing on that.

Evidence continued: I am not now living with Gray: I have left him three years. Whilst living with him I saw Mrs. Gray several times at Wapping and Moulsey; the first time at Prescot Street. Mrs. Gray saw Mr. Gray at his house. She never had any meal with him. She once lunched with me, but not with Gray. I have gone out of the room and left them together. We were at Wapping in 1856 for nine or ten months. Mr. Gray has said something to me about a divorce.

Mr. M. Chambers objected that what Mr. Gray said, not being in the petitioner's presence, could be no evidence against her.

By the Court: So far as affects Gray, what he says would be admissible; but the issue which the jury are trying is not joined with him, but only with Mrs. Gray; and what he has said is not good against her.

Sir F. Slade: It may affect the question of costs.

By the Court: That may be so hereafter; but there is no issue before the jury which makes the evidence admissible now.

**[558]** Evidence continued: Mrs. Gray once told me she intended to get a divorce; that was just after she found out his marriage with me.

Stephen Nokes deposed: I am a bottle and wine-merchant. I know Gray; I knew him under the name of Addams, at Wapping. Was employed by him in 1855, and till April, 1856, at Nelson Walk, and afterwards in Devonshire Square in September, 1860. In December he closed up. He was a wine and bottled-stout merchant. Know Mrs. Gray, the petitioner. Have seen her at Mr. Gray's, at Wapping, and in Devonshire Square. She drove down in September and December, 1860, with her son. I used to be in the cellar. She may have stayed two hours.

On cross-examination: The boy was about sixteen, and going to sea. She came about his father getting an outfit.

Mrs. Gray, the petitioner, was then called by Sir F. Slade, and the admissibility of her evidence objected to by Mr. M. Chambers: (16 & 17 Vict. c. 83, s. 3) "No husband shall be compellable to disclose any communication made to him by his wife during marriage, and no wife shall be compellable to disclose any communication made to her by her husband during marriage." This is also a suit instituted by reason of adultery, and petitioner is within the exception of the second section of the Act just cited, and of the exception of the 4th section of 14 & 15 Vict. c. 99.

By the Court: I think that is so. Though the immediate issue before the jury is collusion in the prosecution of the suit, the petition is a proceeding instituted in

consequence of adultery, in which the Queen's Proctor has intervened; and the petitioner, whether as a party to the suit, or as the wife of a party to the suit, is within the exceptions of the section referred to.

[559] Sir F. Slade then said he could carry the case no further on behalf of the Queen's Proctor.

*The Judge Ordinary*, to the Jury: You will probably think that there is no evidence before you on which you can find that the petitioner has been acting in collusion with the respondent for the purpose of obtaining a divorce. When the Court was established, it was quite possible that a dissolution of the marriage might be obtained where each party knew the other to be quite as guilty. One came and asked for a divorce, and the other spouse simply took no part in the proceedings. The object of the law, however, was not to give relief to the guilty; and the Amendment Act of 1860 was passed, enabling the Queen's Proctor to intervene and bring matters before the Court, which, before that Act, third parties had no power to do.

Again, there are cases in which the husband and wife may agree together to present a case before the Court in order to obtain the divorce which they both desire, which is the charge brought against the petitioner in the present instance by the Queen's Proctor. She denies, however, any concert or agreement with her husband about the matter; and I apprehend that the Queen's Proctor has failed to produce any evidence which can establish that there was such concert or agreement.

The jury found a verdict for the petitioner on the issue joined.

Mr. M. Chambers asked for costs.

By the Court: No; the whole case was one in which the Queen's Proctor's intervention was most properly exercised. The petitioner, though herself living in adultery, would have obtained a dissolution of the marriage if the Queen's Proctor had not intervened. Secondly, I much doubt whether I have power to give costs against the Crown.

**[560]** GETHIN *v.* GETHIN (the Queen's Proctor intervening). January 31, 1862.—Verdict of Jury.—Motion for New Trial.—Affidavits.—Practice.—On the wife's petition for dissolution of marriage, to which the husband had not answered, the Queen's Proctor intervened, and alleged the adultery of the petitioner and collusion. Issues taken on these points were found in favour of the petitioner by verdict of a jury. On motion for rule nisi for a new trial, the Court read affidavits of the Queen's Proctor, and of witnesses who had been called by him at the trial; the affidavits of the latter were in substance that they had told the truth, but not the whole of what they knew, and it was argued that if the whole of what the witnesses knew had been laid before the jury, they would have found a different verdict.—The Court refused, on such affidavits, to make a rule nisi.

[S. C. 31 L. J. (Mat.) 57; 5 L. T. 721; 10 W. R. 266.]

This was originally a suit by Lady Gethin for a dissolution of her marriage with Sir Richard Gethin. The respondent filed no answer, but while the suit was pending the Queen's Proctor intervened, and alleged that Lady Gethin had been guilty of adultery, and that she and Sir Richard had colluded for the purpose of obtaining a divorce contrary to the justice of the case. These allegations were denied by the petitioner, and the issues were tried before his Lordship and a special jury on the 19th, 20th, and 21st December last. The jury found both issues in favour of the petitioner.

The Attorney-General (with whom was Sir F. Slade, Q.C.) moved for a rule nisi for a new trial on behalf of the Queen's Proctor, upon the grounds, first, that the verdict upon the issue of adultery was against evidence; and secondly, that since the trial some of the witnesses who had been examined in support of the Queen's Proctor's allegations had disclosed some material facts which they had before withheld, and which had not therefore been laid before the jury. On the first point the Attorney-General contended that the conclusion **[561]** that the adultery had been committed was an irresistible inference from the admitted facts of the case. Lady Gethin, while she was living apart from her husband, daily visited Mr. Ellis, a widower, at his lodging in the house of the Misses Denny, at Notting Hill, and remained with him for several hours, generally until late at night. Their opportunities of meeting were ample. Their meetings were not accidental, but contrived, and they were upon terms

of the greatest familiarity. It was hardly possible that stronger evidence of adultery should ever be given, short of proving that the parties were openly living together as man and wife. He next proceeded to the second ground upon which he applied for the rule, and which he admitted presented some difficulties.

*The Judge Ordinary* asked whether there was any authority in the reports of the Common Law Courts for the reception of affidavits under circumstances similar to the present.

The Attorney-General referred to the case of *Edgar* v. *Knapp*, 6 Scott's N. R. 707. He next read the affidavit of the Queen's Proctor, to the effect that he had used every means in his power to obtain from the witnesses all the information in their possession; that he had great difficulty in obtaining any evidence at all from the Misses Denny, and that they had refused to make any statement to him until he had served them with a subpœna; that after the Misses Denny had heard the evidence of Mr. Ellis, and of the brother of the petitioner, in support of the petitioner's denial of the allegation of adultery, they made certain statements to his clerk which induced him to go on the day after the trial to their house, and that he there had an interview with them, when they stated to him several material facts which they had before withheld. The Misses Denny also made an affidavit, stating that they had often heard the bed creak when Lady Gethin and Mr. Ellis were in Mr. Ellis's bedroom together, [562] and had found the bed tumbled after they had left the room. They added that they were in ill-health, and were very unwilling to be examined as witnesses in such a case, and had deliberately and advisedly avoided going into these indelicate details; that they had answered every question put to them according to the truth, but they had avoided going into matters as to which they had not been questioned; and that after the evidence of Mr. Ellis, they remarked to the Queen's Proctor's clerk that his statements were wholly untrue, because they had often heard the bed creak and seen it tumbled. Caroline Wilson, the servant of the Misses Denny, also swore that she often heard the bed creak when Mr. Ellis and Lady Gethin were in the bedroom together, and had seen it tumbled after they came out, but she had not made this statement in the first instance to the Queen's Proctor, because she thought that, as her mistresses had confined themselves to answering the questions put to them, without volunteering any information, she was bound to take the same course. The Attorney-General submitted that these facts ought to have been laid before the jury; and, as the conduct of the witnesses had made it impossible to lay them before the jury at the last trial, there ought to be another trial before a second jury, in order that the whole truth might be elicited and justice done.

*The Judge Ordinary*: This is certainly an important application; but, having had notice that it was to be made, I have had an opportunity of examining and considering the affidavits now presented to the Court, and I think the course I ought to take is perfectly plain, and that I must refuse to grant a rule.

This is not a suit between party and party, it is not a question raised between Sir R. and Lady Gethin; but it is a suit instituted by the Queen's Proctor as guardian of the public morals, for the purpose of preventing a misapplication [563] of the statute constituting this Court. The Queen's Proctor has done his duty, and nothing more than his duty, in bringing this case before the Court. He has to take care that parties do not abuse the privilege given them by that statute. But the charge he has made against the petitioner is a quasi-criminal one, that of having colluded with the respondent and endeavoured to get a divorce by a false case.

The case is to be looked at in two aspects:—First, with reference to the verdict of the jury. It is not suggested that there was anything erroneous on the part of the Court in presenting the facts of the case to the jury. The rules of law applicable to evidence of adultery were stated by me, not in my own language, but in that of Lord Stowell. In considering the verdict of the jury, I am not bound to say that I should have found the same verdict. I cannot tell what verdict I should have found, for I had not the responsibility cast upon me of dealing with the evidence; but the parties had the benefit of a special jury of gentlemen of education, and there is no reason to suppose that they acted under the influence of prejudice, or of passion, or of mistake. It is not suggested that they believed anything sworn to which they ought not to have believed, or that they wilfully rejected the testimony of any witness without any ground for so doing. It is simply suggested that they did not draw that inference which the Attorney-General thinks they ought to have drawn from the

facts before them. No direct evidence of adultery was given, but the jury were asked to infer it from the circumstances proved in evidence. The jury appear by their verdict to have said, "We are not satisfied with the evidence; we are left in such doubt that we feel we cannot safely draw the inference suggested, and therefore we find that the charge is not proved." In substance the verdict cannot be put any higher than that. It is manifest that the opinions of mankind may vary very much as to the circumstances from which the inference of adultery is to be drawn. The opinions of the jury may depend upon [564] the sort of society in which they have lived, whether they were accustomed to associate with people who were strict and careful, or with people who were free and easy, and somewhat careless in their conduct. One set of men may think, that if a married woman indulges in any improper familiarity with a man, she would be likely to commit adultery; whilst another set may think that a great degree of license may exist, and yet that a woman would stop short of committing the great offence. Why should I say that this jury were wrong in the inference they drew, rather than that another jury would have been wrong if they had drawn a harsher inference? Even if I were to say now that I should not have found the same verdict, could I assume that I should have been right, and that the jury were wrong? I therefore think I ought not to say that the verdict was wrong; and, unless I could go as far as that, I ought not to disturb it. Be it remembered that the jury had the positive evidence of Mr. Ellis to get over, and it was not a pleasant thing to say that they believed Mr. Ellis to be perjured. True, if there had been direct evidence on the other side, and it had been necessary for them to say, either that Mr. Ellis, on the one side, or that A. or B. on the other side, were perjured, they could not have avoided taking upon themselves the responsibility; but in the absence of affirmative evidence on the other side, they were justified in saying that they would not disbelieve the positive evidence. I cannot tell by what reasoning the jury arrived at their verdict. They may have said, "The lady has been very imprudent, she has indulged in improper familiarities, but we are not satisfied that she is therefore an adulteress; we should have been very much dissatisfied if any connection of our own had gone so far, but we are not satisfied that she is an adulteress, and, being in doubt, we are bound, according to legal principle, to give her the benefit of the doubt, the person alleging adultery being bound affirmatively to prove it." They may have argued that if, during the long period of time [565] over which the allegation of adultery extended, these ladies discovered no more than they said they had discovered, no adultery could have taken place. They were vigilant; the servant proved that there was a good deal of listening at doors and prying at keyholes going on, and the jury may have argued that when they had heard their evidence, they had heard the worst that could be said against these persons. For these reasons, taking the case as it stood when it went to the jury, I think I should be assuming far too much if I were to say that the verdict of the jury was wrong.

Then comes the question as to the affidavits. The only case which the Attorney-General has been able to find—and, no doubt, if there had been another case he would have found it—is one which differed very much from the present. It appeared that in that case there was some misapprehension upon the part of counsel as to what could be proved by a gentleman who had not previously been examined by the attorney, and who, when he came out of the witness-box, said, "Oh, I could have proved a great deal more than that if I had been asked." How different is this case! Two ladies—very respectable ladies in their way, for aught I know,—come here to say, "We wilfully abstained from giving evidence; at least, we gave evidence of a part only, not of all we could prove." They do not present themselves in a very favourable aspect when they say that they deceived the gentleman who called them as witnesses, and that they gave their evidence in such a manner that they wilfully deceived the Court and the jury. Is it likely that another jury would be disposed to act upon their evidence under these circumstances?

Again, they were called to prove adultery, and they proved circumstances from which they wished the inference to be drawn that adultery had been committed. Counsel were, or ought to have been instructed that these ladies were unwilling witnesses; that they had at first refused to give their testimony, and that they had at last given it only up to a certain [566] point; and I should imagine that any counsel so instructed would have tested and probed them by further questions as to

whether they had observed or heard anything more than they had stated. But not a word of that sort was said. One of the ladies said that she had given Mr. Ellis a hint that he had better go away, because the neighbours had noticed his familiarity with Lady Gethin: not that she had noticed it, not that she was satisfied that an improper intercourse was being maintained between them. If she knew for months that such an intercourse was going on, if she was so convinced of it that she sometimes rang the bell in order to disturb them when she thought they were committing an act of adultery, does it redound very much to her credit that she allowed this man to occupy her lodgings for months and months, and never desired to get rid of him or his paramour, until the neighbours noticed their familiarity? Even supposing I were to send the case down again for trial, the great probability is that a jury would reject the evidence of these ladies, not calmly and deliberately, but somewhat passionately.

As to Caroline Wilson, she also appears now to carry her evidence a great deal further than she did at first. The ladies did not like to mention these indelicate facts, but she had no scruple of that sort. Why should she hesitate to tell about the bed being tumbled? She says, that when she saw the course taken by her former mistresses, she thought she had better take the same course, and she therefore confined herself to giving categorical answers to the questions put to her. There is nothing to warrant me in submitting the parties to the ordeal of another trial under these circumstances.

The Queen's Proctor has only done his duty in presenting this case to the jury, because there was abundance of suspicion to call for inquiry; but I cannot undertake to say that the jury did wrong, and I ought not therefore to disturb the verdict as given contrary to the evidence, or upon these affidavits.

Rule refused.

**[567]** CARTLIDGE *v.* CARTLIDGE. April 16, 1862.—Custody of Infant pending Suit. —Right of Father.—20 & 21 Vict. c. 85, s. 35.—The father has the Common Law right to the custody of an infant, however young; and, in the case of an infant of seven months, the Court held that the mother must show more than the mere natural desire of a mother, to induce the Court to exercise its discretion under the Divorce Act in her favour, and, as it did not appear that either mother or child were suffering by the separation, the Court refused to make any order.

[S. C. 31 L. J. (Mat.) 85; 6 L. T. 397; 8 Jur. (N. S.) 493; 10 W. R. 672. Distinguished, *Barnes* v. *Barnes*, 1867, L. R. 1 P. & D. 463. Referred to *In re Andrews*, 1873, L. R. 8 Q. B. 159.]

This was an application for the custody of an infant, pending suit, on behalf of the wife, who had petitioned for judicial separation by reason of the alleged cruelty of the husband. The marriage took place on the 2nd of January, 1861, and the child was born on the 3rd of October. The petitioner had left her husband's house and the child there on the 29th of January, 1862.

Dr. Spinks now applied for the custody of the child to be given to the mother, pending suit. The 35th section of the Divorce Act, 1857, gives the Court a discretionary power in respect of interim orders as to the custody of children. The 2 & 3 Vict. c. 34 (Talfourd's Act) would appear a proper guide for the Court in such a case; and, to a child seven months old, the mother's right seems paramount. The father intends to sell off his goods and go abroad.

Mr. Aspland, contrà: The father is, at Common Law, entitled to the custody of a child, however young (*Re Alicia Race*, 7 Ell. & B. 186). The Court cannot now go into the merits of the parties; there is no suggestion that the child is not properly cared for; in fact, the affidavits show that the child has thriven better since the mother left.

**[568]** *The Judge Ordinary*: There are certain principles which I must keep in mind: First, that the father has the Common Law right to the custody of the child. Secondly, I quite agree with Dr. Spinks, that the 35th section of the Act gives the Court a discretionary power pending suit; but I think I ought to exercise that power with reference to the primâ facie legal right of the father, and the petitioner must establish a case beyond the mere natural desire of a mother to have the custody of her infant child. On the whole of these affidavits it is quite clear to my mind, that the child is healthy, and at least as thriving as when the mother was with it. There is no proof that the mother's health is injured, or that she is capable of suckling the

child. It being unnecessary then, on account of either the mother or the child, I think I ought not to remove it; but, inasmuch as it is intimated that the husband may sell off and go out of the jurisdiction, I reject the motion only on condition of an undertaking being given by the husband, that he will not move the child from where it now is without the sanction of the Court; and the mother ought to have reasonable access to it.

(Motion to set aside Demurrer.)

LEETE *v.* LEETE. May 13 and 20, 1862.—Wife's Petition on ground of Cruelty.—Demurrer. Motion to set aside.—Pleading.—Practice.—It is not necessary that every paragraph in a petition by reason of cruelty should allege a fact or facts on which, if proved, the Court could found a sentence. Some allegations short of this are admissible, as showing the habits and animus of the party charged.—Allegations of actual violence, however general as to time and place, can only be met by an application on summons for particulars.—Semble, a party is not at liberty to traverse and demur at the same time, without leave of the Court.

[S. C. 31 L. J. (Mat.) 121; 6 L. T. 507.]

**[569]** This was a question arising on the pleadings in the wife's petition for judicial separation by reason of cruelty.

The third paragraph of the petition was in general terms, viz.:—"That since your petitioner's said marriage, the said W. S. L. has, on divers occasions, treated her with cruelty.

"4. That on an occasion, happening in the month of August, 1853, her said husband threw a silver spoon at her with great violence, making use of a foul oath at the same time.

"6. That on an occasion, happening in or about the month of December, 1855, whilst sitting in the room just after dinner, and without any provocation on her part, the said W. S. L. threw a walnut at her head with great violence.

"8. That the said W. S. L. was continually in the habit of using insulting language to the petitioner, and taunting and abusing her in the presence of the governess and the servants.

"9. That your petitioner's said husband was in the habit of returning home at all hours of the night, and after abusing the petitioner in very bad language, would beat, kick, and strike the petitioner, and has frequently severely bruised and hurt your petitioner on various parts of her person, and has ejected her from the bedroom; but that your petitioner is unable to set forth the particular occasions when this occurred."

The tenth, eleventh, thirteenth, fourteenth, and fifteenth paragraphs, specified acts of violence during the year 1861.

To the petition the respondent filed an answer—first, denying the truth of the allegations in the paragraphs of the petition from the third to the sixteenth inclusive; secondly, demurring to the fourth, sixth, and eighth paragraphs of the answer as bad in substance, on the ground that none of the matters therein alleged would be any warrant for the relief prayed; thirdly, demurring to the ninth paragraph, on the ground that **[570]** the respondent was not legally bound to answer charges of such a character, in respect of which the petitioner declares herself unable to specify any particular occasions.

The answer alleged, fourthly, that the petitioner, since the summer of 1857, had given way to habits of intoxication, and had been frequently intoxicated; fifthly, that if on any of the occasions in the tenth, eleventh, thirteenth, fourteenth, and fifteenth paragraphs of the petition specified, the respondent used any force or personal violence towards the petitioner, such force or personal violence was rendered necessary by the violent and outrageous conduct of the petitioner while intoxicated. Upon this, the petitioner's solicitor gave notice of motion to direct the answer to be amended by striking out the second, third, and fourth paragraphs thereof.

Dr. Spinks, for the petitioner, moved the Court accordingly.

*The Judge Ordinary*: Your more strictly formal motion would have been to set aside the demurrers as frivolous; however, in substance, I think you have done so.

Dr. Swabey in support of the demurrers: In a petition for cruelty, every distinct substantive allegation of violence should be such as, if proved, Court could found a sentence upon. Here the fourth paragraph charges that, in 1853, a silver spoon was thrown with great violence at the petitioner, and there it ends. So in the fifth,

that in December, 1855, a walnut was thrown at her with great violence. It is impossible to say that a decree of the Court could be founded on such charges, if proved: they rather tend to throw an air of ridicule over the whole matter; as to which, and the impropriety of admitting such charges, see Lord Stowell's remarks in *Evans* v. *Evans*, 1 Consist. 69. As to the eighth paragraph, insulting and abusive language, even in the presence of third persons, not alleged to have affected health, does not amount to legal **[571]** cruelty. [By the Court: Has not Lord Brougham stated that mere language might, under certain circumstances, be treated as cruelty, or at least entitle the wife to a judicial separation?[1]] There is no allegation of any injury resulting here. As to the ninth paragraph, the petitioner sets out abundance of violence over a period of nine years (the marriage was in 1853), and says she cannot set forth any particular occasions. As she does specify one act in August, 1853, another in December, 1855, and several on occasions sufficiently pointed out, in 1861, it must be taken that this paragraph is incapable of amendment, and that in its present shape the respondent is not bound to answer it, or the petitioner to give evidence on it. As to the objection to the fourth paragraph of the answer, it was not intended to raise an issue of the petitioner's drunken habits, except in connection with the averments in the fifth paragraph; but in that connection it must in some shape be admissible.

*The Judge Ordinary*: As to the charge of intoxication against the petitioner, the form of pleading may be set right by adding to the fifth paragraph, "as in the last preceding paragraph alleged"; there will then be no doubt of the intention of the general charge in the fourth paragraph. With respect to the demurrers, I have a strong impression at present that they cannot be sustained, but I will take time to consider. Cur. adv. vult.

May 20.—*The Judge Ordinary*: This is a case in which I was asked to strike out two paragraphs of an answer to the wife's petition for cruelty as frivolous; the first was a demurrer to the fourth, sixth, and eighth paragraphs of the petition, on the ground that the matters therein alleged, were not any warrant for the relief prayed. I find also, which escaped my notice at the time of the argument, that in the first paragraph of the answer **[572]** the party has traversed the averments of the paragraphs demurred to; that was a work of supererogation if they were not to be taken into account. The demurrer, therefore, cannot be allowed.

But on principle also, I am of opinion that this demurrer cannot be allowed. It is very true that the acts alleged might or might not turn out to be sufficient to establish the charge of cruelty. The paragraphs objected to contain charges of throwing a silver spoon and throwing a walnut with great violence. Now, in the first place, I am not aware that it is necessary that each paragraph should in itself allege an independent act of cruelty upon which the Court could found a sentence. Secondly, before you can succeed on demurrer, it must be apparent on the face of the allegation that it could not amount to an act of cruelty, whatever might be the evidence of the transaction and its circumstances. The only mode of assailing these allegations would be by special demurrer; and I do not intend to sanction any proceedings analogous to the old Common Law special demurrer. I cannot say that a silver spoon, or even a walnut, might not be thrown with such violence as to injure a woman—striking her, for example, on the face. Short of this, it may serve to shew the temper and habits of the man charged with cruelty; so it is often stated in a distinct paragraph that foul oaths and abusive language were used, though it is true that hard words break no bones. The ninth paragraph is very general; but if the husband felt that he was at any disadvantage by reason of the generality, the proper remedy was to have applied on summons in chambers for particulars.

**[573]** JEWELL *v.* JEWELL. May 15, 1862.—Petition on ground of Cruelty.—Pleading.—Practice.—Evidence to prove a species of cruelty not pleaded in the petition is not admissible; though evidence of violent demeanour and language not pleaded, but leading up to and making probable acts of violence pleaded, may be admissible.

[S. C. 6 L. T. 369; 10 W. R. 672.]

This was the wife's petition for dissolution by reason of adultery and cruelty.

---

[1] Per Lord Brougham, in *Paterson* v. *Russell*, 7 Bell App. Cas.

The petitioner's case was conducted by Dr. Spinks, who, in examining the petitioner's brother, elicited some statement as to the mark of a bite on the petitioner's hand.

Mr. S. Harding Giffard, for the respondent, objected to this evidence, that no charge of violence answering to that description was laid in the petition.

Dr. Spinks submitted that he was entitled to give evidence on matters not specifically pleaded, as they tend to shew the probability of the charges specified and proved; that even under the general charge of cruelty such evidence would be admissible—cruelty, generally speaking, being an aggregate of particular facts.

*The Judge Ordinary*: I think I ought not to admit this evidence. Evidence of violent demeanour and language leading up to and making probable acts of violence charged may be admissible, though not specifically pleaded; but, as to actual cruelty, it is on the aggregate secundum allegata et probata that a petitioner is entitled to the relief prayed; as to this, I think you are limited to the occasions and matters specified in the petition.

**[574]** HUNT *v.* HUNT AND DUKE. May 27, 1862.—Answer of Co-respondent.—Pleading.—Adultery.—Practice.—Where the co-respondent charged the petitioner with having committed adultery with three females, named, without time or place, in one and the same paragraph of the answer, the Court refused to let the petition be amended by alleging the adultery with each of the three females in three distinct paragraphs, with time and place, on the ground that the inconvenience arising from the mode of pleading might be corrected by applying for particulars.

[S. C. 31 L. J. (Mat.) 163; 6 L. T. 727.]

A petition had been filed in this case by the husband, charging his wife with adultery with the co-respondent.

The co-respondent had filed an answer, denying the adultery, and recriminating adultery against the petitioner.

Paragraph five of the answer (to which objection was now taken) was as follows:—"5. That in and prior to the month of December, 1861, the petitioner committed adultery with three females of the names of Reed, Gates, and Lizzie."

Dr. Tristram now moved the Court to direct the answer to be amended, by alleging the charges of adultery with each of the three females in three separate paragraphs, with the dates and places of the adultery charged. The co-respondent here raises three distinct issues with three different females in one and the same paragraph. This is contrary to the authorized and usual mode of pleading. The practice has been, where adultery is alleged with several persons whose names are known, to make a distinct charge of adultery with each person in a different paragraph.

*The Judge Ordinary*: It would have been more correct to have pleaded the adultery in separate paragraphs; but I **[575]** think it is unnecessary to direct the answer to be amended on this ground. All the information you require can be obtained on a summons in chambers for particulars.

Mr. R. Searle, for the co-respondent, asked for the costs of the motion.

*The Judge Ordinary*: No; I will not give you the costs of the motion. The mode of pleading the adultery is not correct.

LAWRENCE *v.* LAWRENCE. May 10 and June 11, 1862.—Petition for Dissolution.—Desertion.—Conduct of Husband—Letters of Husband.—B. and C. married in 1852, and cohabited in England till 1856, when—but under what circumstances did not fully appear—B., the husband, went to China, holding an office in the Commissariat. C. and the only child of the marriage remained in England. By letters written from B. to C. between February and December, 1859, it appeared that B. had led a most extravagant life in China, and had been found guilty by a court-martial of embezzling moneys; that C. and her family had treated B. liberally in respect of money, and in the course of 1859 provided him with considerable sums, on his representation of amendment, and intention of going to Australia. These letters expressed affection for his wife and child, but no desire to join them, or to be joined by them. B. came through Paris to London, instead of going to Australia, and on the 10th of December, 1859, wrote to his wife saying that he had spent all his money, and incurred divers liabilities by

borrowing and otherwise. He addressed a few lines to her on the 13th of December, which were the last he wrote, but made no attempt to see her. In November, 1859, he made the acquaintance of the woman with whom the adultery was proved, and in a letter to her, dated the 10th of August, 1860, wrote:—"I was forced into a marriage some years ago with one who is very rich, and for whom I had no love. . . . I was miserable in my home, and took a **[576]** staff appointment abroad about three years ago. I have not seen my wife for more than three years."—By her petition, dated the 7th of November, 1861, C. prayed for a dissolution of her marriage by reason of B.'s adultery and desertion; and the Court held that, construing B.'s letters by his acts rather than by their words, his conduct amounted to desertion.

[S. C. 31 L. J. (Mat.) 145; 6 L. T. 550; 8 Jur. (N. S.) 972. Distinguished, *Townsend* v. *Townsend*, 1873, L. R. 3 P. & D. 131.]

This case was unopposed, but seems of consequence in respect of the circumstances that were held to constitute desertion.

The petition alleged as follows:—

"1. That your petitioner, then Augusta Jane Hay, spinster, was, on the 15th day of January, 1852, lawfully married to Edward Daniel Lawrence, at the parish church of St. George, Hanover Square, in the county of Middlesex.

"2. That after her said marriage, your petitioner lived and cohabited with her said husband, at Cambridge, in the county of Cambridge; at Brussels, in the kingdom of Belgium; at Gibraltar, in Spain; and lastly, at Eastwick Park, near Leatherhead, in the county of Surrey; and that your petitioner and her said husband have had issue of their said marriage one daughter, aged eight years.

"3. That on the 5th of November, 1859, the said Edward Daniel Lawrence deserted your petitioner without reasonable excuse, and has ever since lived separate and apart from your petitioner.

"4. That on divers occasions in the months of March and April, 1860, the said Edward Daniel Lawrence committed adultery with a female named Elizabeth, otherwise Eliza Brown, in the Queen's Bench Prison, in the county of Surrey.

"5. That in the month of May, 1860, the said Edward Daniel Lawrence adulterously cohabited with the said Elizabeth, otherwise Eliza Brown, at Westbrook House, Margate, in the county of Kent.

"6. That in and during the months of June and July, **[577]** 1860, the said Edward Daniel Lawrence frequently visited the said Elizabeth, otherwise Eliza Brown, at Hemus Terrace, Chelsea, in the county of Middlesex, and on divers of such occasions committed adultery with the said Elizabeth, otherwise Eliza Brown."

The petitioner's case was conducted by Dr. Deane, Q.C., Dr. Wambey, and Mr. Browning.

The petitioner was examined on the desertion; but the case as to that chiefly turned on the respondent's letters, which are noticed and partly set out in the judgment. Cur. adv. vult.

June 11.—*The Judge Ordinary*: This was a petition by a wife for dissolution of her marriage by reason of the respondent's adultery and desertion for two years and upwards, without reasonable cause. The respondent did not appear.

At the hearing before me on the 10th of May, the adultery was fully proved, but I reserved for further consideration the sufficiency of the evidence of desertion. The marriage took place in January, 1852. One child (a daughter) was born of the marriage, and the parties lived together in England until 1856, when the respondent went to China, holding an appointment in the Commissariat. No evidence was given of the terms on which the parties had lived together, or of the circumstances which led to his accepting such an appointment, or which caused the petitioner to remain in England, save that which is found in a letter bearing date the 12th August, 1860, addressed by the respondent to Eliza Brown (whom it will be necessary to mention more particularly hereafter). In that letter he says:—"My only motive for concealing from you that I was married was that I knew you would cast me off, as you often said that you would never have anything to do with a married man. Although you cannot bring **[578]** yourself to think so, I have loved you, do love you, with my whole heart and soul. I could not bring myself to tell you, as I knew I should be cast off by you, and that I could not bear. I was forced into a marriage some years ago with one who is very rich, and for whom I had no love; that marriage

has been the curse of my life. I was miserable in my home, and took a staff appointment abroad about three years ago. I have not seen my wife for more than three years."

Taking his own account of his motives for leaving England, and of his feelings towards the petitioner, the Court may safely conclude that he had no wish to return to cohabitation with her; but that letter does not satisfy me that he had, when he left England, formed a resolution to desert her. His subsequent history is also to be collected chiefly from his own letters which were put in evidence. On the 14th of February, 1859, he wrote to his wife thus from Hongkong:—"My dear Augusta,—If you only knew what my feelings are, I am sure you would pity me. I am to be brought to a court-martial in consequence of the bills being dishonoured. I must now tell you all. I have been ashamed to write to you to tell you of my fearful extravagance. I have never been free from debt since I have been here. I have been obliged to send money to Gibraltar, Constantinople, and London. I have been very extravagant; when I first came here I lost a large sum of money at the races; I was obliged to borrow money to pay these debts, at an enormous rate of interest, and then to borrow again to pay the sum off. I have spent a great deal of money at the club, giving dinners, etc. I lost over £300 out of the chest in bank-notes, through carelessness, and I had to borrow this sum to pay it into the chest, so that the head should not know anything about it, or I should then have been brought before a court-martial. This is a very expensive place: the dollar does not go further than a shilling in England; if you draw bills on England, the loss **[579]** is very great. I have drawn bills upon home to the amount of £593. Three bills have already been sent back dishonoured, and I owe £800 more here, making a total of £1400. I know it is useless for me to say I am sorry, for you would not believe me; but if you could read my heart, you would know how truly miserable I am, and for how many long weary months my life has been a burden to me. Oh! dear Augusta, can you do anything to save me? I know I have no right to expect mercy or pity from anyone," etc.

Again, on the 25th of February, he wrote thus:—"My dearest Augusta,— I have enclosed a long letter to Robert, which, of course, you can read, but please forward it to him with as little delay as possible. I have told him everything concerning my debts here. I have implored him to try and save me for the last time; I know I do not deserve to have any mercy. I have cruelly deceived you, my parents, your mother, every one; you have all been too kind, too good to me. My life, ever since I married you, has been one great falsehood. I have never been quite free from debt. I think how happy I might have been with you and my dear child if I had only acted properly towards you both," etc. On the 21st of May, he wrote thus:—"Stanley, 21st May, 1859. My dearest Augusta,—Words cannot express how grateful I felt for your kind and affectionate letter. I expected reproaches, and to be cast off for ever; instead of that, I meet with nothing but love and goodness. If anything can add to the bitter pangs I now suffer, it is the knowledge that I have made such a wicked return for all the great and undeserved kindness I have experienced at the hands of those who love me. I can never, never forgive myself for the past. I have been a very bad husband to you, and made you very wretched; let me entreat you to forgive me," etc.: thus bearing testimony to the continued affection of his wife, but not a word indicating even a wish to return to her. On the **[580]** 9th of August again, from Hongkong, he announced his determination never to return to England:—"As I am not coming to England, and being a person of small consequence, this painful affair will soon be forgotten. People will have other things to think about. To England I can never come again," etc. On the 28th of August, he wrote again from Hongkong, affecting still attachment to his wife and child, but not expressing any desire to return to them or have them with him:—"I will indeed write regularly by every mail, which I see leaves Australia on the 20th of every month. The mail leaves England on the 12th of every month, and takes between fifty and sixty days to reach Australia. I trust, dearest Augusta, that you will write long letters by every mail, and tell me everything about yourself and the darling"; and repeating his determination never to return to England.

It appears that he left Hongkong for Alexandria, pretending that thence he should take his passage to Sydney, and he urged his wife to prevail on her mother to send him £200, which was done; and on the 22nd of October, 1859, he wrote from

Alexandria the following letter:—"My dearest Augusta,—I received your kind letter of the 2nd of October, also the £220; very many thanks for both, it is the last sum I shall ever call upon you for; if God gives me health, I am determined to earn enough to live upon. It is very good of you to have had dearest Ada's picture taken for me. You had better keep it till I can tell you where to send it to. I have determined on going to Sydney. My eyes are still very bad; I hope to start from this on the 25th. Please direct, Post Office, Sydney. I was much disappointed in not receiving a letter from you according to promise by the Marseilles boat, leaving England on the 10th. I shall feel very lonely and very miserable. Do try and believe, dearest Augusta, that my intentions are good, and that in a new country I will indeed lead a new life. Pray thank your **[581]** mother and Robert for their very kind letters; I cannot answer them now, but will on arriving in Sydney. May God bless and preserve you and darling Ada. Ever your affectionate husband," etc.

The next information which the petitioner received of his movements, was by a letter dated London, the 10th of December, in the following terms:—"For days and days I have been thinking to bring myself to write to you. I must now, though I have not the least hope that you will take the least notice of my communication. At the last moment, though God knows with the best intentions, I could not bring myself to leave for Australia. I went to Paris; lost a large sum of money at cards, hoping to increase what I had. I have no excuse to make, save that remorse and misery made me reckless and mad, and made me do things for which I scorn and loathe myself. I owe altogether, with old and new debts, about £550. I have behaved shamefully. I have made use of your name in one instance, and in one your mother's, to obtain articles which I sold for a mere trifle. When I arrived in London, now nearly a month ago, I was obliged to pay back a Russian gentleman, with whom I travelled from Venice, what he lent me in Paris, to enable me to pay my hotel bill and reach England. When I write this I have just enough to pay my railway fare to where I am going. I do not ask you for money for myself, as I must take the consequences of my own wickedness; but I implore you to pay those whom I have deceived, and who have lent me money. One is a naval officer I knew well in China, Captain E. Maddan, R.N., Thursland Cottage, Villiers Road, Southsea. He most kindly lent me £17, much to his own inconvenience. I gave him a bill, which will be presented at Hoare's on Monday. For God's sake send him the money. Say nothing about me. Oh, spare me, for the sake of yourself and others. I owe a bill at Fenton's Hotel, St. James Street, since the 29th November. I have left **[582]** some things in my room there; they think I have gone down to Portsmouth. I said I should return to-day, Saturday. Hallstaff has lent me £33, 10s., for which he has a bill, which will be presented on Monday at Hoare's. The head waiter at the New Hummums Hotel (Robert) has lent me £5, for which he has an I O U. Let me implore you, if possible, to pay them. I have deceived them. They lent me the money from the kindest motives. Do not blame them; let all your anger fall upon me. Do not expose me to them. Let me not be an object of scorn and loathing to them, particularly to Maddan, who has behaved so nobly to me. He has heard a report stating that I left China owing £400 to Baynes. Let me earnestly beg of you to clear me in this respect. State to him what you know to be a fact, that I left China perfectly free from debts. I do not think I can stand this remorse and misery, my life is truly such a burden to me. If you wish to hear anything further of me, will you put an advertisement in the *Times*, headed 'L. D.'? Do not say anything that will make any one know it is for me. I shall know where to direct. Oh, may God forgive me! I feel He never can.—Your truly miserable EDWARD."

The manner in which he had occupied the time between his arrival in England and the date of that letter was proved by other witnesses. Mrs. Macdonald, the mother of Captain Maddan, R.N., whose name appears in respondent's letter of the 10th of December, proved that he stayed at their house for ten or fourteen days; and Eliza Brown proved that, on the 12th of November, she met him at the Crystal Palace, Sydenham, and that she afterwards cohabited with him; and in July, 1860, he took the oath required for obtaining a licence to marry Eliza Brown, but no such marriage was solemnized. The petitioner did not put any advertisement in the paper, as suggested in his letter of the 10th of December. He wrote a few lines to her on the 13th of December, saying that he had not sixpence left, but made no attempt to see her, and never wrote again.

**[583]** The result of the evidence, then, is this. In 1856 the respondent went to China, and says of himself that he had been miserable with his wife, and therefore accepted a foreign appointment; from Hongkong he wrote repeatedly, pretending affection, which, according to his own account, he did not feel; avowing, from time to time, that he was leading a very reckless life, making hypocritical professions of a desire to reform his habits, always pressing for money, but never shewing the slightest inclination to return. The next stage of his career was being brought to a court-martial and dismissed the service, whereupon he avowed a determination not to return to England, but to seek his living and amend his manners in a foreign land, and praying for pecuniary assistance. This having been granted by the petitioner's mother, he abandoned his virtuous projects, visited Paris, there lost at a gaming-table the money that had been so supplied, then came to England, and was there for a month, without communicating with his wife or her friends, and in that time formed an illicit connection with a young woman, for whom he professed the greatest affection, and with whom, it seems, he at one time contemplated committing bigamy. At the expiration of the month, being penniless, he again wrote to his wife, not expressing any desire to see her, and not giving his address, but requesting her to put an advertisement in the newspaper, if she wished to hear further of him.

Construing his letters by his acts rather than by their words, I have come to the conclusion that, probably from the time when he left England—certainly from the time he left Alexandria—he never intended to return to his wife; the professions of attachment in his letters being hypocritical falsehoods, written for the purpose of obtaining money wherewith to pursue his profligate career in a foreign land. He had, therefore, deserted her for more than two years before her petition was filed; and on the ground of his adulterous intercourse with Eliza Brown, coupled with such desertion, I pronounce a decree nisi for the dissolution of his marriage with the petitioner.

**[584]** WADDELL *v.* WADDELL. May 17 and June 3, 1862.—Wife's Petition.—Adultery.—Cruelty.—A wife, married in 1842, discovered in May, 1861, an adulterous intercourse of her husband, left his house, and petitioned for dissolution by reason of adultery and cruelty. It was proved that her husband struck her in the face in 1852; it did not appear that since that he had intentionally struck her; but he had, while drunk, cut her hand, and in 1858 had cut her finger by throwing a jug of water at her. There was also evidence of his having frequently thrown cold water over her, and of several times having spit in her face.—And the Court held she was entitled to a dissolution of the marriage.

[S. C. 31 L. J. (Mat.) 123; 6 L. T. 552; 8 Jur. (N. S.) 623.]

In this case the wife petitioned for a dissolution of her marriage by reason of her husband's adultery and cruelty. The husband did not appear, and the adultery was clearly proved, but the Court took time to consider whether the cruelty was established.

The petitioner's case was conducted by Dr. Deane, Q.C., and Mr. W. Downing Bruce.

The petition alleged the following acts of cruelty:—

"That on divers occasions in the month of June, 1852, the said Henry William Waddell, while living and cohabiting with your petitioner at No. 7 Manor Terrace aforesaid, without provocation, violently assaulted and struck your petitioner on the eyes, causing her nose and mouth to bleed to a serious extent, and the effects of these assaults were visible for two months afterwards on your petitioner's face.

"That, on or about the 2nd day of March, 1851, at No. 7 Manor Terrace aforesaid, the said Henry William Waddell, without any provocation, maliciously cut your petitioner's hand with a knife.

"That, on or about the 5th day of June, 1852, at No. 7, etc., the said Henry William Waddell, without any provocation, threw a glass of hot brandy-and-water at the face of **[585]** your petitioner, which caused her great suffering and inflammation in the eyes.

"That, during the aforesaid cohabitation of your petitioner and the said H. W. Waddell, the said H. W. Waddell committed divers other acts of cruelty towards your petitioner."

The adultery was charged between the 13th day of March, 1859, and the 22nd of March, 1861.

The petitioner left her husband's house in May, 1861, when she had become aware of his adulterous intercourse. The Court took time to consider the sufficiency of the evidence of cruelty, which is stated in the judgment. Cur. adv. vult.

June 3.—*The Judge Ordinary*: This was a petition by a wife for a dissolution of her marriage on the ground of cruelty and adultery. The respondent did not appear.

The petitioner proved that for some time after her marriage, which took place in 1842, her husband behaved kindly to her, but that he afterwards contracted irregular and intemperate habits and then treated her with cruelty, using continually very foul language, and treating her, if not with actual violence, yet with so much indignity as rendered a continuance of cohabitation scarcely bearable. Some acts of violence were stated by the petitioner to have been committed from time to time. In 1852, on some trivial dispute taking place when he was drinking hot brandy-and-water, he threw it in her face and made her eyes smart very much. In the same year, having come home intoxicated at night, he ordered her to clean his boots while he was still lying in bed; she, being irritated, told him to clean them himself, and threw them at him, whereupon he gave her a blow on the face with his hand, which gave her a black eye and cut her lip. In this instance the petitioner was certainly not free from blame, and if the blow had been of a less severe character it might have been treated as a venial offence. The manner in which the peti-[586]-tioner gave her evidence was calculated to raise a suspicion that she spoke under the influence of excited feelings, and might therefore probably indulge in some exaggeration. But her evidence as to the injury sustained was corroborated by a witness named Tucker, who was in the house as a visitor at the time, and the respondent afterwards expressed to him his sorrow that he had been guilty of such an act, and begged him not to make it known to the petitioner's family.

It did not appear that the respondent ever struck her again, but in 1855 he came home tipsy when she was in the act of cutting some bread; he desired her to desist, and because she did not, he pulled the knife out of her hand, and in so doing inflicted a severe cut. The evidence did not cause me to believe that he intended so to wound her, but the act was a very reckless one, and shewed that it was dangerous to be with him when in liquor.

At another time, in 1858, as she was going upstairs, he pulled her back so as to throw her down and injure her ankle; that injury was not of any importance, but the act shews his want of self-control when intoxicated. In the same year he threw a jug full of water at her: it struck her hand, and cut one of her fingers. In addition to the wife's evidence of these specific acts, which was corroborated by servants, she deposed to his having frequently thrown cold water over her, and to his having on many occasions spat in her face, as to which also she was corroborated by a person who had been for some years in her service. Of this act Dr. Lushington, in *Saunders* v. *Saunders*, 1 Rob. 562, said: "So gross a personal insult would be insufferable in the lowest grades of life. How much more criminal, how much more painful to the feelings of the injured wife when such an offence takes place between those who have been accustomed to the decencies of society, and have been educated to entertain a high regard for them." In that I entirely concur, but I think that the dictum of the judge of the Consistory Court, in *Westmeath* v. [587] *Westmeath*, 2 Hagg., supp. 52, is also applicable to the same subject: "A natural test of injuries of this kind is the sense in which they are received. If they are not resented as injuries at the time, a state of things intervenes which either detracts from the weight of the particular evidence when brought forward at a subsequent period, or may introduce quite another view of the relative situation of the parties."

In this case, however, there was nothing to lead me to suppose that the insult to the wife would not be felt as an act of grievous cruelty. I may say in this case, as Dr. Lushington said in *Saunders* v. *Saunders*, that I am not called upon to decide what would be the effect of such an act taken by itself; it suffices to say that, combined with the other acts proved, it would have constituted a sufficient ground for the interference of the Court if the wife had made her complaint at the time. It is true that all these acts were from time to time condoned, but were revived by the adultery committed by the husband from September, 1859, to November, 1861,

which was fully proved, but of which the wife was not cognizant during any part of their cohabitation.

On the two grounds, then, of adultery and cruelty, I feel bound to make a decree nisi with costs.

[588] IN THE GOODS OF THOMAS FAIRWEATHER (deceased). July 1, 1862.—Section 73 of Probate Act.—Creditor.—Secretary of an Association.—The Court will not make a grant of administration under the 73rd section of the Probate Act to a party entitled to a grant in another character.—The Court declined to make a grant de bonis non with the will annexed under the 73rd section to a creditor without citing certain residuary legatees named in the will, who were resident in Australia.—Where an application is made for a grant of administration to the secretary of an association, on the ground that the deceased was indebted to the association, the Court ought to have such information of the constitution of the association as would shew that the secretary can be treated as a creditor.

[S. C. 6 L. T. 788; 10 W. R. 862.]

Thomas Fairweather, late of No. 6 Charlotte Square, Newcastle-upon-Tyne, schoolmaster, died on the 29th of August, 1860, leaving a will, of which he appointed his wife, Jane Fairweather, and Thomas Leslie executors; he bequeathed all his property to his executors, in trust to pay the annual income thereof to his wife for her life, and after her decease he gave one moiety thereof to his nephew John Fairweather, and the other moiety to the children of his brother, Rowland Fair-[589]-weather. Thomas Leslie died in the testator's lifetime, and Mrs. Fairweather proved the will as surviving executor, and afterwards (on the 20th of March, 1861) died intestate, leaving part of the deceased's estate unadministered. The deceased, at the time of his death, was indebted to the Schoolmasters' Association for the North of England, in £89, 14s. for money drawn by him from the treasurer of the corporation of the borough and county of Newcastle-upon-Tyne, on account of the said Schoolmasters' Association. The debts now due from his estate (including the sum due to the association) amounted to £265, 1s. 7d., and the unadministered assets to £107, 8s. 3d.

A renunciation and consent to the grant being made to Mr. Michael Watson, as treasurer of the Schoolmasters' Association, had been filed on the part of the said John Fairweather, the residuary legatee substituted of one moiety of the deceased's property. There were five children of Rowland Fairweather, who were entitled to the other moiety of the residue, all of whom were resident in Sydney, in New South Wales, and had no agent in this country.

Dr. Tristram moved, under the 73rd section of the Probate Act, for a grant of administration de bonis non with the deceased's will annexed to be decreed to Michael Watson.

*Sir C. Cresswell*: The 73rd section of the Probate Act does not apply to this case. Watson claims to be a creditor of the deceased's estate, and if so, he should take the grant in that character, and not in the inferior character of a nominee of the Court under the 73rd section of the Probate Act.

In consequence of the rejection of this motion a citation issued against the children of Rowland Fairweather, an abstract of which was duly advertised in three newspapers, according to the practice of the Court, but no appearance had been entered thereto.

[590] Dr. Tristram now moved the Court to make the grant to Mr. Watson, as a creditor of the deceased.

*Sir C. Cresswell*: You do not shew how he is a creditor. It appears that the deceased owed a sum of money to the Schoolmasters' Association for the North of England, of which Watson is treasurer. That will not necessarily make Watson a creditor.

Dr. Tristram: The treasurer would be entitled to give receipts for the association, and probably to sue for debts.

*Sir C. Cresswell*: It does not appear that he has authority to sue for debts. I have no information as to the constitution of the association, and in the absence of such information, I cannot grant the motion.

Motion rejected.

IN THE GOODS OF THOMAS DUANE (deceased), on Motion. July 22 and 29, 1862. —Will.—Clause introduced per Incuriam —Probate.—Where a clause is introduced in a testamentary paper per incuriam, and the deceased executes the paper, not having given any instructions for, and being ignorant of the existence of such clause, it forms no part of the will of deceased, and probate will be granted of the remainder of the paper, omitting such clause.

[S. C. 31 L. J. (P.) 173; 6 L. T. 788; 8 Jur. (N. S.) 752. Distinguished, *Harter* v. *Harter*, 1873, L. R. 3 P. & D. 20. Referred to, *Rhodes* v. *Rhodes*, 1882, A. C. 198. Applied, *In the Goods of Boehm*, [1891] P. 250.]

In this case the deceased, a serjeant-major in the 64th Regiment of Foot, died on the 3rd of October, 1861, having duly executed a testamentary paper by his mark, on the same day. The paper consisted of a skeleton printed form, supplied by the War-Office; in the present instance headed, in print:—"Form of will, No. 3. To be used by a soldier de-**[591]**-sirous of leaving money to be invested for the benefit of his child or children"; and, after some printed and some blank lines, with printed directions alongside for particular bequests, it ended in print thus:—"And the rest of my estate and effects, and everything that I can give or dispose of, I desire may be sold, and the proceeds invested under the orders of the Secretary of War, for the equal benefit of my children. In witness whereof I the said have hereunto set my hand," etc.

From the affidavit of C. F. F. Wood, a clerk in the military purveyor's department of the War-Office, and one of the subscribed witnesses to the mark of the deceased, it appeared that he was sent for on the 3rd of October, 1861, to prepare the will for the deceased, who was then in hospital; that he took with him the above-mentioned printed form; but on seeing the deceased, received from him instructions to prepare his will, leaving the whole of the property to his wife; and accordingly, after the printed line, "after payment of my just debts and funeral expenses, I give to my," filled up in writing, "wife, Elizabeth Duane, all my goods and chattels." Wood then read over to the deceased, from the paper so printed and filled up in writing, "This is the last will of Serjeant-Major Thomas Duane, No. 3160, of the 64th Regiment of Foot. After payment of my just debts and funeral expenses, I give to my wife, Elizabeth Duane, all my goods and chattels." He did not read the remainder of the printed form, or advert to it as having any effect, but filled up the testimonium clause, and the deceased then made his mark.

Dr. Swabey now moved the Court to grant letters of administration with the will annexed to the widow, omitting the residuary clause in favour of the children, which was not read over to the deceased, and in respect of which no instructions were given. Williams, J., on Executors, p. 330 of 5th edition, says: "It is a necessary consequence of some of those rules **[592]** of Courts of Probate, which there has already been occasion to notice, that a will may be in part admitted to probate and in part may be refused. Thus if the Court shall be satisfied that a particular clause has been inserted in a will by fraud without the knowledge of the testator in his lifetime, . . . probate will be granted of the instrument with reservation of that clause"; and refers to *Barton* v. *Robins*, 3 Phill. 455, note. (See also *Allen* v. *M'Pherson*, 1 H. of L. 191, cited in Deane's Wills Act, p. 49, and in Williams on Executors, p. 331). The principle seems applicable to the present case, and if in the passage cited the words "per incuriam" are substituted for "by fraud," of which in this case there is no suggestion, it would be a direct authority. Cur. adv. vult.

July 29.—*Sir C. Cresswell*, after stating the facts as above, said:—*Allen* v. *M'Pherson*, decided in the House of Lords, shews that a Court of Probate has authority to omit from probate a clause introduced into a will by fraud, although it formed part of the will when executed. I can see no difference in principle between that case and the present one, where a clause, for which the deceased gave no instructions, and which was not read over to him, formed, per incuriam, part of the document signed by the deceased. I think administration with the will annexed may go, omitting the residuary clause in favour of the children.

**[593]** IN THE GOODS OF THOMAS DOUCE (deceased), on Motion. July 22 and 29, 1862.—Execution by Mark.—Wrong Name.—Probate.—A. B. put his mark to a testamentary paper in which he was throughout described as C. B. The Court, being satisfied on affidavit that A. B. duly executed the paper by mark animo testandi, granted probate thereof as his will.

[S. C. 31 L. J. (P.) 172; 6 L. T. 789; 8 Jur. (N. S.) 723.]

In this case, Thomas Orme, a schoolmaster, since deceased, wrote a will for the deceased, Thomas Douce, who could neither read nor write. Orme, mistaking the Christian name, described the deceased throughout as *John* Douce, of Witherby, in the county of Leicester, labourer, and wrote against the mark by which the will was executed, "The mark of John Douce." The will referred by name to five children of the testator. From the affidavit of Henry Orme, who, with his father the said Thomas Orme, subscribed the will, it appeared that before the execution of the will it was fully explained to Thomas Douce by Thomas Orme, that it was prepared and written by Orme as and for the will of Thomas Douce, and that the name "John" in the introductory words of the will, in the testimonium clause, etc., was inserted in error and by mistake for Thomas, which was the real Christian name of the testator, and by which he was well and commonly known; that at the date of the will there was no person answering the name and description of John Douce, of Witherby, in the county of Leicester, labourer, other than the testator's son, John Douce, mentioned in the will. It was also stated on affidavit that the deceased Thomas Douce had the children whose names were mentioned in the will as the children of the testator.

Dr. Swabey moved for probate as of the will of Thomas Douce to be granted to the executor named in the will. *The Goods of Eleanor Bryce*, 2 Curt. 325, comes nearest to the **[594]** present case in circumstance; there a testatrix signed a paper by a mark, and no name appeared on any part of the paper. Sir Herbert Jenner, in disposing of that case, says: "The paper is identified as being the will of the deceased; and, being signed, etc., I am of opinion that the statute is sufficiently complied with." Here a wrong name appears on the face of the paper, but if the Court is satisfied that it is identified as being the will of the deceased, it is submitted that it will be entitled to probate. (*In the Goods of Shuttleworth*, 1 Curt. 911, was also cited.) Cur. adv. vult.

July 29.—*Sir C. Cresswell*: In this case a person of the name of Thomas Douce, an illiterate man, placed his mark to a paper which had been prepared for him by a schoolmaster, against which mark the schoolmaster wrote John Douce, and throughout the document so described the testator. On application for probate it was objected that it was not the will of Thomas Douce; but I am quite satisfied that Thomas Douce was the man who put his mark to the paper, intending thereby to execute it as his will. The contents of the paper afford internal evidence of this, for it mentions the names of certain children of the testator, and these names are shewn to be the names of the children of Thomas Douce. I had occasion to consider (*In the Goods of Susanna Clarke*, 1 Swab. & Trist. 22), whether a marksman signing, against whose mark a wrong name was written, was sufficient, and I held that it was. Here I am satisfied that Thomas Douce duly executed this paper by mark animo testandi, and that is as much as if he had written Thomas Douce; and the discrepancy between the real name and the wrong name which appears on the paper being fully explained, I think the will is entitled to probate.

**[595]** IN THE GOODS OF GEORGE JOHNSON (deceased), on Motion. July 22, 1862.—Administration.—Renunciation of Next of Kin solely entitled.—In case of an intestacy, where the persons who are sole next of kin and the only persons entitled in distribution renounce their title to administration, the Court will make the grant to a person who would have been next of kin if the sole next of kin had been out of the way, although such person has no interest.

[S. C. 7 L. T. 337. Followed, *In the Goods of Trigg*, [1901] P. 42.]

In this case George Johnson died in May, 1862, a bachelor, without a parent, and intestate, leaving him surviving five brothers, his only next of kin, and the only persons entitled in distribution. The five brothers had formally renounced their right to administration of the deceased's effects, and George Johnson, an uncle of theirs and of the deceased, had taken the oath with a view to take out letters of administration, but a difficulty was raised in the registry as to the uncle's want of interest.

Dr. Waddilove moved the Court to grant administration to the uncle. *In the Goods of Mary Keane*, 1 Hagg. 692, administration was granted "to the Rev. Charles Edward Keane, the nephew, upon the renunciation of Benjamin Keane (his father),

the brother and the only next of kin of Mary Keane, the intestate." In that case the nephew had no interest any more than the uncle in the present.

*Sir C. Cresswell*: On the authority of the case cited the grant may go as prayed.

[596] (Before *Sir C. Cresswell*, on Motion; and before *Sir C. Cresswell* and a Special Jury.)

HINGESTON *v.* TUCKER AND HER MAJESTY'S PROCTOR (intervening). July 24 and 27, 1861, and June 18, 1862.—Will.—Queen's Proctor.—Alleged Next of Kin opposing.—Interest.—Practice.—Costs.—A party propounding a will may put any person opposing it on proof of his interest; but where two parties oppose a will, e.g. the Queen's Proctor and an alleged next of kin, neither can put the other on proof of his interest.

[S. C. 31 L. J. (P.) 91; 9 L. T. 337.]

In this case, the plaintiff propounded a will of Thomas Lisle Follett, deceased, bearing date March the 18th, 1861.

The defendant Charles Benjamin Tucker, who claimed to be the cousin-german of the deceased and his sole next of kin, opposed the will, and on the 3rd of July, 1861, filed pleas, in which he alleged, first, that the will propounded was not the last will of the deceased; secondly, that it was not executed according to the provisions of 1 Vict. c. 26; thirdly, that at the time of its execution the deceased was not of sound mind.

The Queen's Proctor intervened, and on the 12th of July, 1861, filed similar pleas.

The Queen's Advocate (Sir J. D. Harding), on behalf of the Queen's Proctor, moved the Court to direct that before the question as to the validity of the will of the deceased should be tried, the defendant Tucker should propound and prove his interest as next of kin of the deceased. An affidavit of John Rutter, clerk to the Queen's Proctor, stated that he was informed and believed:—1. That the deceased died a widower without known relations. 2. That on the 18th of March, 1861, the deceased executed a will, the validity of [597] which was contested by the Queen's Proctor and by Charles Benjamin Tucker, a son of Sarah Tucker, deceased, formerly Sarah Follett, alleging himself to be the lawful cousin-german and sole next of kin of the deceased. 3. That the deceased left real estate producing a rental of about £615 per annum, and personal estate of the value of about £8800. 4. That the paternal grandfather and grandmother of the deceased were Benjamin Follett and Ann Pomeroy, who had the following children, namely: (1) Ann, born April 11, 1742; (2) John, born September 26, 1743; (3) Thomas, born August 17, 1744; (4) Benjamin, born February 5, 1748; (5) Samuel, born August 13, 1751; (6) Sarah, afterwards Sarah Tucker, born December 10, 1753; (7) Mary, born October 3, 1757; (8) Samuel, born March 25, 1760. 5. That the deceased was the son of Thomas Follett, deceased, the third child of the said Benjamin Follett. 6. That in the year 1812, John Follett, the second child of the said Benjamin Follett and brother of the said Thomas Follett, died intestate, leaving considerable real and personal estate, and it was represented to the Lords of the Treasury that he was illegitimate. 7. That commissions of escheat were thereupon issued for the counties of Dorset, Somerset, and Devon, in which the real estates of the said John Follett were situate; and evidence was given thereon, on the part of the Crown, that the parents of the said John Follett were not married (although every exertion was made by the family to find the certificate of their marriage, but without avail), whereupon the said John Follett was found to have been illegitimate, and the Crown took possession of his real and personal estate, and disposed of the same, according to the usual practice. 8. That, under the foregoing circumstances, the said Thomas Follett, the deceased's father, and the said Sarah Tucker, the mother of the defendant, were not born in wedlock.

The Queen's Advocate: According to the practice of the [598] Prerogative Court, this would first have been turned into an interest cause. Tucker would first have been assigned to propound his interest. (Coote's Pract. of Eccl. Courts, 470, 641.)

*Sir C. Cresswell*: If the plaintiff had called on one of the defendants to propound his interest, there would have been no difficulty in making him do so. But, where two persons oppose a will, can one of them call upon the other to propound his interest?

The Queen's Advocate: I imagine so; at least, where one of the parties opposing

is the Crown. The right to oppose a will is not inherent in the subject; he must shew an interest. (*Brotherton* v. *Hellier*, 1 Lee, 599, see 600; *Wright* v. *Rutherford*, 2 Lee, 266: and *Baskcomb* v. *Harrison*, 2 Rob. 118.) I admit these are not precisely in point.

*Sir C. Cresswell*: Suppose Tucker had not appeared, and the Queen's Proctor had contested the will with success, Tucker might then have come in.

The Queen's Advocate: Yes.

Dr. Spinks, contrà: The motion is not warranted by the practice of the Prerogative Court. In no case was one co-defendant allowed to put another to proof of his interest. The next of kin entered a caveat in March, 1861, the Crown in the following May. It is the Crown that intervenes, not the next of kin. The question of kinship may never require to be decided, i.e. if the will is established: if the will is invalid it may then be a question who is entitled: but the Queen's Proctor wants us to try the second question first.

Mr. J. T. Hopwood for the plaintiff.

**[599]** *Sir C. Cresswell*: I will consider the matter. At present I think there is the objection to the motion, which Dr. Spinks points out. Cur. adv. vult.

*Sir C. Cresswell* now said: I have considered the cases cited. They clearly establish that before a person can be permitted to contest a will, the party propounding it has a right to call on him to shew that he has some interest; but they go no further than that. No case has been cited, nor can I find one which will support the present application. In fact, the Queen's Proctor did not make the application because he thought Tucker had no interest, but because he thought he had an interest, and he wished to see if he was or was not the proper person to contest the will. I find no authority for granting such an application, when made by one party against another on the same side, and I must therefore reject the motion.

The issues in this case as between the plaintiff and defendant were tried before the Court by a special jury on the 18th of June, 1862.

Mr. Collier, Q.C., Dr. Deane, Q.C., and Mr. Aspland, for plaintiffs; Mr. Karslake, Q.C., and Dr. Spinks, for the defendants; Dr. Twiss, Q.C., watched the case on behalf of the Crown.

A verdict was found against the validity of the will.

Hingeston was condemned in costs of Tucker, but no order was made as to any costs incurred on behalf of the Crown.[1]

**[600]** IN THE GOODS OF THOMAS EELES (deceased), on Motion. November 4, 1862.—Will.—Cutting.—Dependent relative Revocation.—Probate.—Where a testator cut a piece out of his will which had been duly executed, containing the word "witnesses," and the names of the attesting witnesses, giving his reason, at the time, for having so cut the same, that he had some idea of altering it, and having a new will made; and subsequently, on the same day, refastened the piece he had so cut out, saying "that his will would do for the present, and that if he wanted another will made he could do it afterwards," and died without making another will:—The Court, on motion, but with the consent of the parties interested in case of an intestacy, granted probate of the will to the executors named therein.

[S. C. 32 L. J. (P.) 4; 7 L. T. 338; 11 W. R. 31.]

Thomas Eeles, late of Carlton, in the county of York, stonemason, deceased, died on the 17th of May, 1862. On the 28th of August, 1859, the deceased duly executed a will in the presence of two attesting witnesses, and of his wife, Elizabeth Eeles.

Some considerable time after the execution of the will, the deceased, in the presence of his said wife, cut out of the said will a piece on which was written the word "witnesses," and the names Thomas Wake and John Leng, being the signatures of the attesting witnesses, and at the same time gave as his reason to his wife for having so cut the said will, that he had some idea of altering it and having a new will made. Later on in the same day, the deceased, in the presence of his wife, refastened to the said will the piece he had cut out by plastering pieces of paper at the

[1] As to the liability of the Crown to be condemned in costs on appeal in a Probate Cause, see *Dyke* v. *Barton*, 10 Moore, P. C. 458.

back thereof, saying, when he replaced the piece of paper, that the will would do for the present, and that if he wanted another one made he could do it afterwards. Application had been made to the registrar of the district registry at York, for probate of the said will, upon the special affidavit of Elizabeth Eeles, and he had transmitted the papers in the case to the principal registry.

**[601]** Dr. Spinks moved the Court to grant probate of the will to the executors named therein. The testator had given a reason for cutting the piece out of the will, namely, that he was going to make a new will in substitution for it; but he did not do so. He could only have intended to cancel the will conditionally, and not having carried out his intention of making a new will, the old will stands.

*Sir C. Cresswell*: With the consent of the parties interested in case of intestacy, I will grant probate of this will on motion. The nearest case to it I have found is *In the Goods of De Bode*, 5 Notes of Cas. 188. There the testator did something equivalent to what was done by the deceased in this case.

NORRIS *v.* ALLEN. November 4, 1862.—Probate in solemn Form.—Directions for Trial.—County Court.—Probate Act, 1857, s. 59.—Probate Act, 1858, s. 10.—When the Judge of the Court of Probate is satisfied that the County Court has jurisdiction, he will direct a cause to be tried before the Judge of a County Court having jurisdiction, and will also direct the papers in the cause to be transmitted to the County Court for the purposes of the suit; but he will give no directions as to the mode in which the cause shall be tried.—It will be for the Judge of the County Court to decide whether the cause shall be tried before him with or without a jury.

[S. C. 32 L. J. (P.) 3.]

This was a cause of proving, in solemn form of law, a codicil bearing date the 14th of September, 1861, to the last will and testament of Alice Berry, late of the town of Whittlesey, in the Isle of Ely and county of Cambridge, widow, deceased, who died on the 22nd of April, 1862. The codicil was propounded by Thomas Norris, the plaintiff, as the executor **[602]** named therein, and was opposed by the defendant, who alleged himself to be a legatee named in the will, and pleaded several pleas thereto, upon which issue was joined.

The personal property of the deceased was under the value of £200, and she was not seised of or entitled to any real estate. At the time of her death she had her fixed place of abode at Whittlesey, in the Isle of Ely, and within the jurisdiction of the County Court of Northamptonshire, holden in the city of Peterborough.

Dr. Spinks, for the plaintiff, moved the Court for leave to have the cause tried in the County Court of Northamptonshire, and to order the registrars to have the papers transmitted to the said County Court for that purpose. He also asked for directions as to the mode of trial.

*Sir C. Cresswell*: You should apply to the Judge of the County Court to direct the mode in which the cause is to be tried. I cannot give directions for the cause to be tried in any particular manner. I shall only direct that it be tried before the Judge of the County-Court of Northamptonshire, and leave him to decide whether it shall be tried with or without a jury; and I will also direct the papers in the cause to be transmitted to the County Court.

HARGREAVES AND OTHERS *v.* WOOD AND OTHERS. November 11, 1862.—Executors.—Issues tried before Judge of Assize.—Compromise.—Rule of Nisi Prius.—Probate.—Where on a trial before a Judge of Assize and a jury of issues relating to the validity of a will, certain executors of which were plaintiffs, and certain other executors of which were defendants in the suit, a **[603]** verdict was taken by consent for the plaintiffs on an agreement made an order of nisi prius, one of the terms of which was that the executors (the defendants) should renounce probate, the Judge of the Court of Probate refused to make the order of nisi prius a rule of the Court, on the ground that the Court of Probate could not properly enforce an agreement that any executors of a will should renounce probate thereof, but granted probate to the executors plaintiffs.

[S. C. 31 L. J. (P.) 8.]

The plaintiffs in this case were four of the executors, and had propounded the last will with a codicil thereto of Joseph Hargreaves, deceased, late of Shipley Fields, in

the parish of Bradford, in the county of York. The defendants, in opposition to the will, had filed pleas alleging undue execution, undue influence, etc. Upon these pleadings issue had been joined, and the Court directed the questions raised to be tried before the Judge of Assize by a special jury, at the summer assizes, 1862, to be holden in and for the county of York. The question came on for trial before Wilde, B., and a special jury at York, on the 22nd of July, 1862, and a verdict was taken by consent of the plaintiffs and defendants, their counsel and attorneys, upon the terms agreed upon; and an order of nisi prius was thereupon made, embodying the said terms, by which it was ordered "that a verdict should be entered for the plaintiffs; that certain legacies should be paid by one payment, and not by instalments; that the defendants should have £300 towards their costs out of the estate; and that two of the defendants, Joseph Wood and Benjamin Wood, who were executors of the will, should renounce probate and disclaim the trusts of the will and codicil." A copy of this order had been served on the defendants.

Mr. Kemplay now moved the Court to direct that the said order of nisi prius be entered and made a rule of the Court of Probate, and that probate be granted of the will and codicil to the plaintiffs, as four of the executors named therein.

Mr. Quain appeared for the defendants and assented thereto.

**[604]** *Sir C. Cresswell*: By the practice of this Court, there is an objection to granting this motion. I am not aware of any instance in which this Court or the Ecclesiastical Courts have recognized a bargain or agreement made by an executor to renounce probate, and I do not see how I could enforce the agreement against the two defendants.

Mr. Quain: The Court might enforce it by attachment.

*Sir C. Cresswell*: I should have a difficulty in enforcing an agreement to renounce probate. I do not want to make a rule of this Court binding executors to renounce probate. Mr. Kemplay's better course would be to make the order of nisi prius a rule of the Court of Common Law from which the writ for trial issued, and he may then come and say that the will has been established, and ask me to grant probate to the four executors. Primâ facie any one or more executors appointed in a will, coming in proper form before this Court, are entitled to probate thereof.

Mr. Kemplay: I will alter the form of motion, and will now move for probate of the will and codicil to be granted to the four executors.

*Sir C. Cresswell.*—I will decree probate accordingly.

IN THE GOODS OF JOHN O'BRIEN (deceased), on Motion. February 20, 1861.—Domiciled Resident in British Guiana.—Local Law.—Administration to Attorney of Administrator-General of Guiana.—B., having acquired a domicil in British Guiana, died a bachelor and intestate, without any known relations there. Under an ordinance **[605]** of that colony the Administrator-General took possession of B.'s property in that colony, and appointed Messrs. P., F., and P., of Liverpool, to be his attorneys, and in his name to take letters of administration to the personal estate of the deceased in this country.—The Court, after the usual notice to the Queen's Proctor, and citations of next of kin, made the grant accordingly.

[S. C. 31 L. J. (P.) 194.]

In this case, the deceased, John O'Brien, a native of Ireland, had been resident in the colony of British Guiana for about thirty years, and died domiciled in that colony, in August, 1859, a bachelor and intestate, without any known relations there. By an ordinance of British Guiana of the 24th of May, 1851, reciting that there is an administrator-general for the counties of Demerara, Essequibo, and another for the county of Berbice, it is enacted that each administrator-general shall be, and he is hereby authorized and empowered, for the purposes hereinafter mentioned, to enter upon and take possession of and administer to all estates within his jurisdiction, which shall be then or at any time thereafter unrepresented, and that such unrepresented estates shall be and they are hereby defined to be:—3rdly. The estate and effects of every person who shall die in the colony intestate, and whose heir ab intestato shall be unknown, or if known shall be absent without having an attorney or agent in the colony to represent him. 4thly. The estate and effects within the colony of any person dying out of the colony intestate, or whose executors shall be absent from the colony, or, whether absent from or present in the colony, shall refuse or decline to act,

or where the estate and effects shall not be taken possession of by the heir of the deceased or by the attorney or agent of such heir.

The deceased left certain property in the colony, and was entitled to personal property in England, consisting of certain bonds of two joint-stock companies, for securing payment of two sums of £600 and £250.

By virtue of the ordinance, Mr. Daly, the Administrator-General of the counties of Demerara and Essequibo, had en-[606]-tered upon the estate of the deceased in the colony, and had appointed Messrs. Parker, Finne, and Parker, of Liverpool, merchants, to be his attorneys, and in his name to take letters of administration in this country to the estate of the deceased.

Dr. Phillimore, Q.C. (Mr. Westlake with him), moved the Court to grant letters of administration of the effects in England of the deceased John O'Brien to the attorneys of the Administrator-General. Counsel referred to *The Goods of Beggia*, 1 Add. 340; *Scarth* v. *Bishop of London*, 1 Hagg. 625; *Aspinwall* v. *Queen's Proctor*, 2 Curt. 241, and submitted that though it did not appear that there was any Court in the colony of British Guiana which had power to grant letters of administration in such a case, yet that the Administrator-General was by virtue of the ordinance clothed with a character so like that of a personal representative of a deceased intestate constituted by the Court of the domicil, that this Court would, as usual in such cases, follow the grant in respect of property in this country.

*Sir C. Cresswell*: This motion must at all events stand over for notice to be given to the Queen's Proctor, and for citations of the next of kin to be advertised. My present impression is, that the ordinance referred to is a local law for the protection of unrepresented property in that colony, and does not clothe the Administrator-General with the character of general personal representative of the deceased.

Citation thereupon issued against next of kin, if any, and in March, 1862, in default of some of the parties cited, and with consent of the only party who appeared, the administration was granted as prayed.

**[607]** WELLS *v.* WELLS. February 25, 1862.—Plea.—Demurrer.—Practice.—Where a party takes no step on an order to join in demurrer within a given time, the party demurring is at the expiration of the time entitled to judgment on the demurrer.

[S. C. 31 L. J. (P.) 112.]

In this suit the plaintiff propounded a will of Charles Wells as sole executrix. The defendant pleaded several pleas in opposition to the will. One of them was that the executrix was not the lawful child of Charles Wells. To this plea the plaintiff demurred. On the 11th of February, 1862, an order was made that the defendant should join in the demurrer within four days.

Dr. Swabey, for the plaintiff, moved that the plea might be struck out, the defendant having failed to comply with the order.

*Sir C. Cresswell*: The proper course is not to strike out the plea, but to give judgment in your favour upon the demurrer.

ISHERWOOD *v.* CHEETHAM. April 17, 1862. — Domicil. — Will. — Declaration. — Demurrer.—Where a declaration propounding a will depends on the due execution according to the law of testator's domicil, it must contain a distinct averment that it was duly executed according to the law of the domicil. An averment that the will was admitted to probate by a competent Court of the alleged domicil is insufficient.

[S. C. 31 L. J. (P.) 99.]

Declaration.—Mehalah Bennett Isherwood, by George White, her attorney, says that Thomas Isherwood Cheetham, **[608]** alias Thomas Cheetham Isherwood, formerly of Werneth, in the parish of Stockport, in the county of Chester, deceased, but late of Cincinnati, in the county of Hamilton, and state of Ohio, one of the United States of North America, died on or about the 19th of February, 1842, at Cincinnati aforesaid; that the deceased being then domiciled at Cincinnati aforesaid, and passing by the name of and styling himself Thomas Cheetham Isherwood, made his last will and testament in writing, bearing date the 19th of February, 1842, and in the said will appointed the said Mehalah Bennett Isherwood and Acquilla Ramsey sole executors; that on the 24th of February, 1842, the said will of the deceased, on the

part of the executors therein named, was presented to the honourable the then judges of the then Court of Common Pleas at Cincinnati, in the county of Hamilton, and state of Ohio aforesaid, the said Court being the competent tribunal in and for the said state of Ohio for determining upon the validity of the said will, and that the said the honourable the judges of the said court did, on the said 24th of February, 1842, by their definitive sentence or decree, pronounce that the said deceased was at the time of executing the said will of sound and disposing mind, memory, and understanding, of full age, and under no undue or lawful restraint, and ordered the said will, being satisfied that it was duly executed according to the law of the said state of Ohio, to be received, and admitted the said will to probate as a good and valid will by the law of the said state for the purpose of passing personal estate. That by virtue of the said definitive sentence or decree of the said Court of Common Pleas of Cincinnati aforesaid, the said will is entitled to be admitted and proved in this honourable court as a good and valid will for passing personal estate situate in England. That the said Mehalah Bennett Isherwood and Acquilla Ramsey accordingly took probate of the said will as the executors named therein, and that the said Acquilla Ramsey afterwards, to wit, in the month of December, 1845, departed this life, [609] leaving the said Mehalah Bennett Isherwood the sole surviving executor of the said will.

Demurrer.—That the declaration is bad in substance. The grounds of demurrer stated were, that the defendant contends that the validity of the will, according to the law of Ohio, must be distinctly averred, and that the statements respecting the admission of the will to proof apparently without contest, and certainly without the present defendants being party to any contest, cannot be substituted for such an averment, inasmuch as they amount at most to evidence, valeat quantum, of the truth of that averment.

Joinder in demurrer.

Dr. Spinks in support of the demurrer: When it is alleged that a testator was domiciled in a certain country, it must also be distinctly alleged that the will was executed according to the law of that country.

Dr. Tristram, contrà: The declaration is sufficient; the deceased died domiciled in Cincinnati, and a competent Court pronounced the will to be valid; if we were to allege the execution according to the law of Ohio, the other side would traverse it.

*Sir C. Cresswell*: The declaration does not allege that the Court of Common Pleas in Cincinnati pronounced their definitive sentence that the will was duly executed. It does not appear that that question was raised before them. Would it have been sufficient if the declaration had alleged that the deceased died domiciled in the state of Ohio, and that by a competent tribunal of that state his will had been admitted to probate?

Dr. Tristram: Yes; probate by a competent Court in Ohio would be conclusive. (*Hare* v. *Nasmyth*, 2 Add. 25; *Larpent* [610] v. *Sindry*, 1 Hagg. Eccl. 382; *In the Goods of Read*, ibid. 474; *In the Goods of Cringan*, ibid. 548; *De Bonneval* v. *De Bonneval*, 1 Curt. 856; *Laneuville* v. *Anderson*, 2 Swab. & Trist. 43; *Price* v. *Dewhurst*, 4 Myl. & Cr. 82.) The object with which the declaration was framed was, to obtain the judgment of this Court before going to trial, upon the question whether the judgment of the Court of Ohio is conclusive evidence of the validity of the will, and binding upon this Court.

*Sir C. Cresswell*: The question is not whether such a judgment is conclusive evidence, but whether it is in a matter of law conclusive upon this Court.

Dr. Tristram: The declaration expressly avers that by virtue of the decree of the Court of Common Pleas of Cincinnati, the will is entitled to probate in this Court.

Dr. Spinks: The cases cited shew that the declaration should have averred that the will was executed according to the law of the deceased's domicil.

*Sir C. Cresswell*: The latter part of the averment in the declaration is insufficient.

Dr. Tristram: Does your Lordship hold that you are not bound by the judgment of the Court of Ohio?

*Sir C. Cresswell*: That question is not raised, and I cannot decide a merely speculative question. I am of opinion that the averment in the declaration is insufficient. My judgment is for the demurrer, with leave to amend within a fortnight, on paying costs of demurrer and of previous amendment.

**[611]** IN THE GOODS OF JOB DRINKWATER (deceased). April 29, 1862.—Limited Grant of Administration.—73rd Section of Probate Act.—A son, being entitled to the whole of the personal estate of his father, deceased intestate, wrote from Madras, where he was serving in the Royal Artillery, to a cousin in England, giving him certain directions as to securing the amount of the property, and transmitting a small sum to him.—The Court granted administration, under the 73rd section of the Probate Act, to the cousin for the use and benefit, etc., limited to carrying into effect the directions contained in the said letter.

[S. C. 31 L. J. (P.) 93; 7 L. T. 251.]

Job Drinkwater, late of the parish of Castle Morton, in the county of Worcester, farmer, deceased, died on the 28th of February, 1861, intestate, a widower, leaving him surviving Samuel Drinkwater, his natural and lawful and only child, and the sole person entitled to his personal estate and effects. Samuel Drinkwater was, at the time of the death of his father, a private soldier in the 17th Brigade of Her Majesty's Royal Artillery, stationed at Madras, in the East Indies. The deceased died possessed of certain farming stock, which, shortly after his death, by the direction of his brother Moses Drinkwater, was sold by Messrs. Harper and Son, auctioneers, and the net proceeds of the sale, amounting to £300, remained in the hands of Messrs. Harper and Son. On August the 12th, 1861, Job Wagstaff, a cousin of the deceased, wrote to Samuel Drinkwater, informing him of the death of his father, and of the sale of the farming stock, and that the proceeds of the sale were in the hands of the auctioneer; and in reply received a letter from the said Samuel Drinkwater, which contained the following:—

"As I have now but three years to serve, I think it would be advisable to serve my time out. . . . In the meantime, I wish you would take the necessary steps, and lodge the **[612]** amount of the estate in the Bank of England in my name, and send me a receipt for the amount, to enable me to draw the amount at any time I may require it. I, appointing you my trustee, if you will be kind enough, will enable you at any time when I send you authority to draw any sum I may want, and transmit it to me. If you can send me a £10 note by the next mail, in a letter, I shall be glad. Dear cousin, be sure not to forget to enter the amount in the bank in my own name, Samuel Drinkwater. . . . I hope Tom will take care of father's watch, and do the best he can till my return. The bedding can remain with my uncle, as I do not wish that to be sold, but the ready money and sale money I hope you will put in the bank, and, as I said, send me the receipt of the total deposited, and an account of any outstanding property."

The value of the deceased's estate was under £450.

Dr. Spinks now moved the Court to grant letters of administration of the personal estate and effects of the deceased to Job Wagstaff, for the use and benefit of the said Samuel Drinkwater, and until he shall apply for and obtain letters of administration to be granted to him.

*Sir C. Cresswell*: I think I may make the grant under section 73 of 20 & 21 Vict. c. 77, but it must be limited in accordance with the directions given by Samuel Drinkwater in his letter. The grant will be limited to receiving the £300 and paying it into the Bank of England in the name of Samuel Drinkwater, with the exception of £10 which he wishes to be remitted to him.

**[613]** IN THE GOODS OF EDWARD BAYLIS (deceased). May 13, 1862.—Intention to appoint Executors.—Bad for Uncertainty.—B., by his will, left all his property to his three sons therein named, and appointed "A. as my executor, with any two of my sons." A. proved the will at the Cape of Good Hope alone, and two of testator's sons now asked for probate of an authentic copy, reserving power to A. —The Court rejected the motion, holding the appointment of "any two of my sons" to be void for uncertainty.

[S. C. 31 L. J. (P.) 119; 7 L. T. 251; 8 Jur. (N. S.) 546. Followed, *In the Goods of Blackwell*, 1877, 2 P. D. 72. Distinguished, *In the Goods of Punchard*, 1872, L. R. 2 P. & D. 369.]

Edward Baylis died on the 12th of September, 1861, at the Cape of Good Hope, having made a will bearing date the 11th of September, 1861, whereby he gave all his property to his three sons therein named, and appointed executors in the words following:—"I hereby appoint Lewis Alford, Esq., merchant, of Cape Town, to whom

I bequeath ten pounds, as my executor, with any two of my sons." On the 17th of September, 1861, the will was duly proved in the Supreme Court of the Cape of Good Hope by the said Lewis Alford, and an authentic copy or exemplification had been transmitted to this country for the purpose of being proved here. Martin Spencer Baylis and Thomas Hutchison Baylis, two of the testator's sons, had been sworn as two of the executors. The third son, Arthur Baylis, left England for New Zealand in November, 1855, and in January, 1858, when last heard of, was in Melbourne.

Dr. Spinks now moved that probate of the said will should be granted to Martin Spencer Baylis and Thomas Hutchinson Baylis, as two of the executors appointed by the will, power being reserved for Lewis Alford to come in and obtain probate. He could find no case which is conclusive, but submitted that, as there was no distinctive selection of any two of the testator's sons to act as executor with Lewis Alford, **[614]** the testator intended that all his sons should be on the footing of persons who were equally entitled to a grant of administration, so that the two first applying had a right to the grant.

*Sir C. Cresswell*: I am very unwilling to establish a precedent by making such a grant; in some cases it might be of great importance. I am afraid there is that uncertainty about the clause which will prevent my treating it as an appointment.[1]

Motion rejected.

THE VISCOUNTESS HAWARDEN *v.* DUNLOP.[2] July 22 and 29, 1862.—Will.—Compromise.—Failure to carry out Terms.—Bill in Chancery.—Limited Grant to substantiate Proceedings in Chancery.—D. propounded the will of E., which was opposed by H., one of the next of kin of E., and certain issues in the suit came on for hearing before the Court and a special jury. Before the jury were sworn, certain terms of compromise were signed by counsel on behalf of both parties; one of which terms was that a Scotch confirmation of the will brought into this Court by D. should receive the seal of the Court. (Sec. 21 & 22 Vict. c. 56, s. 12.)—Subsequently, the parties being unable to agree as to the meaning and effect to be given to the terms of compromise, D. moved to have the confirmation sealed and delivered out to him: the Court refused to give effect to one of the terms of the compromise, the parties being unable to agree as to the rest, but held that D. was entitled to take out the confirmation unsealed.—H. then filed a bill in Chancery for administration of E.'s estate, etc.; a demurrer to this bill for want of parties was allowed.—The estate of E. was also alleged to be vested in trustees by a certain sequestration under Scotch Bankruptcy Acts.—**[615]** H. now moved for administration with the will annexed, pendente lite, or for administration limited to substantiate the proceedings in Chancery; and the Court held that the nominee of H. would be entitled to a grant of the latter description.

[S. C. 31 L. J. (P) 180; 7 L. T. 251.]

This was an application to the Court to constitute a personal representative of the estate of the late Baron Elphinstone under the following circumstances:—

The Baron Elphinstone died on the 13th of January, 1861, leaving the plaintiff, the Viscountess Hawarden, and her two sisters his coheiresses-at-law, and his sole next of kin in this country and in Scotland. Upon the death of Baron Elphinstone, Mr. George Dunlop expeded confirmation of his personal estate in Scotland under a trust disposition dated the 13th of February, as the sole disponee named therein.

The Viscountess Hawarden cited Mr. Dunlop to appear in this Court, and to propound the said trust disposition, or to shew cause why administration of the personal estate of the deceased should not be granted to her as one of his next of kin. Mr. Dunlop had propounded the trust disposition as the last will of the deceased, to which the Viscountess Hawarden pleaded various pleas, on which issue was joined.

On the 30th of November, the cause came on for trial before the Court and a special jury, when the cause was compromised on the following terms:—

---

[1] See *Edward Altham's Case*, 8 Rep. 155 a; *Strode* v. *Russel*, 2 Vern. 624; 1 Roper on Legacies, 4th ed. 186.

[2] Ante, p. 340.

"Terms of agreement, 30th of November, 1861. All contentious proceedings to cease upon the following terms, to be embodied in the order of the Court:—

"Will to be affirmed. Judge of Probate Court to seal confirmation.

"£22,000 to be paid to Mr. Dunlop, in full of his debts and all claims. Mr. Dunlop to assign the property carried by the will to the plaintiff, with warrandice from fact and deed, and to warrant the plaintiff as to all acts of his to encumber the estate, or any debts chargeable to the estate.

**[616]** "Mr. Dunlop to give credit for all moneys received since John fourteenth Lord Elphinstone's death.

"Charges of fraud to be withdrawn.

"If any question arises on these terms, to be referred to Serjeant Shee and Mr. M. Smith.

"All necessary deeds to be settled by some counsel, to be named by Serjeant Shee and Mr. M. Smith. All proceedings in Scotland to cease. Factor on the entailed estate to be discharged.

"W. S.

"M. S."

The said agreement for compromise was signed by Mr. Serjeant Shee, as the counsel for the plaintiff, Viscountess Hawarden, and by Mr. Montague Smith, Q.C., as counsel for the defendant, George Dunlop; and has since, by an order of the Court of Probate, dated the 30th of November, 1861, been made a rule of Court.

A draft deed had been prepared by the Viscountess Hawarden's solicitors to carry out the agreement for compromise, and forwarded to Mr. Dunlop; this deed Mr. Dunlop refused to execute, and caused drafts of two other deeds to be prepared, which he contended were more in conformity with the arrangements. These drafts were not approved of by the plaintiff, on the ground that Mr. Dunlop sought to charge the estate of the deceased with sums of money which ought to have been included in his debts and claims agreed to be satisfied by the payment of the £22,000. On the 13th of May, 1862,

Dr. Phillimore, Q.C., on behalf of Dunlop, moved that, as part of the terms of the order above recited, the confirmation should be delivered out with the seal of the Court (21 & 22 Vict. c. 56, s. 12).

Mr. Anderson, Q.C., contrà: The statute does not apply to contentious proceedings. All the other side are entitled **[617]** to is carrying out the terms of the agreement, of which the sealing and delivering out this confirmation was only one. As to the terms of this agreement, we differ about their meaning, and I am afraid there is very little chance of our agreeing.

*Sir C. Cresswell*: It must be remembered that this is not an original application to order the confirmation to be sealed; that it should be sealed was part of the terms of the agreement, but I find that there is a dispute as to carrying out those terms, and I shall not order a part of those terms to be complied with, unless I know that effect has been given to the rest of the agreement; but I think Mr. Dunlop is entitled to have the confirmation delivered out if he likes to take it unsealed.

The Viscountess Hawarden then filled a bill in Chancery, praying that the personal estate of the deceased should be administered under the direction of the Court, and that a receiver should be appointed thereto, and that an account should be taken of the real estate, and that payment of such sums as should be due to the plaintiff in the bill should be made to her.

Application was now made to this Court, to appoint a personal representative of the late Baron Elphinstone, for the purposes of the suit in Chancery.

Mr. Anderson, Q.C., moved for administration pendente lite to be granted to the plaintiff as next of kin to the deceased, or for administration limited to substantiate the proceedings in Chancery. A demurrer to the bill in Chancery had been filed by Mr. Dunlop, for want of a personal representative in England. He refused to constitute himself the deceased's personal representative here, and at the same time says to the plaintiff, "You shall not represent him." The Court surely will not allow the bill to be stayed by this manœuvre of Mr. Dunlop's.

**[618]** Dr. Phillimore, Q.C. (Mr. Everitt with him), contrà: The course adopted by the plaintiff, both in this Court and in the Court of Chancery, is wholly unnecessary. The real question at issue between the parties is, the construction and validity of the agreement. The plaintiff might and ought to have raised these questions directly, by filing a bill for specific performance: such a suit would have proceeded

without a personal representative to the deceased being requisite. Instead of this, she has brought an administration suit, the foundation of which suit is, that she is assignee of the universal legatory of the will of the deceased; and yet she now asks the Court to make a grant to her as one of his next of kin, thereby ignoring the agreement and will. Again, the estate of the deceased has been sequestered under 19 & 20 Vict. c. 79, s. 13, and 20 & 21 Vict. c. 19; and a trustee has been appointed on the petition of the creditors, in whom the personal estate of the deceased is vested.

Mr. Anderson, Q.C., in reply: The objections stated on the other side do not hold against a grant limited to substantiate proceedings in Chancery.

Cur. adv. vult.

*Sir C. Cresswell*: This was an application for administration with the will annexed of John Fleming, Baron Elphinstone, deceased.

The circumstances under which the application was made were singular. In 1854, Baron Elphinstone executed at Edinburgh a trust disposition and settlement, and thereby nominated and appointed George Dunlop to be his sole executor and universal legatory. On the death of Baron Elphinstone, Dunlop obtained confirmation in Scotland, and then applied to this Court to affix its seal in pursuance of the 21 & 22 Vict. c. 56, s. 12. This was opposed by the present applicant, who in the meantime had instituted proceedings in this Court for the purpose of contesting the validity of the said **[619]** trust disposition, and under such circumstances the Court refused to order the seal to be affixed. In the suit instituted by Lady Hawarden, Dunlop propounded the trust deed, pleas were pleaded in answer, and issues joined, which came on for trial, when by agreement the suit was compromised on certain terms arranged by counsel, and signed by them, one of which was, that the will should be affirmed, and the confirmation sealed; but in the meantime disputes had arisen about the meaning and effect of the terms of arrangement, and the Court again, at the instance of Lady Hawarden, refused to order the seal of the Court to be affixed to the confirmation. Lady Hawarden and two others then filed a bill in Chancery, in which, amongst other things, the trust deed making Dunlop sole executor and universal legatee, and the agreement signed by counsel, were set forth, and the bill prayed, first, "That the personal estate of Baron Elphinstone may be duly administered by and under the direction of this honourable Court, and that the share and interest therein of the plaintiff may be ascertained and duly secured, and that for that purpose all necessary and proper steps may be taken, directions given, and inquiries made"; secondly, for a receiver; thirdly, for an account of the real estate. To this bill the defendant demurred, on two grounds: first, that the bill did not state such a case as entitled them to discovery, nor any equity whereon the Court could ground a decree; secondly, for want of proper parties, there being no duly constituted legal personal representative in England of the testator Baron Elphinstone.

Vice-Chancellor Kindersley, before whom the case came, having expressed an opinion that the plaintiffs could not proceed without having a duly-constituted legal personal representative of Baron Elphinstone before the Court, Lady Hawarden offered unconditionally to consent that Mr Dunlop should have the seal of this Court affixed to the confirmation, but he now declines to ask it. Lady Hawarden, as one of the **[620]** next of kin of the testator, asks to have administration with the will annexed, or to have administration limited to substantiating proceedings in equity.

Cause was shewn by Dr. Phillimore and Mr. Everitt, who contended that unless the agreement entered into by counsel is valid, and makes Lady Hawarden in equity assignee of the universal legatory or residuary legatee, she can have no right to maintain her suit in equity; that the first step, therefore, for her was to obtain a decree as to the validity and true construction of that agreement, for which purpose a representation to Baron Elphinstone was unnecessary. They relied also on a sequestration granted on the 7th of July last by the Lord Ordinary, under the Bankruptcy Act for Scotland in 1856, and the Bankruptcy and Real Securities Act for Scotland of 1857, as having vested all the property of the deceased in the trustees thereby appointed.

On the other hand, Mr. Anderson did not deny that Lady Hawarden might have filed a bill simply to obtain a decision as to the alleged agreement; but insisted that she had a right to commence an administration suit, relying upon that agreement as the foundation of her right, and that, according to the usual practice, if the party primarily entitled to represent the testator will not take upon himself that character,

administration may be granted to the next of kin, or, at all events, a limited administration, for the purpose of enabling her to proceed in equity; and that the proceedings under the Scotch Bankruptcy Act cannot affect that right.

I am of opinion that the plaintiff had a right to raise both questions in the same suit, and that a grant limited to the purposes of the suit should be made, not to herself, but to a nominee; and that such a grant should be made, notwithstanding the sequestration recently granted in Scotland. If that proceeding affects her rights in equity, the Vice-Chancellor will know how to deal with it. In this Court I think I am not affected by it. After this expression of my opinion, Mr. **[621]** Dunlop will probably consent to ask that the confirmation may receive the seal of this Court.

Dr. Phillimore asked for a few days, to consider what course his client should adopt, which was agreed to.

IN THE GOODS OF WILLIAM KING (deceased). November 18, 1862.—Affidavits.—Interlineation.—Description of Widow.—Rule 58, non-contentious Business.—Affidavits were sent out to New Plymouth, New Zealand, to swear the widow of W. K., deceased, as administratrix. In the meantime she had moved to Hobart Town, in Tasmania, and certain interlineations in accordance were made in the affidavit, but not initialed by the judge who administered the oath; the description of Mrs. King, as widow, was also slightly irregular. The Judge made an order that such affidavit should be filed.

[S. C. 32 L. J. (P.) 14.]

In this case William King, of New Plymouth, New Zealand, died in February, 1861, intestate, leaving Eliza Mary King, his lawful widow, him surviving. In the form of affidavit sent out to enable the widow to take out administration in respect of some property in England, she was described as "Eliza Mary King, of New Plymouth, New Zealand, the lawful widow, and relict of the said deceased." In the meantime, Mrs King removed to Hobart Town, Tasmania, and there made two affidavits and executed the bond. When the affidavits were returned to England, it was found that the word "late" was interlined before "of New Plymouth," and the words "but now of Hobart Town, in Tasmania," interlined before "the lawful widow and relict"; and such interlineations were not marked with the initials of the judge before whom the oath was sworn, nor noticed in the jurat. A diffi-**[622]**-culty was felt with respect to their irregularity in the registry; it was also objected that in the above description she was not described as "Eliza Mary King, widow," though she was so described in the heading of the administration bond. The 58th rule, non-contentious business (Principal Registry, 1862), provides that "the registrars are not to allow any affidavit to be filed, unless by leave of the judge, which is not fairly and legibly written, or in which there is any interlineation, the extent of which, at the time when the affidavit was sworn, is not clearly shewn by the initials of the commissioner, or other person before whom it was sworn."

Dr. Spinks now moved the Court to accept the affidavit, and submitted that the description, as widow, was sufficient.

*Sir C. Cresswell*: I think that I may safely make the order, and that there is a sufficient description of the widow as such.

IN THE GOODS OF COLONEL GORDON (deceased). April 13, 1859.—Confirmation and Probate Act, 21 & 22 Vict. c. 56, s. 12.—Effect of an Eik, or Additional Confirmation, limited to Personal Estate in England.—An additional confirmation, granted under section 12 of the Confirmation and Probate Act, 1858, does not apply to an original confirmation granted before that Act came into operation.—Semble: an additional confirmation, which does not include personal estate in Scotland besides personal estate in England, is not entitled to be sealed with the seal of the Probate Court under the above section.

[S. C. 29 L. J. (P.) 67. Followed, *In the Goods of Wingate*, p. 625, post. Distinguished, *In the Goods of Ryde*, 1870, L. R. 2 P. & D. 86; *Mahon* v. *Hodgens*, 1871, Ir. R. 6 Eq. 344.]

Colonel John Gordon, late of Cluny Castle, Aberdeenshire, died on the 10th of July, 1858, at Edinburgh. On the 7th **[623]** of October, 1858, his executors gave up an inventory of his personal estate in Scotland, amounting to £251,598, 15s. 4d.,

which inventory was recorded in the Commissary Court of Edinburgh, and confirmation of the will was, on the 12th of October, 1858, granted to his executors.

On the 12th of the following month, November, 1858, the Confirmation and Probate Act, 21 & 22 Vict. c. 56, came into operation. By the 12th section of this Act, it is enacted that "from and after the date aforesaid, when any confirmation of the executor of a person, who shall in manner aforesaid be found to have died domiciled in Scotland, which includes, besides the personal estate situate in Scotland, also personal estate situate in England, shall be produced in the principal Court of Probate in England, and a copy thereof deposited with the Registrar, together with a certified copy of the interlocutor of the Commissary, finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate."

On the 27th of December, 1858, the Commissary, by his interlocutor, found that the deceased died domiciled in Scotland, and that it was competent to include in the inventory of his personal estate to be recorded in the Commissary Court any of his personal estate situate in England or in Ireland, or both.

On the 25th of January, 1859, an additional inventory of the personal estate of the deceased was recorded in the Commissary Court of Edinburgh at the instance of the executors, comprising the amount of his personal estate in Scotland contained in the original inventory, and in addition thereto £4210, 1s. 2d. Consols, and £7759, 6s. New Three per Cents. English property.

**[624]** On the 27th of January, 1859, the Commissary Court granted to the executors an eik, or additional confirmation.

The Registrar of the Court of Probate had refused to seal this eik, or additional confirmation, on the ground that the 12th section did not apply to an eik, or additional confirmation.

Mr. Anderson, Q.C., moved the Court on behalf of the executors, to direct that the eik should be sealed. The additional confirmation was a ratification of the appointment of executors, and the additional inventory containing, by reference to the original inventory, personal estate in Scotland as well as in England, the 12th section is applicable. Moreover, the affixing of the seal under this section is a ministerial and not a judicial act of this Court, and it is bound to follow the opinion of the Commissary Court.

*Sir C. Cresswell*: The additional confirmation has no operation upon the property in Scotland. I doubt whether you have any power to engraft a proceeding under this Act on a confirmation, which had been made before this Act came into operation. My present opinion is, that the 12th section does not apply. Cur. adv. vult.

*Sir C. Cresswell*: I retain the opinion I expressed, when the motion was made, that I ought not to order the seal of the Court to be affixed to this instrument. The question turns upon the 12th section of the statute. This section made an alteration in the law, which was to take effect after the 12th of November, 1858; and of course the original confirmation, which was granted previous to that date, is not within its operation. It appears to me, that the additional confirmation does not come within the terms of the Act, because it does not include personal estate in Scotland besides the personal estate in England. All the personal estate in Scotland had been previously confirmed by the original grant. This Act **[625]** cannot have a retrospective operation. It was contended that I ought to act ministerially; but I think I am bound to act upon my own opinion, whether the statute is applicable or not; and being of opinion that it is not applicable, I cannot order the Registrar to affix the seal of the Court.

Motion rejected.

Mr. Anderson: The executors will take probate in common form.

IN THE GOODS OF ANDREW WINGATE (deceased). December 3, 1861.—Confirmation and Probate Act (1858), 21 & 22 Vict. c. 56, ss. 9, 12.—Eik, or Additional Confirmation.—Seal of Court.—Where an inventory has been recorded in a Commissary Court of Scotland of the personal estate of a person who died domiciled in Scotland, and confirmation has been granted in respect of the same, and afterwards an additional inventory has been recorded of personal estate belonging to

the deceased in England, and an eik, or additional confirmation, has been granted in respect of the same, the Court of Probate will not seal such eik, or additional confirmation.

[S. C. 8 Jur. (N. S.) 142. Distinguished, *In the Goods of Ryde*, 1870, L. R. 2 P. & D. 86.]

Andrew Wingate, a merchant of Glasgow, died on the 23rd of June, 1860.

He executed a deed of settlement, dated the 15th of July, 1857, of which he appointed the Rev. William Wingate, George Wingate, and Andrew Wingate, junior, executors. On the 1st of September, 1860, this deed of settlement was duly recorded in the Court Books of the Commissary of the county of Lanark, in Scotland, and the executors gave up, on oath, an inventory of the deceased's personal estate situate in Scotland, amounting to £9074, 13s. 8d., which inventory had also been recorded in the said Court Books on the same day: and on the 4th of September, 1860, the Commissary of **[626]** Lanark granted confirmation of the appointment of the said executors.

Subsequently to the confirmation, it was discovered that there were certain shares in the Church of England Insurance Company standing in the deceased's name, and which shares he held as a trustee.

On the 17th of October, 1861, an additional inventory of the personal estate of the deceased was recorded on the part of the executors in the Commissary Court of Lanark, in which, after reciting the death of the deceased and the execution of the deed of settlement, and that the same had been recorded in the Commissary Court of Lanark, it was as follows:—

| | | | |
|---|---|---|---|
| "Amount of the estate wheresoever situated, given up in the Commissary Court Books of Lanarkshire, on the 1st day of September, 1860 . . . . . | £9074 | 13 | 8 |
| "Effects omitted, England:— | | | |
| "Fifty shares in the Church of England Insurance Institution, held by the deceased as trustee, with dividends . . . . . | 186 | 11 | 0 |
| "*Note.*—Amount of estate situate in England and Scotland . . . . . | £9261 | 4 | 8 |
| "*Note.*—The inventory duty on the total estate, wheresoever situate, is . . . . . | £180 | 0 | 0 |
| "The duty paid on the former inventory . . . . | £180 | 0 | 0 |

"There is therefore no duty on additional inventory."

On the 18th of October, 1861, the Commissary of Lanark, by a confirmation, after reciting the death of the deceased, and that his executors nominate under the said deed of settlement had given up an inventory of his personal estate and effects, and had expeded a Testamenta on the 4th of September, **[627]** 1860, and had since given up on oath an additional inventory of the personal estate of the deceased situate in England, amounting to £186, 11s. 11d., and that the additional inventory had been recorded in his Court Books on the 17th of October, 1861, he thereby confirmed the nomination of executors contained in the aforesaid deed of settlement, and gave and committed to them full power to receive, administer, and dispose of the said personal estate and effects contained in the aforesaid additional inventory, and to grant discharges for the same.

Application had been made at the Principal Registry that the eik, or additional confirmation, should be sealed under 21 & 22 Vict. c. 56; but the Registrar had refused to seal it, on the ground that the statute did not apply to an eik, or additional confirmation.

Dr. Tristram moved the Court to direct, that the eik, or additional confirmation, should be sealed with the seal of the Court. He was aware that there was a decision of the Court, *In the Goods of Colonel John Gordon, deceased*, which had been relied on in the Registry, as an authority for refusing to seal the eik. In that case, however, the original confirmation was granted before, and the additional confirmation was granted after the Confirmation and Probate Act, 21 & 22 Vict. c. 56, had come into operation, which might distinguish it from the present case. The interpretation put by the Commissary Court of Scotland and by the authority of this Court on the Act would

be in conflict, if the motion was rejected. By the 9th section of the Act, the executors were entitled to include in the inventory of the deceased's personal estate personal property situate in England as well as in Scotland. By the 10th section, confirmation was to be granted in the form, or as nearly as may be in the form, of the schedule annexed; and by the 12th section, any confirmation of the executor of a person found to have died domiciled in Scotland, **[628]** including personal estate in England as well as in Scotland, upon its production in the Court of Probate, was entitled to have the seal of the Court affixed to it. The first inventory was incomplete; the further or supplementary inventory had been brought in to make it complete; and he submitted that the two inventories were, to all intents and purposes, to be taken as one inventory. If the original and additional inventory were to be treated as one inventory, then the original and additional confirmation would be taken as one confirmation, and the 12th section would apply. The real question was, what was the true interpretation of the word eik; and according to the practice of the Commissary Courts of Scotland, it was considered to be equivalent to the confirmation referred to in the 12th section.

*Sir C. Cresswell*: I think this case must be governed by the decision I gave in *The Goods of Colonel John Gordon, deceased*. The eik, or additional confirmation, does not, in my opinion, come within the terms of the 12th section, because it does not confirm the executors in respect of personal estate situate in Scotland, but only in respect of personal estate situate in England. If it is desired that I should treat these additional confirmations as a confirmation referred to in the 12th section, the form of them should be altered.

IN THE GOODS OF ALEXANDER PILE (deceased). January 14 and 21, 1862.—Administration with Will and Codicil annexed.—Construction.—Residuary Estate.—Tenancy in Common.—Lapse to undisposed Residue.—A. by his will bequeathed the residue of his personal estate to be equally disposed of between five of his children, whom he named. One of those children died in A.'s lifetime.—**[629]** The Court held that the five children took as the tenants in common, and the share of the deceased child therefore lapsed to the undisposed residue, and general administration with the will and codicil annexed to B., son of the deceased, not as a legatee, but as entitled as one of his next of kin to part of the undisposed residue.

[S. C. 21 L. J. (P.) 40; 7 L. T. 194.]

Alexander Pile died on the 24th of August, 1832, having made and duly executed his last will and testament, dated the 9th of April, 1831, with a codicil thereto, dated the 10th of April, 1831, and by his will appointed his wife, Harriet Pile, his sole executrix; and he gave her all his copyhold and leasehold premises, goods and chattels for her life, and after her death bequeathed "what goods or chattels remained, to be equally disposed of amongst his children, viz. Harriett Pile, John Pile, Mary Pile, Ann Chedzoy, and Hester Pile." He also left to his son, Samuel Pile, after the death of his wife, a malt and mill-house and houses. Ann Chedzoy died in the lifetime of the testator, and Harriett Pile, Mary Pile, and Hester Pile survived him, but had all since died intestate, leaving John Pile, the surviving residuary legatee, substituted. Harriett Pile, the executrix, died on the 16th of January, 1841, without having proved the deceased's will, and no representation had hitherto been taken out to his personal estate.

John Pile had been cited by Samuel Pile, as one of the natural and lawful children of the deceased and a legatee named in the said will, to accept or refuse administration with the said will and codicil annexed, or to shew cause why the same should not be granted to the said Samuel Pile as such legatee, but John Pile had entered no appearance thereto.

The notice of motion filed was in accordance with the terms of the citation.

Dr. Tristram appeared for Samuel Pile.

**[630]** *Sir C. Cresswell*: There is a preliminary objection to my granting the motion according to the terms of the notice of motion filed. The only property given to Samuel Pile may, for anything that appears, be copyhold or freehold. To entitle you to the motion, there should be an affidavit shewing that it was leasehold.

Dr. Tristram: There was certainly that objection to the motion as worded. But he submitted that the grant ought to go to Samuel Pile, not as a legatee, but under

a superior title, viz. as one of the next of kin of the deceased, and as such entitled to share in his undisposed residuary estate. The one-fifth share of the residuary personal estate given to Ann Chedzoy, provided it were given to her as tenant in common, would lapse by her death in the testator's lifetime and fall into his undisposed residuary estate. The words of gift were, "what goods or chattels remain after my wife's death to be equally disposed of amongst my children" (the five before named); and the rule of construction was, that where a residue is given to more persons than one by any mode of expression that denotes a severance, they take as tenants in common. The words, "to be equally disposed of amongst my children," clearly denoted such a severance as to create a tenancy in common between them. (2 Wms. on Exors., 5th ed. 1317.) And the rule was, that where a residuary bequest is made to several persons as tenants in common, and one of them dies in the testator's lifetime, his share did not pass to the survivors, but was treated as undisposed residue. (2 Wms. on Exors., 5th ed. 1315.) Upon the dicta cited, he submitted that the grant should go to Samuel Pile, as one of the next of kin of the deceased, and as such entitled to share in the undisposed residue of his personal estate; and he moved accordingly.

*Sir C. Cresswell*: The question of construction is not **[631]** free from difficulty, and there are cases referred to by Williams, J., which may go against the construction you contend for. I will look into these cases before deciding the question of construction. Cur. adv. vult.

*Sir C. Cresswell*: I have looked at the cases referred to by Williams, J., and I think the construction put upon the residuary clause by Dr. Tristram is correct. I will, therefore, direct the grant to go to Samuel Pile as one of the next of kin of the deceased entitled to share in the undisposed residue of his personal property.

IN THE GOODS OF LOUISA MARIA DE LA FARQUE, widow (deceased). June 24, 1862 — Administration Bond.—Sureties dispensed with.—Probate Act, sect. 82.—The Court made an order to dispense with the usual sureties to an administration bond, to be entered into by A. B., who was beneficially entitled to a fund which had been paid into the Court of Chancery, and for which the administration was required, it appearing that A. B. was, in consequence of sickness, in great poverty, and unable to induce any of his relatives or friends to become sureties to the bond. [S. C. 31 L. J. (P.) 199; 7 L. T. 194. Followed, *In the Goods of Paton*, [1901] P. 189.]

Louisa Maria de la Farque, of Ipswich, died on the 24th of November, 1833, a widow, having made her last will, dated the 20th of November, 1833, whereby she bequeathed all her residuary estate to her executors Robert Garrod and Edward Davers, upon trust for her three sons, William James de la Farque, George A. de la Farque, and Charles H. de la Farque. On the 7th of February, 1834, Edward Davers alone proved **[632]** the said will in the Prerogative Court of Canterbury, and died in 1853, leaving a will, of which he appointed no executor, and the said Robert Garrod him surviving.

On the 12th of November, 1858, the said Robert Garrod duly renounced the executorship of the deceased's will.

The deceased under the limitations of her father's will, was, at the time of her death, entitled to one-fifth share of £791, 17s. New Three per Cent. Bank Annuities, and £332, 8s. 5d. cash, which was now standing in the name of the Accountant-General of the Court of Chancery.

William James de la Farque (the eldest son of the deceased) was in a state of great poverty, and, in consequence of ill-health, of no fixed occupation, and at times dependent for subsistence upon private charity; one of his two brothers died many years ago intestate and unmarried, and the other had not been heard of for about twenty-five years, and was believed not to have been married.

Under these circumstances, William James de la Farque claimed to be entitled to the whole of his mother's one-fifth share in the above funds—namely, to one-third in his own right and to the remaining two-thirds as sole next of kin of his brothers—and was about to petition the Court of Chancery for the payment to him of the same, but was advised by his Chancery counsel that, previous to filing his petition, he ought to obtain letters of administration de bonis non with the deceased's will annexed.

He had, however, no relatives or friends who were willing to become sureties to the administration bond.

Dr. Spinks, upon the joint affidavit of the said William James de la Farque, and Mr. H. A. Maude, his solicitor, verifying the above facts, moved the Court for an order to dispense with the usual sureties to the bond to be entered into by the said William James de la Farque, upon his obtaining his grant of letters of administration de bonis non with **[633]** the deceased's will annexed. (Court of Probate Act, 1857, s. 82.)

*Sir C. Cresswell* declined granting the motion without some further account of the brothers of William James de la Farque, so as more clearly to shew that the applicant was entitled in his own right to the whole fund.

Dr. Spinks renewed the above motion. There was a further affidavit of William James de la Farque filed, stating that his brother George Augustus de la Farque entered the British navy as a seaman in 1837; that the ship to which he was attached was shortly afterwards ordered to the South African station; that he died while so stationed there, a bachelor and intestate; that he had been informed that his brother Charles H. de la Farque, about the year 1840, sailed on a smuggling expedition, that he was last seen by an old schoolfellow about the year 1841, at the Cape of Good Hope, and that he had never since been seen or heard of, and that he had never heard of his being married or having made a will. A further affidavit of Mr. Maude, his solicitor, had also been filed, stating that on inquiry at Somerset House, he had been informed that it appeared by the register that a person of the name of George Augustus de la Farque, who was born at Ipswich, had entered the British navy in October, 1837, and had died on board her Majesty's ship "Bonetta," in February, 1838, off the Island of Ascension. A certificate of his death was annexed.

*Sir C. Cresswell*, on this further information, granted the motion.

**[634]** IN THE GOODS OF JAMES BROWNING (deceased). November 5, 1861.—Administration.—21 Hen. VIII. c. 5, s. 3.—Joint Grant to a Widow and to a Person entitled in Distribution refused.—Probate Act, s. 73.—The Court is precluded by 21 Hen. VIII. c. 5, s. 3, from making a joint grant of administration to a widow and one of the persons entitled in distribution, even with the consent of the next of kin and of all the other persons entitled in distribution; and the 73rd section of the Probate Court Act does not enlarge the power of the Court in such a case.

[S. C. 31 L. J. (P.) 161; 7 L. T. 217; 10 W. R. 96.]

James Browning died in April, 1861, intestate, leaving Frances Browning his widow, Mary Ann Grace his sister and only next of kin, and six nephews and five nieces, the only persons entitled in distribution of his personal estate and effects. The deceased, who was senior partner in a firm carrying on business as merchants, in which some of the nephews above mentioned were also partners, left personal property of the value of £110,000. Shortly after the death of the deceased, a caveat was entered in the principal registry on behalf of James Browning, one of the nephews, but an arrangement was afterwards come to between Mrs. Browning, the widow, and his nephews and nieces, that the caveat should be withdrawn, and that in consideration of the large amount of the estate, an application should be made to the Court, with the necessary consents, for a grant of administration to be decreed to Mrs. Browning, the widow, and to Mr. James Browning, one of the nephews, Mr. Henry and Mr. William Browning, two other nephews and partners, consenting, on the grant being made, to execute the administration bond as sureties. Consents to a joint grant being so made were filed on behalf of Mrs. Grace, the deceased's sister, and all the nephews and nieces. An affidavit of Mrs. Browning, the widow, was also filed in support of the motion.

**[635]** Dr. Phillimore, Q.C. (Dr. Tristram with him), moved "for a joint grant of the personal effects of the deceased to be decreed to Mrs. Browning, the widow, and Mr. James Browning, the natural and lawful nephew, and one of the persons entitled in distribution to the effects of the deceased." The 21 Hen. VIII. c. 5, s. 3, directs the ordinary in case of intestacy to grant administration "to the widow of the same person deceased, or to his next of kin, or to both, as by the discretion of the same ordinary shall be thought good." And the 31 Edw. III. c. 11, directs the ordinary to depute the next and most lawful friends of the dead person intestate to administer his goods. The statute of Henry VIII. ought not to be construed so as to restrain the discretion of the ordinary from including in the grant a person entitled in dis-

tribution with the consent of all the parties interested. If the widow and sister were not to take the grant, it would go to the nephew on his applying for it. Why should he not be joined in it with the consent of all parties? The property is of large amount, a great part of it is employed in the business of the firm, and it is considered by all persons interested, that Mrs. Browning should have a person accustomed to the transaction of business joined with her in the administration. Even if the Court feel itself precluded by the statute of Henry VIII., there are, it is submitted, special circumstances which would bring the application within the terms of the 73rd section of the Probate Act.

*Sir C. Cresswell*: If I am to make a joint grant of administration at all, it must be to the widow and to the sister, as the next of kin of the deceased. I am of opinion that the statute 21 Hen. VIII. c. 5, s. 3, precludes me from joining the nephew, who is only a person entitled in distribution, and not next of kin of the deceased, in the grant. Neither can I make the grant under section 73 of the Probate Act.

**[636]** SERRELL *v.* SERRELL AND BAMFORD. May 6, 1862.—Decree nisi.—Affidavit of Search within Three Calendar Months.—Practice.—Where affidavits in support of a motion omit to state material facts, which facts existed at the date when the affidavit was made, the Court may allow such motion to stand over.—But where a motion cannot be granted by reason of the non-existence at the date of the affidavit of material facts, such motion must be rejected.

Dr. Swabey moved the Court to make absolute a decree nisi for dissolution of marriage, which had been pronounced on the 30th of January, 1862, upon an affidavit in the usual form, which stated that search had been made on the 30th of April in the book kept in the registry for entering appearances, and that no person wishing to shew cause against the decree being made absolute had then entered an appearance, and that the Queen's Proctor had not applied for leave to intervene.

*The Judge Ordinary*: I cannot grant the motion. The search in the registry was made a day too soon. Under the 23 & 24 Vict. c. 144, s. 7, any person may shew cause against **[637]** the decree being made absolute at any time during three months (i.e. calendar months) from the pronouncing the decree. The motion must be rejected.

Dr. Swabey asked that the motion might not be rejected, but allowed to stand over.

*The Judge Ordinary* said that he was generally willing to allow motions to stand over which he could not grant upon the affidavits before him, in consequence of their omitting to state material facts, if those facts really existed; but that here the motion could not be granted upon the state of facts which existed at the time the affidavit was made, and there must be a fresh search for an appearance; there must therefore be a fresh motion.

NICHOLLS *v.* NICHOLLS. May 6, 1862.—Order for Payment of Taxed Costs.—Personal Service.—Practice.—When an order for payment of a sum of money within a specified time is made, and personally served, a personal demand for payment is unnecessary to found a motion for attachment for disobedience to the order.

[S. C. 31 L. J. (Mat.) 115.]

This was originally the wife's petition. On the 22nd of May, 1861, an order had been made that the respondent should, within one week from the service of the order upon him, pay to the petitioner, or her solicitors, Messrs. Deane, Chubb, and Saunders, £22, 0s. 1d., the amount of her taxed costs. On the 31st of May, 1861, this order was personally served on the respondent, but he had failed to obey it.

Dr. Spinks now moved for an attachment.

**[638]** Dr. Wambey, contrà: The affidavits on which the motion is founded do not state that there has been a personal demand of payment. From *Thomas* v. *Thomas*, ante, p. 64, it would appear that a personal demand was usually made.

*The Judge Ordinary*: I think when the order is to pay within a specified time, that a personal demand is unnecessary. When I first presided in this Court I acted in accordance with the practice of the courts of Common Law, and thought that a personal demand was necessary. In those courts, to obtain an attachment for non-payment of costs, it is requisite that a copy of the rule, with the Master's allocatur

thereon, be personally served, and at the same time a personal demand made. I shall grant an attachment, but it may lie in the registry for a week.

Dr. Spinks: In this Court the practice of the Court of Chancery is followed. Under the new orders of the Court of Chancery a demand is unnecessary.

BOULTON *v.* BOULTON AND PAGE (Her Majesty's Proctor intervening). May 6, 1862. —Husband's Petition for Dissolution.—Decree Nisi.—Queen's Proctor's Intervention.—Reversal.—Costs.—B. petitioned for dissolution by reason of his wife's adultery, and on proof of this allegation, neither respondent appearing, obtained a decree nisi.—On motion to make the decree absolute, an affidavit of the respondent charging B. with bigamy was before the Court, who directed it to be laid before the Queen's Proctor.—The Queen's Proctor intervened and pleaded collusion, and the bigamy and subsequent adultery of B. B. replied, denying the collusion, but admitting the bigamy and adultery.—**[639]** The Court, on motion on behalf of Queen's Proctor, reversed the decree nisi, dismissed the petition, and condemned B. in the costs of the Queen's Proctor's intervention.

[S. C. 31 L. J. (Mat.) 115.]

This was the husband's petition for dissolution of marriage, to which neither of the respondents appeared.

On the 31st of May, 1861, a decree nisi was pronounced.

On the 22nd of January, 1862, the Queen's Proctor, in consequence of information (see ante, p. 405) which had been laid before him by order of the Court, applied for and obtained leave to intervene and shew cause against the decree nisi being made absolute, and on the 27th of January, 1862, he filed pleas, in which he alleged that the petitioner and respondent had been acting in collusion for the purpose of obtaining a divorce, contrary to the justice of the case, and with that intent kept from the knowledge of the Court till after the decree nisi had been pronounced, the following material facts, viz.:—1. That the petitioner who had been lawfully married to the respondent on the 27th of May, 1839, was in fact married on the 29th of January, 1847, to Eleanor Ravenhill, the respondent being still living. 2. That he afterwards cohabited with and committed adultery with the said Eleanor Ravenhill until her death in October, 1859. 3. That the petitioner by his said conduct had conduced to the adultery of the respondent.

On the 15th of February the petitioner filed a replication, in which he denied that he had been acting in collusion with the respondent; admitted the bigamy and adultery charged by the Queen's Proctor; denied that he had, by his conduct, conduced to the adultery of the respondent; and alleged that before he married Eleanor Ravenhall, he, in July, 1846, detected the respondent in the act of committing adultery, and that he immediately sent her to her mother, and had never afterwards had any connection with her.

Dr. Spinks now moved, that, as sufficient of the facts **[640]** pleaded by the Queen's Proctor were admitted by the petitioner, the Court should reverse the decree nisi, dismiss the petition, and condemn the petitioner in the costs incurred by the Queen's Proctor.

Mr. A. S. Hill, contrà, urged that the conduct of the wife, who had been, and still was, living in open adultery, ought to be taken into consideration, and that the petitioner should not be condemned in costs.

*The Judge Ordinary*: A man guilty of bigamy, who sues for a divorce, must take the risk of the Queen's Proctor intervening; I have nothing to do with the conduct of the wife, it is the conduct of the husband that I have to deal with. The decree must be reversed, the petition dismissed, and the petitioner condemned in the costs of the intervention.

SEDDON *v.* SEDDON AND DOYLE. January 14, 1862.—Petition for Dissolution.—Petitioner's Adultery.—Dismissal of Parties.—Custody of Children.—Costs.—A jury found the respondent guilty of adultery; petitioner guilty of conduct conducing to wife's adultery and of adultery, and assessed the damages at a farthing.—The Court dismissed all parties, condemned the petitioner in respondent's costs, made no order as to costs between petitioner and co-respondent, and refused, even if it had the power under such circumstances, to make an order giving the respondent the custody of or access to the children.

[S. C. 31 L. J. (Mat.) 101; 7 L. T. 253.]

This was a petition by a husband for dissolution of marriage, claiming £3000 damages against the co-respondent. The **[641]** respondent and co-respondent denied the adultery. The co-respondent also pleaded that the petitioner by his wilful neglect of the respondent, and by his misconduct towards her, and by his profligate and dissipated habits, had conduced to her adultery, and that he also had been guilty of adultery.

The issues raised by these pleas were, in December, 1861, tried before the Judge Ordinary by a jury, who found that the respondent had been guilty of adultery with the co-respondent, and that the petitioner had been guilty of wilful neglect and misconduct conducing to the adultery, and that he had also been guilty of adultery. They assessed the damages against the co-respondent at one farthing.

Dr. Phillimore, Q.C., for the petitioner, now moved the Court for judgment upon this verdict; and also that an order allowing the respondent to have access to the children of the marriage pendente lite should be rescinded if it did not cease to operate upon judgment being pronounced; and that the co-respondent should be condemned in costs.

Mr. Hannen (for the respondent): That in the decree dismissing the petition an order giving the respondent access to her children should be inserted.

*The Judge Ordinary*: If I dismiss the parties, I make no decree, and have no power to make any order with respect to the children. As to them, the parties must have recourse to the Courts of Law or Equity.

Mr. Hawkins, Q.C., for the co-respondent, opposed the motion that he should be condemned in costs.

*The Judge Ordinary*: The petitioner has come before the court in a most unfavourable character. His conduct towards the unfortunate respondent was most heartless. Jealous **[642]** by nature, that unhappy woman had her jealousy constantly kept alive by her husband, and at last threw herself into the arms of her seducer. She must take the consequence of her conduct. It will probably have a salutary effect on the interests of public morality, that it should be known that a woman, if found guilty of adultery, will forfeit, as far as this Court is concerned, all right to the custody of, or access to her children. Even if I possessed the power (which I think I do not) to make an order giving the respondent access to her children, in such a case I should not make one.

As to costs, the petitioner has failed in his suit, and is therefore not entitled to costs from the co-respondent. I shall therefore dismiss all parties from the suit, and order the petitioner to pay the respondent's costs; but, as between the petitioner and the co-respondent, there will be no order as to costs.

SHAW *v.* SHAW. April 29, 1862.—Delivery or Inspection of Papers.—Commission to examine Witnesses.—Practice.—The wife, petitioning for judicial separation on the ground of cruelty, moved for an order on the husband to deliver to the petitioner, or her attorney, certain documents and papers alleged to have been taken from the petitioner by the husband, and to be material to the conduct of her petition, especially to enable her to comply with an order of the Court for particulars of dates, etc. The husband objected to give up the papers, but was willing to allow copies to be taken.—The Court ordered the papers to be produced by the respondent's attorney to petitioner's attorney, the latter to be at liberty to take copies, and reserved the question of costs of the motion; no application having been made to the husband before notice of motion given.—**[643]** Before issue joined, an application for a commission to examine witnesses is premature.

[S. C. 31 L. J. (Mat.) 95; 7 L. T. 254.]

This was the wife's petition for judicial separation on the ground of cruelty. Issue had not yet been joined.

Mr. H. Bullar, on behalf of the petitioner, now moved the Court first to order the respondent within one week to deliver to the petitioner, or her solicitors, certain portions of a pocket diary kept by the petitioner, and containing entries from the month of April to the month of May, 1859, which were alleged to have been torn by the respondent from the said diary, and also a diary for the year 1861, together with certain letters, papers, and memoranda in the handwriting of, or belonging to the petitioner, which the respondent took away from the petitioner's lodgings, or that the petitioner's solicitors be permitted to inspect and take copies of the same respectively;

and also to order that, if the same are not delivered, or such inspection and copying permitted within the time specified, that the order of the Court of the 4th of March, 1862, directing the petitioner to give particulars of dates, etc., be rescinded. Secondly, to order a commission to issue directed to her Majesty's Consul or Vice-Consul at Paris, to take the evidence of Ulysse Gosse, a witness on behalf of the petitioner.

The first motion was founded upon an affidavit of the petitioner, in which she stated that in October, 1859, she was staying with the respondent at Brighton; that the respondent suddenly left her and went to his residence, Western Lodge, Hammersmith; that he then unlocked and broke open her closets, writing-table, drawers and wardrobe, and took out, amongst other things, a pocket diary, in which short references had been made by the petitioner at different times between May and October, 1859, of acts of cruelty and misconduct of the respondent towards her; that the respondent afterwards re-**[644]**-turned the diary, stating that he had taken out several of the leaves; that in May, 1861, the petitioner, having ceased to live with the respondent, resided at Clifton in concealment from him, when he entered the house in which she was residing, and broke open her boxes and took therefrom another pocket diary and letters, memoranda and other papers; that the said diary, papers, etc., contained entries made by the petitioner of the respondent's conduct towards her, and which entries would enable her to comply with the order of the 4th of March, and were also necessary and material to her in prosecuting the suit, and that without them she was unable to give further particulars. Other affidavits were also filed, corroborating some of the above statements.

In support of the motion for a commission an affidavit of the petitioner's solicitor was filed, stating that Ulysse Gosse was a necessary witness, that he was residing at Paris, and that there was no reason for believing that he would come within the jurisdiction of the Court in time to be served with a subpœna to attend and give evidence at the hearing.

Mr. H. Bullar: This Court possesses the same equitable jurisdiction as the Common Law Courts to order the inspection of a document in the possession of a party to the suit for the purpose of the other party framing his pleading or supporting his suit or defence. It appears from the affidavit of the petitioner that she is unable to comply with the order of the Court to give further particulars of the acts of cruelty without the papers she asks for. He also asked for a commission.

Mr. J. B. Karslake, Q.C., contrà: I do not intend to raise the question whether this Court has jurisdiction to order the production of the documents. The respondent complains that no application was made to him for these papers until he received notice of the motion. The respondent is willing to **[645]** allow the petitioner to take copies of the papers, but she certainly is not entitled to have them given up, as they are the respondent's property. The application for a commission should not be granted until the issues to be tried have been raised.

*The Judge Ordinary*: I think it will be sufficient if the papers are produced for inspection. I order that they be produced by the respondent's attorney to the petitioner's attorney, who is at liberty to take copies of them. The question as to the petitioner's right to the costs of the motion must be reserved. As to the second motion, until the issues to be tried have been raised, an application for a commission to examine witnesses is premature.

DICKENS *v.* DICKENS. July 15 and 22, 1862.—Order to pay Alimony.—Attachment.—Order of Discharge in Bankruptcy.—Sequestration.—24 & 25 Vict. c. 184, ss. 149, 161, and 165.—An order of discharge under the Bankruptcy Act, 1861, protects the bankrupt from any proceeding to enforce payment of alimony, in respect of which he has been attached before the order of discharge.—A rule to shew cause why sequestration should not issue against his estate was therefore discharged.

[S. C. 31 L. J. (Mat.) 183.]

This was originally the wife's petition for judicial separation, and permanent alimony was allotted. An attachment had issued against the respondent for non-payment of arrears of such alimony. He subsequently, on the 25th of March, 1862, obtained his order of discharge under the 24 & 25 Vict. c. 184.

**[646]** Mr. Aspland, on behalf of the petitioner, obtained a rule nisi for a sequestration against the estate of the respondent in respect of the arrears of alimony.

Mr. Hannen shewed cause against the sequestration issuing; and
Mr. Aspland argued in support of the rule.
The facts and authorities cited are sufficiently stated in the judgment.

Cur. adv. vult.

*The Judge Ordinary*: In this case a decree was pronounced for judicial separation on the 26th of July, 1859, and on the 1st of July, 1860, permanent alimony was allotted to the petitioner at the rate of £60 per annum. On the 30th of July, 1861, an attachment issued against the respondent for £75 arrears of alimony up to the 26th of October, 1860. On the 14th of January, 1862, an attachment issued against the respondent for non-payment of £153, 11s. 5d. taxed costs, and £60 arrears of alimony. On the 24th of January, 1862, the respondent was brought up by habeas corpus, and charged in execution for those sums. On the 22nd of January, 1862, the respondent filed his petition in the Court of Bankruptcy, and in his account filed under that petition the sums above mentioned were included. On the 25th of March an order was made by a commissioner in bankruptcy for his discharge. On the 1st of July, an order nisi for a sequestration for arrears of alimony was granted, against which Mr. Hannen shewed cause, and contended that the discharge granted under the Bankruptcy Act of last year protected the respondent from any such process. He relied on the effect of sections 149, 161, and 165. On the other hand, it was contended that the discharge under the 165th section did not extend to alimony, although the words are general, for that alimony has always been considered **[647]** as something different from other demands, the payment of which can neither be enforced nor discharged as other debts, for which the case of *Stones* v. *Corke*, 7 Sim. 22, and 8 Sim. 321, in note, was cited.

But it seems to me that the question is not affected by that decision. That was an application to a Court of Equity by the executors of a married woman to enforce payment after her death of arrears of alimony due when she died; that application was made on the ground that after her death the Ecclesiastical Court would not enforce the payment. The decision appears to have proceeded on the ground that the matter was of ecclesiastical conusance, and as the Ecclesiastical Court would not enforce payment under such circumstances the Court of Chancery had no such jurisdiction. The question therefore is not affected by authority, and I must endeavour to construe correctly the enactment of the Legislature, and give effect to it. Now, by section 149 of the 24 & 25 Vict. c. 134, a person entitled to enforce against the bankrupt payment of any money, costs, or expenses, by process of contempt issuing out of any Court, shall be entitled to come in as a creditor under the bankruptcy and prove for the amount payable under the process. The wife in this case was a person entitled to enforce against the respondent payment of money by process of contempt issuing out of this Court, and as this Court was in existence before the Act passed, I cannot doubt that it was included in the expression, "any Court." By section 161 it was enacted that "the order of discharge shall, upon taking effect, discharge the bankrupt from all debts, claims, or demands proveable under his bankruptcy." This demand was so proveable. By section 165, "the order of discharge shall discharge the bankrupt from the effects of any process issuing out of any Court for contempt of any Court for non-payment of money, and from all costs that he would be liable to pay in consequence of, or on purging his contempt." These sections appear to me to include the pre-**[648]**-sent case, and to discharge the respondent from any proceedings to enforce payment of the alimony, for non-payment of which he had been attached before his discharge. The order nisi for a sequestration must therefore be discharged.

POLLACK *v.* POLLACK AND DEANE AND MACNAMARA (the Queen's Proctor intervening). November 11, 1862.—Decree Nisi.—Queen's Proctor's Intervention.—Pleas.—Attendance of Petitioner.—When, after a decree nisi, the Queen's Proctor intervened and pleaded collusion and condonation, and the petitioner took issue thereon, and the case was ready to be heard before the Court, a motion on behalf of the Queen's Proctor was made to order the attendance of the petitioner at the hearing under the 43rd section of Divorce Act. The Court refused to make such order, but ordered the proceedings to be stayed till he should attend.

This was originally the husband's petition for dissolution of marriage, to which the respondent did not answer. On the 25th of June, 1861, the Judge Ordinary

made a decree nisi for a dissolution of the marriage, and before the decree was made absolute the Queen's Proctor obtained the leave of the Court to intervene, and filed pleas of collusion and condonation, on which the petitioner took issue; and these issues were now ready to be tried before the Court itself. On an affidavit of the Queen's Proctor stating as above, and that he believed that Mr. Pollack, the petitioner, was abroad, and that he was advised that in case the question of identity should be raised on behalf of the petitioner, his presence at the hearing of the cause would be necessary for the purpose of justice, and that **[649]** the cause could not safely be brought to a hearing without the petitioner's presence thereat,

Dr. Spinks moved for an order on the petitioner to attend, and that cause should be deferred till next term.

*The Judge Ordinary*: I doubt whether I have power under the 43rd section of the Divorce Act, which undoubtedly is embodied in the more recent Acts, to make such an order unless the Queen's Proctor becomes a party to the suit whilst the questions are depending between the original parties. [Dr. Spinks referred to *Marris* v. *Marris and Burke, and the Queen's Proctor intervening*, ante, p. 530.] But there the Queen's Proctor intervened, and pleaded before the original petition was heard; but here, after the decree nisi has been obtained, the proceeding assumes a quasi-criminal shape; and I am not satisfied that I have power to order the attendance of the petitioner under the 43rd section of the Divorce Act. But I will make an order to stay proceedings till he appears.

THOMPSON *v.* THOMPSON AND BARRAS. November 25, 1862.—Dissolution of Marriage.—Settlement.—22 & 23 Vict. c. 61, s. 5.—The Court will make no order respecting settled property under 22 & 23 Vict. c. 61, s. 5, after dissolution of marriage by reason of the wife's adultery, to deprive the husband of any benefit derived from the settlement.

[S. C. 32 L. J. (Mat.) 39.]

This was originally the husband's petition for dissolution of marriage on the ground of the wife's adultery. On the 1st of July, 1862, the decree absolute was made, and the late **[650]** wife now moved the Court to make an order with respect to a post-nuptial settlement under the 22 & 23 Vict. c. 61, s. 5, which enacts that "the Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as to the Court shall seem fit."

From the petition "of Mary Ann Barras, wife of James Barras, and formerly Mary Ann Thompson, the respondent in the above cause," and from Mr. Thompson's affidavit, filed in opposition to the motion, the following facts, among others, appeared: that Mrs. Thompson, under the wills of an aunt and of her father, became, on the death of her mother, in August, 1859, entitled to a life-interest in certain hereditaments, with remainder to her children. As this interest was not secured to her separate use, the husband, Thompson, became entitled during their joint lives, jure mariti. For some years previously the parties had been living separately, and after some negotiation, a deed of settlement was made in April, 1860, by which the property was conveyed to certain trustees, on trust to pay, during their joint lives, one-half of the proceeds to Thompson, and the other moiety to Mrs. Thompson "until the said Mary Ann Thompson shall commit any act of adultery, and the trustees for the time being acting in the trusts, etc., shall declare by writing under their hands that they have received evidence thereof," etc., from and after which time the trustees to pay Mrs. Thompson's moiety to Elizabeth Thompson, the daughter of the parties. In April, 1861, the trustees gave notice that they were satisfied that Mrs. Thompson had committed adultery, and that they intended to pay her moiety to the daughter. That Thompson had contributed nothing to the support of his **[651]** wife and child since 1840. On the other hand, Thompson alleged that before commencing his suit for dissolution, he had made his daughter a bonâ fide offer of a home, which she refused, and that she had been living and continued to live with her mother and Barras.

Dr. Middleton, under the above circumstances, moved the Court to direct that the moiety of the rents and profits now payable under the deed of settlement to James

Henry Thompson shall for the future be applied for the use and benefit of the said Elizabeth Thompson, the only child of the said James Henry Thompson.

Dr. Swabey, for Mr. Thompson, was not called upon.

*The Judge Ordinary*: The section relied upon must be taken in connection with the 45th section of the original Divorce Act, which enacts that "in any case in which the Court shall pronounce a sentence of divorce or judicial separation for the adultery of the wife, if it shall be made to appear to the Court that the wife is entitled to any property, either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof for the benefit of the innocent party, and of the children of the marriage, or either or any of them." Under this section the Court thought it had no power to deal with settlements, and therefore the 22 & 23 Vict. c. 61 gives that express power; but it never was intended that the Court should deprive an injured husband of the benefit he takes under a settlement at the prayer of the adulterous wife, whether for the benefit of the children or not.

**[652]** ARTHUR HENRY BEAVAN (an infant, by Joanna Beavan, his guardian) *v.* EMILY LOUISA BEAVAN. July 22 and November 16, 1862.—Petition by Infant. —Costs.—Alimony pendente lite.—Wilful Neglect or Misconduct.—20 & 21 Vict. c. 85, s. 31.—An infant husband, by his guardian, petitioned for dissolution by reason of his wife's adultery; the Court—Held, that the wife was entitled to have her costs taxed as usual, but refused to make any order for alimony pendente lite, the wife failing to shew that the husband had any income or property, in possession or reversion.—B., an infant, married on the 29th of November, 1860, C., a prostitute several years older than himself; they lived together till the 22nd of December, when B., being a ward in Chancery, the parties were summoned before the Master of the Rolls, by whose order B. was delivered to his guardian and sent abroad. C. was interdicted from all intercourse or communication with B. C. remained till July, 1861, in the same lodgings in which she had cohabited with B., and there was no proof of any misconduct on her part while there. She applied to B.'s family for money, but received none. Adultery was charged and proved against her in October and November, 1861: and the Court—Held, that B. was entitled to his decree nisi for dissolution of the marriage.

[S. C. 32 L. J. (Mat.) 36; 7 L. T. 535; 8 Jur. (N. S.) 1110; 11 W. R. 155.]

This was a petition for dissolution of marriage by reason of the wife's alleged adultery, which she denied, and pleaded that before the alleged acts, to wit, on or about the 22nd of December, 1860, the petitioner deserted and wilfully separated himself from the respondent without any reasonable cause, and has continued so to desert the respondent, and has so wilfully neglected the respondent as to conduce to her committing adultery, on which plea the petitioner took issue.

On the 4th of April, 1862, a summons was issued on behalf of the respondent for payment into Court by the guardian of a sum to meet the respondent's costs of the hearing. The following affidavits were filed on that occasion, and as **[653]** they stated, for the most part accurately, the facts of the case, are here inserted:—

Affidavit of respondent, sworn 12th of April, 1862, saith:

"1. That I was married to the above-named petitioner, A. H. Beavan, at the church of St. Paul's, Camden Town, in the county of Middlesex, on the 29th of November, 1860.

"2. That I lived and cohabited with my said husband from the day of our marriage as aforesaid till the 22nd of December, 1860, at No. 6 Victoria Terrace, Rochester Square, Camden Town, in the said county of Middlesex.

"3. That on the 22nd of December, 1860, I was deserted by my said husband, and left by him without any means of support, and I have since that day received no pecuniary support or assistance from my said husband or his friends, nor have I ever seen or heard from him, and I am in consequence of such desertion quite destitute and unable to meet the necessary expenses of this suit.

"4. My said husband, as I believe, has been sent abroad by his friends and relatives, and is not now residing in England.

"5. I was deserted by my said husband under the following circumstances. A few days before the said 22nd of December, 1860, my said husband and myself were

served with a summons to attend before his Honour the Master of the Rolls, at his chambers in Chancery Lane. In the said summons I was charged with having married an infant ward of Court. I attended with my said husband at the chambers of the Master of the Rolls on the said 22nd of December, 1860, in obedience to the said summons, and whilst I was being examined by the said Master of the Rolls on the subject of my marriage, my said husband was, as I believe, taken away by his friends and relations, and I have never since been able to find him, though I have made repeated applications for the purpose to his mother and guardian in this suit, and to others of his friends and relatives.

**[654]** "6. Until I was served with the said summons, I was not aware that my said husband was under the age of twenty-one years, nor that he was a ward of the Court of Chancery, as he always represented to me that he was twenty-one years of age and upwards.

"7. My said husband's friends and relations are in wealthy circumstances, and his said mother and guardian in this suit is entitled, under the will of my said husband's father, who died in the year 1852, to a life-interest in the sum of £45,000 or thereabouts, one-fifth of which sum is by the said will bequeathed to my said husband on the death of his said mother."

Affidavit of Peter Barron Matthews, clerk to petitioner's solicitors, sworn 15th of April, 1862, saith:

"1. That I have been informed by Mr. Chas. John Shoubridge, one of my principals, and believe the same to be true, that in the year 1853 a suit was instituted in the High Court of Chancery by him or his late firm of Shoubridge and Bramby, as solicitors for their next friend, on behalf of Joanna Sophia Phillips Beavan, Hugh John Cadell Beavan, Horace Charles Beavan, Arthur Henry Beavan, the above-named petitioner, and Alfred Edward Beavan, the then infant children of Henry William Beavan, deceased, against Joanna Beavan, their mother and guardian, as the executrix and one of the trustees of the will of the said Henry William Beavan, and also against Thomas Paterson Anderson, the other trustee, as defendants thereto.

"2. I attended to the conduct and management of such suit, and I say that such suit was instituted for (among other purposes) the administration of the estate of the said Henry William Beavan under the direction of the said Court of Chancery, and is still pending; by means thereof the said petitioner Arthur Henry Beavan became and still is a ward of the said Court of Chancery.

"3. By an order bearing date the 22nd of December, 1860, **[655]** made by his Honour the Master of the Rolls in the said cause, it was ordered that the infant plaintiff, Arthur Henry Beavan, should be forthwith delivered into the custody of his guardian, the said defendant Joanna Beavan, and that the said defendant, as such guardian, should be at liberty to take or send the said infant abroad. And it was ordered that Emily Louisa Dane, alleging herself to be the wife of the said infant plaintiff, Arthur Henry Beavan, should be restrained from having any interview with the infant plaintiff Arthur Henry Beavan, and from having any intercourse or communication with him directly or indirectly, by letter or message, or by any messenger, or by any other manner whatever, and from knowingly receiving any letter from the said infant plaintiff Arthur Henry Beavan, or resorting to any place for the purpose or with the view to meeting him, or shewing him that she was present. And it was ordered that the said Emily Louisa Dane, alleging herself to be the wife of the said infant plaintiff Arthur Henry Beavan, should attend at the bar of that Court in the Rolls Yard, Chancery Lane, in the county of Middlesex, on the 12th of January, 1861, at three o'clock in the afternoon of that day, to shew cause why she should not be committed to the Queen's Prison for marrying or attempting to marry the said infant plaintiff, Arthur Henry Beavan. And it was ordered that an inquiry should be made whether the said infant plaintiff, Arthur Henry Beavan, had contracted a valid marriage, and with whom, and under what circumstances.

"4. Pursuant to such order, the said Arthur Henry Beavan was delivered into the custody of his said guardian, and he was sent by her abroad, as I was informed by the said Mr. Shoubridge, and believe.

"5. By another order, bearing date the 20th of December, 1861, made in the said cause by his Honour the Master of the Rolls, it was ordered that the said defendant Joanna Beavan should be at liberty to take or send the said infant **[656]** ward, Arthur Henry Beavan (who, as I am informed by the said Mr. Shoubridge, and believe, was

then about to return to this country), abroad any time within twelve months from that day, and pursuant to such order, the said Arthur Henry Beavan has (as I have been informed by the said Mr. Shoubridge, and believe) been sent abroad."

Affidavit of Joanna Beavan, petitioner's guardian, sworn 14th of April, 1862, saith:

"1. That I am the mother of the petitioner, Arthur Henry Beavan, and his guardian, appointed by the will of his father, my late husband, Henry William Beavan, deceased.

"2. The said petitioner was born on the 22nd of July, 1844, and is now in the eighteenth year of his age.

"3. There is a suit pending in the High Court of Chancery for the administration of the estate of my late husband, and the said petitioner is a party to the said suit and is a ward of the said Court in respect of his interest under the will of my said late husband.

"4. The interest of the said petitioner under the said will is contingent on his attaining twenty-one years of age, and is a reversionary interest expectant on my decease, so that unless he attains twenty-one and survives me, he will never come into possession of any property under the said will.

"5. He has no absolute present or vested interest in the property whatsoever. No allowance is made to me for his maintenance or education. He is entirely maintained and educated by me out of my own income. He is not engaged in any trade or profession, nor has he any means of gaining his living, but is wholly dependent on me for his support. At the time of his marriage with the respondent he was residing at home with me, and was under the instruction of a private tutor."

The summons was opposed by counsel on behalf of the guardian, but the judge made the order.

**[657]** On the 28th of April, 1862, a petition for alimony pendente lite was filed by the respondent, to which the guardian refused to answer; but on summons, the judge, after hearing counsel and taking time to consider, directed that she should file an answer.

On the 22nd of July the question of alimony came before the Court on motion.

Mr. G. Francis, on behalf of the respondent, contended that the guardian was liable to all the incidents of the suit, and among them to alimony pendente lite in respect of property to which the infant was entitled, having regard to his position in life. [By the Court: Has the infant any reversionary property within the meaning of the judge's remarks in *Stone* v. *Stone*, 3 Curt. 341?] The guardian is liable for necessaries for the infant; is she not so for those of the infant's wife? In *Chapple* v. *Anne Cooper*, 13 M. & W. 252, it was held that an infant widow is bound by her contract for the furnishing of the funeral of her husband, who left no property to be administered. In *Bruere* v. *Bruere*, 1 Curt. 566, the husband being an insolvent debtor, but entitled to an estate in reversion after his father's death, the Court refused to allot alimony eo nomine, but suspended the proceedings till some maintenance should be provided for the wife.[1]

**[658]** Dr. Spinks, contrà, for the guardian: The principle is, that the husband and wife separated howsoever, the wife, pending a suit in this Court, has a right to

[1] In *Malo* v. *Malo*, Consist. of London, November, 1786, Dr. Wynne, the then Chancellor, allotted alimony pendente lite on an allowance from father to son; it was the husband's suit, by reason of the wife's alleged adultery. The learned judge said:—"It is to be taken, then, as proved that he is not of himself legally possessed of anything, and that his allowance does not exceed £200 a year, and from thence I must take what he may be able to allow. It frequently occurs, that you cannot fix any certain sum as the property of the party who brings the suit; but it does not follow from thence that a woman against whom the suit is brought should be left in poverty and distress. It is plain in the present case that the father is a man of substance, by the allowance which it appears the son has received from him: if his son is maintained in any way, the Court, in this as in other instances, is sometimes obliged to judge from appearances, and, under all the circumstances, I allow £50 a year, from the return of the original citation." Mr. Malo's proctor immediately undertook for payment of alimony and costs. (From a MS. note in the possession of one of the present reporters.) [Referred to, *Haviland* v. *Haviland*, 1863, 3 Sw. & Tr. 115. Followed, *Martin* v. *Martin*, [1919] P. 283.]

share the husband's income whatsoever; but, if there is no available income, the Court declines to make any order. As to reversionary interests, the question is, are they a marketable commodity? In this case, certainly not till the infant comes of age.

*The Judge Ordinary*: I am of opinion that I ought to make no order for alimony pendente lite in the present case; but, as the point raised, viz. the liability of the guardian, seems a new one, the costs of this argument may be taxed on behalf of the respondent.

On the 16th of November, the issues raised in the petition for dissolution came on for trial before the Judge Ordinary.

Mr. Serjeant Shee and Dr. Spinks for the petitioner.

Mr. G. Francis and Mr. Tidswell for the respondent.

The following, among other facts, were proved at the hearing:—

The petitioner, then between sixteen and seventeen years old, was, on the 29th of November, 1860, married to Emily Louisa Dane, at the district church of St. Paul, in the parish of St. Pancras; he was living with his mother, in Blandford Square. In the autumn of 1860 the respondent lived in, or frequented, a house of ill-fame in Dorchester Place. A police-[659]-man said, that she had not, to his knowledge, lived there since the beginning of November, 1860; that he had not seen Beavan, the petitioner, go to that house with the respondent, but had seen him go to the house in August, 1860, when she was living there. Her age, judging from appearance, was put by various witnesses at from twenty-eight to thirty-five. The marriage was by license, and the parish clerk being at first the only witness at hand, the respondent had gone out of the church and shortly returned with a woman, who signed the register. After the marriage the parties lived in Victoria Terrace, Camden Town, till they were taken before the Master of the Rolls, as stated in the affidavits above printed. According to the evidence of the landlord of the house in Victoria Terrace, the petitioner and respondent lived happily while they were together there; she came back after he did not return, and seemed miserable for a time after; she behaved decently while she stayed, which was till the end of July, 1861; used to go out about ten in the morning and returned at six, seven, or eight in the evening. She was asked once or twice for rent, but said she had no money.

The evidence of adultery, in October and November, 1861, was not contested by the respondent's counsel; on the other hand, it was not denied that she never had any money from the petitioner's family, though she had applied to them for assistance by letter.

Mr. G. Francis submitted that the neglect of the petitioner's family to support his wife, even admitting that, under the order of the Master of the Rolls, howsoever, the husband could not be said to have deserted his wife, necessarily threw such a wife back on her old course of life, and had so conduced to the adultery as to raise a case for the discretion of the Court under the 31st section of the Divorce Act. He cited *Coulthart* v. *Coulthart*, 28 L. J. (Mat.) 21; *Morgan* v. *Morgan*, 2 Curt. 688-9.

**[660]** Mr. Serjeant Shee, contrà, cited *Du Terreaux* v. *Du Terreaux*, 1 Swab. & Tris. 555, and referred to Morgan's Divorce and Cripp's Divorce, H. L. Journals.

*The Judge Ordinary*: This is a suit for dissolution of marriage on the ground of the wife's adultery.

The case made on behalf of the respondent is not by way of bar to the prayer of the petition, assuming the adultery to be proved, but it is by way of appeal to the discretion of the Court. No authority gives so much anxiety to the Court in its exercise as a discretionary authority. The case is remarkable. A boy sixteen years of age marries a prostitute, whose age has been variously reckoned between twenty-eight and thirty-five; as far as experience goes, therefore, it was all on her side: her course of life had been such as that she must have been a pretty good judge of the ages of young men. I can't believe she thought him of age at the time of the marriage. I have no doubt that she knew he was not twenty-one; she certainly knew it was a clandestine marriage, and from the evidence of the parish clerk it appears that it was she who went out to seek the second witness and took the leading part. The Master of the Rolls, Beavan being a ward in Chancery, took upon himself to dissever them; when his judgment is impeached I dare say he will know how to vindicate his own order.

Without stating what is the law, it is enough now to say that it is generally supposed that till twenty-one years of age the Court of Chancery has such juris-

diction. It is said that the mother ought to have supported this woman; how could she expect that? The boy had nothing, and was out of the way; the mother was naturally indignant; the wife must have been prepared for the consequences of such a marriage; the husband did not leave her voluntarily; money he had none. Is it within the discretionary power of the Court to say that the family ought to find money?

**[661]** There is no evidence of any endeavour after the separation to support herself by any honest means: the evidence offered is merely negative,—that for some time she did no positive harm during the hours she was in those lodgings. It would be a very bad example if this Court were to hold out that, whenever a prostitute inveigles a boy into marriage, his family is bound to maintain her.

Decree nisi for dissolution.

JANE MUNT *v.* WILLIAM MUNT. November 11 and 25, 1862.—Sequestration.—Amount Due under Award.—Payment into Court.—Attorney's Lien.—On non-payment of certain sums due by way of alimony and costs, a writ of sequestration issued against the respondent's property, and an order was made on K. to pay into Court a sum of money awarded in an action in the Queen's Bench to be paid by K. to respondent. On motion on behalf of petitioner to order such sum to be paid out in part satisfaction of her attorney's taxed costs and her own alimony, the Court refused to make such order, H. and F., respondent's attorneys in the action in the Queen's Bench, having satisfied the Court, on affidavit, that they had a lien for costs in that cause exceeding the sum so paid into Court.

[S. C. 31 L. J. (Mat.) 134; 7 L. T. 438.]

This was a question arising out of proceedings in the wife's petition for judicial separation, in the course of which certain orders had been made on the respondent to pay sums of money by way of costs and alimony, which he had disobeyed.

On the 27th of March, 1862, a writ of sequestration was issued against his property; and on the 15th of July an amended order was made, calling on Henry Kennedy, of Brighton, to pay, within three days after service of the order, into the registry of Her Majesty's Court of Probate, the sum of £65, 5s., which, by an award, bearing date the 19th of May, **[662]** 1862, Mr. H. T. J. Macnamara had awarded to be paid by the said Henry Kennedy to William Munt, the respondent in this cause, in an action in the Court of Queen's Bench, wherein the said William Munt was plaintiff, and the said Henry Kennedy was defendant.

In obedience to such order, Henry Kennedy, by P. W. Dolman, his attorney, paid into the registry of the Court of Probate the sum of £65, 5s. On notice given to Mr. Dolman as Kennedy's attorney, to Messrs. Hillyer and Fenwick as Munt's attorneys in the action in the Queen's Bench, and to E. W. Crosse as his proctor in this suit,—

Dr. Spinks moved the Court to order the said sum of £65, 5s., so paid by the said Henry Kennedy into the registry, to be paid out; £40, 2s. 10d. to Montague Gosset (the petitioner's attorney), on account of a portion of his costs, as taxed and ordered to be paid; and the balance to the petitioner, on account of alimony ordered to be paid to her.

Messrs. Hillyer and Fenwick had served a notice on Mr. Gosset and on the registrar of the Court, to the effect that they claimed a lien upon, and to be entitled to, the sum of £65, 5s.; that the said sum was ordered to be paid by award (as above stated), which award was made a rule of the Court of Queen's Bench on the 13th of June; and that due notice of such lien was given to the defendant, and Mr. Dolman, his attorney, on the 15th of July.

Mr. J. Brown, on behalf of Messrs. Hillyer and Fenwick, opposed the motion.

The Court directed the matter to stand over for a more precise affidavit from Messrs. Hillyer and Fenwick as to their lien, and in reply to certain charges of contempt of Court brought against them by Mr. Gosset.

Messrs. Hillyer and Fenwick, on 20th of November, served **[663]** notices on Mr. Gosset and Mr. Crosse, to the effect that they should move the Court on the 25th of November, to order the said sum to be paid to themselves in part liquidation of costs, charges, and expenses, due and owing to them from the said William Munt, as his attorneys in the action in the Queen's Bench.

On the renewed motion,

*The Judge Ordinary* said: This case stood over to give Messrs. Hillyer and Fenwick an opportunity of shewing the lien they claimed, and of clearing themselves of an imputation of having treated the process of the Court with contempt. They do now shew the existence of an attorney's lien for costs in the suit exceeding the amount paid into Court; all that the other side can do therefore is to tax their bill at the risk of costs.

---

# APPENDIX.

## [665] In the Consistorial Court of Dublin.

(Before *Dr. Radcliff, LL.D., Q.C.*, Vicar-General.)

Seaver *v.* Seaver.[1] 1846.—Restitution of Conjugal Rights.—Adultery.—Mutual Guilt.—Compensatio Criminis.—Replication.—A. (the wife) sued B. (her husband) for restitution of conjugal rights. B. pleaded in bar A.'s adultery. A., in her replication, (1) denied her adultery, and (2) recriminated B.'s adultery. The admission of so much of A.'s replication as recriminated B.'s adultery was opposed. —Held (in the Consistorial Court of Dublin; and afterwards, on appeal, in the Court of Delegates, Ireland), that the doctrine of compensatio criminis applied to suits for restitution of conjugal rights; that A. was entitled to recriminate B.'s adultery; and that where both parties had been guilty of adultery, the Court would, at the suit of one of them, make a decree for restitution of conjugal rights. [Discussed, *Russell* v. *Russell*, [1895] P. 315; affirmed, [1897] A. C. 395. Overruled, *Brooking-Phillips* v. *Brooking-Phillips*, [1913] P. 80.]

This was a suit brought by Mrs. Seaver against her husband, for restitution of conjugal rights. The impugnant pleaded in bar his wife's adultery. The promovent replied, by way of recrimination, her husband's adultery. The question arose upon an objection to the admissibility of this replication. The facts of the case are sufficiently stated in the judgment.

Dr. Wiley argued the case for the promovent, Mrs. Seaver.

**[666]** Dr. Hayes for Mr. Seaver, the impugnant. Cur. adv. vult.

*Dr. Radcliff*: This was a suit for restitution of conjugal rights, brought by Mrs. Seaver against her husband. A former suit had been instituted by this lady against her husband, for a divorce, on the grounds of cruelty and adultery, to which the husband pleaded a case of recrimination, charging her with adultery. Both parties were dismissed in that suit for failure of proof of their respective cases, and soon after the pronouncing of that order of dismissal the present suit was commenced. The libel in this suit was exhibited on the 9th of November, 1844; a reconventional matter was exhibited on behalf of the impugnant, in bar of his wife's suit, in which he prayed a decree of divorce, and pleaded that the promovent was of wanton habits, and of a debauched, discontented, and violent temper and inclination; that they cohabited together in France for some years after their marriage, until the 30th of October, 1833, when, by reason of debts there contracted by her, he fled from that country, where he left her with her children, and did not again see her until the month of February, 1841. That in the year 1834, Mrs. Seaver received money from her father to bring her home, where she remained until the spring of 1834, when, from wantonness, and without knowing where her husband was, she left her father's house, and returned to France. It then pleaded that she committed adultery, when in France, with one William Browne, and afterwards returned to England, and continued her adulterous intercourse with Browne, by whom she had a child in 1835, in London,

---

[1] The effect of a plea of compensatio criminis in a suit for restitution of conjugal rights was raised in *Hope* v. *Hope*, 1 Swab. & Trist. 94, where the Judge Ordinary decided that the plea was inadmissible. The important decisions given in Ireland in *Seaver* v. *Seaver*, on the same question, are not referred to in *Hope* v. *Hope*, there having been, at the date of that judgment, no published report of them. The reporters have been permitted, by the courtesy of Dr. Todd, LL.D., barrister-at-law in Dublin, who subsequently published a report of these judgments, to append his report of them to the present volume.

after which she returned to Southsea, and there resided for some time, but without having any further intimacy with Browne.

He then pleaded that after the death of her father, in 1836, she returned to and resided at her husband's house in Ireland, and, while there, committed adultery with a person named Freeland, by whom she became pregnant before her husband's return from the Continent, in the month of February, 1841; and that, he believing her to be perfectly innocent, they cohabited, with occasional interruption and quarrels, till December, 1842, when their domestic differences caused a separation, which was followed by the suit already adverted to, pending which, he alleges, he discovered she had been guilty of the adulteries adverted to.

Issue having been joined on this reconventional matter, and several witnesses having been examined in support thereof, Mrs. Seaver exhibited the replication, the admission of which has been objected to; **[667]** since which Mr. Seaver has withdrawn his prayer for divorce on the ground of her adultery, and by a special proxy has authorized his proctor to abandon on the acts any such relief; so that the question respecting the admissibility of the promovent's pleading stands on different grounds from what it did when Mr. Seaver prayed for a divorce.

If the impugnant had persisted in his prayer for a divorce, there could be no question as to the promovent's right to recriminate, by pleading the adultery of the impugnant as a bar to that relief. When, therefore, the pleading of Mrs. Seaver was exhibited, it was clearly admissible. But it is contended, on behalf of the impugnant, that in a suit for restitution of conjugal rights, the adultery of the promovent bars her of all remedy, notwithstanding the adultery of the husband, although, if the husband sought for a divorce, his own adultery, at any time before suit, would bar his right to such relief. It was also objected that the same matters were alleged in the former suit for a divorce, but this is no objection to the pleading, as was decided by the Privy Council in the case of *Moore* v. *Moore*, 3 Moo. P. C. Cas. 86.

Mrs. Seaver's pleading has been supported on three grounds:—first, malicious desertion; secondly, that if the husband fail in his proof and she succeed in proving his adultery, she may change her prayer and seek a divorce; thirdly, that the mutual adultery is a compensatio criminis, and puts the parties in the same position as if no adultery had been committed by either of them.

As to the first point, malicious desertion, some doubts have been entertained whether it be a circumstance to bar the husband, unless he was guilty of connivance. The question was discussed in *Clowes* v. *Clowes*, 4 No. Ca. 29, in the Arches Court (and see *Philips* v. *Philips*, 1 Rob. 162).

As to the second point, viz. the right of the wife to change her prayer, the case of *Kirby* v. *Kirby*, 2 Curt. 216, note, has been cited. It is an authority which would justify the Court in admitting this pleading, although it is not clear from that case that a wife could, under the circumstances of this case, change her prayer into one for separation. Such an allegation was rejected in the case of *Raibould* v. *Raibould*, 2 Curt. 214, note, but the difficulty was got over in *Kirby* v. *Kirby*.

Originally a divorce could not be decreed in a restitution suit; but in progress of time, to save expense, and for other reasons, a contrary practice has been adopted, originating probably in the desire, as the husband must pay all the costs, to make one suit answer the purpose **[668]** of settling every question between the same parties; so, in this case, there is no reason why the wife should be compelled to institute a second suit against her husband, in which the same evidence would be relied on. On this ground, therefore, I think the pleading would be admissible.

It now remains to consider the third ground relied on to sustain the admissibility of this pleading, namely, compensatio criminis, and its effect. Not being able to find any authority expressly deciding that a wife would be entitled to a decree for restitution of conjugal rights, in a case where mutual adultery was proved, and supposing, from the observations of Dr. Lushington in some of the reported cases, that there had been a decided case on the subject, or some acknowledged practice, I delayed giving my judgment until I had an opportunity of communicating with that learned judge. In reply to my communication, he has kindly informed me, that having conferred with that eminent advocate Dr. Haggard, he could not discover that there was any decided case or any known fixed rule of practice on the subject. The absence of such a decision may be accounted for partly by the disinclination of the adulteresses to return to their husbands, and partly by the paucity of cases in which husbands, guilty

themselves of adultery, have had the inhumanity to cast their wives penniless on the world; or the opinion of the profession may have been adverse to the maintenance of suits for restitution in cases of mutual adultery. However that may be, I cannot have the advantage of any decided case to guide me on the present occasion, and must, therefore, resort to other sources of information.

The decision of this question depends on the effect which is given to a plea of compensatio criminis by the law of the Ecclesiastical Courts in these countries. By the Canon Law, no intermediate state between cohabitation and a formal separation was acknowledged; all separations merely voluntary were held to be illegal, and not to be tolerated or presumed. If the parties were not entitled to and did not obtain a divorce à mensâ et thoro, they were under a legal obligation to return to cohabitation. If, under that law, one party sued for a divorce, because of adultery committed by the other, the right to relief was barred by proof that the complainant was also guilty of the same offence; this was styled compensatio criminis. The right to relief might also be barred by proof of condonation or connivance; so in suits for restitution, or in which a decree for restitution, though not the primary object, might be obtained, if the party proceeded against sought to bar **[669]** the suit by a plea of adultery committed by the promovent, the promovent might reply the adultery of the impugnant, or condonation, or connivance; and on proof of any of these, the promovent would be entitled to a decree for restitution.

It has, however, been contended that this is not the law of these countries, first, because the Canon Law respecting marriage was not received in England to this extent before the Act of 28 Hen. VIII. c. 13, s. 10; secondly, because, whether it were received to this extent or not before the passing of that Act, it cannot be the law of this country since that Act, because it is contrary to the Common Law and the first principles of justice; and thirdly, that the total absence of authority to prove that it was introduced into these countries proves that it was always rejected here.

As to the first agreement, viz. that this doctrine of the Canon Law was not received in this country prior to the statute of Henry VIII., the doctrine of compensatio criminis is a principle applicable, in the Canon Law, to all suits. That law, as cited in Consist. 299, in notis, acts on the principle, "quod cum paria crimina compensatione mutuâ deleantur," i.e. blotted out; the maxim was adopted from the Civil Law, "paria enim delicta mutuâ pensatione dissolvuntur," Dig. xxiv. 3, 39, i.e. annulled, cancelled, or abrogated. In this country it is called a set-off;" the meaning is the same in all, and the only question is as to the applicability of the doctrine to this particular suit for restitution. This principle and doctrine were always, and are now, undoubtedly received in this country to some extent, namely, as a bar to a divorce, and the onus would seem to lie on the party seeking to limit their consequences to cite some authority to shew that this blotting out, cancellation, or set off, only applied to suits in which a divorce was sought, especially as our law of matrimony and divorce has been derived from the Canon Law, by which law the rule was applied to restitution suits. Lord Stowell, in the case of *Proctor* v. *Proctor*, 2 Hagg. 300, states this clearly :— "It is notorious that this country, at the Reformation, adopted almost the whole of the law of matrimony, together with all its doctrines of indissolubility, of contracts 'per verba de præsenti et per verba de futuro,' of separations à mensâ et thoro, and many others. The whole of our matrimonial law is, in matter and form, constructed upon it; some Canons of our own may have varied it; and a higher authority, that of the Legislature, has swept away some important parts of it; but the doctrine of indissolubility remains in full force. **[670]** The very practice of the Legislature in granting, by special Acts, particular divorces in particular cases, affirms the indissolubility as existing in the general law, and to be maintained by the Courts in their dispensations of justice. The principle of indissolubility brings with it all its consequences—that every breach of the remaining vinculum continues with all the legal brand of adultery upon it, fully as much as at any period of its existence. It is a par delictum with any other act of adultery that may have taken place during any former period of the marriage contract. Of course, it carries with it all the disability which an adultery creates of obtaining an authorized separation." In this passage Lord Stowell shews that not only was our matrimonial law adopted from the Canon Law, but that, from the admission of a general principle, all the legal consequences of that principle must follow, and that compensatio criminis is in force here, with all its consequences.

Not only is there no decision to negative the applicability of this doctrine of recrimination to restitution suits, and its reception here before the Act of Hen. VIII., but there is much in the Statute of Westminster 2nd, chap. 34, 2 Inst. 432, to shew it was then in full force. "Et si uxor sponte reliquerit virum suum, et abierit, et moretur cum adultero suo, amittat in perpetuum actionem petendi dotem suam, quæ ei competere posset de tenementis viri sui, si super hoc convincatur, nisi vir suus sponte et absque cohertione ecclesiasticâ eam reconciliet, et secum cohabitare permittat, in quo casu restituatur ei actio."

This, however, is not conclusive, as the sentence referred to might have been founded on connivance; but it shews that the Ecclesiastical Courts then claimed and exercised a power to compel a husband to take back and cohabit with an adulteress, in some possible case, where he did not voluntarily forgive her; and this recognition is to some extent an admission that this practice was not at variance with the spirit of the Common Law.

That condonation of, or connivance at, the wife's adultery will bar a husband from relying on that adultery as a bar to a suit for restitution, would seem to be the received and admitted law of our Courts at the present time, in the opinion not only of the best authors, whom I shall cite hereafter, but of some eminent judges. In *Moore* v. *Moore*, 3 Moore, P. C. 86, Dr. Lushington says:—"Unless the husband has condoned or been a party to the concealment of acts of adultery, it is undoubtedly competent for him to allege them as grounds for a de-**[671]**-cree in a suit for restitution of conjugal rights, even though they should not be sufficiently specific to support an allegation in a suit for divorce; but there is a great difference between a suit for restitution and a suit for divorce, which this case has in fact now become." Here he assumes that if the husband had condoned or connived at his wife's adultery, he could not rely upon it. The effect of condonation is so strong, that in certain cases, if the husband's adultery be condoned, and long afterwards the wife should commit adultery, the husband would be entitled to a divorce: *Anachini* v. *Anachini*, 2 Curt. 214; and if this be so, it would seem to be an à fortiori case that such condoned adultery would not bar him or her obtaining a sentence of restitution: *Westmeath* v. *Westmeath*, 2 Hagg. Suppl. 114. In *Denniss* v. *Denniss*, reported in the note to *Turton* v. *Turton*, 3 Hagg. 353, Lord Stowell said, "That though a wife was entitled to her dismissal, on the ground of the husband's connivance at her incest with his brother, it did not necessarily follow that in a suit for restitution of conjugal rights, the Court would compel the husband to return to an incestuous bed," admitting the general rule. In *Dillon* v. *Dillon*, 3 Curt. 86, a divorce was refused, chiefly on the ground of the husband's connivance, and the suit dismissed. Immediately afterwards, the wife instituted a suit for restitution; but the husband stated he was too poor to defend it, and submitted to a sentence, 1 No. Cas. 443—which would indicate an opinion in the profession that the adultery of a wife, if connived at, would not bar her suit for restitution. On the whole, then, it seems to me that condonation or connivance would prevent a husband relying on his wife's adultery, so condoned or connived at, as a bar to her suit for restitution. And if this be so, adopting the general principle that if parties are not entitled to a divorce, they may be compelled to cohabit, there are two cases in which, according to the principles of the Canon Law, an adulteress may obtain a decree for restitution of conjugal rights. It is not probable that when the ultimate appeal was to Rome, the doctrine of compensatio criminis, so favoured by the Canon Law, would have been curtailed, as is contended, particularly when adultery was considered so high a crime. However, there is a distinction in point of criminality between connivance and compensatio: connivance is not only guilt on the part of the husband, but also acquiescence or consent; it falls within the rule volenti non fit injuria: Shelford on Marriage, 449. It may be passive, but there must be an intention that the guilt should ensue, something more than mere negligence; it must be intentional **[672]** concurrence, in order to amount to a bar: *Rogers* v. *Rogers*, 3 Hagg. 59. It is, in part, collusion; it is what Dr. Lushington, in *Moore* v. *Moore*, refers to as "being a party to the concealment of acts of adultery." In other writers, Clarke, Conset, Oughton, it is called knowledge. But however different may be the degrees of guilt, the existence of the rule shews that the doctrines and rules of the Canon Law, in that respect, were fully carried out in the Ecclesiastical Courts of this country. To the Canon Law the judges of these Courts have had recourse for a guide in matrimonial questions, whenever any difficult or novel question arises. In the view

of the Canon Law, as well as of our Ecclesiastical Courts, adultery was, as it still is, an odious crime. Our sixty-first Canon, similar to the English Canon, calls on churchwardens to present it. A suit may be instituted by the Office to punish it as a crime. The illegality of any intermediate state between cohabitation and legal separation, the leading doctrine of the Canon Law, was also the settled doctrine of the Ecclesiastical Courts. In *Mortimer* v. *Mortimer*, 2 Consist. 318, Lord Stowell says: "This Court considers a private separation as an illegal contract, implying a renunciation of stipulated duties"; and in *Warrender* v. *Warrender*, 2 Cl. & F. 561, Lord Lyndhurst says: "One may pledge himself not to claim or institute a suit for restitution of conjugal rights, but he cannot be bound by any such pledge, for it is against the inherent condition of the married state." Here, then, we have by judicial dicta the whole of the Canon Law rules recognized as the settled law of these Courts, although there is no actual decision in print declaring that compensatio criminis—received here, in all other cases, equally with connivance—is to have the same force in suits for restitution of conjugal rights. It is said the Court will not assist an adulteress; but it does in the cases above mentioned, if such be assistance. But if this doctrine be not applied to this case, as it is contended on behalf of the impugnant it ought not to be, the husband will derive a benefit from his plea alleging his wife's adultery, for if he is not compelled to take her home, he need not maintain her; inasmuch as the cases at Common Law which have been cited establish, that if sued at law for goods supplied to her, he will be entitled to a verdict on a proof of her adultery, no matter what his own guilt may be. Will not this refusal, then, have almost all the effect of a sentence of separation, contrary to every principle of these Courts and of the Civil Law?—"Viro atque uxore mores invicem accusantibus causam repudii dedisse utrumque pronuntiatum est" (Dig. xxiv. 3, 39).

**[673]** But the question does not rest solely on principle. On referring to the "Reformatio Legum," which shews to what extent the Canon Law was at that time received in England, it will appear that the doctrine is applied to suits for restitution: "Si persona, quæ fuerit adulterii convicta, crimen in altero conjuge possit idem ostendere, et ostenderit priusquam conjux ad novas nuptias diverterit, utriusque conjugis culpa par in pares incidet pœnas, et prius inter illos firmum manebit matrimonium" (Ref. Leg. de Adult. c. 17).

Throughout the whole title, "De adulteriis et divortiis," in the "Reformatio Legum," most of the Canon Law is adopted. Cap. 1 begins by denouncing the crime of adultery. Capp. 2, 3, and 4 prescribe severe punishments. Cap. 5 permits the innocent party to marry again. Cap. 6 recommends forgiveness, and taking back the guilty party. Cap. 7 prohibits separation for adultery, unless after judicial sentence. Cap. 16 provides that if the husband be suasor aut author of his wife's adultery, she shall be condemned, but he also lenocinii reus pronunciabitur, but neither shall be freed from the bonds of matrimony: like rule as to the wife. Cap. 17 contains the passage I have already cited; and cap. 19 abolishes divorce à mensâ et thoro altogether, as contrary to Scripture, and mischievous. This whole intended code of matrimonial law for England adopts most of the rules of the Canon Law, fits them to absolute divorce, and by not permitting any divorce à mensâ et thoro, and no voluntary separation, and no divorce if both be guity of adultery, it virtually declares that adultery is no bar to restitution if both be guilty. This would seem to shew that the Canon Law was on this point theretofore in force, and that there was nothing in it contrarient to the common law of England, or repugnant to the authorities of that day. The question, then, remains—Is the rule applicable to suits for restitution in practice? In such a case as this, it may be permitted to refer to text-writers and books of practice. Clarke, in his "Praxis," written A.D. 1596, tit. 115, discusses, among others, compensatio as a bar to divorce; and tit. 116, amongst the causes "quæ impediunt restitutionem in causâ matrimonali," enumerates "probatio quod post contractum, vel citra solemnizatum matrimonium ac recessum mulieris a viro (vel e contra) vir vel uxor commiserit adulterium, sufficit ad impediendum restitutionem in causâ matrimonali. In hoc tamen casu, si pars actrix replicaverit, et probaverit compensationem, vel scientiam condonationem, vel remissionem criminis ut superius notatur in proximo precedente titulo,—obtinebit actor restitutionem petitiam." Oughton, also, in tit. 215, 216, discusses the **[674]** subject, and states the law and practice, as laid down by Clarke, in very nearly his words.

These passages in Clarke and Oughton are adopted almost verbatim by Conset,

pars 6, sect. 2, no. 6. In Floyer's "Practice," 2nd edition, 1746, p. 48, it is stated:—"In causes of restitution of conjugal rights, the adultery of the promovent, alleged and proved by defendant, hinders a restitution, unless promovent proves a compensation or remission of the crime"; and in Poynter, p. 224, the husband's adultery is stated "to be a complete remission or compensation of the injury he complains of: he is thereby entirely barred of his remedy, and becomes subject to all the inconveniences which the claims of a licentious wife and a spurious issue may occasion him, and liable to a suit to be instituted on her part for the restitution of her conjugal rights, in which, unless barred by new facts, she would, it is presumed, be entitled to the sentence of the Court, whereby he would be enjoined to receive back his wife, and treat her with conjugal affection." In a note to this passage he observes on *Proctor* v. *Proctor*, and in another note, after quoting a passage from Ayliffe as to the effect of the husband's adultery after a sentence for divorce, suggests a doubt as to Ayliffe's opinion being now law: and in p. 245 he says:—"A plea in bar to a suit for restitution may be defeated (as if it were originally a suit for divorce) by a counter-plea, alleging condonation, compensation, etc., which, if established, would, it is presumed, by placing the parties on their original ground, entitle the party praying restitution to the benefit of the sentence prayed for." Dr. Addams, in his note to *Brisco* v. *Brisco*, 2 Add. 264, states that the law is accurately laid down by Poynter, but explains that Poynter's doubts, as to compensatio criminis entitling a wife to restitution after sentence of divorce, founded on the passage in Ayliffe, were not well founded, admitting that he is in the main correct.

So far as to books of practice, the earlier of which are of great weight, as shewing that the settled practice was to allow recrimination in suits for restitution, which could only be in order to neutralize the defendant's charge, because at that time divorce was not prayed or granted in such suits, nor till about 1730, as appears by the cases cited in *Best* v. *Best*, 1 Add. 412. Ayliffe pushes the doctrine further, in which he is wrong, if he applied his observation to a civil suit. He says:—"But if the husband shall, after such divorce, commit fornication, the marriage shall be restored, on the score of his lewdness, and the husband, for a punishment thereof, shall be obliged to receive his **[675]** wife again"; and cites 32 Q. 5, 3, that is the 32nd cause, question 5, and chap. 3 of the 2nd Book of the Decrees; which refers, however, to a criminal suit by the Office, and not to a suit for restitution by the party, as would appear from the note in 2 Add. 264, who does not suggest a doubt as to the doctrine of compensation having been received and adopted in England.

Mr. Shelford, in his "Law of Marriage," p. 577, also makes some valuable observations on this subject.

There are several dicta on the subject to be found in the reported cases. Thus, Lord Stowell, in *Beeby* v. *Beeby*, 1 Hagg. 789:—"It is not unfit, if he who is the guardian of the purity of his house has converted it into a brothel, that he should not be allowed to complain of the pollution which he himself has introduced, if he, who has first violated his marriage vow, should be barred of his remedy. The parties may live together, and find sources of mutual forgiveness in the humiliation of mutual guilt." He does not say that they must live together, but otherwise the passage is unmeaning. In *Anachini* v. *Anachini*, 2 Curt. 219, Dr. Lushington says:—"I next look at the consequences of such a principle of law. If a husband be not entitled to a separation from his wife, he is bound to cohabit with her, and how difficult would it be to enforce such a principle of law! I know no authority which states that whatever be the guilt of both parties, if the Court does not pronounce for a separation, they are not, according to the law of this country, bound to live together; and I think such a principle would be dangerous to society and to public morals." No doubt, these observations were made in a case of condonation; this however makes no difference in principle, nor are they confined by Dr. Lushington to such cases. In *Kirby* v. *Kirby*, 2 Curt. 215, Sir W. Wynne observes:—"Suppose she proves adultery against the husband, she is not obliged to pray separation, and he could not set up his own adultery in bar. If both prove adultery, it is not necessary to say now what would be the consequence; perhaps the Court might say it would give no sentence." The difficulty in this case also was caused by the wife praying a divorce, her suit being originally commenced for restitution. If the law be clear, that recrimination would be an answer in a suit for restitution, why should there be any difficulty in dismissing the suit if the adultery of both parties be proved?

In reply to all this there has been much argument, but very little authority has been adduced. The following passage in the judgment **[676]** of Lord Stowell, in *Proctor* v. *Proctor* (p. 302), has been mainly relied on, viz.: "There is no return to cohabitation, nor any means to be resorted to for the purpose of compelling it." If Lord Stowell meant that no suit for restitution of conjugal rights could be maintained, it is difficult to reconcile such a statement with his previous observations, referring our whole law of divorce to the Canon Law, when not altered by our canons or statutes. He may have meant that in the particular divorce suit, or in a suit to punish the adultery, no such order for restitution of conjugal rights could be made. If a wife improperly sues for a divorce, she may, in general, be ordered to return to her husband on failing in her suit, and to this Lord Stowell may have alluded. There is certainly great difficulty in the passage, which puzzled Poynter (p. 225) also; but it is not cited for this purpose by Mr. Shelford, although he gives other authorities. Dr. Addams, in his note, 2 Add. 264, also throws a doubt on the meaning of this passage, and inclines to refer the observation to a criminal proceeding by the Office. A passage from Mr. Shelford's work has been also relied on for the impugnant in p. 422:— "The husband is not bound to receive or to support his wife after her commission of adultery, although he had before been guilty of adultery, and turned her out of doors without any imputation on her conduct. In such a case, the Ecclesiastical Court would not assist the wife in a suit for restitution of conjugal rights"; and in support of this position he recites *Govier* v. *Hancock*, 6 T. R. 603, decided in 1796, where a dictum to that effect is to be found in the judgment of the Court. The point, however, was not argued; the case itself was a hard one; a husband had turned out his wife when innocent, and taken in another woman. It was so decided for the first time. He refers also to a similar dictum in *Rex* v. *Flintan*, 1 B. & Ad. 227, decided in 1830. The defendant had been convicted under the English Poor Law for not maintaining his wife. It appeared that she had sued her husband in the Ecclesiastical Court, by reason of adultery committed by her husband. She failed in her suit, the husband having pleaded in recrimination her adultery, which had been committed by her when living with him, but without his knowledge or condonation; his adultery was committed after she had left him. In this case, Bayly, J., observes (p. 229): "How can he be bound to maintain her, if he can neither be sued for maintenance found her, nor for restitution of conjugal rights?" This position of Mr. Shelford's is founded solely on these dicta of Common Law judges on a point not within their jurisdiction, and not even argued **[677]** before them by civilians. The case of *Proctor* v. *Proctor* is cited in the last case, and probably misunderstood. In both cases the wife was living apart from her husband, and not desirous to return. In *Astley* v. *Astley*, 1 Hagg. 722, Dr. Lushington, observing upon the inconveniences that might follow from the doctrine of recrimination urged in a suit for divorce brought by a husband, namely, his liability for her debts and obligation to support a spurious offspring, adds: "It is to be remembered that the wife will equally suffer inconvenience if a sentence be given against her and she be turned loose upon the world." How so, it is said, if she could sue for restitution? Yet these observations would equally apply in the case of *Anachini* v. *Anachini*. However, in *Astley* v. *Astley*, Dr. Lushington had before him (p. 742) *Naylor* v. *Naylor*, which was a restitution suit brought by the wife, in which her adultery was relied on by the husband, who, on this ground, prayed a divorce; the wife replied recrimination as a bar to the divorce only, and not for the purpose of entitling her to restitution.

I cannot find any other authorities affecting the wife's right to restitution, and none have been cited. The cases on dower do not apply, as they are all founded on an Act of Parliament, a woman before that Act not having been barred of her dower by reason of adultery. The cases decided at law in actions for maintenance do not apply, as they proceed and Common Law Courts act on a different principle. In *Rex* v. *Flintan*, above referred to, Bayly, J., says: "The ground of a husband's liability in an action for goods supplied to his wife is a supposed authority communicated to her by him; but when she improperly leaves him that authority is determined." The cases on this subject are collected in Starkie on Evidence, pp. 540-1.

All these authorities and writers satisfy me that there has been, up to a very recent period, from a remote period, a general understanding among all the writers, practitioners, and judges of these Courts, that the law of recrimination applied to prevent a defendant in a suit for restitution from relying on the promovent's adultery

as a bar, as it did in the Canon Law, and that, during all this period there was no decision, or even a well-considered dictum to the contrary. Such a rule is consistent with the whole code of law on marriage and divorce in the general Canon Law, as well as the particular law admittedly received here, and the status of the parties. Nothing has been adduced against it except the loose dicta already noticed, which, if carried out, would introduce great confusion, and perhaps criminality. I can find no **[678]** principle on which to rest a decision in favour of the impugnant. At first I was disposed to think the rule of the Court might be not to assist either party under such circumstances and to dismiss the promovent; but on consideration I do not think such is the rule.

If the promovent was to be barred in a suit for restitution, in cases of mutual adultery, this would give the other party a legal separation, and enable that party to free himself or herself from the matrimonial bond, though equally guilty; this Court would thereby sanction a renunciation of stipulated duties, a dereliction of those mutual offices which the parties are not at liberty to desert. In this case it would enable the husband to send his wife a beggar into the world, and perhaps compel her to resort to prostitution for the means of subsistence, a course not quite consistent with the principles of the law on this subject. If the wife were the impugnant, it would enable her virtually to have a divorce, although her husband, on finding he could not get a divorce, might desire to take her home, and protect himself from debts and a spurious issue. The cases which establish that a slighter proof of adultery suffices to bar a restitution suit than to obtain a divorce, do not militate against this, as the crime must be proved to the satisfaction of the Court, although not so fully as in a suit originally for divorce. Not being at present able to discover any sound principle on which I can reject this pleading—though entertaining as strong a disinclination as any judge ever did to extend the doctrine of recrimination,—I feel myself coerced to admit it to proof, though I entertain great doubts on the subject. To warrant me in rejecting the pleading, and so for ever preclude the promovent from raising the question, I should entertain a decided opinion against her. But as it is, I give her the benefit of my doubts, as by so doing, though I may put the impugnant to greater expense, I do no other injury, as the question will be as open on the hearing as now, if both cases proceed. On both grounds, therefore, I overrule the general objection to the promovent's pleading, which must be reformed in some particulars, after which the rule can be entered, so as to give the impugnant an opportunity of appealing at once, which it would be very desirable he should do.

From this judgment an appeal was brought to the Court of Delegates.

**[679]** (Coram the *Honourable Judge Crampton*, *Dr. Stock*, *LL.D.*, Judge of the Court of Admiralty, and *Dr. Mounterford Longfield*, *LL.D.*, now one of the Commissioners of the Court for the Sale of Incumbered Estates in Ireland.)

Sir H. Meredith, Q.C., and Dr. Hayes, appeared for the appellant; Sir T. Staples, Q.C., and Dr. Wiley, for the respondent.

*Crampton*, *J.*, delivered the judgment of the Court:—

This is an appeal from an Order of the Consistorial Court of Dublin.

The Order appealed from is dated the 18th of April, 1846, and is an Order admitting to proof, a defensive pleading put in by the promovent in the Court below, by way of replication to a plea in bar; and the question of this Court is, whether the learned judge should have rejected or admitted that pleading.

According to the old practice of the Court, for which the summary proceeding by motion has, in later times, been substituted, the impugnant would have taken an exception or demurrer to the pleading objected to. A demurrer, we know, admits the facts pleaded. The appeal, therefore, proceeds upon the principle that, if the whole of pleading excepted to were established by proof, it would furnish no answer to the case made by the impugnant's plea.

I shall state the substance of the pleadings, in order to see whether the pleading, thus excepted to, be or be not an answer to the plea in bar.

The suit is brought by Mrs. Jane Stewart Seaver for restitution of conjugal rights.

The husband, Mr. Seaver, pleads in bar a reconventional matter, alleging adultery on the part of the promovent, and concluding by a prayer for a separation à mensâ et thoro.

The wife, the promovent below, exhibits a defensive pleading in the nature of a

replication; she denies the adultery charged, and she recriminates on the husband, charging him with adultery, cruelty, and profligate incitements to her to commit adultery.

From the pleadings it appears, that there had been a former suit between these parties; that Mrs. Seaver had instituted a suit for divorce and alimony, on the ground of cruelty and adultery; and that Mr. Seaver had pleaded, in bar, adultery on the part of the promovent, and prayed a divorce; and that the cause having been heard on pleadings and proofs, the suit had been dismissed, and the prayer of both parties refused.

I mention this previous suit to put it out of the way, for it is nothing more than evidence of that which must be assumed for the argu-[680]-ment of this case, namely, that both promovent and impugnant, wife and husband, have been unfaithful to their marriage vows and duties, and have each established against the other a case of adultery. They are, in this respect, in pari delicto.

The dates of the proceedings in the present suit are these:—

9th November, 1844.—Mrs. Seaver exhibited her libel in this suit, praying restitution of conjugal rights.

21st June, 1845.—Mr. Seaver exhibited his reconventional matter charging adultery, and praying for a divorce.

April, 1846.—Mrs. Seaver offered her defensive pleading, the subject of the present exception, and on the 18th April, 1846, the order appealed from was pronounced.

The prayer for divorce in the husband's plea was on the same day, 18th April, 1846, on his own motion struck out by the Court.

If that amendment had not been made, it is, I think, plain that the wife's defensive pleading could not be rejected. For, by the reconventional matter praying a divorce, the suit for restitution was turned very much into a suit for divorce. The husband so far became a promovent or actor in the cause, and the wife was put upon her defence. And nothing can be better established than the position that a party, who is himself an adulterer, cannot obtain a divorce from his guilty partner on the ground of adultery. And I may add that this amendment is a confession, on the husband's part, that he is not entitled to a separation.

I shall now, then, take the case as if the amended pleading had stood originally as it now appears. And I think the substance of the case will remain as before.

As before intimated, I assume the case of mutual guilt,—that each party has established adultery against the other. By the law of England this is a state of things in which neither party can claim to be divorced from the other. The vinculum matrimonii remains by law unbroken; and are not its rights and its duties therefore unchanged? It is otherwise in the law of Scotland; but our present inquiry is, what is the law of England on this important subject?

Where both husband and wife are equally guilty; where each has lost the right of claiming a legal separation from the other; where the vinculum matrimonii is, by the law of England, indissoluble; shall mutual criminality emancipate the parties from ties and duties which the Common and Ecclesiastical Law of the country pronounces to be indissoluble? In such a state of things, does anything remain, but repentance for the past, and a return to the discharge of conjugal duty? [681] There has been mutual injury; there should be mutual forgiveness. There has been a common crime; there should be common contrition, mutual humiliation, and mutual compensation.

I can find neither principle nor authority in the law of England for a middle state in the relation of husband and wife between that of consortium vitæ and divortium à mensâ et thoro (2 Hagg. Consist. 298).

"Viro atque uxore invicem accusantibus causam repudii dedisse utrumque pronuntiatum est; id ita accipi debet, ut eâ lege, quam ambo contempserunt, neuter vindicetur, paria enim delicta mutuâ pensatione dissolvuntur,"—is the language of the Digest; and two principles are here laid down applicable to the present case, viz. that the injured party is entitled to claim a separation from the guilty partner; but that, where the guilt is mutual, the guilt of each, as respects the other, is annulled, and each has lost the right of calling for a separation. This doctrine is called by the ecclesiastical writers the doctrine of compensation.

It is, beyond controversy, a doctrine of the Canon Law; and that it has been incorporated into the Ecclesiastical Law of England, appears to me to be equally clear;

and the result of this doctrine of compensation, coupled with the admitted principle of the Law of England, that the vinculum matrimonii is indissoluble, seems to me necessarily to lead to the conclusion that, where there is not a causa separationis, the law implies the consortium vitæ, and in this indissolubility of marriage, according to the law of England, we may perhaps find the reason of its difference from the law of Scotland on the subject of compensation.

The appellant's counsel scarcely denied that compensation was a doctrine of our Ecclesiastical Law; but they contended that it was a doctrine of neutrality, and that it declared both parties unworthy of any aid from the Ecclesiastical Court, and had the effect of tying up the hands of the Courts from giving any relief to either of the guilty parties.

But I can find no ground for this limitation; on the contrary, all the writers upon our Ecclesiastical Law, from the earliest to the latest, state the doctrine of compensation exactly as the doctors of the Canon Law do. Oughton is express upon the subject. After laying down that adultery on the promovent's part is a bar to the claim of restitution of conjugal rights, Oughton adds:—"In hoc casu tamen, si actor replicaverit et probaverit compensationem vel scientiam, condonationem vel remissionem criminis (ut superius notatum in præcedente titulo 214), obtinebit actor restitutionem petitum."

**[682]** The same doctrine we find laid down in all the practical writers, including Poynter, the last among them. See p. 245 of Poynter, where he says:—

"A plea in bar to a suit for restitution may be defeated (as if it were originally a suit for divorce) by a counterplea, alleging condonation, compensation, etc.; which, if established, would (it is presumed), by placing the parties on their original ground, entitle the party praying a restitution to the benefit of the sentence prayed."

But it is objected that there is no precedent for such a replication. It is true, none such has been cited, and I believe there is none that can be produced. It might be enough to say that the proceeding is grounded on principle, and sanctioned by all the writers upon ecclesiastical practice.

But though there be no case directly on the point, there are some, and those modern cases, of high authority, in which the principle of compensation to the extent applied in this case seems to be directly recognized. I shall cite only two, viz.:—first, *Proctor* v. *Proctor*, before Lord Stowell, 2 Hagg. Consist. 297.

[The judge here read passages from Lord Stowell's judgment.]

It is impossible to read these passages, and not to see that Lord Stowell's opinion was against the medius status contended for by the appellant here.

Secondly, *Anachini* v. *Anachini*, 2 Curt. 219, before Dr. Lushington.

Dr. Lushington, in that case, says, "I next look at the consequences of such a principle of law," viz., that a wife having condoned her husband was thereby licensed to commit adultery. "If a husband be not entitled to a separation from his wife, he is bound to cohabit with her; and how difficult would it be to enforce such a principle of law! I know no authority which states that, whatever be the guilt of both parties, if the Court does not pronounce for separation, they are not, according to the law of this country, bound to live together. And I think such a principle would be dangerous to society and public morals." See also Lord Stowell's judgment in *Beeby* v. *Beeby*, 1 Hagg. 790.

The common law cases cited by the appellant's counsel in support of the doctrine of a medius status, in the relation of husband and wife, are outside the argument. These all recognize the jurisdiction—the exclusive jurisdiction—of the Ecclesiastical Courts on the subject of divorce and of restitution; and, although there may be some incautious **[683]** language in some of them, they assume to act upon the same principles as the Ecclesiastical Courts do; I therefore pass these cases by.

But, again, it has been urged that, in such a case as the present, when the parties appear to be in pari delicto, the Ecclesiastical Court should act in analogy to the principles of a Court of Equity, which, as between participes criminis will not interfere for either party against the other.

But I should say, first, that the rule, even having regard to the practice of a Court of Equity, is laid down too broadly. It is by no means a universal rule.

The advocates around me (many of whom are practitioners in the Court of Chancery) know that the Courts of Equity will, even at the suit of a guilty party, give relief whenever a principle of public policy requires their interference; in a large

department of these Courts they are but auxiliary to the Courts of Common Law, and in the class of cases referred to they leave the parties to their legal rights. The Court Christian acts upon a totally different principle; its interference is pro salute animarum.

Having the sole cognizance of questions of marriage, its rights and its duties, so long as the relation of husband and wife subsists, it will protect those rights and enforce these duties. It acknowledges no status which is founded upon a violation or relinquishment of those rights and duties. The rights of one party may be forfeited by crime, and the other party thereby be released from conjugal duties, and in such cases the Court Christian will protect the injured party by its sentence of divorce à mensâ et thoro; but it will not tolerate the principle that either mutual crime or mutual compact can release or suspend the obligation of the marriage vow. If there be mutual faults, the parties (in the language of Lord Stowell) "may live together, and find sources of mutual forgiveness in the humiliation of mutual guilt."

We were pressed with the inconvenience of the doctrine upon which this case has been ruled, and, no doubt, serious inconvenience may result from its application to particular cases; but, on the other hand, I think I can see still greater inconvenience from holding the doctrine contended for by the appellant.

I can suppose the case of a man receiving a large fortune with his wife;—I can suppose that man to become an abandoned adulterer, and designedly to seduce his unhappy partner to imitate his profligate courses;—I can suppose him to abandon his yet innocent partner, and to leave her in such circumstances as would require more than common **[684]** prudence and propriety to save a female from falling. Shall the lapse of the unfortunate party, under such circumstances, consign her to infamy and destitution, and shall the profligate seducer have the legal sanction of the Court Christian to set his unhappy wife at defiance, enjoy the property acquired by the marriage, and leave his victim to pine in helpless destitution and dishonour?

I put an imaginary case; let me not be understood as applying it to the parties before us.

I only of the Court am, of course, answerable for the arguments and observations which have fallen from me in the course of this judgment; but I have the authority of my learned brethren for saying that they entirely concur with me in the general principles I have stated, and in the result at which I have arrived.

That result is, that the learned judge below was right; that this appeal must be dismissed with costs; and the cause remitted.

As the opinion of the Court was unanimous, the other members of it did not deliver judgments. The following note of Dr. Longfield's intended judgment is, with his permission, printed:—

*Dr. Longfield*: This is a suit by Mrs. Seaver for the restitution of conjugal rights.

The wife pleads her marriage, her readiness to perform the duties imposed on her by that sacred contract, and she calls upon the Court to compel the husband to perform his part.

To this demand the husband puts in a defensive allegation, not denying his marriage, nor pretending that he is willing to discharge his duties as a husband, but alleging that she has committed adultery, and has thus relieved him from the obligation of cohabiting with and maintaining her.

To this the wife has replied by a formal denial of her guilt, and by an allegation that, even if she is guilty, her husband also has committed adultery, and that, therefore, neither can justly reproach the other with that offence of which they have both been equally guilty.

The husband objects to this allegation, and has appealed from the sentence of the Consistorial Court of Dublin, which was in favour of its admission.

I am of opinion that the sentence of the Court below should be affirmed, and that the same pleadings which are sufficient to protect the wife against a divorce, when the husband seeks it by lawful process, **[685]** will equally protect her against a divorce imposed by the husband without any process of law. It is on both sides admitted that the precise point now in dispute has never been the subject of direct decision, and, as is usual in such cases, each party relies upon that absence of precedent, and wishes to throw upon the other side the onus of producing a case in point, when it is confessed that a case in point cannot be found. In the absence of precedent, we must have recourse to principle and analogy, and inquire against which side the charge

of novelty may be most fairly brought. First, then, and in a case of this nature, it is a matter of some moment, and adds force to other arguments, I find that all the text-writers are unanimous on the point that the pleading ought to be admitted. In Clarke's "Praxis," written about the year 1590, tit. 116, the doctrine is thus stated, speaking of a suit for restitution against which adultery has been pleaded:—"In hoc tamen casu, si pars actrix replicaverit et probaverit compensationem vel scientiam, condonationem vel remissionem criminis, ut superius notatur in proximo præcedente titulo, obtinebit actor restitutionem petitam." Oughton lays down the same rule in the same words, and Consett and Poynter give the same account of the law applicable to the present case.

It is difficult to believe that, if the doctrine thus laid down was contrary to law, and so flagrantly mischievous as it has been represented by the advocates for the appellant, it would have remained without qualification or contradiction, though proclaimed in those text-books which have been the subject of constant reference for a period of more than two hundred years.

An attempt has been made to diminish the force of this authority by alleging that the authors in question merely adopted the rule of the Canon Law, without inquiring whether the same rule had been introduced into the English Ecclesiastical Law: an improbable and unsatisfactory statement, for, although the substance of the law is the same, yet the language bears no similarity to that in which the same doctrine is expressed in the most authentic sources of the Canon Law; and it is not very probable that the Proctors practising in the Ecclesiastical Courts should derive their doctrine from the old Canon Law, of which they, probably, had very little knowledge or regard, rather than from the decisions and opinions with which they were likely to meet in their daily practice.

It is also intimated, on behalf of the appellant, that the doctrine of the Canon Law was misunderstood, and is applicable merely to the case [686] in which the bishop, ex officio, interfered to compel the parties to live together, and not to the case where one party brings a suit for restitution against the other. I do not think there is any ground for this distinction. See the Decretals, lib. v., Dis. xvi. cap. 6 and 7, where restitution in case of mutual guilt is ordered. The sixth chapter certainly refers to a restitution sought by the wife. The words are, "Prædictum virum sibi restitui postulavit;" and in cap. 7, "Super quo tibi respondimus, quod cum paria crimina mutuâ compensatione deleantur, vir hujusmodi fornicationis obtentu suæ uxoris nequit consortium declinare"; and in the gloss on this chapter it is observed, "Ex sic nota quod compensatio admittitur in delictis, et hoc intelligunt quidam quoad exceptionem et replicationem aliter nunquam."

Now the replication of such a fact could only occur in a suit for restitution, as it does in the present case; and the gloss, in an endeavour to reconcile conflicting opinions respecting the effect of adultery committed by the husband, after he has obtained a divorce for adultery committed by his wife, comes to this conclusion, "Quod illa possit petere virum, non obstante sententiâ, quia vir illi sententiæ renuntiavit"; —that she may maintain a suit for restitution, notwithstanding the divorce, since the husband, by his subsequent adultery, has waived that sentence. I may observe here that, in modern practice, a decree for a divorce does, in terms, impose upon the party who obtains it the obligation of leading a chaste life.

I need not cite any further passages from the ancient Canon Law, because I do not think it possible to raise any reasonable doubt on this part of the case; and I turn to the assertion on which the advocates for the appellant appear to place more reliance, viz. that there is no proof that this portion of the Canon Law was ever recognized as of authority in England. On this point of the case, that unanimity among the text-writers to which I have alluded must be considered as of some importance. The rule has been recognized by judges as well as text-writers; for, although a pleading like the present did not come directly before Sir William Scott, yet he has taken occasion to express his opinion, and no authority can be higher in its favour. He repeatedly expressed his opinion to be, that unless a husband is entitled to a divorce, he is bound to cohabit with his wife, and that a husband who is guilty of adultery is not entitled to a divorce. Thus, in *Forster* v. *Forster*, 1 Hagg. Cons. 144, he described a suit for a divorce as a "prosecution brought by the husband against the wife to be relieved from the obligation of cohabiting with her, by reason of her adultery"; he ex-[687]-plains the doctrine of compensatio criminis as it obtained in

the Civil Law; and, although it could not there apply to a suit for divorce or restitution, since a husband could divorce his wife without any cause, yet he gives an instance of its application to a suit by the wife for her dower or portion, which was exactly analogous to a suit for restitution of conjugal rights, as it was the remedy provided by the Civil Law for an innocent wife rejected by her husband. It was, in fact, a suit for restitution of conjugal rights, with this only difference, that the conjugal rights of the wife were not as extensive as they became under the Christian code. Her legal conjugal rights consisted of dower, instead of cohabitation. To such suit her adultery was a sufficient answer, as it is to a modern suit for restitution; but to this answer an allegation that the husband also had committed adultery was a sufficient reply.

It is not possible, if the same replication, relying on the compensatio criminum, was not admissible in the analogous modern suit, that Sir William Scott could have omitted to notice the difference, and to state that all the text-writers were mistaken in supposing it admissible in a suit for restitution. On the contrary, he cites this as an example of the compensatio criminis, which he states was, in the Civil Law, not applied to cases of divorce merely, because the subject itself was not within the jurisdiction of the magistrate, and he adds:—"The Canon Law, therefore, which attributed to the ecclesiastical magistrate the question of divorce, carried this principle along with it, for the exercise of his authority" (1 Hagg. Cons. 148). Could the Judge have uttered these words without qualification, if he was of opinion that the doctrine of compensation was introduced only to half its extent, and did not apply to cases of restitution, and that all the text-books had fallen into the mistake of applying it to such suits? And he adds, "that, in the case of Lord and Lady Leicester, this was unanimously recognized by all the delegates as the standard Canon Law of this country in all cases of divorce, and so in all other cases."

This language is plainly applicable to the present pleading, if we bear in mind that the instance which Sir William Scott had just cited was one in which the doctrine of compensatio criminum was applied to support a suit, not to resist one.

Again, in *Forster* v. *Forster*, he treats the refusal of a divorce as equivalent to a decree for restitution; and he adheres to the same rule, notwithstanding the danger of a spurious offspring, and the other inconveniences alluded to by the advocates of the appellant in this cause, as consequent upon a decree for a restitution, and even although [688] he appears to have taken an exaggerated view of these inconveniences. He says:—"In the state of separation, whether authorized or merely conventional, which usually takes place, there is, certainly, the increased danger of a spurious offspring; and as the regulations of property exist among us, the danger of separate debts, to the great eventual injury of the husband and his legitimate family. But even if such mischief may be presumed to follow the modern application of the rule, this Court still remains under the legal obligation of adhering to it until a competent authority provides another. Whether the inconveniences of the rule, as it now operates (considered, as they ought to be, in opposition to those which might follow from the reversal of it), are such as, nevertheless, ought to produce a reversal, is a question which this Court has neither the power nor the will to entertain."

The same doctrine is recognized by a very high authority in the case of *Anachini* v. *Anachini*, 2 Curt. 219. Dr. Lushington says:—"If a husband be not entitled to a separation from his wife, he is bound to cohabit with her; and how difficult would it be to enforce such a principle of law! I know no authority which states that, whatever be the guilt of both parties, if the Court does not pronounce for a separation, they are not bound to live together; and I think such a principle would be dangerous to society and to public morals." Could Dr. Lushington have used this language if he adopted the appellant's view of the law—that, in a case of mutual guilt, the husband might dismiss his wife; and, if the Common Law would not compel him to support her while living apart from him, neither would the Ecclesiastical Law compel him to receive her into his house?

It is scarcely possible to read the numerous cases which have been decided on the subject of divorce without arriving at the conclusion that, in every contingency, either one party is entitled to a divorce, or the other party is entitled to a restitution. There is no middle course. A divorce obtained by the husband does not compel him to live separate from his wife; it merely permits him to do so; and the law which, under certain circumstances, refuses to permit him to live separate, must in consistency

be prepared to compel him to receive her. Indeed there is authority for holding that, in an unsuccessful suit for a divorce, the Court, as a consequence, may order the unsuccessful party to return to cohabitation: *Moore* v. *Moore*, 3 Moo. P. C. Cas. 86, referred to in *Clowes* v. *Clowes*, 4 No. Ca. 29.

In order to support the doctrine that there is a middle case, in which **[689]** the Court will refuse relief to either side, the appellant's advocates have compared the doctrine of this Court to that of a Court of Equity, which required a plaintiff to come into Court with clean hands, and, in certain cases, will refuse to interfere on either side, either to rescind a contract or to enforce it, but leaves the matter to the Courts of Common Law, i.e. to the Courts of ordinary jurisdiction.

But such neutrality is not allowed to this Court, which has the exclusive jurisdiction, and fills the place both of the Courts of Common Law and of the Courts of Equity, in relation to the subject of this suit. The Common Law right is, that the parties should live together, as the effect of the valid marriage contract, against which no objection has been raised. The decree for a divorce is an extraordinary equitable relief. The analogy to the practice of the Courts of Equity is preserved by the rule which, in this case, would deny relief to either party praying for a separation.

The appellant has referred to the state of the law on some collateral points, to which I shall briefly refer. First, it is observed, that the wife who abandons her husband for an adulterer is not entitled to dower on her husband's death, and that the husband's adultery could not be set forth in a replication to support the wife's right to dower. I cannot draw any inference from this to bear upon the case before us. The loss of dower is a punishment imposed on the wife by statute. It has nothing to do with the Common Law; and, on the other side, it is equally irrelevant, that her adultery will not disentitle her to the jointure provided for her by her marriage settlement; nor to a share of her husband's assets, under the Statute of Distribution.

The manner in which the Common Law treats the adulteress during the life of the husband may appear to have more bearing on the question now before the Court; and cases have been cited on behalf of the appellant, to shew that, in a case like the present, the husband would not be liable to tradesmen for necessaries supplied to his wife; that he was not bound to support her; that he might let her starve, or be dependent on public or private charity for a subsistence. This state of the Common Law would furnish a conclusive argument for the interference of the Court Christian in the present case. The husband is entitled to the use and disposal of all the common property, whether derived through his wife or himself; he may take possession of all her goods, live in her hereditary mansion, consume the rents of her freehold property, and even sell her chattel interests in land; and, while living in splendour and profligacy on her estates, may refuse a single **[690]** shilling to pay for or purchase a meal to save his guilty but repentant wife from starvation. This shocks every feeling of justice and humanity, and is most repugnant to the Ecclesiastical Law, which visits with equal condemnation adultery committed by the husband or by the wife, and will secure to the penitent that justice which is denied to her by her profligate husband.

No human judge can look into the recesses of the human heart, but the facts of a case like this furnish no mean proofs of penitence on the woman's part. For what does she desire and demand by this suit? Merely to return to her domestic duties, and to be maintained and protected from want and guilt. For this she is willing to abandon her course of sin, and all the guilty pleasure in which once she took delight, and to place herself within the power and subjection of a man who hates her, because he indulges in a guilty passion for another; and who despises her for having fallen into equal guilt. Can we agree with the appellant that a sentence gives any encouragement to female adultery, which places her within the lawful power of a man, on whose principles she cannot rely, and whose affection or respect she can never hope to possess, without any protection, except from the extremity of violence, without friends, and without society? Her husband's jealousy and the scorn of her own sex condemn her to a life of solitude. In this state of shame and solitude, the sentence of the Ecclesiastical Court can give her nothing except a mere subsistence and a refuge from further sin.

I cannot concur in the apprehensions which have been expressed of consequences fatal to domestic happiness or female purity from a decision in the wife's favour, while a decision against this pleading would hold out absolute impunity to a husband's

guilt. Where both parties are guilty, the punishment will fall upon both ; and even if the judgment does not prevent some of the evil consequences from falling upon innocent parties, those consequences must, in fairness, be attributed, not to the judgment, but to the sin of adultery, which, perhaps more than any other sin, entails disgrace and damage, not only on the guilty parties themselves, but on their innocent children and relations also—

"Hoc fonte derivata clades
In patriam populumque fluxit."

The danger to the innocent relations, which may arise from the claims of a spurious issue, is rather diminished than increased by a decision in favour of the wife. It is impossible to be blind to the fact **[691]** that, in such a case as this, a suit for restitution must have been brought, more in the hope that it may secure a maintenance to the wife than a return to cohabitation ; but whether the result be a return of the wife, subject to the authority and control of her husband, or an amicable arrangement by which the parties may live totally separate, there is obviously less danger of the birth of a spurious issue, under such circumstances as might enable it to claim the privileges of legitimacy, than if the Court refused to grant a divorce or restitution to either party.

The latter decision would enable the wife to live where and how she pleased. She might lawfully enter her husband's house whenever she could ; she might destroy his property, and haunt his person, and conduct herself in such a manner as to make it impossible for the husband to be supplied with legal evidence to disprove the claims of her illegitimate offspring. How much more favourable is the decree which orders the parties to go and sin no more ! A sentence for restitution will operate as a mutual condonation and compensation of all past offences, and restores the parties to their original matrimonial rights and duties. If either party shall commit adultery after a decree for restitution, the other party may apply for a divorce. The sentence is not merely that the parties shall live together, but its effect in substance is, that they shall fulfil all their matrimonial duties, of which fidelity to the nuptial bed is not the least important. I know that, according to the modern code of morals and feelings, it is hard for the husband to comply with such a sentence. According to this code, a husband incurs no disgrace, and need feel no shame for his own adultery, while his honour is ruined totally by the adultery of his wife. The disgrace thus caused by another's guilt is capable of only one possible aggravation, viz. if he forgives her. This code cannot be recognized in a Court Christian ; nor will a man, against whom adultery is charged and proved, be permitted to allege any reluctance to associate with an adulteress, because she happens to be his wife. I have assumed the pleadings to be true for convenience ; but it may turn out in evidence that both parties may be innocent, and I have applied myself to it, therefore, as if it was a case of mutual guilt. I do not consider it to be necessary to make any observations on the formal objections made to the pleadings, as they have not been argued by either party.

REPORTS of CASES decided in the COURT of PROBATE and in the COURT for DIVORCE and MATRIMONIAL CAUSES. By M. C. MERTTINS SWABEY, D.C.L., Advocate in Doctors' Commons, and of Gray's Inn, Barrister-at-Law, and THOMAS HUTCHINSON TRISTRAM, D.C.L., Advocate in Doctors' Commons, and of the Inner Temple. Volume III. From Michaelmas Term 1862 to Michaelmas Term 1864. London, 1865.

[1] IN THE GOODS OF GEORGE MARTIN (deceased). November 4, 1862.—Practice.—Administration.—Will of Married Woman.—Limited Probate.—Cæterorum Grant.—A. died, leaving a will, whereby he appointed his wife sole executrix and universal legatee. She proved A.'s will, and afterwards married B., and during her coverture made a will in execution of a power vested in her, and appointed B. sole executor. Upon her death, B. took limited probate of her will, and also administration of the rest of her effects:—Held, that B., as representing the whole of his wife's personal estate, was entitled to administration of the unadministered effects of A.

[S. C. 32 L. J. (P.) 5; 8 Jur. (N. S.) 1134; 7 L. T. 756; 11 W. R. 191.]

George Martin died on the 2nd of November, 1837, leaving a will and codicil, whereof he appointed his wife Sarah Martin sole executrix and universal legatee, to whom, on the 1st of December, 1837, probate was granted by the Prerogative Court of Canterbury. Sarah Martin afterwards married William Beavan, and died on the 14th of April, 1861, leaving a will, executed on the 15th of December, 1856, which, after [2] reciting certain indentures of settlement, executed in contemplation of her marriage with William Beavan, contained the following clause:—"In execution of these powers, and of every other power, trust, or authority in anywise enabling me on this behalf, I do, by this my last will and testament, direct, limit, and appoint that all and singular the real estates, chattels real, and personal estates, property, and effects whatsoever and wheresoever, over which I have any power and disposition, shall immediately from and after my decease go," etc.; and she appointed William Beavan, her husband, sole executor. On the 1st of July, 1861, William Beavan obtained probate of this will, limited to the estate which Sarah Beavan had power to dispose of and had disposed of; and on the 19th of May, 1862, he obtained a grant of administration of the rest of the personal estate of Sarah Beavan.

Dr. Spinks moved for a grant of administration to William Beavan of the unadmjnistered personal estate and effects of George Martin.

*Sir C. Cresswell*: The only question is as to the form in which the grant should be made; whether, as was done *In the Goods of Bayne*, 1 Swab. & Trist. 132, there should not be a supplemental grant of probate, limited to the property which Mrs. Beavan had as executrix.

Dr. Spinks: In that case there was not, as here, a cæterorum grant, but only a

limited probate. Mrs. Beavan was universal legatee as well as executrix, under the will of her first husband, and Mr. Beavan, by taking probate of his wife's will and administration to the rest of her effects, represents the whole of her personal estate.

*Sir C. Cresswell*: I think you are entitled to the grant in the form in which you have asked it.

[3] RIDGWAY *v.* ABINGTON AND OTHERS. November 4, 1862.—Revocation of Probate.—Interest misdescribed in Citation.—Amendment of Citation.—Costs.—The plaintiff, in the citation to bring in probate, described himself as one of the lawful cousins and next of kin of the deceased, and upon an order obtained by the defendants that he should propound his interest, filed an act on petition, in which he alleged that he was one of the executors and residuary legatees of A., deceased, who was the lawful cousin-german of the deceased, and one of his next of kin, and living at his death.—Upon motion, the Court gave the plaintiff leave to amend the citation by inserting in it his correct description, upon payment of the defendants' costs up to the time of the amendment, exclusive of the costs of entering an appearance.

This was a suit for the revocation of probate of a will and codicil of Joseph Mayer, deceased, which had, on the 17th of December, 1860, been granted to the defendants as executors. In the affidavit to lead the citation, and in the citation, the plaintiff was described as "one of the lawful cousins and next of kin of the deceased." The defendants entered an appearance, and afterwards upon summons obtained an order that the plaintiff should propound his interest. In pursuance of the order he filed an act on petition, setting forth his interest, and alleging that he was one of the executors and residuary legatee of John Ridgway, deceased, who was the lawful cousin-german of the testator, and one of his next of kin, and living at the time of his death. The deceased had by his will directed all his residuary, real, and personal estate to be divided equally amongst his cousins-german, including the said John Ridgway, and by a clause in the codicil, his real estate was given to the defendants Abington and Wedgwood. The object of the suit was to set aside the codicil.

Dr. Tristram, on behalf of the plaintiff, now moved for **[4]** leave to amend the citition by inserting the description of the plaintiff, as set forth in the act on petition, instead of that erroneously set forth in the citation. The defendants now admit that the plaintiff has an interest, though that interest was not correctly stated in the citation; and according to the practice of the Prerogative Court, leave to amend the citation should be granted.

Dr. Spinks: At least the plaintiff must pay the defendants' costs occasioned by the mistake.

*Sir C. Cresswell*: What costs do you claim to be entitled to?

Dr. Spinks: All costs incurred up to the time when the plaintiff abandoned his original position, viz. the costs of appearance, of the summons to propound interest, of taking the advice of counsel, and of this motion. The defendants, now that the plaintiff has correctly set forth his interest, are ready to propound the will.

Dr. Tristram: The costs of entering an appearance should be costs in the cause. The appearance already entered may stand, for the defendants, before propounding the will, would have to appear.

*Sir C. Cresswell*: I think it is reasonable that the costs of entering an appearance should be costs in the cause, but the defendants are entitled to the other costs. Upon payment of these costs the citation may be amended. The appearance already entered will stand as an appearance to the citation when amended.

[5] FOXWELL *v.* POOLE AND WIFE. November 6, 1862.—Practice.—Costs.—Instructions for Will not annexed to Affidavit of Scripts.—The omission to annex to, or mention in the affidavit of scripts, the instructions for a will, is no ground for allowing out of the estate the costs of an unsuccessful opposition to the will, if such opposition is not founded on the absence of instructions.

The plaintiffs, as executors of Thomas Townsend, late of Gloucester, deceased, propounded his will, bearing date the 2nd of April, 1859. The defendants, Mr. Poole and wife, the latter being the daughter of the deceased, and one of his next of kin, pleaded undue execution and incapacity, and subsequently gave notice that they did not intend to produce witnesses. The cause came on now for hearing before Sir

C. Cresswell, when the due execution of the will and the capacity of the testator were established. The only point worthy of mention was as to costs. Mr. Clutterbuck, a solicitor of Gloucester, who had prepared the will, was called as a witness, and, in the course of his examination, he produced the instructions for the will, which he had written down at the dictation of the testator. These instructions had not been annexed to, nor were they referred to in the affidavit of scripts.

Dr. Spinks, on behalf of the defendants, submitted, that as the instructions for the will had not been annexed to or referred to by the affidavit of scripts, but had been kept back until the hearing, the defendants should be allowed their costs out of the estate.

Dr. Wambey (Mr. Woollett with him) contrà: The instructions undoubtedly ought to have been annexed to the affidavit of scripts; but as the defendants' case was in no way affected by their non-production at an earlier date, they ought not to be **[6]** allowed costs out of the estate. I do not ask that they be condemned in costs.

*Sir C. Cresswell*: Then I make no order as to costs. There is no doubt that the instructions ought to have been brought in; but the opposition to the will is not founded on the absence of instructions. If the defendants had opposed the will on the ground of fraud, undue influence, or that the will was not that of the deceased, there might have been something in Dr. Spinks's argument. Mr. Poole had abundant opportunity of knowing the facts, and there is no ground for the suggestion that the deceased was of unsound mind. I think, therefore, that he was not justified in placing such a plea on the record. But even if undue execution had only been pleaded, I should not, under the circumstances, have given the defendants their costs out of the estate. I pronounce for the will, but make no order as to costs.

Probate granted; no order as to costs.

VAN STRAUBENZEE AND WIFE *v.* MONCK. November 11, 1862.—Duly Executed Paper.—Incorporation by Reference.—M. duly executed a paper with these words on it: "It is my wish for my dear husband to administer to the moneys; the smaller bequests L. will be so kind as to attend to." She then, in the presence of the attesting witnesses, enclosed in it two papers with writing on them, and folded and sealed the first paper. After M.'s death, the envelope was found to contain two sheets of paper, containing bequests of money and other bequests in the handwriting of M., but unexecuted. When found, it appeared that the envelope had been opened and resealed; there was no evidence that the papers found in it were those originally enclosed, or that they were in existence when the envelope was executed. No other testamentary papers were found:—**[7]** Held, that the duly executed paper did not refer to any written document as then existing, and if it did so, that the document was not pointed out in such a manner as to enable the Court to ascertain its identity; that the three papers were not together entitled to probate, and that the duly executed paper, having by itself no testamentary character, was not entitled to probate.

[S. C. 32 L. J. (P.) 21; 8 Jur. (N. S.) 1139; 7 L. T. 644; 11 W. R. 84. Applied, *In the Goods of Sunderland*, 1866, L. R. 1 P. & D. 198; *In the Goods of Kehoe*, 1884, 13 L. R. Ir. 13.]

This was an amicable suit, instituted under the direction of the Court for the purpose of determining whether two paper-writings of a testamentary character had been incorporated in another paper-writing duly executed according to the Wills Act by the late Mary Elizabeth Monck, the wife of Sir Charles Miles L. Monck, of Belsay Castle, Northumberland, so as together to constitute her last will. It had been arranged that Mrs. Van Straubenzee should propound the papers as plaintiff in the suit, and that Sir Charles Monck should appear as defendant.

The personal property over which Lady Mary Monck had disposing power consisted of certain articles of paraphernalia, and she also had the power, under her marriage-settlement, to appoint by will a sum of £5000 charged on her husband's estates, and to be raised and paid after his death.

The facts of the case, as proved by affidavit, were, that on the 6th of May, 1851, Fanny Brown, the housekeeper at Belsay Castle, was requested by Isabella Graham, now deceased, another servant at Belsay Castle, to accompany her to the room where Lady Mary Monck was sitting; that they accordingly went into the room and found her there alone, sitting at her writing-table, upon which were several papers lying

before her, but how many the said Fanny Brown did not recollect; that Lady Mary Monck took from amongst the said papers the said paper marked A, and signed it in the presence of Fanny Brown and Isabella Graham, and requested them to sign their names to it as witnesses, which they thereupon did in her presence, and in the presence of one another. The following is a copy of exhibit A:—

[8] "It is my wish for my dear husband to administer to the moneys, the smaller bequests dear Laura will be so kind as to attend to.—M. E. MONCK, May 16th, 1851. Fanny Brown. Isabella Graham.

"Some tapestry work of the Dowager Countess of Tankerville to be disposed of as Sir Charles may think fit, or kept by the family at Belsay."

This last paragraph was not in the paper when signed by the witnesses. Immediately after the witnesses had subscribed their names, Lady Mary Monck took from among the papers lying on the writing-table two sheets of paper with writing on them (but Fanny Brown could not identify them), and enclosed them in the paper marked A, which she sealed with two seals. Some time after the year 1853, Lady Mary Monck gave to her husband exhibit A, sealed with two seals, impressed with the letter M, to deposit in the strong-room. This paper parcel was opened after her death, and was found to contain two pieces of paper, marked exhibits B and C. They commenced as follows:—

"Belsay, May 11, 1851.

"Of the £5000 in my power to leave, I bequeath to dear Harriet Straubenzee, to be settled on my god-daughter Mary Straubenzee, £1000; £2000 to Louisa and Alicia Hammond, £1000 each; £500 to Maria and Mary Wrottesley, £250 each; £1000 to Gertrude Gorges, to be settled on her son Arthur."

Then followed a great number of bequests of articles of jewellery and pictures to various persons, including the bequest of turquoise and gold earrings, and concluded thus:—"Signed in the envelope, May 16th, 1861"; underneath this, and in a different-coloured ink, were these words: "P.S.—The water-coloured paintings in Duke Street, and whatever else of mine of worth and ornament, to my dear husband. My will revised, April 19th, 1858."

Several alterations in red ink had been made by the de[9]-ceased subsequent to the original date of the document, and it was clear from the state of the seal that the envelope had been opened after it had been sealed in the presence of the attesting witnesses.

The pleadings are sufficiently referred to in the judgment.

Dr. Tristram, for the plaintiffs: The question raised in this suit is, whether Lady Mary Monck had died testate or intestate. Whatever be the result, Sir Charles Monck intends to carry out his wife's wishes as expressed in these exhibits A, B, and C, which are all in her handwriting. It is admitted on the other side that exhibit A was duly executed in accordance with the requirements of the Wills Act. Standing alone, it is not entitled to probate, as it disposes of no property; but there are two expressions in it which clearly refer to some testamentary dispositions made by the deceased. The words "my dear husband to administer to the moneys" must be taken to have reference to some moneys referred to in some other testamentary paper. The use of the word "bequests," where the deceased says, "the smaller bequests dear Laura will be so kind as to attend to," indicate that she had made some testamentary disposition in writing. The only papers to which she can have intended to refer are B and C, which must be taken to be incorporated in the exhibit A, for the following reasons:—1st. There are in existence testamentary papers of the nature of those referred to by exhibit A, viz. exhibits B and C. The moneys referred to in exhibit A may reasonably be assumed to be the £5000 which she appoints in exhibits B and C, and the "smaller bequests" would seem to point to the disposition of her jewellery, paintings, etc., also contained in those exhibits. 2ndly. There are in existence no other papers to which A could refer excepting B and C, and there is no evidence of the deceased ever having made any other testamentary papers except these. 3rdly. They may be identified by date. Exhibits B and C are headed "Belsay, May [10] 11th, 1851," that is, five days prior to the execution of exhibit A. They, therefore, must have been in existence prior to the 16th of May; and at the end are these words, "Signed in the envelope, May 16th, 1851." Here is evidence in the deceased's own handwriting of these being the papers which were enclosed in the envelope. On looking at the ink, it will be seen that the greater part of these papers were written about the same time, and it is equally certain that some additions have been made

since, as stated in the memorandum at the end. The case clearly comes within the doctrine laid down in *Allen* v. *Maddock*, 11 Moo. P. C. 426, so as to let in parol evidence to shew that B and C are the papers referred to. There are several passages in that judgment bearing strongly on the propositions he had laid down [see pp. 453, 454, 455, 461, and 462].

*Sir C. Cresswell*: There is this difficulty you have to contend with amongst others —the envelope was certainly opened after it had been sealed. What is there to shew that exhibits B and C were the two papers enclosed in it by Lady Mary Monck when she sealed it? If it had never been opened, it might have been contended that the envelope of necessity referred to those two papers, and the case would then have been somewhat similar to the case of *In the Goods of Almosnino*, 1 Swab. & Trist. 508.

Dr. Spinks, contrà: If the argument used on the other side is to prevail, the main object of the Wills Act will be defeated. In order that a duly executed paper may incorporate another, there must be a reference to an existing instrument, in such terms as render it capable of identification. In this case there is in paper A no distinct reference to any particular paper, and there is no sufficient evidence that B and C were in existence when A was executed. If the papers are entitled to probate, Sir Charles Monck is executor according to the tenor.

**[11]** *Sir C. Cresswell*: Yes, I think if there is any occasion for probate, he would be entitled to it as executor according to the tenor. Cur. adv. vult.

*Sir C. Cresswell*: In this case Mr. Henry Van Straubenzee and his wife propounded the will of the late Lady Mary Elizabeth Monck, and alleged that in pursuance of the power contained in her marriage-settlement, and of every other authority enabling her in that behalf, she made her last will and testament, dated the 16th of May, 1851, in the manner following:—that two persons having by her previous request come into the room where she was then sitting, she signed her name to a paper-writing which was then on a table before her, containing the words following: "It is my wish for my dear husband to administer the moneys; the smaller bequests dear Laura will be so kind as to attend to," in the presence of the said two persons as witnesses, who duly attested the same; and that the said deceased then, in the presence of the said two witnesses, placed two sheets of paper with writing thereon, and which were lying on the said table before the testatrix, within the first-mentioned paper-writing; and that she then, in their presence, folded up the said first-mentioned paper with the two sheets of paper within it, and sealed the same; and that the first-mentioned paper is exhibit A, and that the two others are exhibits B and C, and that the exhibits A, B, and C contain together the last will and testament of the deceased. The defendant, in his answer, admits the due execution of exhibit A, and that the deceased in the presence of the two attesting witnesses placed two sheets of paper with writing thereon, and which were then lying on the table before her, within exhibit A; but denies that the said two sheets of paper are the same as the two sheets of paper marked exhibits B and C, and denies that the exhibits A, B, and C together contained the last will and testament of the deceased.

**[12]** In support of the case of the plaintiffs, the decision of the Judicial Committee in *Allen* v. *Maddock*, 11 Moo. 426, was relied on, and I was anxious to examine that case carefully, so as to decide the present in conformity with it, for the whole law on the subject was then collected and considered by Lord Kingsdown, in his very learned and elaborate judgment.

The facts in this case, in addition to those admitted on the pleadings, are very few. The papers B and C were found in the envelope A, but it is not shewn that they are the same that were originally placed there by the testatrix. The paper B had a date at the commencement, but no other evidence was given of the time when it was written; and I cannot, for the purpose of this cause, hold that any part, still less the whole, was then written. No other evidence was given of the existence of the papers at any particular time than the fact of the envelope containing them having been delivered to Sir Charles Monck by the deceased, some time before her death, and long after the paper A was signed.

Such being the facts of the case, the judgment in *Allen* v. *Maddock* points out the conclusion at which I ought to arrive. It adopts the opinion of Lord Eldon, in *Smart* v. *Prujean*, 6 Ves. 565, that a testamentary paper duly executed, in order to incorporate another, must refer to it as a written document then existing in such terms that it may be ascertained. To that opinion it has been added, by subsequent decisions, that

the identity may be ascertained by the aid of evidence of the surrounding facts, in conformity with the fifth proposition of Sir James Wigram in his work on Extrinsic Evidence, referred to by Lord Kingsdown in 11 Moo. P. C. 441. Such evidence, however, can only be used to aid in the construction of what the testator has written.

In the present case I think the plaintiffs have failed to establish that the papers A, B, and C constituted the will of the deceased, on two grounds. The reference in A is not dis-**[13]**-tinctly to any written paper then existing. One may conjecture that the deceased was referring to something written or to be written, but it is mere conjecture; and certainly there is no such reference to any instrument as will enable the Court to ascertain it. The fact of the papers B and C being found enclosed in the envelope can have no effect, according to Lord Eldon's opinion in *Smart* v. *Prujean*, especially as it is not shewn when they were placed there. Nor is there any legal evidence to satisfy the Court when they were written. Under these circumstances, I feel bound to pronounce against the papers propounded. Paper A does not refer to any written document as then existing; and, assuming that it does, such document is not pointed out in such manner as to enable the Court to ascertain its identity; and paper A, taken by itself, has no testamentary character, so as to enable the Court to grant probate of it. The costs of all parties should be paid out of the estate.

IN THE GOODS OF JOAQUIM JOSE FERREIRA VEIGA (deceased). November 11, 1862. —Probate of Will of Foreigner.—Foreign Grants.—How far the Court will follow such Grants.—In June, 1856, the Prerogative Court granted administration de bonis non, with the will annexed, of the above deceased, a domiciled Portuguese, to Carniero, a substituted executor in the will; Carniero, in conjunction with the widow, being by the law of Portugal the legal representative. Carniero, in conformity with the Portuguese law, had since renounced his executorship, and one Vianna had been, by the administrator of the district, nominated executor for all legal purposes.—The Court refused to grant administration de bonis non to Vianna, on the ground that there was no authority for an executor, who takes such a grant in an English Court, renouncing, so that there was still a legal personal representative of the deceased in this country.

[S. C. 7 L. T. 644; 11 W. R. 84.]

**[14]** Jose Ferreira Veiga, late of Lisbon, deceased, died on the 7th of June, 1846, having made a will, wherein he named executors in the words following:—"I appoint for my executor, in the City of Lisbon, whither I am about to proceed, my cousin, Joaquim Jose da Castra Ferreira, and I also appoint him guardian of all my sons and daughters, both by my first and my second marriages. In default of my aforesaid cousin, I appoint as executors Messieurs Bento Jose Cardozo and Domingos Manoel Etneo Continho, jointly; in default of those, I appoint as executors Messieurs Custodio Jose Ferreira Bragua and Joaquim Antonio de Moraes Carniero, jointly."

The testator was possessed, at the time of his death, of £160,000 Three per cent. Consols, and other personal property in England.

On October the 6th, 1846, probate of this will was granted by the Prerogative Court to Mr. Ferreira (4 Notes of Cases, 698), who died in August, 1849, leaving the money in the Consols unadministered. By the law of Portugal the executorship, on the death of Mr. Ferreira, devolved upon Cardozo and Continho. On the 27th of August, 1849, Continho executed an act of desistance from the executorship at the bureau of the Administrator of the upper district of Lisbon, and Cardozo, by his attorney, signed an act of acceptance of the executorship, and entered upon the duties of the same in Portugal. The Prerogative Court accordingly, on the 17th of January, 1850, decreed probate of the will, on motion, to Cardozo (7 Notes on Cases, sup. 48).

Mr. Cardozo died on the 8th of February, 1855, leaving a large portion of the deceased's estate in England unadministered. By the law of Portugal the executorship then devolved upon Bragua and Carniero, with whom the Court of Lisbon associated the widow of the deceased, Joana Veiga, as executrix. On the 16th of February, 1856, the Prerogative Court was moved to decree letters of administration de bonis non, **[15]** with the will annexed, to Carniero and the widow Veiga (Bragua having desisted from the executorship), they being the parties upon whom, by the law of Portugal, the administration of the estate of the deceased had now devolved.

The Court rejected the motion, and on the 9th of June, 1856, granted administration with the will annexed to Carniero alone.

Joana Veiga had since died, and Carniero being unable, from the state of his health, to continue to act in the execution of the will, had in conformity to the laws of Portugal renounced the function of executor, and the administrator of the district had nominated as executor, for all legal purposes, Jose Antonio Ferreira Vianna the younger, who had signed a deed of acceptance of the same.

Dr. Wambey moved the Court to decree letters of administration with the will annexed of the unadministered effects of the deceased to be granted to the said Jose Antonio Ferreira Vianna the younger.

*Sir C. Cresswell*: There is an executor now living, to whom a grant was made by the Prerogative Court; has this Court ever recognised the renunciation by an executor after he has taken probate of the will?

Dr. Wambey: No; but it has been the practice of this Court to follow the grant made by the Court of the place where the testator was domiciled (*In the Goods of the Countess da Cunha*, 1 Hagg. 240).[1]

*Sir C. Cresswell*: I should have no hesitation in following the practice of the Portuguese Court, and making a grant to their nominee, if there had not been a grant by an English Court in existence. How can I get rid of the administration **[16]** with the will annexed granted in 1856? I think that, unless you can find some authority for saying that I can follow the practice of a foreign Court in allowing an executor, who has already taken the grant, to renounce, I must reject your motion.

Motion rejected.

IN THE GOODS OF LUIGI BIANCHI (deceased). November 25, 1862.—Administration. —Revocation of Grant.—Domicil.—New Grant.—A Sardinian, who had settled in Brazil, died intestate on his voyage from Bahia to Genoa. He had wound up his affairs in Brazil, and intended to resume his domicil of origin at Genoa. An agreement had been come to between the Brazilian and Italian Governments, with respect to the administration of his property and the guardianship of his children (some of whom were in Genoa and others in Brazil), by which the Brazilian Government gave up to the Italian Government all claim to such administration and guardianship.—The Court revoked a grant of administration which had been made to the representative of the person entitled to it according to the Brazilian law, and made a grant to the person entitled to it according to the Italian Law.

Luigi Bianchi, a Genoese by birth, went to Bahia, in the empire of Brazil, and acquired a considerable fortune. He had a wife and seven children. He sent three of his children to Genoa for their education. In 1856, having wound-up his affairs at Bahia, he sailed from that place with his wife and four children, intending to return to Genoa, and to reside there permanently, and he died on the voyage at Teneriffe intestate. His relatives at Genoa, hearing of his death and not knowing what had become of his wife and the four children, held a family council, and appointed Francesco Cavagnaro guardian of the three children. After the death of the deceased his widow went back to Brazil with the four **[17]** children, and there married a Brazilian: after which, Lorenzo de Souza Marques was appointed guardian of the children in Brazil. In 1859 an application was made to this Court by the duly substituted attorney of Marques for a grant of administration of the effects of the deceased in this country amounting to about £4000, and the grant was made.[1*]

Discussions took place between the Governments of Sardinia and Brazil with respect to the domicil of the deceased at the time of his death, which ended in an agreement being come to between the two Governments that the administration of the estate in Brazil, and the guardianship of the children there, should be placed in the hands of the Italian consul at Bahia.

Dr. Deane, Q.C., moved that the grant to the attorney of Marques might be rescinded, and a grant made to Cavagnaro.

*Sir C. Cresswell*: What is the arrangement between the Courts of Turin and Brazil? If the deceased was domiciled in Brazil at the time of his death, how can such an arrangement affect the grant to be made by me?

---

[1] But see *In the Goods of the Duchess of Orleans*, 1 Sw. & Tr. 253.

[1*] 1 Sw. & Tr. 511. It is stated in the report that the deceased, at the time of his death, was on his way to Europe "for a temporary visit."

Dr. Deane: The Brazilian Government have surrendered all their interest in the matter to the Italian Government. The arrangement is stated in the dispatches of the chargé d'affaires of the King of Italy at Rio Janeiro, and of the chargé d'affaires of the Emperor of Brazil at Turin. The Brazilian chargé d'affaires states that, in consequence of an agreement between the two Governments, the property of the deceased in Brazil, and the minor children in that country, are to be placed under the charge of the Italian consul at Bahia. A decree of the Court at Turin, of March, 1862, de-[18]-clares that the domicil of the minors is Italian and not Brazilian, and that Cavagnaro is their guardian.

*Sir C. Cresswell*: The deceased was originally domiciled in Genoa; he then became domiciled in the Brazils, and there is no doubt of the fact that he died in itinere, as he was returning to Genoa to resume his permanent residence there. Then it may be said that, as soon as he had finally abandoned the acquired domicil by setting off on his journey to return to his domicil of origin, the latter revived.

Dr. Deane: That would be so here.

*Sir C. Cresswell*: It seems to me that under the circumstances you are entitled to the grant.

Motion granted as prayed.

IN THE GOODS OF KLINGEMANN (deceased). December 2, 1862.—Foreign Law.—Ambassador's Certificate.—Practice.—The certificate of the Hanoverian ambassador, under the seal of the Legation, was admitted as evidence of the law of Hanover as to the validity of a testamentary paper.

Dr. Wambey moved for a grant of administration with a testamentary paper, described as a codicil, annexed, of the estate and effects of George Carl Christoph Conrad Klingemann, otherwise Carl Klingemann, or otherwise Charles Klingemann, deceased, to Sophie Louise Klingemann, his lawful widow, and the universal legatee for life named in the said codicil, limited until the original will of the deceased should be discovered and brought into the registry. Carl [19] Klingemann, late of 4 Hobart Place, Eaton Square, in the county of Middlesex, died on the 25th of September, 1862, at 4 Hobart Place. He was the secretary to the Royal Hanoverian Legation in London, and had held that office for thirty years previous to his death. A testamentary paper, written in the German language, was found after his death, commencing thus:—"By way of codicil to my last will and testament, deposited at the Royal Hanoverian Legation here, and by way of addition and completion to the same, I desire and determine as follows." The paper then proceeded to make a disposition of the whole of the deceased's property, and to appoint executors. It was dated the 12th of August, 1859, and was duly executed in London, and attested in accordance with the law of England. Search had been made and advertisements inserted in the "Times" newspaper, but no other testamentary paper could be found. The executors had renounced. The deceased was a domiciled Hanoverian at the time of his death, and Count Kilmansegge, envoy extraordinary and minister plenipotentiary from the King of Hanover, had signed a certificate that "a will, codicil, or testamentary paper, made and executed in accordance with the law of England, is a valid will, codicil, or testamentary paper by the law of Hanover." This certificate was under the seal of the Legation, and had been filed. *The Goods of Anne Dormoy*, 3 Hagg. 767, is an authority that such a certificate was sufficient evidence of foreign law.

The Court granted the motion.

[20] IN THE GOODS OF PETER RICHMOND WYCKOFF (deceased). December 2, 1862.—Foreigner.—Goods within Jurisdiction of Court.—Administration ad Colligendum.—73rd Section of Probate Act.—A foreigner, inhabiting the State of Alabama, in North America, died on board a British ship on his voyage to England, possessed of property, chiefly bills of exchange drawn on merchants in Liverpool, and entitled to a sum of money alleged to be in the hands of another person in this country. On the arrival of the ship in the port of London, the owner took possession of the bills of exchange; and there being no known relation or agent of the deceased in this country, and communication with his relations in the Southern States of North America being difficult and uncertain by reason of the civil war and blockade of the southern ports, the Court granted administration to the owner of the ship, limited to realize and

collect the property which the deceased was possessed of or entitled to within the jurisdiction of the Court, and to invest the proceeds in Three per Cent. Consols; the sureties to justify:—The Court intimated that for the future it would be better that the Queen's Proctor should interpose in such cases for the protection of the property.

[S. C. 9 Jur. (N. S.) 84; 7 L. T. 565; 11 W. R. 218.]

This was an application for letters of administration ad colligendum bona.

The affidavit of Saul Isaac, the applicant, stated that the deceased Wyckoff, late of Mobile in the State of Alabama in North America, sailed on or before the 1st of August, 1862, from Nassau, on board the steamship "Melita," owned by the deponent's firm, for the port of London. That Wyckoff died on board the "Melita" before she reached England. That at the time of his death he had about him on board the "Melita" four bills of exchange, drawn at Mobile on merchants in Liverpool, indorsed to his order, together amounting to £680; gold, cash, and other personal property, to the value of £44, which bills and cash had come into the hands of Messrs. Isaac as owners of the ship. That it was believed that a further sum of £379, belonging to the deceased, was in the hands of **[21]** Mr. Brewer. That the passage-money of the deceased, £31, 10s. for the voyage, was still due and owing to the Messrs. Isaac, and that they had no security for the debt. That the deponent had no reason to believe that the deceased had any relations, or any attorney or agent in England. That owing to the unsettled state of affairs in North America, and the blockade of the southern ports thereof, there was great difficulty and uncertainty in communicating with such relatives of the deceased as were resident in the said Southern States. That it was desirable that no greater delay should take place in presenting the said bills of exchange, and in obtaining payment of the sum of £379, and that there should be a legal personal representative of the deceased in this country to give proper discharges to the person who may accept and be prepared to meet the said bills, and pay the said sum.

The Queen's Advocate (Sir R. Phillimore) (Dr. Swabey with him) moved the Court to decree letters of administration to Mr. Saul Isaac, limited to the property of the deceased hereinbefore mentioned, with power to reimburse his firm the money due to them from the deceased for his passage by the "Melita," and to invest the balance in Government securities till a general administration should be legally obtained. They cited *In the Goods of Mary Radnall*, 2 Add. 232; and *In the Goods of Don Miguel Gudolle*, T. T. 1835, mentioned in Coote's Common Form Pract. 123, 4th edition.

By the Court: Is not the case of *Aspinall* v. *The Queen's Proctor*, 2 Curt. 241, against the application? Ought not the Queen's Proctor at least to have had notice in such a case? My impression is that, in such cases, the Queen's Proctor, on the part of the Crown, is the proper person to interfere.

Sir R. Phillimore: In *Aspinall* v. *The Queen's Proctor*, the **[22]** Consul-General of the United States of North America claimed a general right to administer to the effects of United States' citizens dying intestate in this country, in itinere, limited for certain purposes. Such a right was opposed on behalf of the Crown, and the Court decided against the claim; but it does not appear from the report that the Crown either claimed or took the grant.

*Sir C. Cresswell.*—The papers in the case of *Gudolle* shall be looked up in the registry, and I will consider the whole case. Cur. adv. vult.

From the minute in the registry of the grant *In the Goods of Gudolle* (date July, 1835), the facts alleged appear to have been as follows:—

Don Miguel Gudolle, of the State of Peru, in South America, intending a voyage to England, enclosed in a letter, dated Cadiz, March 31st, 1835, to Thomas Stooks, six bills of exchange, drawn on merchants in London, indorsed by himself to the firm of Elmslie and Stooks, of which firm Thomas Stooks was the surviving partner; such bills amounting to £1932 odd. In the letter, the deceased stated it to be his intention to proceed to London in the month of April, where he arrived on or about the 6th of May, and died suddenly, on the following day, at the Bell and Crown Inn, Holborn. After his death, six other bills of exchange, drawn on persons in London, to the amount of £2250 odd, were found to have been in deceased's possession, of all of which Thomas Stooks took charge, and procured them to be accepted by the several persons on whom the same were drawn; and at the time of the application these bills remained in his custody. It was stated that no will or testamentary paper

of the deceased was then or had since been found; that he died a bachelor and intestate, without a father, leaving behind him his mother and several brothers, resident in Peru. Thomas Stooks had **[23]** paid the sum of £100, or thereabouts, for funeral and other expenses of the deceased in this country. It was stated to be necessary, for the preservation of the estate, that letters of administration should be granted without waiting to hear from the next of kin or others who might be entitled to deceased's property.

On the 30th of May, 1835, after reading the affidavits and hearing counsel thereon, the Surrogate[1] decreed letters of administration to Thomas Stooks, limited to receive the sums due and to become due on the last-mentioned bills of exchange; and after reimbursing himself the sum of £100, or thereabouts, and paying the expenses of obtaining administration, to invest the balance, and also the sum of £1932 in his own name in Government securities, and to keep the same so invested until letters of administration of the goods of the deceased should be granted according to law, on exhibiting an inventory and securities justifying.

In this case a fresh administration was granted in August, 1836.

December 9.—The Queen's Advocate stated that he had conferred with the Queen's Proctor on the circumstances of this case, and that it did not seem one in which it was necessary that the Crown should interfere; but if the Court intimated its wish that in future such cases should be dealt with by the Queen's Proctor, he would of course be ready to interpose.

*Sir C. Cresswell*: The case of *Gudolle* is not a precedent for the present application. There the deceased had **[24]** written to the firm, one of the partners of which applied for the grant, sending bills of exchange indorsed to them, and stating his intention with respect to visiting London, thereby investing them with the character of his correspondents or agents. In the present case, no such connection subsists between the deceased and the party applying; there is nothing more than the accident of his death on board a ship owned by them. It is no doubt of importance that the property of the deceased in this country should be protected; and after what has been to-day stated by the Queen's Advocate, I will, under the authority of the 73rd section of the Probate Act, make the grant to his client, limited for the purpose of realizing and collecting the property which the deceased died possessed of or entitled to within the jurisdiction of the Court, and to invest the proceeds of such property in the Three per Cent. Consols, till an ordinary representation shall have been legally obtained, but no further or otherwise. In similar cases I think the better course for the future would be, that the Queen's Proctor should interpose for the protection of the property till the parties entitled come forward. The securities must justify.[1*]

**[25]** SANDREY *v.* MICHELL AND ANOTHER. IN THE GOODS OF EDWARD BAWDEN (deceased). June 17, 1862.—Administration Bond.—Condition for Payment of Debts.—Order to Assign.—Probate Act, Sections of, 81 and 83.—Practice.—When a person makes out a primâ facie case that there has been a breach of the condition of an administration bond, the Court will direct it to be assigned by the Registrar. —The Court will not entertain objections to the validity of the condition of the bond, but will leave such question to be determined by a court of common law.

[For proceedings in King's Bench, vide 3 B. & S. 405; 122 E. R. 153 (with note).]

---

[1] Stated in the minute-book to have been the Right Hon. Sir John Nicholl, Knight, Doctor of Laws, Surrogate of the Right Hon. Sir Herbert Jenner, Knight, Doctor of Laws, Master, etc., of the Prerogative Court of Canterbury. Sir John Nicholl resigned the Deanery of the Arches and the Judgeship of the Prerogative Court of Canterbury in October, 1834, but continued to hold the Judgeship of the Admiralty Court till September, 1838.

[1*] Query, whether in practice the Crown has hitherto interfered, except where beneficially interested? In Toller's Law of Executors and Administrators, 2nd edition, p. 107, it said: "The Ordinary, also, in default of persons entitled to the administration, may grant letters ad colligenda bona defuncti, and thereby take the goods of the deceased into his own hands, and thus assume the office of executor or administrator in respect to the collecting of them; but the grantee of such letters cannot sell the effects without making himself an executor de son tort. The Ordinary has no such authority, and therefore he cannot confer it on another."

Edward Bawden died on the 12th of July, 1860, a bachelor, without parents, and intestate; whereupon administration of his effects was granted by the District Registrar of Bodmin to his brother, John Bawden (since deceased), who gave an administration bond, with the defendants as sureties, to the Judge of the Court of Probate, in the sum of £900. The bond and condition was in the form annexed to the Rules and Orders of the Court of Probate in non-contentious business; the condition being, that if he do exhibit, or cause to be exhibited, a true and perfect inventory of the effects of the deceased into the District Registry of Bodmin, whenever required by law so to do, "and the personal estate and effects of the said deceased which at any time after shall come to the hands or possession of the said John Bawden, do well and truly administer according to law; that is to say, do pay the debts which he did owe at his decease, and further do make, or cause to be made, a true and just account of his administration whenever required by law so to do, and all the rest and residue of the said personal estate and effects, do deliver and pay unto such person or persons as shall be entitled thereto, under an Act of Parliament inti-
**[26]** tuled 'An Act for the better Settling of Intestate Estates,' etc.," then the bond to be void.

The plaintiff had filed an affidavit, stating that there was due to him from the deceased at the time of his death the sum of £36, 18s.; that he brought an action for it against John Bawden as administrator, and that he had allowed judgment to go by default; that he afterwards issued a fi. fa. against the goods of John Bawden, and that the sheriff had made a return of nulla bona; that John Bawden had since died, and that he believed that assets had come into his hands, out of which he might and ought to have paid the debt. A citation had been issued, at the instance of the plaintiff, against the defendants, calling upon them to shew cause why the bond should not be assigned to the plaintiff for the purpose of putting it in suit against them.

The defendants had filed an act on petition, alleging—(1) that the plaintiff had not cited the administrator to bring in an inventory in his lifetime, as he might have done; (2) that the non-payment of debts was not a condition for the breach of which an action was maintainable at common law.

Mr. Aspland moved the Court to order the Registrar to assign the bond to the plaintiff, on the ground that there had been a breach of one of its conditions. The bond was expressly conditioned for the payment of debts, and even if it were not the intention of the Legislature, in the 81st section of the Probate Act, that this condition should have been inserted in it, it was not competent to the defendants, having executed the bond with this condition in it, now to repudiate it. He submitted that the old cases of *Brown* v. *The Archbishop of Canterbury* (1 Lut. 882), and *The Archbishop of Canterbury* v. *Robertson* (1 Cr. & Mees. 690), would not apply to a bond given under the Probate Act.

Dr. Tristram, contrà: It is not compulsory on this Court **[27]** to order the bond to be assigned, any more than it was on the Judge of the Prerogative Court to order it to be attended with for the purpose of its being sued upon at common law. The words of the 83rd section of the Probate Act are, "that the Court may, on application being made, and on being satisfied that the condition of the bond has been broken, order it to be assigned," etc. There are two objections to the Court making the order in this case:—

1st. The plaintiff did not cite John Bawden, which he might and ought to have done, in his lifetime (*Crowley and Charman* v. *Chipp and Tubb*, 1 Curt. 461); and until an inventory and an account is brought in, there is no constat of there being assets to pay the plaintiff's debt (*Murray and Maling* v. *M'Inerheny and Impey*, 1 Curt. 579). 2ndly. The non-payment of debts is not a condition for the breach of which an action is maintainable at common law. It must have been by an oversight that this condition was inserted in the new forms. By the 81st section of the Probate Act, the Judge is directed to require a bond conditioned for duly collecting, getting in, and administering the personal estate of the deceased, which bond was to be in such form as the Judge shall direct; but he is not thereby authorized to insert a condition for the payment of debts. The words "duly administering the personal estate of the deceased," cannot be construed to extend to the payment of debts. It was so decided in the case of *The Archbishop of Canterbury* v. *Robertson*, and in the cases there referred to, in construing the condition "truly to administer according to law," as contained

in the form of bond prescribed by 22 & 23 Car. II. cap. 10, s. 2. If the Legislature had intended to put a different interpretation on the words "duly administer" in the Probate Act, to what their equivalents were held to signify in the Act of Charles II., it would have clearly expressed such intention. And there is nothing whatever to shew that it was the intention of the Probate Act to give creditors of the estate of intestates greater security for the payment of their debts than they had before.

[28] *Sir C. Cresswell*: I doubt very much whether I ought to have allowed you to raise these questions before me. The 83rd section of the Probate Act authorizes me to order the bond to be assigned on being satisfied that the condition has been broken. I incline to think that all that is required to authorize me to assign the bond is that the party applying for it to be assigned shall make out a primâ facie case that the condition has been broken. I will not decide as to the validity or invalidity of the condition for the payment of debts. I will leave that question to be decided by a court of common law. I direct the bond to be assigned.

[The plaintiff subsequently sued the defendants on the bond in the Queen's Bench, alleging a devastavit. The defendants demurred to his declaration, and the Court gave judgment for the defendants, with leave to plaintiff to amend on payment of costs. The plaintiff has abandoned the action. 32 L. J. Q. B. 100.]

IN THE GOODS OF WILLIAMS JONES (deceased). December 16, 1862.—Administration Bond.—Breach of Condition.—Rule Nisi on Sureties to shew cause why it should not assigned.—Probate Act, 1857, s. 83.—Where a person interested under the estate of a deceased intestate, to whom administration has been taken out, makes a primâ facie case of breach of the administration bond, the Court will direct a rule nisi, calling on the sureties to shew cause why the bond should not be assigned.

[S. C. 32 L. J. (P.) 26; 8 L. T. 90; 11 W. R. 191.]

William Jones, late of the parish of Caron, in the county of Cardigan, died on the 10th of April, 1853, intestate, leaving Margaret Jones, his widow, and five children him surviving. On the 4th of July, 1853, letters of administration of his effects were granted, by the Consistory Court at Car-**[29]**-marthen, to his widow, who, with John Jones and Thomas Jones, her sureties, executed the administration bond. Mary Jones, one of the deceased's children, married Thomas Williams, and died on the 2nd of August, 1857, in the lifetime of her husband; to whom, on the 3rd of August, 1859, letters of administration of his wife's effects were granted. On the 16th of August, 1859, a summons was issued out of the Court of Chancery, calling upon Margaret Jones to shew cause why an order for the administration of the personal estate of the deceased should not be granted. The defendant appeared, and on the 16th of November, 1859, an order was made by Vice-Chancellor Wood, directing, inter alia, that an account of the debts and funeral expenses of the deceased should be taken, and that an inquiry should be made as to what parts (if any) of the personal estate of the deceased were outstanding and undisposed of. On the 5th of November, 1861, the chief clerk certified that there was a balance of £777, 6s. 4d. due from Margaret Jones, as administratrix, after payment of debts and funeral expenses. On the 21st of November, 1861, an order was made by the Vice-Chancellor that Margaret Jones should, on or before the 10th of December, 1861, or within four days of the service of the order, after the 10th of December, pay into the bank, with privity of the Accountant-General of the Court of Chancery, to the credit of the cause £305, 17s. 9d., part of the sum of £458, 16s. 7d., the amount admitted by the said account to be due from her to the estate. This order was duly served on the 13th of December, 1861, on Margaret Jones. Default was made in payment, and a writ of attachment, and subsequently a writ of sequestration, issued against the said Margaret Jones, to enforce the performance of the said order. On the 29th of January, 1862, Margaret Jones was adjudicated a bankrupt by the Bristol Court of Bankruptcy. On the 14th of February, 1862, Thomas Williams was admitted to prove against the estate for the said sum of £305, 17s. 9d., and **[30]** was chosen creditor's assignee. There was no estate under the bankruptcy, nor was there any property of Margaret Jones to make good the said sum of £777, 6s. 4d., or any part thereof. On the 24th of June, 1862, Margaret Jones obtained her order of discharge under the Bankruptcy Act. On the 12th of May, 1862, the Vice-Chancellor ordered that Thomas Williams, the plaintiff, should be at liberty to carry on the said cause against

Margaret Jones notwithstanding the bankruptcy. The share of the said Thomas Williams as administrator of his late wife in the personal estate of the deceased, remained unpaid, and there was no fund out of which the same might be paid other than what might be recovered from the sureties to the administration bond. The other children of the deceased were duly served with a notice of the order of the 16th of November, 1859, but neither of them applied to attend the proceeding thereunder. On the 4th of December, 1862, by an order of the Vice-Chancellor made in the cause, it was directed that Thomas Williams should be at liberty forthwith to take such proceeding as might be advised against Margaret Jones, and against the sureties to the administration bond, for the purpose of putting in force the said bond.

Dr. Spinks, on behalf of Thomas Williams, now moved the Court for a rule nisi calling upon John Jones and Thomas Jones, sureties to the administration bond, to shew cause why the Court should not order one of the registrars to assign the said bond to the said Thomas Williams.

*Sir C. Cresswell*: This is a proceeding which seems to have fallen into disuse in the Prerogative Court. In the only two or three cases which I have been able to find, it appears that a monition was issued to the sureties, calling upon them to appear and shew cause why the bond should not be assigned. In a recent case, I granted an application for leave to issue a citation, calling upon the sureties to shew cause why the bond should not be assigned.

**[31]** Dr. Spinks: The practice of the Prerogative Court was to cite the sureties to shew cause why the bond should not be delivered out. The 83rd section of the Probate Act, 1857, enacts, that "The Court may, on application made on motion or petition in a summary way, and on being satisfied that the condition of any such bond has been broken, order one of the registrars of the Court to assign the same to some person named in such order, and such person, his executors or administrators, shall thereupon be entitled to sue on the said bond in his name, both at law and in equity, as if the same had been originally given to him instead of to the judge of the Court, and shall be entitled to recover thereon, as trustee for all persons interested, the full amount recoverable in respect of any breach of the condition of the said bond." Upon considering the best mode of amalgamating the old practice with that provided by the statute, it seemed to me that the Legislature clearly intended to abolish the unnecessary and cumbersome proceeding of issuing a citation, which would introduce a cause, and that the proper course to take under the statute is to make an ex parte application for a rule nisi, calling upon the sureties to shew cause why the bond should not be assigned. By adopting that course, the same justice will be done to the sureties as by the practice of the Prerogative Court, as they will have an opportunity of shewing cause why the bond should not be assigned; and, on the other hand, the next of kin will not be put to the inconvenience of instituting a suit, which would be the effect of issuing a citation. This seems to be the method adopted in the Irish Court of Probate. (*Morin*, deceased, and *Collins*, deceased, 7 L. T. Rep. N. S. 260.)

*Sir C. Cresswell*: You may certainly take a rule nisi; that will satisfy all that is required. That is the practice of the Irish Court of Probate. My only doubt was whether I was bound to require so much, or whether I ought not to **[32]** have been satisfied with a primâ facie case. The expression used in the statute, "that the Court may, on being satisfied that the condition of any such bond has been broken," etc., is similar to that in the provision of the Common Law Procedure Act, 1852, ss. 18 and 19, under which proceedings may be taken against persons resident abroad, by leave of a judge upon his being satisfied, by affidavit, that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within a jurisdiction. The application to a judge under that provision is strictly ex parte. I think, however, that it is better to have a rule nisi. Take a rule nisi, to be served upon the sureties, returnable on the first motion day next term. The rule need not be served upon the administratrix.

BAKER AND MARSHMAN *v.* BROOKS. MARSHMAN *v.* HUGHES. November 25, 1862, and January 20, 1863.—Administration Bond.—Breach of Condition.—Citation on Surety to shew cause against Bond being assigned.—Probate Act, 1857, s. 83.—On a primâ facie case of breach of administration bond being established, notice in some form having been given to the sureties, the Court

will direct the bond to be assigned; but might refuse to do so if on cause shewn the proceeding appeared to be wholly frivolous and vexatious.

[S. C. 32 L. J. (P.) 25; 8 L. T. 89; 11 W. R. 110.]

Richard Baker, late of Birmingham, dealer in umbrellas and furniture, died on the 11th of November, 1858, intestate. Letters of administration of his effects were granted to Sarah Baker, his widow, who with John Hughes and Joseph Taylor, her sureties, executed the usual administration bond, the penalty being £400.

**[33]** On the 22nd of November, 1859, a citation was extracted by Sarah Baker (since dead), the mother of the deceased, and Ann Marshman, the plaintiff, his sister of the half-blood, two of the persons entitled in distribution, calling upon Sarah Baker, the administratrix, to bring into the registry an inventory and account. The administratrix not appearing to the citation, on the 15th of February, 1860, an attachment issued, under which she was arrested and imprisoned in the county gaol for Warwickshire. She afterwards filed an inventory and account, and on the 26th of April, 1860, applied to this Court for her discharge from prison; but the Court being of opinion that the inventory and account filed were not satisfactory, the application was rejected, and she was directed to amend them. She neither amended the inventory and account nor filed others, but subsequently renewed her application to be discharged from prison, and it was again rejected. It appeared from the inventory filed that the stock-in-trade and other effects of the deceased, valued at £431, 11s. 6d., were sold by the administratrix to John Hughes, one of the sureties to the bond, for £100 subject to the payment of the trade debts and liabilities of the deceased, which amounted to £331, 11s. 6d. It appeared from an affidavit of John Hughes, that he had sold off part of the stock-in-trade, and had resold the plant and tools for £435, 4s. 6d. It also appeared that book-debts owing to the deceased had been received by the administratrix and by John Hughes, and that no account of these receipts had been given. The administratrix had since remarried, and was now Sarah Brooks.

Mr. E. Ward, on behalf of the plaintiff, moved the Court, under the 83rd section of 20 & 21 Vict. c. 77, to direct that one of the registrars should assign the administration bond to Ann Marshman, the plaintiff, in order that it might be put in suit against John Hughes, one of the sureties, or that a citation should issue, calling upon John Hughes to shew cause **[34]** why the bond should not be so assigned for the purpose aforesaid. The motion is in the alternative; but I only ask for the citation calling upon John Hughes to shew cause why the bond should not be assigned. The affidavits shew breaches of the condition of the bond, for it appears from them that the administratrix has not exhibited a true and perfect inventory, though required to do so, and also that she has been guilty of a devastavit.

*Sir C. Cresswell* directed a citation to issue to the surety Hughes, calling on him to shew cause why the bond should not be assigned.

January 20.—Mr. E. Ward moved that the bond be assigned. Notice of motion had been given to the surety on whom the citation had issued.

Dr. Spinks, for the surety cited, submitted that the plaintiff had mistaken his way; that the surety was not, in the first instance, liable to an action, but to an administration suit in Chancery.

*Sir C. Cresswell*: The administratrix has not furnished such an inventory and account as the Court called for: that was part of the condition of the bond; if that is broken, must not the bond be assigned? I had some doubt, under the terms of the statute, whether I ought to have called the surety before the Court; all that the Court really does by assigning the bond is to put the plaintiff in the position of a person who has a right to sue. Now that the surety is before the Court, I think I am bound to assign the bond, if a primâ facie case of a breach of it is made out, as there is in this case. On the other hand, I will not say that if, on cause shewn, the proceeding appeared to be clearly frivolous and vexatious, I would assign the bond.

**[35]** SUMMERELL *v.* CLEMENTS. December 6, 1862. — Costs. — Unsuccessful Opposition to Will by next of Kin.—Rule as to Condemnation in Costs.—A party entitled to oppose a will, who avails himself of Rule 41, contentious business, will never be liable to condemnation in costs. If a party calls witnesses in support of the pleas of undue execution and incapacity, and fails, his condemnation in costs will be in the discretion of the Court on all the circumstances

of the case.—Failure to establish pleas of undue influence and fraud will, as a general rule, be followed by condemnation in costs.

[S. C. 32 L. J. (P.) 33; 8 L. T. 172; 11 W. R. 153. Approved, *Leigh* v. *Green*, [1892] P. 17.]

The plaintiff propounded a will, dated the 9th of April, 1860, of William Clements, late of Bristol. The defendant, one of the sons of the deceased, pleaded undue execution and incapacity. The issues came on for trial before Sir C. Cresswell and a common jury.

Mr. Montagu Smith, Q.C., and Dr. Spinks, for the plaintiff.

Mr. Collier, Q.C., Mr. Henry James, and Mr. G. Brown, for the defendant.

Witnesses were examined on both sides, and the jury found a verdict for the plaintiff.

The Court pronounced for the will.

Mr. Collier moved for costs out of the estate.

Dr. Spinks moved that the defendant be condemned in costs. The personal property was very small, and if the costs were not paid by the defendant, they must come out of the pocket of the plaintiff.

**[36]** *Sir C. Cresswell*: I cannot depart from the general rule I have laid down as to costs.

Dr. Spinks: The rule, as I understand it, is, that where next of kin only raise the questions of due execution and capacity by the pleadings, and give notice that they will not produce witnesses, they are not liable to condemnation in costs. That was also the rule in the Ecclesiastical Courts. But where next of kin do not take that course, but compel the executors to go to the expense of contesting a case, the rule is that they must be condemned in costs.

*Sir C. Cresswell*: I never laid down the rule as broadly as that. I believe I have gone a good deal beyond the Prerogative Court in condemning costs, where the opposition has been unsuccessful, but I do not think I have gone so far as you state.

Dr. Spinks: By the practice of the Prerogative Court, the defendants in this case would have been condemned in costs. They have gone beyond the cross-examination of the plaintiff's witnesses, and have set up a substantive case of their own.

*Sir C. Cresswell*: I think you are perfectly right in your statement of the rule. The next of kin always had the right to put the executors on proof of the will in solemn form, without being liable even to have the question of costs considered. When declarations and pleas were substituted for the old form of pleading, the question arose whether the next of kin should, or should not, have the same right. In order to place them as near as possible in the same position, and to put it out of the discretion of the judge to deal with the question of costs, it was laid down that a next of kin, who gave notice that he did not intend to produce evidence, should be in the same position as the next of kin in the Prerogative Court. The **[37]** practice since that time has been that, wherever there has been a fair and reasonable ground for contesting a case, I have not condemned in costs. If I have thought there was not fair and reasonable ground, then I have condemned him in costs, although the only issues raised were incapacity and undue execution. But if the parties have chosen to raise other issues of undue influence or fraud, and have failed to prove them, then I have almost invariably condemned in costs. I think that is the rule which has been pursued.

No order as to costs.

CUNLIFFE AND ORMEROD *v.* CROSS. January 14, 1863.—Pleading.—Practice.—Plea, "that the alleged codicil was not prepared in conformity with the intentions of the deceased, and the deceased at the time of the execution of the alleged codicil was ignorant of the contents thereof":—Held bad, on demurrer.

[S. C. 32 L. J. 68; 9 Jur. (N. S.) 210; 8 L. T. 172; 11 W. R. 258. Dictum disapproved, *Hastilow* v. *Stobie*, 1865, L. R. 1 P. & D. 65.]

The plaintiffs propounded as executors the will and codicil of Henry Cross, late of Wardle Fold, in the county of Lancaster, who died on the 6th of June, 1862.

Pleas as to the codicil:—1. Undue execution. 2. Incapacity. 3. Fraud. 4. Undue influence. 5. That the said alleged codicil was not prepared in conformity with the intentions of the said deceased, and that the deceased at the time of the execution of the said alleged codicil was ignorant of the contents thereof.

Demurrer to the fifth plea.

Dr. Spinks, for the demurrer, referred to *Middlehurst* v. *Johnson*, 30 L. J. 14, Prob. & Mat.

Dr. Wambey for the plea.

**[38]** *Sir C. Cresswell*: If you were to prove the plea, it would not of necessity destroy the will. A testator may, if he likes, authorize another person to make a will for him, and may say, "I do not know what you have put down, but I am quite ready to execute it." Such a will would be a good one, would it not?

Dr. Wambey: No doubt. But we have also pleaded mental incapacity, and we may be able to prove that the testator had not a full knowledge of the contents of the instrument.

*Sir C. Cresswell*: Then why not plead that it is not his will?

Dr. Wambey: That is an unsatisfactory plea, "for it is not his will" if it was not duly executed, or if the testator was incompetent. It may turn out in this case that, although he was not altogether incompetent, he was so incompetent as to be ignorant of the contents of the will.

*Sir C. Cresswell*: You are relying on some assistance to be derived from another plea; but it is a first principle in pleading that, in arguing in support of one plea, you cannot derive assistance from another.

Dr. Wambey referred to *Fincham* v. *Edwards*, 3 Curt. 73.

*Sir C. Cresswell*: I am of opinion that this is not a good plea. Dr. Wambey has suggested that there are various ways in which it might turn out that this would be no will. But if the allegations in the declaration are not traversed, you cannot say that it is not the deceased's will on the ground that either of those allegations is untrue. When you say that the paper propounded is not the will of the deceased, you mean that he never signed that paper meaning that it should operate as his **[39]** will. I cannot assume any particular state of circumstances. Suppose you were to prove satisfactorily all that you have alleged in this plea, that the will was not prepared in conformity with the deceased's intention, and that the deceased was ignorant of the contents thereof, you would be entitled to a verdict upon the matter of fact; but would that verdict be of necessity an answer to the declaration? It would not, and therefore this is not a good plea.

Judgment for plaintiffs.

INKSON *v.* JEEVES AND OTHERS. January 20 and 27, 1863.—Interest.—Pleading.—Practice.—A caveat was warned by the widow of a deceased, and the defendants appeared thereto as universal devisees and legatees of the estate of A. B., the universal devisee and legatee of the whole estate of the deceased. The plaintiff thereupon declared, alleging an intestacy. The defendants pleaded propounding a Will, whereof A. B. was sole executrix and universal legatee. On motion for an order to amend the pleas by setting forth how they derived their interest:—Held, that it was too late for the plaintiff to call upon the defendants to set forth their interest after the declaration had been delivered.

The defendants having entered a caveat in the goods of John Inkson, deceased, the caveat was warned by the plaintiff Josephine Inkson, the widow of the deceased. The defendants then entered an appearance as universal devisees and legatees of the estate of Ann Brownfield, the universal devisee and legatee of the whole estate of the said John Inkson. The plaintiff thereupon declared that John Inkson, late of Natal, in South Africa, deceased, died on or about the 15th of April, 1853, at Natal aforesaid, intestate without child, leaving the said Josephine Inkson his widow and relict.

**[40]** Pleas.—1. That John Inkson in the plaintiff's declaration mentioned, and who died on the 15th of April, 1853, did not die intestate, as alleged in the said declaration. 2. That the said John Inkson, being of the age of twenty-one years and upwards, made his last will and testament, bearing date the 4th of March, 1851, and in the said will appointed Ann Brownfield, otherwise Campbell, sole executrix and universal legatee. 3. That the said testator being, at the time of the making of the said will and of the death of the said testator respectively, a natural born subject of Great Britain, was resident and domiciled within the district of Natal, in South Africa, and that the said testator duly made the said will in accordance with the laws in that respect in force within the said district. 4. That the will was duly executed. 5. That the testator was of sound mind, etc.

Dr. Spinks, for the plaintiff, moved that the defendants' pleas may be ordered to be amended by setting forth such matter as would entitle the defendants to a grant of administration with the will annexed of the paper-writing dated the 4th of March, 1851, which they allege to be the will of the deceased John Inkson, in the event of such will being established. This is an interest suit, and the defendants ought to shew a preferable title upon the pleadings. The plea may be true, and yet the plaintiff may be entitled to the grant.

Mr. Pritchard opposed the motion. This is not now an interest suit, but an ordinary testamentary suit, in which one party propounds and the other contests a will. If the plaintiff intended to dispute the defendants' interest, she ought to have called on them to propound it before declaring. It is too late after the delivery of the declaration. Cur. adv. vult.

January 27.—*Sir C. Cresswell*: This was a question whether the defen-**[41]**-dants should reform their pleas by shewing how they derive their interest. I think it is too late for the plaintiff to ask for that. The plaintiff claims by reason of an intestacy. The defendants, being warned to a caveat, appeared, setting out the title under which they claimed. The plaintiff took no notice of that, but declared. I think, therefore, that if they now set up a will which would defeat the claim of the plaintiff, she has for that purpose admitted their right to set up the will as an answer to her claim.

Mr. Pritchard asked for the costs of the motion.

*Sir C. Cresswell*: I will dispose of the question of costs when I have heard the case.

Motion rejected.

CRITCHELL *v.* CRITCHELL. February 17, 1863.—Will pronounced against on Opposition of next of Kin.—Costs.—A next of kin, who contested the validity of a Will propounded by the widow of the deceased as the sole executrix named therein, which was pronounced against by the Court, but without condemning the widow in costs, held to be entitled to have his costs out of the estate.

[S. C. 32 L. J. (P.) 108; 8 L. T. 173; 11 W. R. 401.]

The plaintiff in this case, Mrs. Harriet Critchell, propounded a paper-writing, which she alleged to be the last will of her husband John Critchell, deceased, making her universal devisee and legatee, and appointing her his sole executrix. The defendant Mr. Alfred Critchell, a brother of the deceased and one of his next of kin, contested the validity of the will, on the grounds that it was not the will of the deceased, that it was not duly executed, and that the deceased at the time of its execution was not of sound mind, memory, and under-**[42]**-standing. The case was heard on oral evidence before Sir C. Cresswell without a jury, who, after consideration, pronounced against the will, on the ground that he was not satisfied of the testamentary capacity of the deceased at the time of its execution, but made no order as to costs.

Dr. Tristram, for the defendant, now moved the Court to order that the defendant's costs be paid out of the estate. The rule of the Prerogative Court was, that a legatee who propounded and established a testamentary paper loco executoris, although he might not be entitled to the grant, yet was entitled to have his costs out of the estate (*Williams* v. *Goude and Bennett*, 1 Hagg. 610); the costs he had incurred being considered as part of the testamentary expenses incurred by him in doing what the executor ought to have done. The converse of the rule would hold good, namely, that a next of kin who had successfully opposed a will and established an intestacy, although he might not be entitled to the grant of administration, yet was entitled to his costs out of the estate; he having done what the person entitled to grant of administration ought to have done, and the costs he had incurred were costs incidental to obtaining the grant. He also referred to *Dew* v. *Clark and Clark*, 1 Hagg. 311.

Mr. Searle, for the plaintiff, contrà: The evidence as to incapacity was so conflicting as fully to justify the plaintiff in propounding the will. She was exonerated from all blame by the Court. The defendant as heir-at-law takes the realty, which far exceeds the personalty in value; under the circumstances, the plaintiff ought not to have her share in the personalty diminished by its being made to contribute to the plaintiff's costs.

*Sir C. Cresswell*: I think the defendant, under the circumstances, is entitled to have his costs out of the estate.

**[43]** GLEN *v.* BURGESS AND GOVER. March 3, 1863.—Declaration.—Destruction of Will.—Affidavit of Scripts.—When a Will which has been destroyed is propounded, it is not necessary to set out the substance of the will, or to allege its destruction in the declaration. The declaration should, however, if possible, assign a particular date to the Will, and an averment that the deceased in or about a certain month made his last will is primâ facie insufficient.

In this case the plaintiff declared that A. B. deceased, who died on or about the 15th of November, 1859, made his last will and testament in or about the month of June, 1856, and in the said will appointed the plaintiff and D. Stewart executors, and alleged due execution in the usual terms.

The plaintiff's affidavit of scripts stated that the will propounded had been destroyed by burning or otherwise within a few days after the death of the deceased, and that the contents of the will were set forth in an exhibit annexed to the affidavit.

Dr. Wambey, for the defendants, moved the Court to order the plaintiff to amend his declaration, by stating in the declaration, first, what were the contents of the said will; secondly, what had become of it, and by whom it was destroyed.

Dr. Swabey: As to the first point, no more reason has been stated for introducing the contents of this will into the declaration than the contents of any other will. As to the second point, it might raise as an issue for the jury what is properly matter for the consideration of the Court only, viz. was the original document destroyed or no, so as to admit secondary evidence of its contents either for the jury or the Court, as the case may be. Cur. adv. vult.

**[44]** *Sir C. Cresswell*: I do not think the defendants have any right to have the declaration amended in the terms of the notice of motion; but the declaration should state all particulars within the knowledge of the party, so as to enable the defendants to plead specifically to some particular will. The declaration does not assign any date to the will, but states that the testator made a will in or about the month of June, 1856; it would be better that the declaration should be amended in that particular.

Dr. Wambey intimated that the amendment suggested by the Court was not in the present case material to the defendants.

Motion rejected.

(Before *Sir C. Cresswell*, and a Special Jury.)

CRISPIN *v.* DOGLIONI. February 19 and 20, 1863.—Evidence.—Declarations of Family.—On the issue whether the plaintiff was the natural son of H. C., declarations of J. C., brother of H. C., were tendered as evidence of the relationship between plaintiff and H. C.; but the Court—Held, that such declarations did not fall within the exception which admits declarations of members of the family in cases of pedigree.

[See further, p. 96, post.]

This was an interest suit. The plaintiff alleged that he was the natural son of Henry Crispin, deceased, a domiciled Portuguese, and that by the law of Portugal he was entitled to succeed to the whole of the property of the deceased if he died intestate, and to two-thirds of it if he died testate. The defendant, a sister of the deceased, denied, among other pleas, that the plaintiff was the natural son of the deceased. **[45]** The issue came on for trial before Sir C. Cresswell and a special jury.

The Queen's Advocate (Sir R. Phillimore), Serjeant Shee, Mr. Dowdeswell, Mr. Hannen, and Mr. C. A. Turner, for the plaintiff.

Mr. M. Chambers, Q.C., Mr. Cleasby, Q.C., Dr. Spinks, and Mr. R. E. Turner, for the defendant.

The Queen's Advocate tendered as evidence the declarations of Jose Crispin, a brother of the deceased, as to the relationship between the plaintiff and Henry Crispin.

Mr. M. Chambers objected.

The Queen's Advocate: There is no decision on the point; the principle upon which declarations of members of the family are admitted in cases of pedigree is, that they must have had the best opportunity of knowing the state of the family.

*Sir C. Cresswell*: Would it not be a fair answer to that argument that the family would not be likely to know the peccadilloes of its different members? A man would not be likely to proclaim the existence of his bastard issue, and therefore the reputation that no such issue existed would be worth nothing.

Mr. Serjeant Shee: The question whether B. is heir-at-law may depend upon the

question whether A. is legitimate or illegitimate. The reputation of the family as to A.'s illegitimacy would be evidence.

Mr. Chambers referred to Taylor on Evidence, p. 623 of **[46]** third edition. A bastard has no family by the English law, and therefore there is no such thing as a declaration by a member of the family; it would be very unjust to admit the declaration of a stranger for the purpose of bastardizing a person.

*Sir C. Cresswell*: As the question is to be decided on principle, I certainly think the evidence is inadmissible. The admissibility of hearsay evidence is exceptional, and ought not to be carried further than the decisions in the books, for it is a departure from the first rule of evidence. I can well understand that where a matter is likely to be discussed and well known in a family, a member of the family may be allowed to give evidence of it; but in this case the plaintiff, according to his own account, is filius nullius by our law. The question is, whether a declaration of one brother may be admitted as to another brother having had intercourse with a woman, and having had a child by her; I think it ought to be excluded.

COOK AND ANOTHER *v.* LAMBERT AND OTHERS. February 7 and 17, 1863.—Will.—Paper fastened at End of Will.—Signature of Testator and Attesting Witnesses to it.—Where the signature of the testator and of the attesting witnesses was made, not on the paper on which the Will was written, but on a piece of paper which had been attached to the paper on which the Will was written:—Held, to be a good execution within 15 and 16 Vict. c. 24, s. 1.

[S. C. 32 L. J. (P.) 93; 9 Jur. (N. S.) 258; 9 L. T. 211; 11 W. R. 401.]

The plaintiffs in this case were the executors of the last will of John Lambert, late of Grundisburgh, Suffolk, beerhouse-keeper, deceased, dated the 9th of July, 1859, which **[47]** they had propounded in the usual declaration. The defendants denied the due execution of the will.

The case was heard before the Court without a jury.

The will was executed under the following circumstances:—

In July, 1859, the testator requested John Grayson, a shoemaker, who had made a former will, to prepare a fresh will for him, and for that purpose gave him the former will.

The substance of Grayson's evidence was as follows:—

"I made notes of the instructions which deceased gave me with a pencil on a bit of paper, for I had to go to my own house to write the will. When I got to my house, I took the blank sheet from the old will, and wrote the present will on it; there was some writing of the will (an indorsement or address) on the bottom of the sheet on which I wrote this will, and that there might be room for the attestation and signatures, I pasted a piece of paper on the bottom, which covered over the writing I have mentioned. I put the piece of paper on before I came back to Lambert's house. I read the will over to him before the attesting witnesses came into the room. Lambert set his seal and mark. I wrote the testimonium clause before he marked; the attestation clause 'signed, sealed, and delivered,' etc., after he marked. I wrote 'John Lambert, the testator, his mark.' Crapnall and Cook signed it. I then folded it up, put it in an envelope, sealed, and left it with him."

The mark of the testator, and the names of the witnesses, were made on the piece of paper so pasted on.

Crapnall and Cook, the attesting witnesses, were examined. They confirmed Grayson's account of the execution, and on the will being shown them in the witness-box, said that the paper appeared to be in just the same state as when they wrote their names.

*Sir C. Cresswell*: The point is, whether the signature is on a part of the paper on which the will is written.

**[48]** Dr. Spinks argued that there was a due execution. On the evidence the Court must be satisfied that the paper on which the names are written was affixed to that on which the will was written before the execution (*In the Goods of John Gausden*, 2 Swab. & Trist. 362). It would be another matter if it were shewn that the names had been written before the paper was affixed. Cur. adv. vult.

Lawrence, contrà.

February 17.—*Sir C. Cresswell*: In this case, which stood over for consideration, the question raised was, whether the will propounded was duly executed. The

circumstances which raised the doubt as to its due execution were, that the attestation clause, the signature of the testator, and the signatures of the attesting witnesses, were made on a piece of paper firmly attached by some adhesive matter to the paper on which the will was written. I am of opinion that this case is substantially the same as the one I decided *In the Goods of John Gausden*, 2 Swab. & Trist. 362, where the will was written on a piece of parchment; and at one corner, at the bottom of the parchment, a piece of paper was pasted, with a stamp impressed upon it, upon which paper the signature of the testator and the attesting witnesses were subsequently made. I think the signature of the testator must be accepted as a signature made on a part of the will, and so made as to come within the words of the first section of 15 & 16 Vict. c. 24: "The signature being so placed at the end of the will that it is apparent, on the face of it, that the testator intended thereby to give effect to the writing signed as his will"; and I therefore pronounce for the will.

Dr. Spinks asked whether the Court would make any order as to costs.

*Sir C. Cresswell*: This is a case in which the costs of both parties must be paid out of the estate.

**[49]** IN THE GOODS OF EMILY SUSAN GRAHAM RAFFENEL, Widow, deceased (on Motion). March 3, and 24, 1863.—Domicil of Origin.—Acquired Domicil—Intention to resume.—B. left Dunkerque, where she had an acquired domicil, with intention of residing in England; she got on board the packet at Calais, but before it left the harbour she was, through illness, obliged to land, and never sufficiently recovered to leave France:—Held, that there was no sufficient act to give effect to the intention to resume the English domicil.

In this case the deceased had her domicil of origin in England, but married a French naval officer, and lived with him in France, at Dunkerque, till his death in December, 1850.

From the affidavit of Leonie Clara Raffenel, a daughter, and A. M. Bromhead, a cousin and intimate friend of the deceased, it appeared that after her husband's death the deceased frequently expressed her intention of returning to England with the view of permanently residing there; that about the 13th of August, 1853, she left Dunkerque for Calais, and with her children and baggage got on board the packet for England, but before leaving the harbour she was taken so ill as to be obliged to land again at Calais, where she remained about three months, in the hope of getting sufficiently well to undertake the voyage. This not being the case, and the remainder of a term in a house at Dunkerque being still on hand, they returned there on the 20th of November, 1853; the deceased never recovered sufficient strength to resume the journey to England, and died at Dunkerque on the 13th of April, 1854, having in the previous month made a will valid by the law of England, but invalid by that of France. Her property was in England.

Dr. Deane, Q.C., moved the Court for probate of this will. **[50]** The deceased's domicil undoubtedly became French by marriage with a Frenchman domiciled and residing in France; but it is submitted that the fact of leaving Dunkerque on her journey to take a permanent residence in England is sufficient to give effect to the intention which the deceased had of resuming her domicil of origin. There was an act of abandonment of the acquired domicil.

*Sir C. Cresswell*: I cannot think that the French domicil was abandoned so long as the deceased remained in the territory of France. It must be admitted that she never left France, and that intention alone is not sufficient. I reject the motion.

HARENC *v.* DAWSON AND CLUCAS. March 17, 1863.—Affidavit of Service of Citation, and of Search for Non-Appearance.—Practice.—An affidavit of service of a citation should identify the citation served; the citation should be made an exhibit to the affidavit.—An affidavit of search and of non-appearance should state the day on which the search was made; and where two persons have been cited and neither has appeared, it should state that no appearance has been entered by or on behalf of either of them.

This was an application for a grant of limited administration of the effects of John Christian, deceased. The deceased had left a will, whereof he appointed the defendants executors, who had both been cited, but had not appeared.

There had been filed affidavits of service of the citation on each of the defendants,

in the following forms:—"I did, on the 24th of February, 1863, duly serve F. B. C., of, etc., with a true copy of a citation issued out of this Honourable Court, **[51]** by delivering the same to the said F. B. C., of, etc., aforesaid, and at the same time, at his desire and request, I shewed him the original thereof."

The affidavit of search, after stating that search had been made in the books kept in the registry for entering appearances, but not the day on which the search was made, continued, "and I further make oath and say, that no appearances have been entered by or on behalf of the said Richard Crosbie Dawson and Frederick Brew Clucas to the said citation."

Mr. G. H. Cooper moved for a limited grant on the above affidavits.

*Sir C. Cresswell*: The affidavits of service and of non-appearance are defective, and must be re-sworn. The former refers to a citation served, but does not identify it. It does not appear that it was the citation in this suit. The latter should have stated the day on which the search was made, and also that no appearance had been entered by or on behalf of either of the parties cited.

FERREY *v.* KING. November 28, 1861.—Will.—Plea of undue Execution.—Evidence of attesting Witnesses.—Costs.—Plaintiff, executor, propounded a Will, to which the defendant, next of kin, pleaded undue execution, but gave no notice of merely cross-examining plaintiff's witnesses. At the trial the plaintiff examined one attesting witness, who proved due execution; the defendant called the other attesting witness, who negatived due execution, and the jury found a verdict establishing the Will. The Court made no order as to costs.

[S. C. 31 L. J. (P.) 120; 7 L. T. 219. Applied, *Bone* v. *Whittle*, 1866, L. R. 1 P. & D. 249.]

The plaintiff as executor propounded the will of James **[52]** King, late of Christchurch, Hants, deceased. The defendant, the brother of the deceased, pleaded that the will was not duly executed. The issue joined on the plea was, on the 27th of November, 1861, tried before Sir C. Cresswell, by a jury. The only question was, whether the will was duly attested. The names of the attesting witnesses were Tanner and Barnes. Tanner was called as a witness by the plaintiff, and proved the due execution of the will on the 12th of February, 1858. Barnes was called by the defendant, and he admitted that he had signed the will in the presence of the deceased and of Tanner, but said that neither the deceased nor Tanner had signed in his presence. The jury found that the will had been duly executed, and Sir C. Cresswell decreed probate.

Dr. Deane (Dr. Wambey with him), on behalf of the plaintiff, asked that the defendant should be condemned in costs. No notice was given that the opposition to the will would be confined to the cross-examination of the attesting witnesses.

Dr. Spinks, contrà, asked that the defendant's costs might be allowed out of the estate. In the Prerogative Court, the plaintiff would have been bound to produce both the attesting witnesses, and if he had done so, the defendant would not have been obliged to call any witnesses, and could have given notice that he should only cross-examine the attesting witnesses. Where the attesting witnesses give contradictory evidence as to the execution, the next of kin has a right to have the matter investigated; and, unless there is reason to believe that the defendant has suborned the witness upon whose evidence he relied, he ought not to be condemned in costs.

*Sir C. Cresswell*: I am generally disposed to make the losing party pay the costs, but I will take time to consider the question.

**[53]** *Sir C. Cresswell* now said: I have considered the question; I shall make no order as to costs.

LISTER AND OTHERS *v.* SMITH. March 18 and 25, 1862.—The latter of two Wills propounded.—Citation to see Proceedings.—Persons interested in Real Estate under earlier Will.—Practice of Prerogative Court.—Court of Probate Act, sect. 61.—Where an executor propounds the latter of two Wills, the Court will direct a citation to issue against the devisees under the earlier Will, and against the heir-at-law, though already before the Court, as defendant in the suit.

[S. C. 33 L. J. (P.) 29; 10 Jur. (N. S.) 107; 9 L. T. 578; 12 W. R. 319. See further, p. 282, post.]

Mr. Ralph Wheeldon Smith, the deceased in this cause, had left a will, dated October 26th, 1858, and a codicil, dated July 27th, 1860, disposing of real and personal

estate, which was propounded by the plaintiffs as executors named therein. The deceased had also left a will, dated the 11th of March, 1852, and a codicil thereto, dated July 25th, 1856, by which he made, in some respects, contrary dispositions of his real estate.

Dr. Tristram moved the Court on behalf of plaintiffs to direct a citation to see proceedings to issue against Ralph Wheeldon Smith (the defendant), as the heir-at-law of the deceased, and also against Thomas Smith, Mrs. Julia Mason, and others interested in the deceased's real estate under his will of March 11, 1852, and his codicil of July 25, 1857.

*Sir C. Cresswell*: I understand that you propose to cite Thomas Smith, Mrs. Julia Mason, and others, not as inter-**[54]**-ested in the deceased's real estate under the will and codicil propounded, but as interested in it under the previous will and codicil, which have not been propounded in this suit. By the 61st section of the Probate Act, the heir-at-law, devisees, and other persons having or pretending interest in the real estate affected by the will which is the subject-matter of the suit, may be cited to see proceedings in like manner as the next of kin or others having or pretending interest in the personal estate affected by the will should be cited. I will direct a citation to issue against the heir-at-law. The other parties proposed to be cited are in the same position as legatees under a will of prior date would have been in the Prerogative Court. If by the practice of the Prerogative Court an executor propounding a will could cite the legatees of a prior will to see proceedings, I will direct a citation to issue against the devisees of the will of 1852. Can you furnish me with any authority on this point?

Dr. Tristram apprehended that by the practice of the Prerogative Court an executor who propounded a will was entitled to cite all parties interested in contradicting that will, whether in the character of next of kin or of executors or legatees of other testamentary instruments of the deceased. Unless he had been entitled to do this, the great advantage of proving a will in solemn form, so as to make the probate universally binding, would be defeated. If the Court would permit the motion to stand over, he had no doubt that he should be able to furnish an authority on the point.

*Sir C. Cresswell*: The motion may stand over.

March 25.—Dr. Tristram renewed the motion. He could find no reported case in which the question raised had been decided. There was a passage in "Williams on Executors," 5th edition, p. 300, which favoured the motion, in which it was stated **[55]** "that the executor may, and in prudence often does, for greater security, propound and prove the will in the first instance, per testes, of himself, citing the next of kin, and all others 'pretending interest in general' to 'see proceedings,' which being done, the will shall not be set aside afterwards (provided there be no irregularity in the process) when the witnesses are dead." See also 1 Oughton's Ord. tit. 6, s. 5. The practice of the Prerogative Court on this point was very clearly stated in the following passage contained in the Report of the Ecclesiastical Commission of 1832, p. 32, which Report was, amongst others, signed by Sir John Nicholl, Sir Christopher Robinson, Sir Herbert Jenner, and Dr. Lushington:—"There is another process in testamentary matters, extremely useful and frequently resorted to, which it may be proper here to state. The executor or other person claiming to take the grant of probate of a will or other testamentary instrument may cite the next of kin, and other parties interested under an intestacy, or a former will, to appear and see the will propounded and proved by witnesses; and, if the parties cited do not appear and oppose the probate, they are barred from afterwards contesting its validity, unless on account of absence out of the kingdom, or the like sufficient cause for non-appearance be shewn."

*Sir C. Cresswell*: Upon this voucher of what was the practice of the Prerogative Court, I will direct the citation to issue against the devisees of a former will, as well as against the heir-at-law.

Dr. Swabey appeared for the heir-at-law. He was already a party to the suit. It seemed unnecessary therefore to cite him. If the citation issued against him, he submitted that he should, in no event, be made liable for the costs of the citation.

*Sir C. Cresswell*: I can make no order beforehand to exempt him from the costs.

**[56]** IN THE GOODS OF MARTHA MANLY (deceased). May 13, 1862.—Will.—Construction.—Executrix according to the tenor.—A. B. duly executed a testamentary paper in the form of a letter, beginning "My dear Eliza," and containing full information as to the amount of her property, with full directions as to how she wished it to be disposed of, and concluding with these words: "I know of nothing else, my dear Eliza, to trouble you with, and trust that this will not involve you in much."—The Court decreed probate of the said paper-writing to E. M. A., as executrix according to the tenor.

[S. C. 31 L. J. (P.) 138; 8 Jur. (N. S.) 493; 7 L. T. 200. Referred to, *Boardman* v. *Stanley*, 1872, Ir. R. 6 Eq. 590.]

Martha Manly, late of Sydenham, widow, deceased, died on the 19th of August, 1861. On the 13th of June, 1861, she duly executed the following testamentary paper:—

"My dear Eliza,—When these lines reach you I shall no longer be an inhabitant of this world. My only anxiety is my poor sister; and I feel that I cannot die with comfort until I have made some arrangement for her continuance under the protection so kindly and so wisely procured for her by my best friends. She will lose nothing by my death. The sum now paid to Mr. Hitchcock, £48 per annum, is her own; £30 pension, and the rest in the funds. The pension I have always received; the dividends in the Bank have been received by my agent, Augustus Chippendale, 10, John Street, Adelphi, and through him Mr. Hitchcock has always been paid. You, my dear Eliza, have been so invariably kind to me, I now take the liberty of asking you to extend that kindness to my beloved sister by seeing that her wants are provided for. Mr. Hitchcock is paid half-yearly in July and January, the 6th of which month it becomes due. With respect to her pension, Edward Hooper, I am sure, would manage that willingly. The copy of my father's will and the permission granted me by the Admiralty in the year 1826 to receive her pension, you will find in the pocket-**[57]**-book that will be delivered to you, wherein also I hope will be found sufficient money to bury me decently. I have no debts at this present time, and I cannot be in debt to my agent, as he has received my annuity of £45, 11s., and my sister's dividend from the bank, £18, making £63, from which he has paid £48 to Mr. Hitchcock, and £10 to me annually, so I think he must be my debtor. I have never drawn upon him for more than the above-mentioned sums. I have nothing to leave but my furniture, which would be of no use to my sister. Before I sunk my money for an annuity, I made a will leaving all to her; in the event of her death, to my cousin, Martha Ann Keen; in case of her death, to the late Mary Ann Leigh. That will was left in the care of my then agent, John Chippendale, the father of my present agent, and Mrs. Addams was appointed executrix. This is now my will, for in the event of my sister dying before me, I am heir to her property, £18 per annum from money in the funds, the particulars of which Mr. Chippendale can explain. That sum, my dear Eliza, I wish you to have; if you do not need it, as I trust you do not, you will know how to dispose of it. I am convinced no one will make a better use of it, and if it were hundreds, I could never repay what I owe to you and yours. My books, I think, might be acceptable to my kind friends the Misses W.; my plate to Mrs. P.; my furniture to Mrs. F., after you have selected any that might be useful to yourself. I most especially wish you to have the two stools worked by my mother, they will not disgrace any drawing-room, and my watch, which is a gold one, and was the only thing saved by my husband when wrecked in the 'Apollo' in 1804. I know of nothing else, my dear Eliza, to trouble you with, and trust that this will not involve you in much. I can only pray that every good will attend you in this and the world to come, and am faithfully yours, (Signed) MARTHA MANLY."

**[58]** "Signed, declared, and acknowledged by the said Martha Manly as and to be her last will and testament, in the presence of us both, present at the same time, who in her presence, at her request, and in the presence of each other, do hereunder subscribe our names as witnesses.

"Louisa S. Addams, spinster, Sydenham; Anne Maria F., spinster, Sydenham. Sydenham, June 13th, 1861."

After having executed the above paper, the deceased handed it to Miss Louisa Sawyer Addams, enclosed in an envelope, addressed in the deceased's own handwriting to "Miss Eliza Addams."

The above circumstances were deposed to in a joint affidavit of Miss Lousia Sawyer

Addams and Miss Eliza Mary Addams, who stated that from their acquaintance with the deceased, and from her own statement on the subject, they entertained no doubt that by the person addressed in the body of the said paper as "Eliza," and on the envelope as "Miss Eliza Addams," the deceased intended the deponent, Eliza Mary Addams.

Dr. Tristram moved the Court to decree probate of the said paper-writing as the last will and testament of the deceased, to be granted to Eliza Mary Addams as executrix, according to the tenor. The fact of its being addressed to Miss Eliza Addams, and from its containing full information as to the amount of deceased's property, and how she wished it to be disposed of, it would appear that she intended her to have the management of it after her death. From the words also, "I know of nothing else, my dear Eliza, to trouble you with, and trust that this will not involve you in much," it was evident that she intended her to act as her executrix.

*Sir C. Cresswell*: I think, upon reference to the cases, **[59]** that there is enough to justify me in granting probate of this will to Miss Eliza Mary Addams, as executrix according to the tenor.

NASH *v.* YELLOLY. November 25, 1862.—Executor.—Next of Kin opposing Will.—Costs.—Where a next of kin, defendant, successfully opposed, on the ground of undue influence exercised by the executor and by the residuary legatee, a Will propounded by the executor, the Court condemned the executor, plaintiff, in costs. The plaintiff was also executor under an earlier Will, which appointed the same residuary legatee, under which the executor took nothing, and the Court refused to make an order securing out of the estate to the defendant such costs as he might not be able to recover from the plaintiff.

[S. C. 8 L. T. 290; 11 W. R. 541.]

The plaintiff in this case propounded an alleged last will of Robert Yelloly, late of Berwick-on-Tweed, deceased, made in 1861, as one of the executors named therein. The defendant, who was the son and heir-at-law of the deceased, contested the validity of this will. The issues raised on the pleadings were tried at the summer assizes held at Newcastle in 1862, when the jury found that the making and execution of the said will was procured by the undue influence of the plaintiff and Mary Ann Smart.

Dr. Tristram moved the Court to pronounce against the will, to condemn the plaintiff in costs, and to direct such of the defendant's costs as he might not recover from the plaintiff to be paid out of the estate. There was no precedent for the last part of the application, but he contended that on principle it should be granted. The deceased had left other wills: the plaintiff and a Mr. Wilson are executors of a will made in 1860, the one which will now take effect, and in both the will **[60]** of 1860 and 1861 he had appointed his daughter Mary Ann Smart (one of the persons who, according to the verdict of the jury, was guilty of obtaining the will of 1861 by undue influence) his residuary legatee. The bulk of the deceased's property consisted of realty, which by the will of 1860 he devised to the defendant, and by the will of 1861 to Mary Ann Smart. The plaintiff was a nude executor, and Mary Ann Smart was the person interested in sustaining the will of 1861. If the defendant had been appointed one of the executors of the will of 1860, he would be entitled, on proving it, to take out of the estate the costs he was unable to recover from the plaintiff, as part of the testamentary expenses incidental to obtaining probate of that will. But from the mere accident of his not being executor he would lose this security for costs, unless the Court would make the order as prayed. The person whom the order would really prejudice was Mrs. Smart, the residuary legatee; and as the costs were incurred in consequence of her misconduct, it was more equitable that she should suffer than the defendant, who had been doing what the executors of the will of 1860 ought to have done.

Mr. Temple, Q.C., contrà.

*Sir C. Cresswell* pronounced against the will, condemned the plaintiff in the costs of the suit, but, in the absence of a precedent, declined to saddle the estate with costs not recovered from the plaintiff.

Dr. Tristram (by permission of the Court) again mentioned this case, and said there was a case of *Bewsher* v. *Williams and Others*, not reported, which he submitted would be an authority for ordering the costs not recovered from the plaintiff to be paid out of the estate. Cur. adv. vult.

*Sir C. Cresswell*: In this case I was asked not only to condemn the plaintiff in costs, but to give such costs out of **[61]** the estate as the defendant might fail to get from the plaintiff. The learned Counsel said he could not find any authority for such an order; but he furnished me afterwards with the papers in *Bewsher* v. *Williams*. I apprehend that that case differs very materially from the present. In Dr. Tristram's case the plaintiff set up the will, and the defendant rested his opposition on the grounds of incapacity, want of due execution, and undue influence and control. The third plea was found for the defendant, and it was the duty of the Court to pronounce against the will. The defendant was not a party interested under the will; but he was interested, together with others, in what might be the consequence of invalidating the will. Who were the other parties interested I do not know. *Bewsher* v. *Williams* was a remarkable case. A woman made a will in Belgium in favour of an infant child, who was substantially sole legatee, but left a small legacy to her sister Mrs. Ball, and appointed Williams executor. Bewsher set up an earlier will. Williams, being cited, would not propound the will of which he had been made executor, and Mrs. Ball, really for the benefit of the infant (for she herself was hardly interested at all), propounded the will, and went to the expense of trying the case and establishing the will. Bewsher and the infant were the persons mainly interested in the property. Therefore it was very fair and reasonable that Mrs. Ball should have the costs out of the estate. For under the circumstances, there being evidence from which it might be inferred that there was insane delusion, I could not fairly call on the other party to pay the costs of disputing the will. That was such a different case that it was no precedent for the one now under consideration. I think I ought not to extend the practice of ordering costs out of the estate, and therefore the defendant must rely on the party who has been condemned in costs for payment.

**[62]** BEWSHER *v.* WILLIAMS, BALL, AND OTHERS. January 30 and February 20, 1861.—Will established by Legatee.—Costs out of Estate.—B., acting really in the interest of an infant residuary legatee, succeeded in establishing a Will, under which she herself took only a trifling legacy: the executor having refused to propound the Will.—The Court held that the circumstances of the case were such as to warrant the opposition to the Will, and at first refused to make any order as to costs; but, on the representation that B. was not primarily entitled to the grant with the Will annexed, and so might never be in a position to repay herself the expenses of the suit, it ordered her costs to be paid out of the estate.—Being cited to propound and prove a Will is a distinct matter from being cited to take probate under 21 & 22 Vict. c. 95, s. 16.—Semble, the Court has power to vary a previous decree.

[S. C. 8 L. T. 290 n.; 11 W. R. 541. Not followed, *O'Kelly* v. *Browne*, 1874, Ir. R. 9 Eq. 357.]

The testatrix in this case was Miss Lucinda Bourne Darling, who died at Ramsgate on the 19th of April, 1859, leaving two testamentary papers; namely, a will, dated the 15th of March, 1853, wherein she appointed the Rev. James Bewsher, the plaintiff, residuary legatee; and another will, dated the 15th of March, 1857, wherein she appointed Williams executor. Mr. Bewsher (the plaintiff) propounded the will of 1853, citing the executor and parties interested under the will of 1857 to propound and prove it in solemn form if they thought fit to do so. Mrs. Ball, who had a legacy —an Indian workbox—was the only person who appeared to this citation. The bulk of the deceased's property was left to an infant, whose interest Mrs. Ball was anxious to protect. She accordingly propounded the will of 1857, in a declaration, the validity of which was contested by the plaintiff Bewsher, on the ground of the deceased's insanity.

The case came on before Sir C. Cresswell without a jury, when—

**[63]** Mr. Manisty, Q.C., and Dr. Spinks appeared for the plaintiff, and Dr. Wambey for the defendant.

Several witnesses were examined for the plaintiff, to shew that the testator was labouring under a delusion at the time of making the will of 1857, and was therefore of unsound mind.

*Sir C. Cresswell*, after taking time to consider, gave judgment and pronounced for the will, and refused to make any order as to costs.

February 20.—Dr. Wambey moved the Court to grant letters of administration,

with will annexed, to Mrs. Ball, without requiring her to cite the other parties interested under the will.

*Sir C. Cresswell*: There is an objection to my granting this motion. You have not cited the executor and residuary legatee named in the will.

Dr. Wambey: They were cited by Mr. Bewsher to propound and prove the will of 1857 in solemn form of law, and failed to do so. Mr. Williams's right to the executorship is therefore at an end, for by the 16th section of the Probate Act, 1858, when an executor is cited to take probate and does not appear to such citation, his right to the executorship wholly ceases.

*Sir C. Cresswell*: I do not think that in the citation you speak of the term "prove" is used according to the meaning or the spirit of this section. There is a difference between being cited to propound and prove a will, and being cited to take probate. I cannot make the grant to Mrs. Ball until Mr. Williams has renounced, or has been cited to take probate.

Dr. Wambey, under this uncertainty of Mrs. Ball obtaining **[64]** administration with the will annexed, moved the Court to direct that Mrs. Ball's costs should be paid out of the estate. She had no interest in propounding the will, but did so for the benefit of an infant, after the executor had declined to propound it; and having succeeded in establishing it, it was only equitable that she should have her costs out of the estate.

*Sir C. Cresswell* took time to consider whether he had power to vary the decree already made in the cause, but subsequently granted the motion.

KENWORTHY *v.* KENWORTHY AND WATSON. January 27, 1863.—Citation by Advertisement.—Agent.—Form of Affidavit.—When a party is cited by advertisement, and has no agent in this country, there should be an affidavit that he has no attorney, agent, or correspondent in this country.

This was an application for a grant of administration, with the will annexed, to be made to Elizabeth Kenworthy, the plaintiff, as beneficial residuary legatee named in the will of Hugh Kenworthy, deceased. The deceased died in 1854 and left a will, appointing the defendants his executors and residuary legatees in trust. The will had not been proved. Watson, one of the defendants, had been personally cited and had not appeared. John Kenworthy, the other defendant, went to Australia in 1854, and was last heard of in June or July, 1860, when he was resident at Melbourne; he had been cited by advertisement. The plaintiff in her affidavit stated that the said John Kenworthy had no lawfully appointed agent or attorney in this country.

**[65]** Dr. Tristram moved for a grant.

*Sir C. Cresswell*: The plaintiff's affidavit of John Kenworthy not having any agent in this country is not in a proper form. She says that he has no lawfully appointed attorney or agent in this country. I do not know what she means by lawfully appointed attorney or agent. The form of affidavit adopted in the registry is, that the person cited has no attorney, agent, or correspondent in this country. She should make an affidavit in this form.

Dr. Tristram asked the Court, as the property was under £100, and as the executors had omitted to prove the will for six years, to allow the grant to be made without renewing the motion, on such an affidavit being filed in the registry.

*Sir C. Cresswell*: Under the circumstances I will allow it.

IN THE GOODS OF CHARLOTTE ELIZABETH HAGGER (deceased). March 17 and 24, 1863.—Next of Kin of Minors abroad.—Citation and Renunciation dispensed with.—Probate Act, 1857, sect. 73.—The Court granted administration under the 73rd section of the Probate Act to the guardian elected by minors for their use and benefit, without requiring the citation or renunciation of their next of kin, where the property was very small and the next of kin were in Australia, and their interest was infinitesimal.

[S. C. 32 L. J. (P.) 96; 9 Jur. (N. S.) 386; 8 L. T. 470; 11 W. R. 540.]

Dr. Wambey moved for a grant of letters of administration of the estate and effects of Charlotte Elizabeth Hagger, deceased, to C. H. Pickford, the guardian elected by the children of the deceased, for their use and benefit, or till one of them **[66]** should attain the age of twenty-one, without citing the brothers of the deceased. C. E. Hagger died on the 22nd of December, 1862, a widow and intestate, leaving

three daughters and two sons, all of whom were minors under the age of twenty-one. She was the widow of a veterinary surgeon in the Madras army, and she and her children were entitled to pensions from the Medical Fund. At the time of the death of the deceased the property consisted of £100 arrears of pensions. She left three brothers her surviving; one of whom was in Queensland, and the others in New Zealand. C. H. Pickford had been duly elected by the children as their guardian. In some cases the Prerogative Court had departed from the rule of requiring that the next of kin of minors should renounce or should be cited (*In the Goods of Widger*, 3 Curt. 55; *In the Goods of Ewing*, 1 Hagg. Ecc. 381). The Court might grant administration under the 73rd section of the Probate Act, 1857. Cur. adv. vult.

March 24.—*Sir C. Cresswell*: I have looked at the cases cited, and I think that, as the interest of the next of kin abroad is infinitesimal, the grant may without inconvenience be made under the 73rd section, without citing them or requiring their renunciation.

Administration granted as prayed.

IN THE GOODS OF WILLIAM WALTER HOLMES DUTTON (deceased), on Motion. February 24, 1863.—Will.—Codicil.—Revocation of Will.—Presumptive Revocation of Codicil.—B. duly executed a Will on the 3rd of July, 1852, and on the 16th of October, 1857, a Codicil, described as "a codicil to my will of the 3rd of July, 1852," by which Codicil he left a legacy to N., and other-**[67]**-wise confirmed his Will. B. handed the Codicil to N., and it remained in her custody till B.'s death on the 7th of January, 1863. In September, 1860, the deceased expressed his displeasure with certain legatees under the Will, and in the presence of N. took the Will out of a box, cut off his own signature and those of the attesting witnesses, and replaced the mutilated paper in the box, where it was found at his death. At various times between September, 1860, and his death, B. gave certain instructions to his solicitors with respect to another Will, but nothing was ever settled or completed. Three or four days before his death deceased executed a bond securing to N. a monthly payment of £4.—On motion for administration with the Codicil annexed, the Court refused to make the grant on motion, at least without citing those interested in an intestacy, and intimated its opinion that there was nothing to rebut the presumption that the revocation of the Will was a revocation of the codicil.

[S. C. 32 L. J. (P.) 137; 8 L. T. 609; 11 W. R. 1063.]

William Walter Holmes Dutton, late of 29 Beaufoy Terrace, in the parish of Saint Marylebone, in the county of Middlesex, a major-general in Her Majesty's forces, died on the 7th of January, 1863, a widower, without a parent, and without having had any children, leaving Charles Dutton, his natural and lawful brother and sole next of kin.

On the 3rd of July, 1852, the deceased duly made and executed his will in favour of certain of his relations, viz. his sister Matilda Breton, and the children of his nephew Frederick Breton, and the two daughters of the Rev. John Buchanan, all in the said will more particularly named, and on the 16th of October, 1857, the deceased duly executed a codicil to his said will, by which he bequeathed to his housekeeper Sarah Nicoll a legacy of £100, and the said Sarah Nicoll then received the said codicil from the said deceased, and retained possession of it from that time until the death of deceased.

In the month of September, 1860, the deceased revoked his said will in the manner following:—

The deceased one morning called the housekeeper into the **[68]** dining-room at his house at Herne Bay, where the deceased was then residing, and explained to his housekeeper that the said John Buchanan and Thomas Godfrey had given him very great offence, and had made use of most insulting language in reference to him the said deceased; he then asked for a pair of scissors, and opening a certain box with a Bramah lock, in which he kept his papers, he said, "No one shall ever reap any benefit from me who abuses me in my lifetime; now see what I'll do." He then took out his said will, which was sealed up, from the said box, and deliberately and carefully cut off that portion of the said will upon which was written the signature of deceased, and the witnesses thereto; and deceased then replaced the said will in the said box and locked it, and the said will so remained in the said box from that time

down to the time of the death of the said deceased, when the said box was taken possession of by the said Charles Dutton, the natural and lawful brother and sole next of kin of the said deceased. The will was stated to be in all respects in the same plight and condition as after it was mutilated by the deceased. It appeared that certain instructions were at various times up to within a few days of his death given by deceased to his solicitors, with the view to the preparation of a fresh will, but such will was never finally settled or approved by him; and that on the 3rd of January last the deceased executed a bond securing to Sarah Nicoll, if in his service at the time of his death, a monthly sum of £4.

The codicil was in the following terms:—

"This is a codicil to the last will and testament of me W. H. Dutton, of the town of Herne Bay, in the county of Kent, a colonel in Her Majesty's service, which will bears date the 3rd day of July, 1852. I bequeath to my housekeeper Sarah Nicoll, widow, a legacy of £100, such legacy to be paid to her clear of duty within three calendar months after my decease, and to be in addition to the wages that may at my decease be due to her, and in addition also to **[69]** any testamentary dispositions in her favour heretofore made by me. In all other respects I confirm my said will. In witness," etc.

Dr. Spinks now moved the Court to grant administration with the codicil annexed. The 20th section of the Wills Act requires intention to revoke either will or codicil; there is no proof here of intention to revoke the codicil, which was left by the deceased in the custody of the person benefited by it after the will was destroyed. He cited *In the Goods of Richard Halliwell (deceased)*, 4 N. C. 400; and *Clogstoun* v. *Walcott*, 5 N. C. 623.

*Sir C. Cresswell*: It cannot be put so high as that; since the Wills Act there is no such thing as presumptive revocation of a codicil by the destruction of the will. At present I shall reject this motion; those interested under the intestacy must be cited. But the inclination of my opinion is, that the codicil is revoked; that, taking the nature of the codicil into account, and the subsequent conduct of the testator, there is nothing to rebut the presumption that the revocation of the will was also a revocation of the codicil.

IN THE GOODS OF GRAHAM (deceased). April 28, 1863.—Two Testamentary Papers. —Different Executors.—Probate.—G., a widow, by Will, dated February 25th, 1861, bequeathed certain specified property, over which she had a power of appointment under her marriage-settlement, between her four sons, R., L., W., and G., and made R. sole executor.—By another testamentary paper, dated the 28th day of October, 1862, she left all the property of which she might die possessed between **[70]** her three sons L., W., and G., and appointed W. sole executor.—The Court held that both papers ought to be included in the probate.

[S. C. 32 L. J. (P.) 113; 8 L. T. 610; 11 W. R. 638. Followed, *In the Goods of Fenwick*, 1867, L. R. 1 P. & D. 323. Explained, *In the Goods of Lloyd*, 1872, Ir. R. 6 Eq. 349.]

Hannah Graham, late of Lee, in the county of Kent, widow, died on the 17th of February, 1863. In her lifetime she had made two wills. The first, dated February 25th, 1861, was as follows:—

"I, Hannah Graham, widow, will and bequeath the whole sums of money now invested in railway stock, in trust of my sons Reuben and Loftus Graham, to my four sons Reuben, Loftus, William Wallace, and George Madden, to be divided equally between them, share and share alike. And as at the time of my decease my four sons above-named may not then be all living, I will and bequeath the whole sums of money above-named to whichever of the above-named may then be living, to be equally divided between them, share and share alike. And in case one only of the above-named should be living at the time of my deeease, I will and bequeath the whole sums above-named to that survivor. To my two elder sons, Christopher Alexander and John Alfred, I will and bequeath two sovereigns each, for the purpose of providing a ring. And I appoint my son Reuben Graham my sole executor."

The second testamentary paper, dated October 28th, 1862, was as follows:—

"This is the last will of me, Hannah Graham, widow. I leave all the property of which I may die possessed, of whatever sort or kind, to my sons Loftus and William Wallace and George Madden, to be equally divided, share and share alike, to the

above-named. In case of the decease of any of those named, the survivor or survivors to have it equally divided. And I appoint William Wallace my sole executor."

It appeared upon affidavit that the property disposed of by the first will was property which the deceased, under her marriage-settlement, had power to appoint by deed or will.

**[71]** The property, exclusive of the trust-fund, being under the value of £20, no probate was required in respect of it.

Mr. R. Pritchard moved the Court to decree a limited probate of the first testamentary paper to be granted to the Rev. Reuben Graham, the sole executor named therein, or probate of both the papers. The question is, whether both scripts are entitled to probate, or whether the second is so inconsistent with the first as to revoke it. The first disposes of specified property only, over which she had a power of appointment; the second, of all the deceased's property, and gives it to three of her sons, whereas by her first she had given it among four, and also appoints a different executor.

*Sir C. Cresswell*: I think the second script did not revoke the first, and that probate must be granted of both scripts.

GEAVES *v.* PRICE. May 28, 1863.—Two Testamentary Papers.—Different Executors.—Probate.—D., on the 3rd of January, 1853, devised and bequeathed all his real and personal estate to P., and appointed him "sole executor of this my will."—In March, 1862, by a paper purporting to be his last Will, he devised and bequeathed two houses as described, and their appurtenances, to G., and made G. "sole executor of this my will."—The Court held that the two executors were jointly entitled to probate of both papers.

[S. C. 32 L. J. (P.) 113; 8 L. T. 610; 11 W. R. 809. Explained, *In the Goods of Lloyd*, 1872, Ir. R. 6 Eq. 348. Followed, *In the Goods of Andrew*, 1873, 42 L. J. (P.) 38.]

The question in this case was, whether a will of William Clifton Deane, dated the 3rd of January, 1853, was revoked by a later will, dated the 12th of March, 1862.

Declaration (by plaintiff) propounding a will of William **[72]** Clifton Deane, late of the city of Hereford, bearing date the 12th of March, 1862, whereof William Geaves, the plaintiff, was appointed sole executor.

Plea that the paper-writing bearing date upon the 12th of March, 1862, was in the words and to the effect following, to wit:—

"This is the last will and testament of me, William Clifton Deane, residing in Friars Street, in the parish of All Saints, in the city of Hereford. First, I direct all my just debts and funeral expenses to be paid by my executor hereinunder named; I do hereby devise and bequeath to William Geaves those two dwelling-houses and appurtenances thereunto belonging, and now in the occupation of George Willis and Thomas Rhina, situate in Friars Street, in the parish of All Saints; and I hereby appoint William Geaves sole executor to this my last will. In witness whereof I have hereunto set my hand this 12th day of March, 1862."

That the said paper-writing was not and did not by itself contain the last will and testament of the said William Clifton Deane, otherwise William Deane, for that the said William Clifton Deane, otherwise William Deane, made his last will and testament, bearing date on the 3rd of January, 1853, and therein appointed the said James Gilbert Price (the defendant) sole executor. That the said will, after having been reduced into writing, was in the words and to the effect following, to wit:—

"This is the last will and testament of me, William Deane, of the city of Hereford, in the county of Hereford, yeoman. I direct that all my just debts and funeral and testamentary expenses shall be paid by my executor, hereinafter appointed, as soon as conveniently may be after my decease; and subject thereto I give, devise, and bequeath all my real and personal estate of what nature or kind soever, and wheresoever situated, unto James Gilbert Price, of Llancillow Hall, in the county of Hereford, Esquire, his heirs, **[73]** executors, administrators, and assigns, for his and their own absolute use and benefit. I nominate and appoint the said James Gilbert Price sole executor of this my will, revoking all former and other wills by me heretofore made, and declaring this to be my last will and testament. In witness," etc.

The pleas then alleged due execution and the capacity of the testator, and that the two paper-witings, bearing date respectively the 12th of March, 1862, and the

3rd of January, 1853, together contain the last will and testament of the said William Clifton Deane, otherwise William Deane.

Replication, that the paper-writing bearing date the 12th of March, 1862, is, and does by itself contain, the last will and testament of the said William Clifton Deane, otherwise William Deane; that the paper-writing bearing date the 3rd of January, 1853, was and is revoked by the paper-writing bearing date the 12th of March, 1862.

Dr. Wambey, for the plaintiff: The will of 1853 was revoked by that of 1862 (*Plenty* v. *West*, 1 Rob. 264). In that case the testator left two wills: the earlier, dated 1837, disposed of all his property, real and personal, but appointed no executor; the later, of 1838, appointed executors, but did not dispose of all the personalty, and purported to be the "last will" of the testator. Sir H. J. Fust held that the earlier will was revoked. The Judicial Committee of the Privy Council, in commenting upon the case in *Cutto* v. *Gilbert*, 9 Moo. P. C. 131; s. c. 1 Eccl. & Adm. 422, says,—"Upon this case we will first observe that the two wills were essentially different, that no executors were appointed by the first, that executors were appointed by the second, and that the only ground of argument was that the whole of the personal estate was not disposed of by the second will. It is true Sir H. J. Fust in his judgment relies upon the fact that the testator called the will of 1838 his last will, but that is **[74]** only one circumstance in conjunction with others upon which he based his decision." In *Whitehead* v. *Jennings*, 1 Lee, 510, quoted by Sir G. Lee, a former will was held to be revoked by a later will appointing a different executor. The reason of that, no doubt, is derived from the civil law, the essence of a Roman testament consisting in the institution of an heir who took the whole of the testator's property; so that two wills could never subsist at the same time, as there could not be two distinct owners of the same property.

*Sir C. Cresswell*: There may be another reason why in some cases before 1 Will. IV. c. 40, the appointment of a different executor in a later will might operate as a revocation of an earlier. Before that, an executor was entitled to the undisposed residue of the testator's personal estate; but that Act provided that executors should be considered as trustees of the undisposed residue for the next of kin, unless it should appear by the will or codicil that the testator intended them to take beneficially.

Dr. Wambey also cited *Stoddart* v. *Grant*, 1 M'Qu. H. L. Cas. 163.

Dr. Spinks, contrà: Probate should be granted of both scripts, and to both executors. The later will containing no clause of revocation, it does not revoke the former unless it is wholly inconsistent with it. There may be a difference without inconsistency. The second will is clearly not inconsistent with the first, for it disposes only of two houses, while the first disposes of all the real and personal property (*Richards* v. *The Queen's Proctor*, 1 Eccl. & Adm. 235). The appointment of a fresh executor does not operate as a revocation of the will, but both of them may take probate (*In the Goods of Matthew Leese*, 2 Swa. & Tr. 442). In that case executors were appointed by two testamentary instruments, each of **[75]** which purported to be the last will. In the earlier, L. R. and W. were named executors; in the later, D. and the same L. were named executors. The Court held that both scripts were entitled to probate, and that all the executors were entitled to prove. The only difference between that case and the present is, that here the later will appoints Geaves sole executor; but, as it limits that appointment by the words "to this my last will," it is hardly distinguishable.

*Sir C. Cresswell*: I think that the two papers are not inconsistent, and that, therefore, both are entitled to probate, as together containing the will of the deceased. I have had some doubt whether probate should be granted to both executors, but I think the meaning of the testator is too doubtful to justify me in excluding either. They may, therefore, take probate jointly. I think the costs of both parties should come out of the estate.

MITCHELL AND MITCHELL *v.* GARD AND KINGWELL. May 15 and 27, 1862.—Will.—Residuary Legatee.—Instructions.—Legacies omitted.—B. gave certain instructions to G. for her Will, of which she made him, G., residuary legatee. After the Will was drafted, B. said she wished to leave three other legacies, naming the legatees. G. said it should be attended to; but subsequently read over the Will to B. without adding such legacies, and B. signed it. On the trial of certain issues at Exeter, the jury found that deceased was of sound mind, and

negatived undue influence; that B. had given the instructions for the further legacies; that at the time of execution they were absent from B.'s mind, but present to G.'s mind, who knew that they were absent from B.'s mind.—Byles, J., thereupon directed a verdict on the issue, "Will or not Will of deceased," to be entered for the plaintiffs opposing the Will, with leave to G. to move to set aside. After argument,—**[76]** The Court held that the paper-writing so executed was the Will of the deceased, and made the rule absolute to enter verdict for the defendants on that issue.

In this case the plaintiffs had called in the probate of the will of Mary Gregory, granted in common form, on the 18th of October, 1862, to the defendants, the executors therein named, who propounded the will. Certain issues were sent down from this Court for trial at the spring assizes for the county of Devon.

The questions for the jury, as settled by the registrar, were to the following effect:—1. Was the will duly executed according to the statute? 2. Was the deceased of unsound mind? 3. Whether or not the will was the will of the deceased? 4. Whether the execution thereof was procured by the undue influence and control of the defendant Gard?

The issues were tried at Exeter on the 14th and 16th of March, when a special jury found a verdict for the defendants on the first, second, and fourth issues. As to the third issue, the learned judge, Byles, J., put the following questions to the jury:—

"Do you think that instructions were given to insert, and did the testatrix intend that there should be inserted, as legatees, the names of Mrs. Gillard, Mrs. Perriam, and Mrs. Egg before the execution of the will?

"Were those instructions in the memory of Mr. Gard when he procured the execution of the will?"

The jury answered these questions in the affirmative.

"Were the instructions absent from the deceased's mind at the time of the execution, and was Mr. Gard aware of that, or did she execute the will under the erroneous belief that those legacies had been, or would be given, and did he know that?"

Foreman of the jury: "We apprehend they were absent from her mind and present to his."

"Was he aware that they were absent from her mind?"

**[77]** "We think that he was aware."

Verdict was entered for the plaintiffs on the third issue, with leave for the defendants to move; and for the defendants on the first, second, and fourth issues, with leave for plaintiffs to move on fourth issue.

Mr. Karslake, Q.C. (Mr. H. T. Cole with him), now shewed cause against a rule obtained by Mr. Collier, calling on the plaintiffs to shew cause why a verdict should not be entered for defendants on the third issue. [Sir C. Cresswell read Byles, J., note of the evidence given on the trial, which, for the present purpose, is sufficiently stated in the judgment.] And the learned counsel urged that, to entitle such a will in its entirety to probate, the person obtaining it being beneficial residuary legatee, must satisfy the Court or jury that it contained the whole mind of the testator at the time of execution. The testatrix must have intended, when she put her name to that paper, to give effect to the instructions which she had given, but the jury have found that a part of those instructions were intentionally omitted by Mr. Gard.

Mr. Collier, Q.C., Mr. Coleridge, Q.C. (Dr. Wambey and Mr. H. C. Lopes with them), argued in support of the rule. No question of fraud can arise on these pleadings. The finding of the jury as to the state of testatrix's mind is, that she intended to have given the legacies omitted; but the will without them was read over to her, a competent testatrix, undue influence negatived, and she signed the will as read. How can that state of facts be affected by the finding of the jury, that at the time of the execution Mr. Gard knew that the testatrix had given certain instructions, that they were not in her mind at the time, and that he did not remind her of them?

Cur. adv. vult.

May 27th.—*Sir C. Cresswell* gave the following judgment: In this **[78]** case the defendants propounded a will alleged to have been made by Mary Gregory, widow. The plaintiffs pleaded—first, that the will was not duly executed; secondly, that the deceased was not of sound mind, memory, and understanding; thirdly, that the paper-writing propounded was not the will of the deceased; fourthly, that the will was obtained by the undue influence of the defendant Gard.

Issues were joined on these pleas, and the cause came on for trial at the last assizes for Exeter, before Byles, J., when the jury found, first, that the will was duly executed; secondly, that the deceased was of sound mind, memory, and understanding; fourthly, that the will was not obtained by undue influence.

With regard to the third issue, the learned judge put certain questions to the jury suggested by the evidence, which, as far as that issue was affected, was as follows:—The testatrix, on Tuesday, the 16th of September, in the morning, gave to the defendant Gard instructions for her will. She named several persons who were to be legatees, and the sums to be given to them respectively, and she made Gard residuary legatee. Gard directed his son, who was in practice as an attorney, to prepare a will according to those instructions, and to do it quickly. The son, in his haste, omitted the name of Triplett as one of the legatees. In the afternoon, Gard, the residuary legatee, took the will to the house of the deceased, and was soon afterwards followed by two medical men. One or more of the legatees named in the will were there, and some conversation took place about two or three other persons, and deceased said that she wished them to have a legacy of £5 each. Gard made a memorandum of this, and said it should be attended to; but the will was not altered. Soon after this all persons, except the two Gards (father and son) and the medical men, left the room. Gard then read over the will slowly and carefully to the deceased; she attended to it, and expressed herself satisfied. Neither she nor **[79]** Gard noticed the omission of Triplett's name. The will was then duly executed by her, and attested by the medical men. The learned judge told the jury that an accidental and innocent deviation from instructions (as in the case of the legacy to Triplett) would not vitiate a will afterwards executed and rightly understood, or even executed by a competent testator; but, with reference to the omission of the other legacies, he asked the jury whether the instructions for them were present to Gard's mind at the time of the execution of the will, but absent from the mind of the testatrix, and he (Gard) knew them to be so; or whether the testatrix executed the will in the erroneous belief that those legacies had been given by the will, and Gard knew that she did so. The jury found that the testatrix had given instructions to Gard for legacies to Gillard, Perriam, and Egg; that at the time of the execution of the will those instructions were present to his mind; that they were absent from hers, and that he knew them to be so. The learned judge thereupon directed the verdict to be entered for the plaintiffs on the third issue, giving to the defendants leave to move to enter it in their favour. A rule nisi for that purpose having been granted, cause was shown against it on the 15th of May, when the cases of *Barry* v. *Butlin*, 2 Moo. P. C. 480; and *Mitchell* v. *Thomas*, 6 Moo. P. C. 137, were cited to show that when a person prepares a will by which he is largely benefited, and the capacity of the testator is at all doubtful, it is necessary to prove that instructions were given by the testator, or that the will was read over to him, or that by some other means he was fully acquainted with its contents.

Those cases have no bearing on the question now to be determined, for the testatrix gave instructions for all that was in the will; it was read over to her, and the jury found that she was of sound mind, memory, and understanding, which is not now disputed. The real question is, whether that which she heard read, and approved, and executed, is or is not her **[80]** will, because she forgot at the time that she had desired other legacies to be given, which were not inserted. Before the statute 1 Vict. c. 26, many wills were brought under the consideration of the Prerogative Court, when it appeared that they did not contain all that the testator intended. The cases on the subject may be divided into two classes: one, where there was on the face of the will, as executed, some ambiguity or incongruity which indicated that something must have been omitted by mistake, and in them evidence was received of the testator's intention, and the omission supplied. The other class was where there was nothing on the face of the will to indicate that a mistake had been made, and the principle of law applicable to them was very clearly stated by Sir John Nicholl in *Bayldon* v. *Bayldon*, 3 Add. 232. He says:—"Where a will has nothing doubtful or incongruous on the face of it, suggesting itself the probability of some casual error to account for this in the body of the will, extrinsic evidence of the testator having meant other than the will expresses is inadmissible, as the Court after and notwithstanding such evidence would still be bound to pronounce for the will." And again, in *Shadbolt* v. *Waugh*, 3 Hagg. 573, the same learned judge, with reference to an alleged omission, said,

"It may be possible that the non-insertion escaped his observation when the will was read over, but that is not sufficient."

The omission of the legacies therefore did not prevent the will propounded from being the will of the deceased. There is nothing to show that at the time when it was executed she believed it to be other than it really was; as far as this question is concerned, I think it makes no difference whether the legacies were omitted by accident or intentionally, nor can it make any difference that Gard remembered the legacies, and knew that she had forgotten them. But also the will was executed by her intending that it should be her will; if her execution of it had been obtained by fraud, the case would be different. The knowledge of Gard may raise a suspicion **[81]** against him, but fraud was not pleaded, nor do I learn from the learned judge's notes that it was imputed, nor was any question put to the jury on the subject.

The point reserved must therefore be determined apart from any presumption of fraud, and on the authority of the cases cited, as well as the reason of the thing, I am of opinion that the writing propounded was the will of the testatrix, and that the rule for entering a verdict for the defendants on the third issue must be made absolute.

CHRISTMAS AND CHRISTMAS *v.* WHINYATES. January 15 and 27, 1863.—Will.—Codicil.—Cutting off Part of Will.—Partial Revocation.—Where a will and codicil were in the testator's custody, and the will was found mutilated after his death, in the absence of evidence the presumption is, that it was mutilated by the testator after the execution of the codicil.—W. executed her will on two sheets of paper, signing her name, in the presence of three witnesses, at the foot of the first side of the second sheet, and again at the top of the second side of the same sheet. The attesting witnesses subscribed their names in her presence underneath her signature at the top of the second side of the second sheet. Her signature and that of the attesting witnesses also appeared at the bottom of the second, third, and fourth sides of the first sheet. Subsequently to the execution of the will she duly executed a codicil, which occupied the lower part of the second side of the second sheet, below the signatures of the witnesses to the will. The codicil commenced—"A codicil. Since writing this my will," etc. The last sentence of the last side of the first sheet was, "*Five* thousand pounds Three per Cent. Consols shall revert to the further purposes of my will, as follows in the second sheet of my will."—On the death of W. these two sheets were found, but part of the top of the second sheet had been cut off, including the testatrix's signature on the upper part of the second side, the names of the attesting **[82]** witnesses being untouched. The dispositive part of the will, contained in the second sheet so cut, did not carry out the intention expressed at the end of the first sheet.—Held, that in the absence of evidence the presumption was, that the will was mutilated after the execution of the codicil; that the will and codicil, when executed, formed one testament, which had been mutilated by cutting off a portion; but that, from the manner in which it was cut, the preservation of the rest of the will and codicil, etc., the testatrix only intended to revoke so much of the will as was cut off.

[S. C. 32 L. J. (P.) 73; 9 Jur. (N.S.) 283; 8 L. T. 801; 11 W. R. 371.]

This was an amicable suit to ascertain the effect of certain testamentary papers left by Letitia Whinyates, deceased.

The testator had left a will and one codicil. The will was contained on two separate papers; the first part of it was written on four sides of a sheet of paper (referred to as No. 1), and the remainder on the first side of a paper (referred to as No. 2). The will was executed by the testatrix in the manner following:—She signed her name, in the presence of three witnesses, at the foot of the second, third, and fourth sides of paper No. 1, and the witnesses then attested each of the signatures. She then signed her name at the foot of the first side of paper No. 2, and again at the top of the second side of paper No. 2; and the three witnesses then subscribed their names in her presence, after her signature, at the top of the second side only of paper No. 2. Immediately under their names, at the top of the second side of paper No 2, was written a short codicil, commencing, "A Codicil. Since writing my will," etc., which was also duly executed. After the death of the testatrix, the will and codicil, which had remained in her custody since their execution, were found in a tin box in two open envelopes; the paper No. 1 in one, and the paper No. 2 in another

of the envelopes. It was apparent that the top of No. 2 had been cut off, and with it the testatrix's signature at the top of the second side. The signatures of the attesting witnesses however remained.

[83] The plaintiffs propounded the will and codicil, and the defendant pleaded that after they were made the deceased destroyed them with the intention of revoking them. Issue was joined on this plea The case came on for hearing before Sir C. Cresswell, without a jury, and witnesses were examined on both sides, whose evidence (with the further facts of the case) is given in the judgment.

January 15.—The Queen's Advocate (Sir R. Phillimore, Q.C.), and Mr. Douglas Brown, for the defendant, contended that the will had been revoked by the testatrix by cutting it. Her signature at the top of the second side of paper No. 2 being the final one to the will, and that which the witnesses attested as such, was the one that gave it validity. (*In the goods of Thomas Gullan*, 1 Swab. & Tris. 23.) The presumption of law was that it was cut off by the testatrix. Then arose the following questions:— 1. Was it cut off animo cancellandi? In the absence of evidence of intention the presumption would be that it was. There were papers of the deceased which if admissible in evidence might throw light upon her intention in cutting the will. In the envelope in which paper No. 2 was contained there was a slip of paper, with these words written on it by the deceased,—"The cutting of this sheet is by my own hand." But according to the principles laid down in *Doe dem. Shallcross* v. *Palmer*, 16 Q. B. 747, and *Staines* v. *Stewart*, 2 Swab. & Trist. 320, they would be inadmissible, writings of the deceased coming within the same category as declarations. [Sir C. Cresswell: Yes; but if you can show an act done, that act will be evidence. Suppose a deceased left a letter, in which he said, "I tore up my will," you could show that he had written the letter, but its contents could not be received as evidence of revocation.] 2. Was the will cut before or after the execution of the codicil? There is no evidence of the time when the act was done. In the absence of evidence the presumption is that **[84]** the excision of the signature was after the execution of the codicil; upon the same principle as it is held that unexecuted alterations in a will to which there is codicil are to be presumed, in the absence of evidence, to have been made after the execution of the codicil. If so, and it was cut animo revocandi, it could not be revived by the codicil. [Sir C. Cresswell: You must show that the paper was cut.] The paper shows that upon the face of it. There is the paper stating that she cut the will herself, and others the intention with which she cut it. These papers would be tendered in evidence on behalf of the defendant. Suppose there had been a paper in the deceased's handwriting, stating that she had cut off the top of one sheet of her will in order to reduce it to the size of the other sheets, would not that be admissible? [Sir C. Cresswell: That would raise a very curious question, which I should like to hear argued. She would merely be stating that she had not cancelled her will. The effect of admitting that statement would neither be to make nor to revoke a will by parol. The declaration accompanying the acts would be admissible.] The papers were then tendered in evidence, and witnesses examined for the defendant.

Dr. Deane, Q.C. (Mr. R. E. Turner with him), for the plaintiffs: 1. As the evidence stands, the last side of the will containing any disposition is the first side of paper No. 2. The will ended at the bottom of this side, and the signature at the end of this side is the signature at the foot or end of the will, and that which gives validity to it. The signature at the top of the second side of paper No. 2 was surplusage, and the fact that it was also seen by the witnesses is of no importance. 2. Supposing anything had been written at the top of the first side of paper No. 2, the revocation will be simply a revocation pro tanto of whatever was exercised. The Wills Act, sec. 20, has provided for this kind of revocation. The preservation of a part after the destruction of the other part of the will **[85]** affords a strong presumption that the testatrix only intended the will to be partially revoked. 3. Assuming the excision to have been made after the execution of the codicil, and that the signature excised was the signature which gave validity to the will, as the will was republished by the codicil, the will and codicil would form one instrument, whose validity would depend on the signature to the codicil, which was never cut, and not on the signature to the will.

The Queen's Advocate in reply: In the absence of evidence it must be taken that nothing was written besides the signature upon the top of paper No. 2. The signature

must have been cut off with some object. If it could not have been done to effect a partial revocation, it must have been done to revoke the will in toto.

Cur. adv. vult.

January 27.—*Sir C. Cresswell*: The plaintiffs declared that Letitia Whinyates, spinster, deceased, made her will and codicil, the will bearing date the 28th of January, 1856, the codicil without date, and duly executed the same. The defendant pleaded that after the will and codicil were made, the deceased destroyed the same with the intention of revoking them. Issue was taken on this plea, and the case was heard before the Court without a jury on Thursday, January 15th, when it was proved that the deceased died at Weston-super-Mare on the 11th of January, 1862. The deceased had lived for some years at Cheltenham with her two sisters, and being about to leave Cheltenham for Weston-super-Mare in October, 1861, borrowed of one of her sisters a box for the purpose of depositing some papers in it; she locked the box and left it at Cheltenham, and took the key with her. After her death the box was opened, and in it were found two envelopes; one contained a paper now distinguished by the mark 1, the other containing other papers marked 2 and 5: these envelopes were not sealed or otherwise closed. Besides these papers the **[86]** box contained several others, which it is not necessary to notice particularly.

The paper marked (1), occupying the four sides of a sheet of paper, was as follows:—"Cheltenham, January 28th, 1856.—I, Letitia Whinyates, spinster, of Cheltenham, in the county of Gloucestershire, do hereby make my last will and testament. I cancel a will I made in 1837, and had signed by three witnesses. When called hence, I desire to resign my soul, etc. I wish to have a plain and inexpensive funeral. My bankers are Messrs. Martin and Co., 68 Lombard Street, London. My fortune is vested in the Three per Cent. Consolidated Annuities. I appoint my sister, Octavia Christmas, of Whitfield, in the county of Waterford, to administer to my last will, and I request also my brother, Lieut.-General Edward Charles Whinyates, to join my sister in administering to the same, and also M. General Francis F. Whinyates to do the same, and bequeath to each brother £50. I give and bequeath four thousand pounds in the Three per Cent. Consols to my three unmarried sisters, to Amy Whinyates, to Rachel Whinyates, to Isabella Jane Whinyates, and for their sole use and benefit conjointly as long as they do live, and" [here at the bottom of the second side appeared the signature of the deceased and of three witnesses] "in the case of the demise of one or two of my sisters mentioned aforesaid, the survivors or the sole survivor shall enjoy the same unto the end of life. To my dear sister Octavia Christmas I give and bequeath one thousand pounds in the Three per Cent. Consols, to possess the same unto the end of her life. But in the case of her demise before that of such of my spinster sisters, one or more who may be living at such time, I will this sum to revert to them for their sole use and benefit." [Here, at bottom of the third side, the same signatures.] "But if in the providence of God my sister Octavia Christmas should survive my three unmarried sisters, then in that case the **[87]** four thousand pounds left to my three spinster sisters I bequeath the same to Octavia Christmas during the term of her life alone, and for her sole use and benefit as long as she lives; after which I will that on her demise these two sums, which, if united in her, will form five thousand pounds Three per Cent. Consols, shall revert to the further purposes of my will, as follows in the second sheet of my will." [Here, at bottom of fourth side, the same signatures.] Paper No. 2, when found, was as follows:—"To Amy Octavia Whinyates five hundred pounds, and in case that Amy Octavia Whinyates be married, or be about to be married, when this bequest becomes hers, I will that the five hundred pounds be properly and legally secured to her for her sole use and benefit. To Reginald Chalmer, my godson, and the son of my beloved niece Emily Chalmer, I bequeath five" [this word had apparently been originally written "five," altered to "one," and altered again to "five"] "hundred pounds in the Three per Cent. Consols; one hundred and eighty-two pounds three shillings and elevenpence, I leave to be divided, at the time of my death, between the four daughters of my late niece Emily Chalmer, of Larbert House, Stirlingshire. My cameo brooches, mosaic necklace, bracelet and earrings, and other trinkets, I wish to give to Amy Octavia Whinyates, my niece, together with a pink topaz necklace, cross, and trinkets given to me by my brother, General Edward C. Whinyates. Witness my hand, Letitia Whinyates." The above writing and signature occupied the first side of a single sheet of paper. A piece had apparently been cut off the whole breadth

of the top of this sheet. On turning the sheet of paper, the signatures of the same three witnesses appeared. The paper had been unevenly cut, by which means the names of all the witnesses were left untouched.

Sarah Garrison, formerly Compton, Sarah Tea, and Mary Dale, proved that they lived in the service of the deceased; **[88]** that in the month of October, 1858, they were asked by her to witness her signature; that they saw her sign paper 1 on the second, third, and fourth sides thereof, and signed their names as witnesses; that they also, at the same time, attested her signature to paper 2; that her signature then appeared on the second side; that they saw her sign there, and also at the foot of the first side. They could not say whether the paper had then been cut, or whether anything was written above the signature of testatrix on the second side, for part of the paper was folded down so that they could not see it. Below the signatures of the witnesses, the following writing on the same paper appeared:—"(A Codicil.)—Since writing my will I have received the ninth part of my brother, in Reduced Three per Cents., Admiral Thomas Whinyates' fortune. I bequeath the same, namely, £302, 8s. 9d., to my four great-nieces, the daughters of my late niece Emily Chalmer; to Letitia Layard, £10. Witness my hand, LETITIA WHINYATES." This the deceased, on a subsequent occasion, signed in the presence of the same witnesses, and they attested it. The top of the paper was then folded, so that they could not see whether any part had or had not been cut off.

This paper, No. 2, when found in the box, had the appearance of having been cut at the top. The first sheet ends thus:—"Five thousand pounds Three per Cent. Consols shall revert to the further purposes of my will, as follows in the second sheet of my will." One would therefore expect the second sheet to contain such provisions as the conclusion of the first sheet indicates that she was about to make. But in that respect it is left quite imperfect, supposing that sheet No. 2 never contained anything more than is now found in it. From the appearance of the paper, the want of completeness of the words now found in the second sheet to accomplish the intention indicated at the end of sheet 1, and the evidence of the witnesses as to deceased having signed paper 2 on the **[89]** second side, I am satisfied that the paper was cut after the signatures had been attached, and, as the paper was in the custody of the deceased, it must be presumed that she did it herself.

Three questions remain to be disposed of: When must she be presumed to have mutilated the paper? With what intention? And what is the legal effect of such a mutilation effected at such a time and with such intention?

Since the statute 1 Vict. c. 26, if alterations or interlineations appear on the face of a will, and the time when they were made cannot be proved, it is presumed that they were made after the execution of the will; and if a codicil to such will has been made, it is presumed that the alterations were made after the execution of the codicil. It seems to me that the same principle must be applied to the mutilation of a will, and finding that the will in this case has been mutilated by cutting off a portion and the signature of the testatrix, I must presume that this was done after the execution of the codicil, so that the execution of the codicil cannot re-establish the will in its present state. When the codicil was executed, the will and codicil formed one testament, which has been mutilated by cutting off a portion. But with what intention must the testatrix be presumed to have done this? Certainly with intent to revoke so much of the will as was cut off. But from the fact of the signature, which was written just above the names of the witnesses, having been cut off, it may be presumed that she intended to revoke the whole will. If that fact stood alone, I think that such a presumption would arise. But from the manner in which it has been cut, it seems that she carefully avoided cutting off any of the names of the attesting witnesses; and as they had seen her sign the will on the other side of that sheet, it is not improbable that she thought their names, if left, would give effect to that signature. The manner in which the paper was cut cannot be accounted for by supposing that she was anxious **[90]** to preserve the codicil alone, for the signature and attestation of that remain untouched; and I cannot but suppose that she was anxious to preserve the codicil, and more, that is, so much of the will as remained. Now by 1 Vict. c. 26, s. 20, it appears that a will or any part may be revoked by tearing or otherwise destroying the same (that is, a will or codicil, or any part thereof), with the intention of revoking the same. Presuming, therefore, that her intention to revoke did not extend to anything left on sheet 2, I hold that so much

of the will as was cut off the second sheet was revoked, and no more. The residue and codicil remain, for, as the whole will was not revoked, the presumption that the codicil was revoked by the revocation of the will does not arise. And whatever might be the effect of cutting off the signature at the foot of the will if no codicil had ever been executed, it seems to me that it cannot destroy the effect of the due execution of the codicil to any greater extent than was intended by the testatrix. I decree probate of the will as it now stands and the codicil. Costs of all parties to come out of the estate.

IN THE GOODS OF W. HAMMOND (deceased). April 21 and May 5, 1863.—Will.—Attestation.—Signature.—15 & 16 Vict. c. 24.—A testator wrote a codicil upon the first side of a half-sheet of foolscap folded in the middle, and at the bottom of the sheet were written the words, "For my signature and witnesses see next side." On the fourth side of the half-sheet, and, when it was unfolded, by the side of and on a level with the bottom of the codicil, were the signatures of the deceased and of two witnesses. The paper was folded when the witnesses signed their names, so that they could not see whether there was any writing on the first side of the half-sheet.—Held, on motion, that the codicil was not duly executed, as there **[91]** was no evidence at all from which it could be presumed that anything had been written on the paper before the signatures were put there.

[S. C. 32 L. J. (P.) 200; 9 Jur. (N. S.) 581; 8 L. T. 516; 11 W. R. 639. Considered, *In the Goods of Huckvale*, 1867, L. R. 1 P. & D. 379. Distinguished, *In the Goods of Archer*, 1871, L. R. 2 P. & D. 252.]

Dr. Spinks moved for probate of the will, and of a paper purporting to be a codicil to the will of W. Hammond, deceased.

The codicil was written upon one side of a half-sheet of foolscap folded in the middle, and at the bottom of it were the words, "For my signature and witnesses see next side." On the fourth side of the half-sheet, and on a level with the bottom of the codicil when the half-sheet was unfolded, were the signatures of the deceased and of the attesting witnesses. When the witnesses signed the paper was folded in the middle, so that they could not see whether there was any writing upon the first side. The case comes within the terms of Lord St. Leonards' Act, 15 & 16 Vict. c. 24, s. 1. [Sir C. Cresswell: Does it satisfy the first branch of that section? "Every will shall, so far only as regards the position of the signature of the testator, be deemed to be valid within the said enactment as explained by this Act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will," etc. The question is, whether he signed that codicil? There is no evidence that there was any writing at all on the paper at the time when it was signed. If the case comes within the first branch of the section, then it is not to be affected by such and such enumerated circumstances.] It is unnecessary that the witnesses should see the writing, or know what it is they are signing. [Sir C. Cresswell: There is no testimonium clause; there is nothing to show that he signed it as his will.] From the fact of its being signed, and from the position of the signatures, it may be inferred upon the face of the paper that he intended to give effect to the document hidden from the witnesses. [Sir C. **[92]** Cresswell: Is there any case where the witnesses have attested merely a signature without seeing any writing on that part of the paper? Ought not the witnesses to know that there is some writing of some sort upon the paper they are signing? My opinion is, that if there was evidence that there were any writing there at the time, the signature would be sufficient under Lord St. Leonards' Act.] Yes; but from the statement of the witnesses it is impossible to get any evidence on that question. In the absence of evidence, the presumption omnia rite esse acta prevails. [Sir C. Cresswell: I do not like to decide questions of this sort on motion. They are of great importance as precedents.]

Dr. Spinks asked that the question might be decided on motion, as the estate was small, and the parties did not wish to propound the codicil. Cur. adv. vult.

May 5.—*Sir C. Cresswell*: The question raised by this motion was, whether the codicil was duly executed. It appeared by the affidavits of the two attesting witnesses that they were invited by the testator to witness his signature on a paper that appeared to them to be a blank. They saw no writing whatever on it, and the signature they witnessed was on the fourth side of a sheet of paper folded in the

middle. On the first side of that sheet there now appears to be a codicil. The question is, whether it can be considered that the deceased executed, and that the witnesses attested his execution of that codicil. Dr. Spinks very ingeniously argued that upon the paper being opened the signature was at the side of the codicil, so that the case would come within Lord St. Leonards' Act. He said that it must be assumed from the aspect of the paper that the deceased intended to give effect to it as his codicil, and that the first branch of the clause being satisfied, the validity of the codicil could not be affected by the circumstance that the signature was on a side, or page, or other portion of the paper or **[93]** papers containing the codicil, wherever no clause or paragraph or disposing part of the codicil was written above the signature. I think that would be so, and the signature would be sufficient if I had any evidence at all that anything had been written on the paper before these signatures were put there. The case was compared in argument with that of a will consisting of several sheets, where there was no direct evidence of all the sheets having been present at the time of execution, and also of that of a will executed when the writing was covered over; but I find that in all those cases, from that before Lord Mansfield (*Bond* v. *Seawell*, 3 Burr. 1773) down to the present time, it has always been considered as a question of fact whether the different sheets of a will were present at the time of the execution, and there was always some evidence from which it could be presumed that something had been written before the signature. But this case is absolutely bare of all evidence whatever on that point. I think, therefore, that I ought not to grant probate of the codicil, and I reject the motion.

Motion rejected.

JENKINS *v.* GAISFORD AND THRING. IN THE GOODS OF JOHN JENKINS (deceased). May 22 and June 2, 1863.—Will.—Execution.—Signature or Mark by Direction of Testator.—A testator, towards the end of his life, had his usual signature engraved, so that it might be stamped on letters and other documents requiring his signature. He made two codicils, each of which was so stamped with his name by another person in his presence and by his direction.—Held, a due execution of the codicils under the Statute of Wills.

**[94]** John Jenkins, late of Botley Hall, in the county of Southampton, Esq., died on the 22nd of November, 1862, leaving a will, duly executed on the 14th of April, 1862, whereby he appointed his sister, Jane Gaisford, and his brother, Henry Jenkins, executrix and executor. There were two codicils, dated respectively the 5th of November, 1862, and the 6th of November, 1862, and an affidavit made by Henry Atkins stated the manner in which they had been executed.

Henry Atkins deposed as follows:—"That I have for one year and upwards during the lifetime of the said John Jenkins, and up to the time of his death on the 22nd of November last, acted as amanuensis to the said John Jenkins, who had for a considerable time past much difficulty in writing or signing his name; that the said John Jenkins, some months previously to his death, had an engraving made of his usual signature in order that the same might be used to stamp or impress his signature to letters and other documents, and that in his presence I have been in the habit of affixing to letters and other documents and papers the name of the said John Jenkins by means of the said stamp or engraving; that I am one of the subscribing witnesses to the first codicil to the will of the said John Jenkins now produced and shewn to me, the said codicil being written at the foot of the said will, and bearing date the 5th of November, 1862; that the said codicil was executed by the said testator on the day of the date thereof by my affixing or impressing the signature of the said John Jenkins, in compliance with his express orders and direction, at the foot or end thereof by means of the said stamp or engraving as the same now appears thereon, in the presence of the said John Jenkins and of Ann Budd, the other subscribing witness thereto, both of us being present at the same time, and that the said testator, after his signature had been affixed to the said codicil as aforesaid, placed his hand on the said codicil and acknowledged the signature as his own, and the **[95]** said codicil to be a codicil to his last will, and requested me to attest the same, and I and the said Ann Budd thereupon attested and subscribed the said codicil in the presence of the said testator and of each other." The deponent then gave a similar description of the manner in which the testator's signature had been stamped upon the second codicil.

Dr. Spinks moved for probate of the will and two codicils.

*Sir C. Cresswell* refused to grant probate of the codicils on motion.

Henry Jenkins, the executor named in the will, thereupon propounded the will in a special declaration containing a statement of the above facts, and cited Mrs. Gaisford and Mrs. Thring, the sisters, and with himself the only next of kin, of the deceased. An appearance was given on behalf of Mrs. Gaisford, and a demurrer to the declaration filed and joinder in demurrer; but before the demurrer came on for argument Mrs. Gaisford died, and Mrs. Thring declined to take any steps in the matter.

The point was therefore argued ex parte by Dr. Spinks on the 22nd of May: By the 9th section of the Wills Act, a will is to be signed at the foot or end thereof by the testator, or by some other person in his presence or by his direction. I admit this is different from any decided case that I am aware of, but by analogy to decided cases it seems a good execution. The word "signed" in the section applies equally to the testator and to the other person acting by his direction; but in the case of the testator it has been decided that "signed" is equivalent to "marked"; and it has been further decided that the person signing by the direction of the testator may use his own name (*In the Goods of James Clark*, deceased, 2 Curt. **[96]** 329). In the present case I submit that it is indifferent whether it is taken as a mark or a name; it seems, in fact, to be a mark representing a name—the use of pen and ink is not necessary. Cur. adv. vult.

*Sir C. Cresswell*: I am of opinion that the codicils were duly executed so as to comply with the 1 Vict. c. 26, s. 9. It has been decided that a testator sufficiently signs by making his mark, and I think it was rightly contended that the word "signed" in that section must have the same meaning whether the signature is made by the testator himself, or by some other person in his presence or by his direction, and therefore a mark made by some other person under such circumstances must suffice. Now, whether the mark is made by a pen or by some other instrument cannot make any difference, neither can it in reason make a difference that a fac-simile of the whole name was impressed on the will instead of a mere mark or X. The mark made by the instrument or stamp used was intended to stand for and represent the signature of the testator. In the case where it was held that sealing was not signing, the seals were not affixed by way of a signature.

CRISPIN *v.* DOGLIONI. February, April, May 27, and June 2, 1863.—Will.—Succession.—Authority of Court of Domicil.—The judgment of the Court of the domicil of the deceased at time of death is binding on the Court of a foreign country in all questions as to the succession and title to personal property, whether under testacy or intestacy, where the same questions between the same parties **[97]** are in issue in the foreign Court which have been decided by the Court of the domicil.

[S. C. 29 L. J. (P.) 130; 3 L. T. 179; 9 W. R. 19.]

This was an interest suit (see ante, 44). The special jury found that the plaintiff was the natural son of Henry Crispin, deceased. The other points were argued before the Court itself in the beginning of Easter Term. Cur. adv. vult.

May 27.—*Sir C. Cresswell*: This was an interest suit. A caveat having been entered in the personal estate and effects of Henry Crispin, late of Faro, in the kingdom of Portugal, deceased, was warned by Joze Cortes Crispin, described as the natural son of the said Henry Crispin, deceased, and the sole person beneficially entitled to the estate and effects of the deceased. An appearance was given for the defendant Maria Doglioni, of Faro in Portugal, widow, the sister and surviving residuary legatee named in the will of the deceased, dated the 25th of July, 1825, and at her instance the plaintiff was ordered to declare and propound his interest. The plaintiff originally declared to the effect as reported in 2 Sw. & Tr. 17. I did not think that the judgments of the Portuguese Court were so stated in the declaration as to conclude the questions raised in this Court. The declaration was afterwards amended, and the defendant then traversed all its averments. On the trial of the issue as to the parentage of the plaintiff, it was proved to the satisfaction of a special jury that the plaintiff was the natural son of Henry Crispin, deceased. The other questions raised by the pleadings came on for trial before the Court without a jury. It was proved that Henry Crispin was throughout his life domiciled in the kingdom of Portugal, and died domiciled there; that he died a bachelor, etc., as alleged. On the question whether Henry Crispin was noble or not, according to the law of Portugal, and whether he was a British and not a Portuguese subject, so as to

form an argument that his succession must be regulated according to the law of England, and not according to the law of Portugal, a great deal of con-[98] flicting testimony was given. It could not be disputed that such a suit was instituted, and such judgment given as alleged, or that the Court of First Instance at Faro had jurisdiction; but it was contended that the judgment ought not to be considered satisfactory, because the evidence before me showed that it was not in conformity with the Portuguese law, and that the facts of the case had not been correctly understood.

As usual in such cases, experts were examined on each side, who gave conflicting evidence as to the law of Portugal. They did not quote decided cases, and their evidence did not go beyond their opinion as to the true meaning of certain ordinances which were read in evidence. That such conflicting testimony should be given cannot be a matter of surprise to any one accustomed to legal proceedings. Very learned members of the legal profession in this country often entertain different opinions on points of law. Similar differences are found on the Bench, where the parties expressing them cannot be in any way biassed by the feelings of advocates; and even in the Court of last resort it sometimes happens that the law lords are not unanimous in favour of the successful party. The difficulty of arriving at a correct conclusion as to foreign law, at all times great, is much increased where experts are examined and give conflicting testimony, for the Court has no means of ascertaining the comparative merits and learning of the witnesses. This difficulty I have not now to encounter; for after consideration I have come to the conclusion that it does not belong to this Court to sit as a Court of appeal from the Portuguese Courts. It is beyond dispute that Henry Crispin died domiciled in Portugal, and therefore the succession to his personal estate must be determined by the law of Portugal (*Stanley* v. *Bernes*, 3 Hagg. 373, which related to the succession to an English subject domiciled in Portugal; *Bremer* v. *Freeman*, 10 Moo P. C. 300, and many other cases). And the law of the domicil applies equally whether the party whose succession is in question dies testate or intestate. The law on [99] this subject has never been more clearly or more forcibly stated than by the present Lord Chancellor in the case of *Enohin* v. *Wylie*, 31 L. J. Ch. 402. His Lordship there says:—"I hold it to be now put beyond the possibility of question, that the administration of the personal estate of a deceased person belongs to the Court of the country where the deceased was domiciled at his death. All questions of testacy or intestacy belong to the Judge of the domicil. It is the right and duty of that Judge to constitute the personal representative of the deceased. To the Court of the domicil belongs the interpretation and construction of the will of the testator. To determine who are the next of kin or heirs of the personal estate of the testator is the prerogative of the Judge of the domicil. In short, the Court of the domicil is the forum concursus to which the legatees under a will of a testator, or the parties entitled to the distribution of the estate of an intestate, are required to resort." To that Court the present plaintiff did resort, as alleged in his declaration. The very same points were then raised that have been put in issue in this Court. A judgment was then pronounced in favour of the plaintiff, and that was affirmed on appeal: first by the Court of Release, and again by the the Superior Court at Lisbon. By that judgment it was decided that the plaintiff is entitled to the inheritance of the deceased Henry Crispin. By that judgment I feel that I am bound: he must therefore, in this Court, be admitted as a contradictor of a will alleged to have been made by the deceased.

June 2.—The Queen's Advocate, Sir R. J. Phillimore (Mr. Hannen with him), moved the Court to condemn the defendant in costs.

Mr. M. Chambers, Q.C. (Dr. Spinks with him), contended that the enormous costs had been in great part caused by the erroneous mode in which the earlier stages of the plaintiff's [100] case had been conducted. The question as to the effect of the Portuguese judgments might have been raised in demurrer. At all events it was a most extraordinary case, in which an interest unknown to the English law was alleged.

*Sir C. Cresswell*: I am of opinion that the case must follow the ordinary rule. As to the ingenious suggestion of a demurrer, I do not see how pleas which were a mere traverse of the averments of the declaration could be demurred to. The first great question, namely, of paternity, occupied the Court seven or eight working days, and I must say the impression on my mind was, that it was an undefended case: and the

defendant, after her experience in Portugal, must have known that the plaintiff had at least been accepted as the son of the deceased. With reference to the other issues, the party who pleaded them is responsible for the costs caused by them.

Condemn the defendant in costs.

IN THE GOODS OF LYDIA MATHIAS (deceased). June 2, 1863.—Will.—Memorandum. Codicil.—Incorporation.—M. executed a will in 1848, in which she requested her trinkets to be divided "as I shall direct in a small memorandum." She executed a codicil in 1853, and another in 1862, which amounted to a re-execution of the will. On her death the will and two codicils, and a paper headed "memorandum of trinkets referred to in my will," were found folded together in a locked portfolio. There was no evidence to show that the memorandum was in existence when the will was signed, but there was evidence from which it might be inferred that it was in existence before the date of the last codicil, but the last codicil did not refer to it.—Held, that the re-execution of the will by the last codicil could not **[101]** make that a part of the will which was no part of it before, and that the memorandum ought not to form part of the probate.

[S. C. 32 L. J. [P.) 115; 9 Jur. (N. S.) 630; 8 L. T. 471; 11 W. R. 808. Referred to, *In the Goods of Lady Truro*, 1866, L. R. 1 P. & D. 201; *Durham* v. *Northen* [1895] P. 66; *In the Goods of Smart* [1902] P. 238.]

In this case, Lydia Mathias died on the 30th of March, 1863, and, after her death, a will and two codicils, on the same sheet of paper, and a paper headed "memorandum of trinkets referred to in my will 1847-8," containing a list of various trinkets, written in ink, with names of various persons in pencil against each article, in the deceased's handwriting, were found folded together and locked up in a portfolio.

The will was headed "began February, 1847." Towards the end the following clause occurred:—"I request my trinkets may be divided as I shall direct in a small memorandum." The testimonium clause contained the date "15th day of March, 1848." The codicils bore date respectively the 8th of June, 1853, and the 22nd of July, 1862. There was no evidence to show that the memorandum was in existence at the date of the execution of the will, but there was evidence from which it might be inferred that it was in existence before the date of the last codicil, by which codicil the will would be made to speak as from that date. There was no reference to any memorandum in the codicil.

Dr. Swabey moved for probate.

*Sir C. Cresswell*: Assuming it as a fact that the memorandum was in existence before the date of the last codicil, can that entitle it to form part of the probate? There is nothing to show that the memorandum was in existence when the will was signed; it therefore formed no part of the will. How can the execution of the codicil, which is a re-execution of the will, make that to be a part of will which was no part of the will before, and the codicil contains no reference to the memorandum?

Dr. Middleton (amicus curiæ) refered to *The Goods of* **[102]** *Hunt*, 2 Rob. 622, the side-note to which is,—"A testator by his will bequeathed articles of plate specified in schedules A and B, to be annexed to this document (his will); two such schedules marked A and B were found after his death, which it was sworn were not written when the will was executed, but were in existence prior to the execution of a subsequent codicil, in which no mention was made of the schedules." Sir John Dodson is reported to have said,—"I know of no precise decision in point, still I think probate may pass with the schedule as prayed."

*Sir C. Cresswell*: No reasons are stated for the decision at which Sir John Dodson arrived, in the absence of which I think those I have just stated must prevail. I do not think the memorandum ought to form part of the probate.

**[103]** JAGO *v.* JAGO AND GRAHAM (on motion for a new trial). November 11, 1862.—Verdict of Jury.—Mistake of Witness as to Date.—New Trial.—On trial of issue of adultery, the jury found a verdict against the petitioner. On affidavit by a witness called on his behalf, that she had made a mistake in an important date in giving her evidence, the Court directed a new trial, the error, if there were one, being likely, in the opinion of the Court, to have disturbed the dgment and misled the minds of the jury.

S. C. 32 L. J. (Mat.) 10; 8 Jur. (N. S.) 1081; 7 L. T. 645; 11 W. R. 86.]

This was originally a petition by a husband for dissolution of marriage by reason of the wife's adultery, which she denied. The co-respondent appeared, but did not answer. The issue of adultery was tried before the Judge Ordinary and a common jury on the 4th of July, 1862.

The evidence, so far as material to the present question, was to the following effect:—The respondent, who had been separated from her husband in June, 1861, subsequently lodged at the house of a Mrs. Bull, at Battersea. Lucy Bull stated that on the 17th of July, 1861, the respondent asked if she could have the parlour to herself, as she expected a friend. The witness went out in the evening, and on her return, about **[104]** half-past ten at night, found a man in the parlour with respondent, who introduced him to the witness as Mr. Graham. There was no light in the room. In about half an hour after the man left, when Mrs. Jago said he had wanted to stay all night. Brown and his wife, who occupied a kitchen immediately below the parlour, stated that on the night of the 24th of September, 1861, they were in the kitchen from nine to eleven o'clock; that Mrs. Jago and some man, unknown to them, were in the parlour during that time. Their evidence went to show that adultery was then committed.

At the close of petitioner's case, Sir F. Slade (Mr. Daly with him) obtained leave to amend the petition by striking out the charge of adultery with Graham, and alleging adultery with some person unknown.

Whilst Dr. Spinks, for the respondent, was commenting to the jury on the contradiction of dates in evidence, Lucy Bull exclaimed that she had made a mistake, and meant to speak of the 24th of September.

The case went to the jury, who, after deliberating for more than an hour, found a verdict for the respondent.

Mr. Searle for the co-respondent.

A rule nisi for a new trial was obtained on behalf of the petitioner upon affidavits, stating that Lucy Bull, one of the witnesses called to speak to an act of adultery between the respondent and co-respondent, had made a mistake in a date, by naming the 17th of July, 1861, as the day when a person, alleged to be the co-respondent, had visited the respondent, whereas in fact it was the 24th of September.

Dr. Spinks showed cause against the rule. The petitioner amended his petition after the supposed mistake had been made by the witness, and having elected to go to the jury upon the evidence of the witness, notwithstanding the mis-**[105]**-take, he ought not to be allowed to take advantage of it for the purpose of obtaining a rehearing. The question was one entirely for the jury, depending upon the credibility of the witnesses, and their verdict ought not to be disturbed.

Mr. Daly supported the rule. The affidavits clearly proved that the witness was mistaken, and the mistake, and the amendment rendered necessary in consequence of it, were calculated to produce a great effect upon the jury. He cited *Richardson* v. *Fisher*, 1 Bing. 145; *Gethin* v. *Gethin*, 2 Swab. & Tris. 560; *Miller* v. *Miller and Hicks*, 2 Swab & Tris. 427.

*The Judge Ordinary*: I am of opinion that the rule ought to be made absolute. If the witness did, as she deposed, make the mistake, it was clearly one of a most important character. It made all the difference between having the evidence of two other witnesses corroborated or contradicted by her. I cannot doubt that the variation between her testimony and that of the other witnesses produced a very serious effect on the mind of the jury. I should be very loath to disturb a verdict where I thought that the jury had applied their minds to the evidence, and the evidence had been laid before them without any mistake or misapprehension; but thinking that this is a matter of great importance, that the error, if there was one, was likely to disturb the judgment and mislead the mind of the jury, and having at present no reason to doubt that the young woman speaks the truth when she says she was mistaken, I shall make the rule absolute on payment of costs.

**[106]** WEBSTER *v.* WEBSTER AND MITFORD. November 25, 1862.—Dissolution at Petition of Husband.—Wife's Life-Interest in Settlement Moneys.—22 & 23 Vict. c. 61, s. 5.—The Court will require full information of the husband's means when asked to vary the interest of the wife in her moneys in settlement in favour of the child. Where the marriage had been dissolved by reason of the wife's adultery, and she was entitled to a life-interest in a sum of about £2900 Consols, her own

moneys in settlement, and the husband had scarce any income, the Court ordered the trustees of the settlement to pay £20 per annum out of the life-income of the respondent to the paternal grandfather of the only child of the marriage, a daughter, for her use and benefit.

[S. C. 32 L. J. (Mat.) 29; 9 Jur. (N. S.) 182; 7 L. T. 646; 11 W. R. 86.]

This was an application to the Court under sect. 5 of 22 & 23 Vict. c. 61, to make an order with reference to the application of a portion of the respondent's life-income under her marriage-settlement. The petitioner, who was formerly a lieutenant in the 17th Regiment of Foot, had petitioned for a dissolution of his marriage on the ground of his wife's adultery with Captain Mitford, against whom he claimed £5000 damages.

On June 11, 1861, the cause came on for trial before the Judge Ordinary and a common jury. It appeared in the evidence at the trial, that the petitioner and the respondent were married when very young, and that they had not lived happily together, and that the respondent was a person of violent temper, and had on one occasion attempted to assault her husband with a poker, which facts were urged in mitigation of damages. The jury found that the respondent had been guilty of adultery with the co-respondent, and assessed damages at £5, and the Court made a decree nisi for a dissolution of the marriage, with costs against the co-respondent. The decree nisi was subsequently made absolute. The petitioner had filed a petition praying the Court to direct a por-**[107]**-tion of the wife's life-interest under her marriage-settlement to be appropriated for the benefit of the only child of the marriage. It appeared by the petition that the husband had brought no property into settlement, but that the wife had brought into settlement £2487, 4s. 6d. Three per Cent. Consols, and £427, 5s. 9d. Three per Cents. Reduced; the dividend of which sums was settled upon the wife for life, the remainder to the husband for life, and on the death of the survivor of them the principal was to go to Ada Webster, the only child of the marriage, now about nine years old.

It was also stated in the petition that the petitioner had sold his commission, and that his own means were only small and not sufficient to enable him to maintain and educate the child in a manner suitable to her station in life. The wife had filed an answer to this petition, but not upon oath.

Dr. Tristram moved the Court to direct that a certain portion of the wife's life-income on her property in settlement should be applied for the benefit of the child.

Dr. Spinks for the wife: The Court has not sufficient information of the means of the petitioner to enable it to determine whether this is a case in which it ought to exercise its discretion to deprive the wife of part of her income. The husband in this petition gives a very vague account of his means; he may have ample means to support the child and himself.

Dr. Tristram: If further information is required as to the husband's means, he will file an affidavit as to that point.

*The Judge Ordinary*: I think the Court should be supplied with further information as to the husband's means before making an order. I will adjourn the case to enable him to file an affidavit containing the information required.

**[108]** The husband afterwards filed an affidavit, in which it was stated that in 1858 he was a lieutenant in the 17th Regiment of Foot, but it having come to the knowledge of his brother officers that his wife was living with Captain Mitford, who was formerly in the same regiment, in consequence thereof he received so many annoyances, and his position in the regiment became so uncomfortable, that he was induced to sell his commission, and had realized by the sale £500; that he had since made endeavours to get a partnership in mercantile houses in Liverpool without success; that he had also been an unsuccessful candidate for an adjutancy in a rifle corps; that he had been out to Canada to endeavour to obtain an appointment, but had failed to get one; that he had failed in a farming speculation; that he had also made an unsuccessful application to the War-Office for an appointment as barrack-master; that he was then made a captain in a militia regiment, but he was not called out, and that his intention was to settle in Queensland, and to leave his child, who was now at school in this country, under the care of his father Lieut.-Colonel Webster and his mother; that he had no property except the £500 realized by the sale of his commission, part of which had been spent; and that he had realized £80 since he sold out.

Dr. Tristram renewed the motion: The petitioner was desirous that any sum

allotted by the Court should be made payable to his father for the benefit of the child. He cited *Bacon* v. *Bacon*, 2 Swab. & Tris. 86.

Dr. Spinks, contrà: The income of the respondent is only enough to support her, but she is willing to take the child and support it herself. The case of *Bacon* v. *Bacon* is very different from the present one; in that case the wife was proved to be living in incestuous adultery at the time of the trial.

[109] *The Judge Ordinary*: I think this is a case in which the respondent should contribute out of her life-income under the settlement a certain sum for the benefit of the child. I order £20 a year to be paid by the trustees of the settlement during the respondent's life, out of the dividends received by them on the settled property, to Lieut.-Colonel Webster for the benefit of the child.

(Before the *Judge Ordinary*, assisted by *Williams*, *J.*, and *Channell*, *B.*)

GLENNIE *v.* GLENNIE AND BOWLES. January 22, 1863.—Husband's Suit for Dissolution.—Wife's Costs.—Power of Court.—Practice.—By sect. 51 of the Divorce Act, the Court which hears the suit has absolute authority over costs, and no appeal as to costs only lies. The settled practice of the Court is, that the wife, if she fails, will not be entitled to taxed costs beyond the sum of money paid into Court by the husband at the order of the registrar. In the present case the Court rejected a motion for an order on the husband to pay the balance of the wife's taxed costs above such sum of money paid into Court, and condemned the wife's solicitor in costs of the motion. Quære, whether, if dissatisfied with the registrar's order, the wife's solicitor ought not then to have applied to the Judge Ordinary to vary such order. If the respondent's counsel calls witnesses, the Court will expect him to open his own case and comment on the petitioner's evidence before he calls his own witnesses. If the co-respondent's counsel examines a witness called by the respondent, he can do so only by way of examination in chief, adopting the witness as his own.

[S. C. 32 L. J. (Mat. 17); 7 L. T. 696 n.; 11 W. R. 28. Disapproved, *Allen* v. *Allen and Bell* [1894] P. 248. See the *Evidence Further Amendment Act*, 1869 (32 & 33 Vict. c. 68), and *Brown* v. *Brown* [1915] P. 83.]

This was an application arising out of a suit for dissolution of marriage, brought by the husband against the wife. The respondent denied the adultery, and pleaded connivance and [110] condonation. The co-respondent denied the adultery, and pleaded connivance. The issue joined was tried on the 6th of November, 1862, by the Judge Ordinary, without a jury.

Mr. Karslake, Q.C., and Dr. Spinks, for the petitioner.

Mr. Huddleston, Q.C., and Mr. W. Murray, for the respondent.

The Queen's Advocate (Sir R. Phillimore), and Dr. Wambey, for the co-respondent.

As may be seen by the note,[1] the Queen's Advocate adopted [111] the witnesses, or at least some of them, called on behalf of the respondent.

---

[1] At the hearing the following points arose:—

Mr. Huddleston, at the close of the petitioner's case, said that he should call the respondent's witnesses at once, and should reserve his comments on the petitioner's evidence until he summed up his own.

*The Judge Ordinary*: I think you should comment on the petitioner's evidence now.

Mr. Huddleston: Cockburn, C. J., has laid down a different rule. There is a great difference of opinion amongst the judges on the point.

*The Judge Ordinary*: I think the rule laid down by Cockburn, C. J., only goes to this extent, that counsel, when they sum up their own evidence, may comment on that of the other side. I think that in summing up evidence counsel ought to confine themselves to their own evidence; but it is impossible for a judge to confine counsel within that limit, if they wish to escape from the rule. I cannot, however, permit a wilful abstinence from comment at the outset.

Mr. Huddleston accordingly opened the respondent's case, and commented on the petitioner's evidence.

The Queen's Advocate, after Mr. Huddleston had opened respondent's case, said that he should not call witnesses, and should reserve his speech until after the respondent's evidence had been given.

The Judge Ordinary decided all the issues in favour of the petitioner. The present application was to vary the decision of the registrar as to the wife's costs. When before the registrar to ascertain a sum of money to be paid or secured by the husband to meet the wife's costs of trial, her solicitor pointed out the nature of the case, and asked for £300. The registrar, in his discretion, ordered £150 to be paid or secured. The wife's costs, as taxed after the hearing, amounted to £225. The balance over the £150 remained unpaid to her solicitor, who now in fact prayed the Court to make an order on the husband, the petitioner, to pay the balance.

This motion had been set down to be heard by the Full Court, which had appointed its sitting for to-day. On the case being called,

*The Judge Ordinary* said: By the 51st section of the Divorce Act, the question of costs is in the absolute discretion of the Court which hears the case, and the section provides that there shall be no appeal on the subject of costs only. The learned judges who with me have to-day made the Full Court, disclaim any authority or jurisdiction in the matter; but, as they are present, are willing to help me with their advice.

The Queen's Advocate (Mr. W. Murray with him), for the respondent, admitted that the practice of the Court, if it was **[112]** settled by the cases of *Starkie* v. *Starkie and Irvine*, 30 L. J. 118, and *Sopwith* v. *Sopwith*, 2 Sw. and Tr. 105, was against them; but contended that, if so, the practice should be revised. In this and similar cases the difficulty was caused by no fault or laches of the respondent's solicitor, but by a miscarriage of the discretion of the registrar in directing a sum to be paid in or secured, which was less than the amount ultimately taxed. If that practice is to prevail, it would be impossible for wives to get professional men to conduct their defence properly.

Mr. Karslake, Q.C. (Dr. Spinks with him), for the petitioner: This is really an application to unsettle, for the benefit of respondent's attorney, the practice as settled by the Full Court in *Keats* v. *Keats and Montezuma*, 1 Sw. & Tr. 358, and acted upon constantly since. The attorney, if dissatisfied with the allotment of the registrar, might have appealed to the Judge Ordinary at the time (*Mason* v. *Pollen*, 2 Dow Pr. Ca. 62; *Jones* v. *Jacob*, *ib.* 442). It is too late now. These are hard cases on the husband, for the co-respondent fights in fact under the shield of the respondent as to a large part of his costs.

*The Judge Ordinary*: Generally speaking, if any objection is felt to what a registrar has done, the party objecting may bring the matter before the Court. My learned brothers decline, as members of the Court, to express any opinion; but, privately, they cannot advise me to disturb the rule. I have always considered the question of costs to be paid by the husband in these cases as one of great delicacy. In this case the witnesses called were treated as the witnesses of the co-respondent, as well as of the respondent. Perhaps, strictly, it would be proper only to tax half the expenses of such witnesses against the husband. At all events this motion must be rejected, and the respondent's attorney must pay the costs.

**[113]** STONE *v.* STONE AND BROWNRIGG. November 4, 1862.—Practice.—Decree Absolute.—Affidavit of Search.—23 & 24 Vict. c. 144, s. 7.—The affidavit to found a motion to make absolute a decree nisi for dissolution of marriage, should show that search was made in the registry at a recent date. The Court refused

---

*The Judge Ordinary*: If you call no witnesses you cannot address the Court after the close of the respondent's case.

The Queen's Advocate said that he would then call witnesses. He then opened the co-respondent's case.

After the examination in chief of the respondent's first witness,—

The Queen's Advocate was about to ask the witness a question.

*The Judge Ordinary*: Do you adopt the witness as your witness?

The Queen's Advocate: I may examine her without adopting her as my witness.

*The Judge Ordinary*: You clearly cannot cross-examine her. If so, how can you examine her in chief unless she is your witness?

The Queen's Advocate then examined the witness as a witness for the co-respondent.

to make a decree absolute on the 4th of November upon an affidavit of search on the 1st of October.

[S. C. 32 L. J. (Mat.) 7; 7 L. T. 757.]

In this case, on the 14th of June, 1862, the Judge Ordinary pronounced a decree nisi for dissolution of marriage on the ground of the wife's adultery.

Dr. Swabey now moved the Court to make the decree nisi absolute upon an affidavit in the usual form, sworn on the 1st of October, 1862, which stated that upon that day search had been made in the registry, and that no appearance had been entered by any person in opposition to the decree nisi, and that the Queen's Proctor had not obtained leave to intervene.

*The Judge Ordinary*: The search is not sufficiently recent. A later search must be made, and the affidavit must be resworn.

Dr. Swabey, on the 11th of November, renewed the motion of an affidavit of search on the 6th of November.

*The Judge Ordinary* made the decree absolute.

**[114]** HAVILAND *v.* HAVILAND. January 13 and February 3, 1863.—Alimony.—Voluntary Allowance to Husband.—The wife cannot include in her husband's income liable to alimony any purely voluntary allowance made to him; though possibly there might be circumstances under which the wife might be entitled to alimony out of income to which the husband might have no strict legal right.

[S. C. 32 L. J. (Mat.) 67; 9 Jur. (N. S.) 208; 7 L. T. 757; 11 W. R. 550. Discussed, *Bonsor* v. *Bonsor* [1897] P. 77; *Martin* v. *Martin* [1919] P. 283.]

This was a question arising on a petition for alimony pendente lite, viz. whether an allowance of £300 a year made to the husband by his mother was chargeable with alimony. His answer alleged that so much of his income was a free and voluntary gift from his mother, to which he had no right or title.

Dr. Wambey, in support of the petition for alimony, contended that great hardship might be caused where such an allowance formed the whole or the greater part of the husband's income.

Dr. Spinks contrà: There is no authority or precedent for charging a merely voluntary gift with alimony. Cur. adv. vult.

*The Judge Ordinary*: This was a petition for alimony pendente lite. The wife alleged, inter alia, that the husband received an allowance of £300 a year from his mother. The respondent, as to this, answered that what he received from his mother was a free and voluntary gift on her part, to which he had no right or title. It was argued for the petitioner, that she was entitled to alimony in proportion to her husband's actual income, although it might soon be diminished; in which event he might come to the Court and ask for a reduction of the alimony allotted. On the other hand, it was urged **[115]** that the money received by the husband as a free gift was no part of his faculties; that alimony must be awarded out of that which could be deemed his property, and not out of what might or might not be given to him. I inquired whether any case was known in which a voluntary gift by a parent had been considered part of the faculties of the son, but none such was known at the bar. Dr. Swabey has since kindly furnished me with a note (see Sw. & Tr. 657, *Malo* v. *Malo*, in note) of a case decided by Dr. Wynne, afterwards Sir W. Wynne, in which he allowed alimony out of a voluntary gift by the father. I have had the papers looked up and find the case to have been as follows:—The allegation of faculties charged that the respondent was in partnership with his father, and received, as his share of the profits of the business, £200 per annum. The respondent answered that his name had been introduced into the firm by his father, but that there were no articles of partnership and no agreement that he should have any particular share of the profits. That his father had, on the commencement of this suit, struck his name out and allowed him, as a free gift, £200 per annum. It was contended for the respondent (one of his counsel being Dr. Scott, afterwards Lord Stowell) that no instance was known in which alimony had been allotted in respect of an eleemosynary gift, and no such case was cited on behalf of the wife. Dr. Wynne awarded alimony in respect of this £200, saying that the Court was, in some instances, obliged to judge of the husband's faculties according to appearances. From which I infer that he considered the alteration of the firm, and the alleged free gift of the £200 per annum, an attempt to evade the process of the Court. I have caused inquiry to be made and

cannot learn that any instance is known in which alimony has been allotted out of that which was admitted to be a mere gratuitous and voluntary gift. If such had been understood to be the decision in the case mentioned, I cannot but think that the precedent would have been often followed, **[116]** for such cases must frequently have arisen. If it was so understood at the time, and no attempt has been made since to take advantage of the point so decided, I can only conclude that in the opinion of the profession the ruling could not be sustained. It seems to me that the argument by Dr. Scott in that case was well founded, and that I ought not to allot alimony in respect of the voluntary allowance made by the husband's mother in this case, but I do not mean to say that cases may not arise in which alimony may properly be awarded in respect of an annual income to which the husband has no strictly legal right. Without that sum the husband's income appears to be £800, and out of that I allot alimony at the rate of £160 per annum.

(Before the *Judge Ordinary.*)

GIPPS *v.* GIPPS AND HUME. January 21 and 22, February 10 and 17, 1863.—Petition for Dissolution.—Connivance.—Practice.—In March, 1861, G. petitioned for dissolution by reason of his wife's adultery with H. An arrangement had previously been made that a sum of money, in lieu of costs and damages, should be paid by H. into the hands of a third person, to abide the result of the trial. In June, 1861, before the trial came on, G. signed a paper, by which he undertook, in consideration of the receipt of £3000 from H. as costs and damages, and upon H. securing to him the further sum of £4000, to withdraw his petition. It was found that the record could not be withdrawn, but on the jury being sworn no evidence was given, and a verdict was taken for the respondents. The parties failed to agree upon terms of a separation deed between G. and his wife, and H. refused to pay the £4000. In June, 1862, G. filed a petition for dissolution by reason of his wife's adultery with H. in and since August, 1861. H., among other things, pleaded connivance and conduct conducing to the adultery, and the Court held that the **[117]** bargain by H. to give up his legal remedy for the previous adultery for a sum of money, without stipulation as to his wife's future conduct, amounted, under all the circumstances, to consent and connivance in respect of the adultery now complained of, and dismissed the petition.—After a cause has been heard, and before judgment given, the Court will not allow either party to introduce additional evidence except by the consent of the other party.

[S. C. 32 L. J. (Mat.) 179.]

This was a petition for dissolution of marriage brought by the husband. The petition was filed on the 5th of June, 1862, and alleged the wife's adultery in and since the month of August, 1861, at divers places, with William Wentworth Fitzwilliam Hume, and the birth of twins, the fruit of that adultery, on or about the 4th of May, 1862. The answers of the respondent and co-respondent, filed in July, 1862, simply denied the adultery. The co-respondent, in December 1862, obtained leave, on condition that the cause should be withdrawn from a jury and heard by the Court itself, to amend his answer by pleading connivance, and that the said A. P. Gipps, by his wilful misconduct, had conduced to the adultery, if any; that heretofore, and before the committing the adultery in the said petition complained of, the said A. P. Gipps, having filed his petition in this honourable Court, alleging that the said respondent had committed adultery with the said co-respondent, and the said petition being about to be heard in this honourable Court, in consideration of the receipt of a large sum of money to be paid by the said co-respondent, with a full knowledge of all the circumstances of the case, agreed with the said co-respondent to withdraw his said petition then about to be heard in this honourable Court as aforesaid; that thereupon the said co-respondent paid the said A. P. Gipps a large sum of money, and afterwards, when the said petition came on to be heard in this honourable Court, the said A. P. Gipps refused to offer evidence in support of his said petition, and thereupon a verdict was found against the said A. P. Gipps.

**[118]** Issue was taken on connivance and misconduct conducing, etc.

The case was heard before the Judge Ordinary, on the 21st and 22nd of January.

Serjeant Pigott and Dr. Spinks for the petitioner; Dr. Tristram for the respondent.

The Queen's Advocate (Sir R. Phillimore) and Mr. Henry Lopes for the co-respondent.

There was no doubt about the adultery.

Mr. Evans, petitioner's solicitor, said:—"I was solicitor for petitioner in the first suit in this matter. I arranged with Mr. Halliwell, a friend of petitioner and respondent, for payment of money by Mr. Hume. I went to see him at Mr. Gipps's house in the end of February, 1861, at Mr. Gipps's desire. Mr. Halliwell proposed £3000 to be paid into his hands by Mr. Hume, to abide the result of the petition which I had been instructed to present against Mrs. Gipps and Mr. Hume. The £3000 was for costs and damages; no other damages to be claimed in the petition. It was understood Mr. Hume would go as far as £3000. Mr. Gipps was present. I presented the petition, and the proceedings went on regularly up to the hearing, which was likely to take place on the 18th of June, 1861; the case was called on the 20th. On the morning of the 18th, Mr. Halliwell and Mr. Gipps came to my office. Mr. Gipps instructed me to agree to a compromise of the suit on the terms contained in a written document, which they brought with them; but he objected to certain stipulations as to a deed of separation between his wife and himself, on the ground that Mr. Hume should not interfere between his wife and himself as to the terms of any separation. That part was struck out before Mr. Gipps signed the paper. As signed, the paper was in the following terms:—

**[119]** "'In the matter of *Gipps* v. *Gipps and Hume*.

"'In consideration of the receipt of £3000 from the co-respondent as my costs and damages, and upon the said co-respondent securing to me the further sum of £4000, to be paid upon the death of his mother, he in the meantime paying to me, or as I may direct, interest on the said sum of £4000 after the rate of 5 per cent. per annum, I, with the full knowledge of all the circumstances, undertake to withdraw my suit now about to be heard in the Divorce Court. Dated this 18th day of June, 1861.

"'PEMBERTON GIPPS.

"'Witness, J. T.'

I afterwards saw Mr. Ade, Mr. Hume's solicitor. He wished the record withdrawn that day. I said I did not know if that was practicable; but that I would do so if possible. I thought the cause might be called on for trial, and then we should give no evidence. He said, 'Withdraw the record, if possible, as we desire to avoid publicity.' I instructed counsel to make the motion to withdraw the record; it was unsuccessful, as the other counsel were not present. The motion was renewed, but Mrs. Gipps's counsel objected; there had been a negotiation with Messrs. Broughton and White, Mrs. Gipps's solicitors, who would not consent to withdraw the record unless terms of separation were then acceded to; the terms he asked I objected to, but said that Mr. Gipps had no objection to make an allowance to his wife during good behaviour. I had stipulated that Mrs. Gipps's costs should be paid by the co-respondent. When the cause was called on the jury were sworn, but no evidence was offered, and the verdict was taken for the respondent."

[A long correspondence between the solicitors as to a deed of separation and giving effect to the terms of compromise, which had been read, was then proved, but it was not material to the point decided by the judgment.]

"On behalf of Mr. Gipps I did not receive the £4000 from **[120]** Mr. Hume; I asked for a bond, but did not get it. I was told that I had not complied with the agreement to withdraw the record. I filed a bill for specific performance, a demurrer to which was allowed by Vice-Chancellor Wood."

On cross-examination, Mr. Evans, amongst other things, said:—"Mr. Gipps received the £3000 in two parts; £600 I cannot exactly say when, a considerable sum before the cause came on for hearing on signing the agreement to withdraw: he has never returned any part of that £3000. The bill for specific performance was filed in August, 1861, the demurrer was allowed on the 15th of November, 1861. I received instructions to proceed in this petition in May, 1862, after the birth of the children. After the verdict in June, 1861, Mr. Gipps did not know where his wife was till October or November, 1861; a detective was then employed. After that I don't think that Mr. Gipps pressed for the bond for £4000." Cur adv. vult.

February 10.—Dr. Spinks moved, on an affidavit of Mr. Evans, to put in a letter, part of the correspondence between the solicitors above mentioned, dated 19th of July, 1861, which, as Mr. Evans stated, having been addressed to Mr. Ade personally,

and not to the firm "Clutton and Ade," had been overlooked, and not proved and put in at the hearing.

The Queen's Advocate (Mr. H. Lopes with him) contrà.

*The Judge Ordinary*: I understand that in the Ecclesiastical Courts the judge had the power of rescinding the conclusion of the cause, if he thought it essential to the ends of justice; but could either party bring in documents after the hearing? It seems to me impossible to admit this letter now, as I am asked to do it, without consent. If the letter is introduced, there should be something in the nature of a **[121]** rehearing, an opportunity of asking the witness questions, perhaps of bringing in fresh evidence.

After some further discussion the Queen's Advocate withdrew his opposition, and the letter was taken by consent as part of the correspondence put in at the hearing.

February 17.—*The Judge Ordinary* delivered judgment. This was a petition for dissolution of marriage on the ground of adultery. The respondent by her answer denied the adultery. The co-respondent denied the adultery, and pleaded connivance and misconduct conducing to the adultery.

The case was heard before me, without a jury, on the 21st of January last, when it was proved on behalf of the petitioner, that in October, 1861, and afterwards, the respondent and co-respondent committed adultery. It also appeared in evidence that in 1861 the petitioner had filed a petition against the respondent and co-respondent, praying for a dissolution of his marriage on the ground of adultery, which they by their answers had denied. Before this petition in 1861 was filed, a meeting took place at the petitioner's house between him and his then and present attorney and a Mr. Halliwell, a friend of both petitioner and respondent, who then proposed that £3000 should be paid by Mr. Hume to Mr. Halliwell, to abide the result of the suit, and that it should be in lieu of costs and damages, and that the petition should not contain any claim for damages. The petition was accordingly filed in that form, and afterwards the sum of £3000 was paid over to the petitioner. I may as well observe here that this was as like a petition filed by collusion as could well be; but that is of no consequence now. The cause was appointed for trial by a jury on the 18th of June, 1861. On that morning, Halliwell produced the following document, signed by the co-respondent [the Court here read a counterpart of the agreement set out above]. The petitioner agreed to the terms, except the passage as to terms of separation, which was struck out, and **[122]** signed a corresponding document. Now this agreement was very remarkable: the £3000 was to be paid for costs and damages; what further demand had the petitioner? for what consideration was the sum of £4000 to be paid? It was to be paid for the withdrawal of the suit. Having accepted a satisfaction for costs and damages, he had no further right to enforce against the co-respondent; the only right that remained to him was, that of complaining of his wife's adultery and claiming his legal remedy, viz. a dissolution of his marriage. The £4000 must have been intended as the purchase-money of that right, and for that sum the husband covenanted to shut his eyes and no longer see the infidelity of which his wife had been guilty. He did not condone the offence by resuming cohabitation; he did not then make any stipulation respecting her future conduct, nor any provision for her maintenance, but simply agreed to withdraw the suit and so forgo his right to complain. The cause was called on for trial on the 20th of June. The petitioner asked leave to withdraw the record; the respondent's counsel objected, the jury were sworn, and the petitioner, in order to fulfil his agreement, offered no evidence, and thereupon a verdict was necessarily found for the respondent and co-respondent. Afterwards a negotiation took place between the petitioner and respondent and their respective attorneys respecting a deed of separation and the allowance to be made to her. The parties differed as to the sum to be allowed, and then the co-respondent refused to give a bond according to his agreement unless it contained a stipulation that the interest of £5 per cent. should be paid to the wife, and the bond held in trust for her separate use in case she survived his mother, on whose death the principal sum would become payable. The petitioner, in August, 1861, filed a petition against the co-respondent for a specific performance of his agreement, to which he demurred (*Gipps* v. *Hume*). The petitioner then employed a detective officer to inquire after the respondent, and ascertain how and where she was **[123]** living. In October he was informed by the person so employed that she had been at the

Southwick Hotel in London, and there had been visited by the co-respondent. The question in the equity suit was argued on the 15th of November, when the demurrer was allowed.

The question upon this evidence is not whether the parties to the bargain, both or either, have disgraced themselves by the course that they have pursued, but whether the plea of connivance has been established; or, in other words, if a husband, finding that his wife has committed adultery, forgoes his claim to divorce in consideration of a sum of money, not condoning the offence, but allowing her to remain his wife, and his remedy to be barred by a verdict in favour of the respondent and co-respondent, without making any stipulation as to the future conduct of the parties, does he or does he not shew himself so regardless of his own and her honour that he must be taken to give a tacit consent to any future intercourse between her and her paramour.

The Court is not without high authority on this point. It seems to me that a man so acting withdraws his objection to the intercourse that has taken place; his conduct is almost equivalent to selling his assent to such intercourse; he wilfully closes his eyes then, and his position is very much the same as if he had wilfully closed his eyes before the suit was commenced. Under such circumstances the judgment of Lord Stowell, in *Lovering* v. *Lovering*, 3 Hagg. 87, seems applicable:—"Can a man consenting to adultery with A., but not consenting to adultery with B., take advantage of that adultery, and say to the Ecclesiastical Court, non omnibus dormio? This is language not to be endured." If he cannot say "non omnibus dormio," can he say "non semper dormio"? Again, in *Crewe* v. *Crewe*, 3 Hagg. 133, his Lordship says:—"I come to the next head of objection, viz. connivance or toleration for other purposes, and this is the part of the case which presses with most force. By toleration, I mean that **[124]** passive sufferance of adultery for a length of time which in law enures to a waiver of the legal remedy." Surely the case is stronger: here was no passive sufferance, but an active bargain to tolerate what had passed in consideration of money, without making any stipulation for the future. Can the petitioner divide his wife's adulterous connection with Mr. Hume into two portions, and say,—So much I have tolerated, for that I have received compensation, and have consented that my remedy shall be barred, but non semper dormio; for the residue I will claim a dissolution of my marriage? If he could not say so with reference to different paramours, can he with reference to the same? If the petitioner, when the first suit was commenced, having ascertained the criminal intercourse that existed between his wife and Mr. Hume, had taken no step either to put an end to it or to obtain the redress that the law allowed him, could he, on account of the continuation or renewal of that intercourse at a subsequent time, have maintained a suit? That, as it seems to me, would be directly in contravention of Lord Stowell's judgment in *Crewe* v. *Crewe*. Is it possible to hold that he is in a better position because, being acquainted with his wife's infidelity in 1860, he did not altogether close his eyes, but accepted a pecuniary compensation for it; or, in other words, because he did not altogether waive his legal remedy, but sold it? I apprehend not, and that the opinion of that eminent judge is directly applicable to this case.

Then can he maintain the suit because the bargain made in the former suit has not been fulfilled. It is no part of my duty to express an opinion as to the conduct of a person who forfeits his word and refuses to fulfil such a bargain as that made by Mr. Hume. Whatever may be thought of him, his refusal does not relieve the petitioner from the discredit attaching to the maker of such a bargain. He never repented of the bargain,—he did all he could to enforce it, even after he had obtained information from which he could not but **[125]** infer that the intercourse between his wife and Mr. Hume still continued. Had that bargain been fulfilled, I believe I should never have heard of this suit; but, however that may be, I think it is one where the conduct of the petitioner has amounted to connivance or consent to her intercourse with Mr. Hume, and that the petition must be dismissed.

During the discussion it was remarked that in one of the letters that passed respecting the terms of a deed of separation, the petitioner offered to make a certain allowance to his wife, to be continued so long only as she led a virtuous life. He had made no stipulation of that nature as a condition for allowing the suit to fail for want of evidence, and I fear that the passage referred to was rather for the purpose of

protecting his own purse than to secure the future good conduct of the respondent. For the reasons assigned, my decree is that the petition be dismissed.[1]

**[126]** (Before the *Judge Ordinary.*)

COOKE *v.* COOKE. February 17, 1863.—Judicial Separation.—Cruelty.—Condonation.—Lapse of Time.—Agreement as to Children.—*Matthews* v. *Matthews*,[1*] distinguished.—From 1851 to January, 1855, a wife received great cruelty at the hands of her husband; besides acts of personal violence, he excluded her from the head of his table, and from the management of the household. On various occasions between January, 1855, and September, 1856, the wife left and returned to her husband's house; but after January, 1855, refused to return to her husband's bedroom, unless she were placed in her proper position in the household, which the husband refused to do. In September, 1856, she left, and did not return to her husband's house. In September, 1857, an arrangement was made, through the medium of friends, that she should pay to her husband a portion of income settled to her separate use, and that he should allow the children from time to time to visit her. She paid the money, but in the early part of 1862 three years had elapsed since the husband had allowed any of the children to visit her, and he then refused to do so, though she was very ill. In July, 1862, she petitioned for judicial separation; the answer of the husband denied the cruelty, and alleged condonation and undue delay.—The Court held, that the wife's return to the house shewed a willingness to condone; but that she annexed, as she had a right to do, a condition precedent, with which the husband never complied; therefore there was no condonation so as to bar her suit for judicial separation; but that, if there had been, the husband's conduct and demeanour whilst she remained in the house would have sufficed to revive the gross acts of cruelty; less being sufficient to destroy condonation than to found an original suit.—That the whole of the transactions subsequent to the wife leaving the house in September, 1856, grew out of and were connected with the misconduct of the husband, and raised no suspicion that the suit was brought in 1862 with any other object than to obtain that legal protection to which the wife was entitled.—Undue delay in bringing the suit is no plea, strictly speaking, to a petition for judicial separation.

[S. C. 32 L. J. (Mat.) 154; 8 L. T. 644; 9 Jur. (N. S.) 754; 11 W. R. 957. Referred to, *Moss* v. *Moss*, [1916] P. 159.]

**[127]** This was the wife's petition for judicial separation by reason of cruelty.

Dr. Spinks and Mr. J. P. Murphy conducted the petitioner's case.

The Queen's Advocate (Sir R. Phillimore) and Mr. Aspland for the respondent.

Cur. adv. vult.

---

[1] The decree, as originally worded in this case, was as follows:—

"February 17.—The Judge Ordinary having deliberated, by his final decree dismissed the petition, for dissolution of marriage of the petitioner with the respondent, filed in this cause."

On settling a case for appeal to the House of Lords, on behalf of the petitioner, it seemed doubtful whether the above decree would sufficiently bring all the circumstances of the case before their Lordships; and the Judge Ordinary, on motion of counsel for the petitioner, opposed by counsel for the co-respondent, varied the terms of the decree as follows:—

"May 5.—The Judge Ordinary having heard counsel on behalf of the petitioner and co-respondent respectively, ordered, on the application of the counsel for the petitioner, that the final decree made in this cause on the 17th of February, 1863, be altered, and that the said decree, as altered, be as follows:—

"'February 17th, 1863.—The Judge Ordinary having deliberated, was of opinion that Helen Etough Gipps, the respondent, had committed adultery with William Wentworth Fitzwilliam Hume, the co-respondent; but that Augustus Pemberton Gipps, the petitioner, had connived at such adultery. Whereupon the Judge Ordinary aforesaid, by his final decree, dismissed the petition filed by the said Augustus Pemberton Gipps, praying for the dissolution of his marriage with the said Helen Etough Gipps.'"

[1*] 1 Swab & Trist. 499; 3 Swab & Trist. 161; and 29 L. J. (Mat.) 118.

The circumstances of this case, which is reported only as to the question of condonation and of delay in bringing the suit, as bearing on the bona fides of the petition, are sufficiently stated in the judgment.

*The Judge Ordinary*: This was a suit for judicial separation on the ground of cruelty.

The petition alleged several gross acts of personal injury inflicted by the respondent, and, in addition, that on many occasions he used gross and insulting language towards her; that, in 1854, the respondent, to insult and annoy petitioner, forced her to give up the housekeeping to her eldest daughter, then only sixteen years of age; that he locked her out of her bedroom, and afterwards compelled her to live in a separate room, by day and night, for a fortnight; that, in May, 1855, when petitioner returned from visiting some friends, he again forced her to occupy a separate bedroom, and a few days afterwards rudely drove her upstairs, and obliged her to live in her bedroom for six weeks; that, in September, 1855, the respondent, to insult and annoy her, again compelled her to leave her place at the head of the table, and never again allowed her to resume it; and that, in December, 1855, she was ordered by her husband to move all her clothes into a miserable little room on the back-stairs, which had been a man-servant's room, and she was compelled to sleep there and make it her bedroom; that, in February, 1856, petitioner, without any apparent cause, was driven away from the breakfast-table by the respondent, and ordered by him to live up-**[128]**-stairs again; that, in March, 1856, whilst sitting at tea, in the presence of the family and a gentleman, a friend of respondent's, he declared he would not have petitioner in the room, and endeavoured to pull the chair from under her; that, in September, 1856, being unable to bear longer the continued ill-treatment and insult to which she was subjected, petitioner finally left respondent's house and went to reside with her sister (now Mrs. Mayo), and has ever since resided with her; that, at that time, petitioner forbore to institute proceedings against respondent, who, in consideration of petitioner giving up a portion of her own settled income for her children, agreed to allow them to visit petitioner from time to time; that petitioner has always fulfilled her part of the agreement, but that respondent, in 1862, although she was dangerously ill, refused to let her children visit her.

The respondent, in his answer, denied that he had committed the acts of personal violence, or used the language imputed in the petition, and alleged that if he did use any such language, it was reasonably caused, and in answer to provoking and irritating language and demeanour of petitioner (there was not much evidence of abusive language used by the respondent, and none of any provoking and irritating language used by petitioner); that the petitioner's housekeeping and management were negligent and improper, so much so that it became necessary, for the comfort of respondent and his family, that the housekeeping should be taken from her; wherefore, and not on purpose to insult and annoy her, respondent did take the housekeeping from her as alleged (the charges of negligence and mismanagement made by the respondent in his evidence were of the most frivolous description); that as to keeping her out of her bedroom, and compelling her to sleep and live in a separate room, she did it voluntarily and of her own accord; and the same answer was given to the second charge of the same kind; that as to requiring her to leave the head of the table in 1855, she had **[129]** used insulting and irritating language to respondent in the presence of members of his family, and to put an end to that, and prevent its recurrence, and not to insult or annoy her, he did require her to leave and stay away from the head of the table (there was no evidence to support this assertion); that, on the occasion mentioned in February, 1856, she used irritating and provoking language to respondent in presence of some of their children, wherefore he reasonably required her to leave the room (there was no evidence to support this); that she left respondent's house voluntarily, and it was not caused or rendered necessary by the cruelty or ill-treatment of respondent; that respondent allowed the children to visit the petitioner, in accordance with the agreement between them, until the respondent discovered (as the fact was) that petitioner had encouraged one of respondent's children in habits of dissipation and disobedience to respondent (there was not any evidence of this); that petitioner had condoned the ill-treatment (if any) alleged in the petition; that petitioner (if otherwise entitled to maintain her petition) has been guilty of unreasonable delay in presenting the same.

The petitioner, in reply, denied all the allegations in the answer.

The cause was heard on the 30th of January. Some facts in the history of the parties were not disputed, viz. that they were married on the 9th of April, 1834, and had eleven children, of whom nine are now living, the eldest twenty-five years of age, the youngest twelve. For a good many years they had lived happily together, but in 1851 a change took place. As to subsequent transactions. . . . (The learned judge here went at some length into the evidence given at the trial; in conclusion, he felt no doubt on the question of cruelty, and as the only points worthy of notice are the questions of condonation and delay, as bearing on the motives of the petitioner in bringing the suit, it is not necessary to detail this. It appeared that after January, 1855, she never returned to the respondent's **[130]** bed, and in the end of August, or beginning of September, 1856, left the respondent's house and never returned to it; the circumstances of the parties since January, 1855, are stated at some length in the latter part of the judgment). . . . After her departure some communications took place between Mr. Wilde and Mr. Josselyn respecting an arrangement for their living apart. The petitioner was entitled to a sum of £6600 for her separate use, which was secured by a mortgage on the respondent's property, and he insisted that some part of the interest, amounting to one per cent. on the sum secured, should be allowed by her towards the maintenance of the children; and in September, 1857, the following letter was addressed by Mr. Josselyn to Mr. Wilde, and by him handed to the petitioner:—"Ipswich, September 15, 1857. Dear Sir,—I have seen Mr. Cooke to-day on the subject of our correspondence, and, in addition to what I have before proposed, he authorizes me to say that the one per cent. should be given by Mrs. Cooke amongst the children, or such of them and in such proportions as she pleases, but not to give more than £20 a year to any one child, and to send Mr. Cooke an account of the distribution, to enable him to regulate his money arrangements with the children accordingly. That the children shall, from time to time, but not one child to the exclusion of the others, be allowed to visit Mrs. Cooke where she may be residing, provided such residence be not with Mr. or Mrs. Richards, and provided that no personal visiting or intercourse takes place between the children and Mr. or Mrs. Richards; the time of their (the children's) visits to Mrs. Cooke being so arranged as to meet Mr. Cooke's convenience and the general comfort of the children. I am, dear Sir, yours truly, George Josselyn. To S. F. T. Wilde, Esq., Hadley, Barnet." The petitioner returned it with this indorsement:—"I agree to the terms and conditions contained in the above letter, and promise to abide by them. F. J. Cooke."

**[131]** No agreement was ever executed, but from that time the petitioner regularly paid the one per cent., and in 1858-9 the respondent allowed some of the children to visit her, but afterwards refused; and in 1861 she addressed the following letter to Mr. Josselyn, who communicated it to Mr. Cooke, and then wrote to the petitioner stating Mr. Cooke's determination:—"Yarmouth, I.W., July 9th, 1861. Dear Mr. Josselyn,—I am sorry to be obliged to trouble you by writing, but I cannot help asking you to help me in a matter I have very much at heart. I want you to use your influence with Mr. C., and try and persuade him to change his mind and send a different answer to Lady Symonds's invitation to my three daughters. She wrote to him about a week ago, and kindly asked them all three to come and stay here as soon as convenient to him. She has this morning received his answer, in which he says, he 'cannot let them go,' without assigning any reason. I do not like writing to Mr. C. myself, but I should be very thankful to you if you would remind him of the terms of the agreement which was made by you and Mr. Wilde between me and my husband in September, 1857, in which these words are used, 'that the children shall, from time to time, be allowed to visit Mrs. Cooke,' etc. etc. Since this agreement was drawn up, in 1857, my three daughters have each been allowed to come and stay here only once, though my sister has invited them several times. I have regularly performed my part of the agreement as to paying back the one per cent. of the interest which I receive half-yearly, and I have also strictly complied with Mr. Cooke's wishes in preventing my children from meeting their uncle and aunt Richards, and I think that my husband ought to think himself equally bound to fulfil his part. I think it is a great pity that he should refuse his daughters the pleasure and advantage of a visit to their aunt this summer, especially as Bessie has not been very well lately, and change of air would certainly be good for her, to **[132]** say nothing of the happiness which it would give them and me to meet again. Do,

dear Mr. Josselyn, try what you can do to make him alter his determination and accept my sister's kind invitation for our children. I have always paid for all the journeys of my children when they have come to see me, so that it is no expense to their father. Once more apologizing for writing to you on this subject, and hoping that you will have the kindness to urge my request, I remain, etc., F. J. Cooke." "Dear Mrs. Cooke,—It fortunately happens that I am going to Semer to-morrow, when I will do what I can to accomplish your wishes. Yours very truly, George Josselyn. July 10, 1861. Mrs. Cooke." "Dear Mrs. Cooke,—I placed your letter in Mr. Cooke's hands yesterday; he read it, but held out no hope to me that he would comply with your request. Yours very truly, George Josselyn. Alresford Hall, July 12, 1861. Mrs. Cooke."

Early in 1862, Lady Symonds had married Dr. Mayo, and in February of that year the petitioner was staying with Dr. and Mrs. Mayo, at their residence in London, and Mrs. Mayo then addressed the following letter to the respondent:—"Dear Mr. Cooke,—I write to you to entreat you to allow Bessie and Frances to come here at once to see their mother, who is, I fear, very ill. You remember that you promised that my sister should see her children 'from time to time,' and it is now three years or more since she has seen Bessie and Frances. Her present precarious state makes it of great consequence that she should have the comfort of seeing them, and I cannot think that under these circumstances you will refuse to grant my request. My urgent reason for writing to you to-day is, that last night my sister had a new and very important symptom of her pulmonary affection, namely, a shivering fit. Yours sincerely, S. M. Mayo. February 26, Wednesday." And received the following answer:—"Semer, Ipswich, February 28, 1862. Dear Mrs. **[133]** Mayo,—I am sorry to hear Mrs. Cooke is unwell, I hope she will soon be better. I cannot allow Bessie and Frances to go and see her. The reason why I did not let them go as bridesmaids at your wedding was that they should not come in company with Mrs. Cooke. James still keeps his bed. You state, 'you remember that you promised that my sister should see her children from time to time'; there can be no mistake about that, because I had it put on paper. I am yours sincerely, James Y. Cooke. To Mrs. Mayo." On the 1st of March, Dr. Mayo wrote to the respondent as follows:—"56 Wimpole Street, 1st of March, 1862. Dear Sir,—I am obliged to you for the letter with which you have favoured Mrs. Mayo in answer to her request that you will allow the Miss Cookes to see their mother in her present dangerous state. For though you do not grant this point, your letter throws light upon the measures which must be adopted in order to obtain that which you refuse. Your letter places you in the following position:—In the same page you refuse to permit your daughters to see their mother in her state of danger, not having seen her for nearly three years; and you admit to Mrs. Mayo that 'you had promised to do so from time to time.' You have also received pecuniary advances from your wife in consideration of this promise. It is for you to reflect gravely on the view which the law may take of this procedure on your part. With the most anxious wish to consult your interests as well as your wife's, I shall take an opinion on the point. Believe me, yours faithfully, Thomas Mayo." And the respondent merely acknowledged the receipt. On the 8th of May, 1862, the respondent wrote the following letter to the petitioner:—"Semer, Ipswich, 8th of May, 1862. Madam,—James is now pronounced by Mr. Grower to be in health, although he is still a little lame. You have been the means of causing this protracted case, and it is the most fortunate thing he was not crippled for life. The medical bills and travelling **[134]** expenses amount to £35, 0s. 6d., which I must call upon you to pay. James has tried to impose on the sick fund, but I prevented it; what he has done in that way previous to his coming home I must refer the party to you for repayment. James Y. Cooke. To Mrs. Cooke. Send the cheque at once and have the bills settled." To which Dr. Mayo replied as follows:—"Sir,—Mrs. Cooke duly received your letter of the 8th of May, but was at that time too ill to enter upon the disagreeable topic which it brought before her; namely, your demand that she should pay the expenses of children whom she was not allowed by you freely to see. I now beg to inform you that she declines to submit to your demand, as contained in your first letter, of £35. To the letter of the treasurer of the sick fund at Newcastle she has already replied. I am, Sir, your obedient servant, Thomas Mayo. P.S. I enclose a copy of the letter written by Mrs. Cooke to the treasurer of the sick fund." On the 9th of June the respondent wrote

to Dr. Mayo, enclosing a letter for the petitioner:—"Semer, Ipswich, 9th of June, 1862. Sir,—I addressed a letter to Mrs. Cooke at your residence about a month since, to which I have had no reply. If Mrs. Cooke is not residing with you I request that the enclosed may be forwarded to her. I am, Sir, your obedient servant, James Y. Cooke. Dr. Mayo." "Semer, Ipswich, June 9th, 1862. Madam,—I want the money for those medical bills for Jemmie, and I want to know whether you have paid back to the sick fund at Stephenson's. James Y Cooke. To Mrs. Cooke."

In July, 1862, the suit was commenced, and the petitioner admitted that she should not have instituted it had there been no dispute about seeing the children according to the agreement, and that she is not in fear of her husband coming and beating her now, and has not considered such acts of violence probable since she left his house. . . . The respondent also put in evidence several letters written by the petitioner since the **[135]** separation, with what particular object I know not, unless to shew that she addressed him as Dear James, and sometimes subscribed herself his affectionate wife; he certainly cannot be accused of writing to her in a similar strain. . . . As to the acts which I take to have been proved, there is no nice or doubtful question whether they amount to what the law calls cruelty—in my judgment they establish cruelty of a very aggravated and unmanly character; but it may be asked, if the story of the petitioner and her witnesses be true, why did she not bring forward her charges before Mr. Wilde and Mr. Josselyn? It seems to me that this silence is very easily accounted for: those two gentlemen met for the purpose of effecting a reconciliation; the wife was willing to be reconciled if restored to her proper position as a wife at the head of her table, and in the management of household affairs; would the object in view have been advanced by exposing to them the cruel personal injuries that had been inflicted upon her? Assuredly not, and I can well understand that a lady who contemplated remaining in her husband's house would shrink from making known to any person the grievous indignity to which she had been subjected.

The next question the Court has to deal with is that of condonation. Did the wife condone the acts complained of? It is unnecessary to go further back than the 28th of January, 1855; it appears by the evidence that the wife on that night returned to her husband's room, but that it was not voluntarily, it was in consequence of his violently insisting upon it in such a manner that the daughters feared for her life, and as soon as practicable she left her home. I cannot treat that sort of forced cohabitation as proving condonation. In *Popkin* v. *Popkin*, 1 Hagg. Sup. 768 (note), the last act of cruelty alleged was in December, 1790, and the wife quitted cohabitation on the 6th of January, 1791, and Lord Stowell considered that it was soon enough to repel the suggestion of condonation. But she returned to her husband's house on the 12th of May, **[136]** and remained there till the month of March in the following year. Her voluntary return shews at least a willingness to condone; but was that absolute or conditional? The petitioner states, and in this she was not contradicted, that she refused to return to her husband's bed unless she was reinstated in all respects in the position that a wife should occupy. Now, on her return a separate bedroom was prepared for her, and although she was for a short time allowed to take her meals with the family, she was not allowed to sit at the head of the table, or to interfere in the management of the household, and towards the end of May, in consequence of some imputed interference, she was compelled to live entirely upstairs. In the month of June Mr. Wilde and Mr. Josselyn met, and for some time afterwards she was better treated, and allowed to sit at the head of the table, but not to interfere in the management of the house; and in September, upon some alleged interference by giving some trifling order, the respondent directed a small bedroom, which had formerly been occupied by a man-servant, to be prepared for her, and there she slept, occupying the spare room by day, until she left home on the 26th of March, for the following reason:—On the 25th a gentleman came to visit the respondent, and as the spare room was wanted for him, she went downstairs to dinner. In the evening, when she was preparing to make tea, the guest being then present, the respondent came up to her, and ordered her to retire, for he would not have her there; and taking hold of her chair, shook it so violently, that if she had not moved she must have been thrown down. Next morning she told him she would not stay in the house to be subjected to such insults, and he sent her to Hadley in

his dog-cart, whence she travelled by railway to London, and went to stay with her sister, Lady Symonds, who had then become a widow. It seems to me that there never was any perfect condonation; it was in her power to grant or refuse it, and as she annexed a condition to her offer to condone, which was **[137]** never complied with, I think there never was condonation that could be pleaded as an answer to her suit. In *D'Aguilar* v. *D'Aguilar*, 1 Hagg. Sup. 782, Lord Stowell seemed to think that a return to matrimonial cohabitation was necessary to a complete forgiveness; and in *Snow* v. *Snow*, 2 N. C. 16, Sup., Dr. Lushington intimates a similar opinion; here there was no such return proved, nor was there any ground for presuming it; the contrary was clearly established. But if there had been, I think his subsequent conduct was sufficiently threatening to revive the offences condoned; for, according to *Wilson* v. *Wilson*, 6 N. C. 291, and 6 Moo. P. C. 484; *D'Aguilar* v. *D'Aguilar*, and many other cases, much less is sufficient to destroy condonation than to found an original suit.

On the 26th of August she returned again to her husband's house. When they met he would not shake hands, and she found every bed occupied, and therefore slept in her daughter's room. Next day he said he would not allow that, and then she slept in Miss White's room; he objected to that, and then, as the little room was vacant, it was prepared for her; but he said she should not sleep there, and ordered the sheets to be taken off; but she slept there without any. He then said that if she lived there she should return to his room, but she refused unless she was treated as a wife, and restored to her proper position downstairs, and in the management of the house. He then became very insulting, and called the servants to hear him find fault with her, and said that her conduct and management were such that he would not bear it any longer. On the following Sunday he burst into the little room where she was dressing to go to church, and said that he would not allow her to have that room any longer; to which she replied that she should only require it one night more, and would then leave his house, which she accordingly did, and never returned. This last return to her husband's house again shews that she was willing, and in effect offered, to condone; but she annexed a condition precedent which he **[138]** would not perform, and as he refused even to shake hands with her, and again treated her with contumely in the presence of her servants, I think she was fully justified in thinking that cohabitation with him would be unsafe. I am therefore of opinion that, on this occasion, there was no perfect condonation, and even if her return to the house could be so considered, she had sufficient reason for leaving it again.

The last plea of the respondent remains to be considered, viz. that the petitioner had been guilty of unreasonable delay in presenting her petition. The plea seems to be founded on the 31st section of the Divorce Act, 20 & 21 Vict. c. 105, which applies to suits for dissolution of marriage, and not to suits for judicial separation; and in this suit, strictly speaking, it is no plea. Mere lapse of time is not of itself a bar to the suit, but it may be offered as a circumstance to be taken into consideration, and, combined with others, may be a sufficient reason for dismissing such a petition. In this case it was relied on in connection with the petitioner's avowal that, but for the refusal to let her see her children, she should not have instituted the suit, and that, when living apart from her husband, she was not afraid of personal violence; and *Matthews* v. *Matthews*,[1] 1 Swab. and Trist. 499, and 29 L. J. 118, was cited as an authority for dismissing the petition.

That case, having been decided on appeal, must give the law to this Court until it has been overruled by some competent authority. The learned judges who gave judgment in that case appear to have arrived at the conclusion that the wife was not sincere in asserting that she feared her husband's violence; and that opinion was founded on the weakness of the evidence of personal injury, the lapse of time, and an apparent pecuniary motive for the proceeding, which induced them to think that the Court was asked to pronounce a sentence of judicial separation, not on account of any evil felt resulting from a habit of cruelty, but with a view to some other **[139]** object having no relation to it. In the case now before the Court there can be no doubt as to the charge of cruelty; no doubt that, as long as the husband manifested the same want of affection, and the same determination not to allow her the proper position of a wife in his house, she could not safely cohabit with him; no doubt that she left

[1] Also 3 Swab. & Trist. 161.

him in consequence of his cruelty. True, she abstained, for reasons that may well be imagined, from bringing her wrongs before the public, and was content to submit to the separation, so rendered necessary, provided he would allow her the consolation of having sometimes the society of her children. That consolation was afterwards withdrawn ; she could no longer have it unless she returned to cohabitation with her husband. No part of his conduct or his letters since the separation evinced any more kindly feeling towards her ; and therefore, I believe she was sincerely afraid of further violence, and, in order to obtain that to which, as a wife and a mother, she was entitled, and which she could only have by returning to a cohabitation that was dangerous, or by an appeal to this Court, she adopted the latter course. I find in all this no symptom of a scheme to promote or assist any purpose that has no relation to the ill-treatment that she has suffered and the peril to be encountered by a renewal of cohabitation. It appears to me, therefore, that the case of *Matthews* v. *Matthews* is plainly distinguishable from the present, and that I am bound to pronounce the decree prayed for.

REEVES *v.* REEVES. November 14 and 25, 1862.—Cruelty.—One Act of Cruelty.—No Cohabitation.—Where one act of violence is of such a character as to found a reasonable apprehension of further violence in case of cohabitation, the wife is entitled to the protection of a matrimonial Court.

[S. C. 32 L. J. (Mat.) 178 ; 8 L. T. 174 ; 10 W. R. 111.]

**[140]** This was the wife's petition for dissolution on the ground of adultery coupled with cruelty. No appearance had been entered for the respondent.

Dr. Spinks conducted the petitioner's case.

The marriage took place at Shrewsbury, on the 17th of December, 1860. The adultery was proved. The following was the evidence as to the cruelty :—

Mrs. Reeves, the petitioner, examined :—I was a widow before the marriage. I became acquainted with Reeves, who was a soldier in the Artillery at Woolwich, in September, 1860. I bought his discharge. On the day after the first night of the marriage I left him at Shrewsbury. I had no money left, and it was his wish that I should come to London to get some. He told me he would come up by New Year's Day, and I was to send him some money when I got home. I did send him money. The next time I saw him was on the 12th of January, 1861, near Shrewsbury. I sent into a public house for him, and waited outside. He came out, used very violent language, and asked me what I had come down for. I said I had come to see what he was doing, as he required so much money from me. He asked me whether I had any money to give him then. I said I was surprised at his asking me for more after what he had had. He began swearing at me, and said he did not want me and he did not consider I was his wife. He then attempted to strike me, and I avoided the blow ; and then he gave me a kick in the leg. I ran away, and he went back into the public house. In February, 1861, I was in the Elephant Inn, at Shrewsbury, and I saw him come in with two females. He would not say anything to me. In November, 1861 (this was subsequent to the service of the citation), I met him in the street in London. He said to me, "Holloa ! you are the very person I want. I am glad to see you. I want some money." I said I would **[141]** not have anything to say to him ; and I begged him to go away. He then said he knew I had money, and he wanted some. I went away, and he followed ; as I was going to cross the road he came in front of me, caught hold of my two shoulders, and pushed me down on the kerbstone. A crowd collected, and he got into a cab and went away. Another witness proved that Mrs. Reeves had a wound on her leg just after the marriage.

There was ample evidence of adultery.

*The Judge Ordinary* : I have some doubts as to the cruelty.

Cur. adv. vult.

November 25.—*The Judge Ordinary* : This was a sort of case which I hope is not very common. A widow, whose husband had left her some property, married a young man whose discharge from the army she purchased, and she was grossly ill-used by him on the only two occasions when they came together after the marriage. The second of these occasions was after the petition was presented, and cannot therefore be taken into account. The first act was one of very gross ill-usage, and, from the habits and general conduct of the man, I cannot but think she would be in great danger of ill-usage if she lived with him. The case, therefore, is one in which

a decree for divorce à mensa et thoro for cruelty would have been granted by the Ecclesiastical Courts. It has been laid down that where one gross act of cruelty is of such a nature as to raise a reasonable apprehension of further acts of the same kind, the Court will grant relief.

Decree nisi granted, with costs.

[142] MACCANN *v.* MACCANN. November 25, 1862.—Evidence.—Communication between Attorney and Client.—In a suit by a wife for judicial separation on the ground of cruelty, the wife was asked, in cross-examination, whether she had not originally instructed her attorney to institute a suit for restitution of conjugal rights. The question was objected to, and the objection was overruled.

[S. C. 32 L. J. (Mat.) 29; 8 L. T. 175; 9 Jur. (N. S.) 207; 11 W. R. 112.]

This was the wife's petition for judicial separation on the ground of cruelty.

Plea, a denial of the charge.

The Queen's Advocate (Sir Robert Phillimore) and Dr. Swabey for the petitioner.

Dr. Spinks for the respondent.

The petitioner was cross-examined by Dr. Spinks, and was asked, "Did you instruct your solicitor to institute a suit for restitution of conjugal rights?"

The Queen's Advocate objected.—It was a confidential communication between the attorney and client on the subject of this suit, and was therefore privileged.

*The Judge Ordinary*: Does the privilege extend to the client as well as to the attorney when the client himself is in the box? It is not a communication with reference to this suit, but with reference to a suit of a different kind.

Dr. Spinks: The client cannot claim the privilege when under cross-examination.

*The Judge Ordinary*: I cannot think the privilege extends to a case like this; the question must be answered.

The objection was accordingly overruled, and the question put.

[143] WITT *v.* WITT AND KLINDWORTH. December 13, 1862.—Evidence.—Statements of Patient to Medical Man.—Statements in writing by a patient to a medical man, describing the symptoms of the illness upon which the medical man has advised the patient, are not admissible in evidence.

[S. C. 32 L. J. (Mat.) 179; 8 L. T. 175; 9 Jur. (N. S.) 207; 11 W. R. 154.]

This was the husband's petition for a decree of dissolution on the ground of adultery. The respondent pleaded, inter alia, a denial of the charge. The issues came on for trial before the Judge Ordinary and a common jury.

Mr. Hawkins, Q.C., and Mr. D. D. Keane for the petitioner.

Mr. Karslake, Q.C., and Dr. Tristram for the respondent.

The Queen's Advocate (Sir R. Phillimore) and Mr. Holl for the co-respondent.

Mr. Karslake called Mr. Clover, the respondent's medical attendant, who said that the respondent had gone to Tunbridge Wells by his advice on account of her health, and that whilst she was at Tunbridge Wells he had received letters from her. In consequence of those letters he had sent her prescriptions and medicines.

Mr. Karslake proposed to have the letters read.

Mr. Hawkins objected.

Mr. Karslake: The statements of a sick person to a medical man are evidence. Upon the same principle, the letters in which a patient describes her symptoms should be admitted. [144] A deaf and dumb patient suffering from an internal malady would be obliged to describe his symptoms in writing.

*The Judge Ordinary*: I shall not set a precedent for the admission of written communications to a medical man. The subject was much considered in *Aveson* v. *Lord Kinnaird*, 6 East, 188, and the limit is stated by Mr. Pitt Taylor as follows:—"The representations by a sick person of the nature and effects of the malady under which he is labouring, are receivable as original evidence, whether they be made to the medical attendant or to any other person, though the former are naturally entitled to greater weight than the latter, inasmuch as a physician is far more capable than a man unacquainted with the symptoms of diseases of forming a correct judgment respecting the accuracy of the statements." ("Taylor on Evidence," part 2, c. 7, s. 518.)

The evidence was accordingly excluded.

FORSTER *v.* FORSTER AND BERRIDGE. May 20 and June 3, 1862.—Entry of Appearance.—Effect of an Absolute Appearance.—Plea to Jurisdiction of Court.—Practice.—A respondent in a suit for dissolution of marriage having entered an absolute appearance, cannot afterwards plead to the jurisdiction of the Court, nor can she raise such objection by act on petition.—If a respondent intends to plead to the jurisdiction of the Court, she should appear under protest.—Semble, however, that at the hearing she may, notwithstanding, object to the jurisdiction.

[Reported on other points, 32 L. J. (Mat.) 133, 134, 206.]

This was a petition filed by Major Forster, of Her Majesty's Indian Army, for a dissolution of his marriage with his wife, on the ground of adultery committed with the co-respondent in **[145]** London, while the petitioner was engaged on military duty in India. It was alleged in the petition that the parties were married in India in 1839; that since their marriage they had generally cohabited in India, and that the petitioner had come from India to England for the express purpose of instituting this suit. The respondent and co-respondent had appeared absolutely by their attorneys to the citation, and on the 16th of April, before the time for putting in an answer to the petition had elapsed, the respondent took out a summons before the Judge Ordinary in chambers, calling on the petitioner to shew cause why she should not be at liberty to amend the appearance entered for her, and make an appearance under protest. The co-respondent took out a similar summons. At the hearing of the summonses, Mr. H. F. Gibbons appeared for the petitioner, and Mr. W. G. Harrison for the respondent, and Dr. Spinks for the co-respondent. An affidavit was filed on behalf of the respondent, deposing that she was not aware of her position until after the absolute appearance was entered, and that as since the appearance was entered she had been advised that the petitioner and herself having been born in India, the Court had no jurisdiction to dissolve the marriage solemnized in India, she sought to be allowed to appear under protest, so as to raise the question of the jurisdiction of the Court to entertain the suit. An affidavit was also filed by the co-respondent and his solicitor, from which it appeared that when the appearance was entered on his behalf, neither of them was aware that the marriage was celebrated in India, and that both the parties had been born, and had been always domiciled in India. The Judge Ordinary, however, dismissed both summonses. Afterwards the co-respondent put in his answer, denying the adultery. On the 2nd of May, time having been granted for the purpose, the respondent put in the following answer:—"The respondent, Mary Owen Forster, answers to the petition and citation of the said William Robert Forster as follows; that is to say, the **[146]** respondent in her own proper person comes and says that the Court hath no jurisdiction in the matter of this suit, and ought not to have or take further cognizance thereof, because she says that before and at the time of the alleged occurring of the several matters in the petition and hereinafter mentioned, the petitioner was, and still is, domiciled in India, and not within the realm of England or within the jurisdiction of this Court. That his domicil of origin was India. That he was born at a certain place beyond the seas, that is to say, in India aforesaid, and was the son of parents neither of whom was a natural-born subject of our Lady the Queen, or any of her predecessors, sovereigns of this realm, or domiciled in England, both of whom at the time of his said birth, and from thence hitherto, were domiciled in India aforesaid. That the petitioner has never abandoned his said domicil of origin or acquired any domicil elsewhere; but, on the contrary, he became and was an officer of the military forces of the East India Company, bound and liable to serve as such officer within certain territorial limits beyond the seas, that is to say, in India aforesaid, and that he so continued to be such officer up to and until the passing of a certain Act of Parliament, made and passed in the Session of Parliament, held in the twenty-first and twenty-second years of the reign of the now Queen, entitled 'An Act for the better Government of India,' and that he then and from thence hitherto continued to be and still is an officer of the said forces, that is to say, a local Major in the 14th Regiment of the Native Infantry of Her Majesty's Indian Army, otherwise the Schewattie Brigade, otherwise the Schewattie Battalion, now stationed at Goruckpore, in India aforesaid, and that at the commencement of this suit he was and now is absent from the said regiment on furlough. That the said marriage was celebrated in India aforesaid, according to the laws and customs thereof, and not within this jurisdiction. That the respondent's domicil of origin is in India

aforesaid, [147] where she was born, and was the daughter of parents neither of whom was a natural-born subject of our Lady the Queen, or of any of her predecessors, sovereigns of this realm, or domiciled in England, and both of whom were at the time of her said birth, and from thence hitherto, domiciled in India aforesaid, and that she hath never abandoned her said domicil of origin, nor hath she ever been, nor is she domiciled in England, or within the jurisdiction aforesaid, and that her said husband had never cohabited with her in England, or within the jurisdiction aforesaid; wherefore the respondent humbly prays judgment whether there is anything in the said petition which she ought to be compelled to answer; and whether this Court hath any jurisdiction in the matter of this suit, or can, or will, or ought to take any further cognizance thereof. (Signed) MARY OWEN FORSTER."

May 13.—Mr. H. F. Gibbons moved the Court to order that the plea should be struck out.

Mr. W. G. Harrison, contra, cited *The "Ida,"* 1 Lushington's Admiralty Rep. 6.

Cur. adv. vult.

May 20.—*The Judge Ordinary*: In this case a petition was filed by a husband for dissolution of marriage. The respondent appeared absolutely by attorney, and not in person, or under protest. There are cases in the Common Law Courts in which objections may be taken to the jurisdiction under the general issue or by a special plea. I say nothing as to the possibility of the respondent's raising the question of jurisdiction, but she certainly cannot by the practice of this Court do so by a plea in this form. If I were to admit the plea, and ultimately should hold that it was not proved, the result of a trial, which might be long and expensive, would be that the respondent would have to do what I think she is now bound to do, viz. [148] file an answer. The case cited from the Admiralty Reports is not in favour of the respondent. In *The "Ida"* there was an absolute appearance; the plaintiff proceeded by act on petition, and in it set out facts which raised a question of jurisdiction. The learned Judge of the Admiralty Court, treating that as equivalent to a voluntary declaration, allowed objection to be taken to the jurisdiction. That decision has no bearing on the present question. Here a dilatory plea has been pleaded in person by the respondent, who is not before the Court in person, but by attorney. Such a proceeding is quite irregular in all respects, and the plea must therefore be struck out.

Plea struck out.

On the 26th of May the respondent filed an act on petition, which was as follows:—

"William Francis Low, solicitor for Mary Owen Forster, says that on the 20th day of June, 1839, she was married to William Robert Forster, at Bareilly, in India, and that before and at the time of the said marriage the said William Robert Forster was, and from thence hitherto hath been, and still is, domiciled in India aforesaid, and not in the realm of England or within the jurisdiction of this Court. That his domicil of origin was Indian. That he was born in India aforesaid, and was the son of parents neither of whom was a natural-born subject of our Lady the Queen, or of any of her predecessors, sovereigns of this realm, or domiciled in England, and both of whom at the time of his said birth, and from thence hitherto, were domiciled in India aforesaid. That the father of the said William Robert Forster was born in India, and afterwards entered the military service of the East India Company, and the mother of the father of the said William Robert Forster was a Mohammedan lady.

"Secondly, That the said William Robert Forster has never abandoned his said domicil of origin or acquired any domicil elsewhere, but, on the contrary, he became and was an officer [149] of the military forces of the East India Company, bound and liable to serve as such officer within certain territorial limits beyond the seas, that is to say, in India aforesaid, and that he so continued to be such officer up to and until the passing of the Act of Parliament 21 & 22 Vict. c. 106, entitled 'An Act for the better Government of India,' and that he then and from thence hitherto hath continued to be and still is an officer of the said forces, that is to say, a local Major in the Fourteenth Regiment of the native infantry of Her Majesty's Indian Army, otherwise the Schewattie Brigade, otherwise the Schewattie Battalion, now stationed at Goruckpore, in India aforesaid, and that on the 21st day of March, in the year of our Lord 1862, he was, and from thence hitherto hath been and now is absent from his said regiment on furlough.

"Thirdly, That the domicil of origin of the said Mary Owen Forster is in India

aforesaid, where she was born and bred, being the daughter of parents neither of whom was a natural-born subject of our Lady the Queen, or of any of her predecessors, sovereigns of this realm, or domiciled in England, and both of whom were at the time of her said birth, and from thence unto their respective deaths, domiciled in India. That the said Mary Owen Forster has never abandoned her domicil of origin, nor has she ever been, nor is she, domiciled in England, or within the jurisdiction of this Court.

"Fourthly, That on the 21st day of March, in the year of our Lord 1862, a citation was issued out of this Court at the suit of the said William Robert Forster, and a petition filed by him praying for a dissolution of his marriage with the said Mary Owen Forster by reason of adultery, which said citation and a copy of the said petition was served upon the said Mary Owen Forster on or about the 24th of March, in the year of our Lord 1862.

"Wherefore the said William Francis Low prays that it may be declared by this honourable Court that at the time **[150]** of the issuing and service of the said citation and petition, both the said William Robert Forster and the said Mary Owen Forster were domiciled in India, and that the Courts in India were the competent and exclusive authority to deal with the matters of the said petition and to determine the conjugal rights of the said Mary Owen Forster, and the respective claims of herself and of her said husband, and that this honourable Court has no jurisdiction in respect of the matter aforesaid. And that this honourable Court may make such further and other order in the matter as it might seem fit.

(Signed) "WILLIAM FRANCIS LOW."

May 27.—Mr. H. F. Gibbons moved for directions as to mode of trial.

Dr. Phillimore, Q.C. (Mr. W. G. Harrison with him): The respondent has filed an act on petition for the purpose of raising the question of jurisdiction.

*The Judge Ordinary*: In the Ecclesiastical Court, did not a party by appearing absolutely waive any objection to the jurisdiction in the first instance?

Dr. Phillimore: Yes. Can the respondent raise the question at the hearing?

*The Judge Ordinary*: As at present advised, I think she may; but she has not filed an answer.

Dr. Phillimore then asked leave to file an answer.

*The Judge Ordinary* granted the application.

June 3.—Mr. H. F. Gibbons moved that the act on petition should be struck out.

**[151]** Dr. Phillimore, Q.C., and Mr. W. G. Harrison, for the respondent.

*The Judge Ordinary*: Let it be struck out.

Mr. H. F. Gibbons: I also ask that the costs of these motions may not be taxed against the husband.

*The Judge Ordinary*: Certainly. The costs of such interlocutory motions, if the wife is unsuccessful, are not taxed against the husband.

The respondent afterwards filed an answer, and the case was set down for trial.

FORSTER *v.* FORSTER AND BERRIDGE (Graham intervening). May 22, 1863.—Intervention.—Material Facts put on the Record, but not proved at Trial.—23 & 24 Vict. c. 144, s. 7.—Where an appearance had been entered by a friend of the co-respondent, against whom £5000 damages had been awarded, for the purpose of shewing cause against a decree nisi being made absolute, on the ground that there were material facts in the case which were not brought to the notice of the Court, and most of the material facts had been put on record by the parties, and were not established at the trial, and the intervener had not established by affidavit a single fact of importance, the Court declined to suspend its decree, and condemned the intervener in the costs occasioned by the intervention.

This case was heard before the Judge Ordinary and a special Jury on the 19th and 20th of December, 1862. The petitioner, Major Forster, an officer in the Indian Army, instituted a suit for the dissolution of his marriage with the re-**[152]**-spondent and for damages, on the ground of her adultery with the co-respondent (see ante, p. 144). The respondent and co-respondent having appeared absolutely in the suit, applied on summons to be allowed to appear under protest to the jurisdiction of the Court; but their application having been rejected (see ante, p. 145), they subsequently filed answers, in which they respectively denied the adultery, and brought counter-charges of adultery, and misconduct conducing to adultery, against the petitioner.

The respondent and co-respondent appeared by counsel at the trial, when the adultery was proved, and after some evidence had been given on behalf of the respondent on some of the counter-charges, her counsel (The Queen's Advocate) abandoned his opposition to the petitioner's suit. The counsel for the co-respondent (Mr. Montague Smith, Q.C.) then having addressed the jury in mitigation of damages, which were assessed at £5000, a decree nisi for the dissolution of the marriage was thereupon pronounced, and since the decree nisi Mr. William Graham had entered an appearance as an intervener, under sec. 7 of 23 & 24 Vict. c. 144, for the purpose of shewing cause against the decree nisi being made absolute. He had within the time allowed filed an affidavit, deposing that he had received information which he believed to be true:—(1) That the petitioner and respondent were both born in the East Indies of Indian parents, who were always domiciled in India; that they were married in India, and that from the time of their respective births up to the date of the decree nisi, they had been always domiciled in India. (2) That the petitioner had, during the years 1854 and 1855, committed adultery with a native woman in India, whom he had kept as his concubine. (3) That he had without any reasonable grounds refused to cohabit with his wife for some years prior to the adultery, and had also been guilty of neglect and misconduct towards her conducing to the adultery. (4) That if the Court would allow time for further inquiries, he would procure evidence to establish the domicil, adultery, and **[153]** misconduct of the petitioner towards his wife. The intervener also filed affidavits made by Mr. Melton, the co-respondent's solicitor, and others, shewing that two discharged servants of the co-respondent, who had given evidence against him at the trial, which had prejudiced his case, had sworn falsely in answer to questions put to them on cross-examination, denying that they had committed or been taken in custody for feloniously stealing some of the co-respondent's property.

Mr. Barron, the petitioner's solicitor, in answer to these affidavits, filed an affidavit, not denying the domicil of the petitioner and respondent, but alleging that the questions raised by the intervener's affidavit were or might have been investigated at the trial, and that he had reason to believe that the intervener was a personal friend of the co-respondent's, and had intervened at his instance.

*The Judge Ordinary*, on the motion of the petitioner's counsel, directed the questions raised by these affidavits to be argued before the Court on the first day of Trinity Term, 1863.

The case came on for argument, when

May 22.—Mr. Mundell and Mr. Gibbons appeared for the petitioner; and Mr. Coleridge, Q.C., and Dr. Tristram, for the intervener.

Mr. Coleridge, in shewing cause against the rule, said he thought it right to inform the Court that the Queen's Proctor had been asked to intervene and had declined, and that Mr. Graham, the intervener, was a personal friend of the co-respondent, Mr. Berridge.

*The Judge Ordinary*: Does he intervene at the instance of Mr. Berridge?

Mr. Coleridge: No.

**[154]** *The Judge Ordinary*: Does he swear that? I am rather curious to know how the fact is, although it is immaterial.

Mr. Coleridge said there was no statement on the subject in the affidavits, but no doubt Mr. Berridge was willing that Mr. Graham should intervene, and was anxious that he should succeed. But the fact that Mr. Graham's motive for intervening was his personal friendship for Mr. Berridge could not affect the decision of the Court upon the question whether there were good grounds for his intervention. Some motive must be acting upon the mind of every person not the public officer, who intervened under this statute, and Mr. Graham's motive was not a discreditable one.

*The Judge Ordinary*: It was the intention of the Legislature to allow an independent third person to intervene for the purpose of giving information to the Court which the parties themselves had wilfully withheld.

Mr. Coleridge said that any person interested in the public morals and the well-being of society would be justified in intervening. The first ground of the intervention was, that the Court had no jurisdiction over the parties to the suit.

*The Judge Ordinary* said he had already held that a co-respondent and a respondent had no right to raise that question after they had appeared absolutely. It was not

likely that he would act upon an objection raised by a third person which the parties had not been allowed to plead.

Mr. Coleridge submitted that the question of jurisdiction could be raised at any stage of the suit. The petitioner in this case had never been domiciled in England; he always had been, and he now continued, domiciled in India. He was married in India to a lady who also had an Indian domi-**[155]**-cil, the cohabitation was in India, and the children were born there.

*The Judge Ordinary*: I should have been very glad indeed if the Legislature had said that the Court had no jurisdiction except over persons domiciled in England. When Lord Campbell was Lord Chancellor, I asked him to bring in a Bill to settle the question and to define my jurisdiction; but he said, "I cannot do it. Whenever that question is raised, it must be decided upon legal principles. It cannot be defined."

Mr. Coleridge referred to the cases which have been decided in this Court upon the question of jurisdiction, for the purpose of shewing that the Court had no jurisdiction, and ought, therefore, to rescind its decree, and dismiss the petition (*Ratcliff* v. *Ratcliff and Anderson*, 1 Swab. & Tris. 467; *Yelverton* v. *Yelverton*, 1 Swab. & Tris. 574; *Deck* v. *Deck*, 2 Swab. & Tris. 90; *Bond* v. *Bond*, 2 Swab. & Tris. 93; *Brodie* v. *Brodie*, 2 Swab. & Tris. 93). There were two other grounds for the intervention of Mr. Graham,—first, that he had good ground for believing that Major Forster had been guilty of repeated acts of adultery in India; and, secondly, that Major Forster had, in a great measure, contributed to his own dishonour by his wilful neglect and misconduct. Mr. Graham deposed that he had reason to believe that since 1847 Major Forster had treated his wife with indignity, insult, and neglect; that he had also reason to believe that during 1854, 1855, and 1856, Major Forster had lived with a woman in India as his concubine; and that he had every reason to believe that, if the Court would suspend making its decree absolute, he should be able to procure evidence that Major Forster had been guilty of habitual adultery. Other affidavits had been filed by Mr. Graham with regard to some evidence which had been produced at the trial bearing rather hardly upon Mr. Berridge.

**[156]** *The Judge Ordinary*: It is hardly within the province of an intervener to move for a new trial upon affidavits. I have endured a good deal of Mr. Graham's proceedings, but that is really too bad.

Dr. Tristram followed on the same side. The Act did not direct the Court to inquire into, or to be influenced by, the motives of an intervener in making the intervention. It simply stated (sec. 7) "that any party might intervene and shew cause why the decree should not be made absolute by reason of material facts not brought before the Court." If Mr. Graham established facts shewing that the petitioner and respondent were never subject to the jurisdiction of the Court; or that the petitioner had committed adultery in India; or that he had been guilty of misconduct conducing to the adultery of the respondent, these would be clearly material facts which ought to be brought to the notice and consideration of the Court. Mr. Graham swore that he had reason to believe that if the Court ordered further inquiry, he would be able to establish these facts. He submitted therefore that there were good grounds for the Court to order such an inquiry to be made within a reasonable time and at Mr. Graham's risk as to costs.

Mr. Mundell supported the decree. He pointed out that Mr. Graham did not depose to any material fact, but merely to his belief in certain facts, and he did not even state from whom he had received his information. He also submitted that it was not competent to an intervener to raise the question of jurisdiction, as that was not a fact material to the issue.

*The Judge Ordinary* said it was unnecessary to carry the argument any further. Soon after the Court was established it was suspected that attempts had been made to procure a **[157]** dissolution of marriage by means of collusion, and there had been other instances in which both the party suing and the party sued were equally anxious to obtain a divorce, and without collusion the party sued abstained from setting up matter which might be set up in answer to the petition. It was in order to check these practices that the statute was passed, and not at all for the purpose of enabling persons to raise questions as to the jurisdiction of the Court. The question of jurisdiction might, for aught he knew, be raised elsewhere, and he should be very glad if

any authority would point out to him that he had not jurisdiction in the case. With regard to the point that material facts had not been brought before the Court, it would be affectation to pretend that he was not satisfied that this was really an application made by Mr. Berridge in the name of a third person. Mr. Graham took a strange interest in the proceedings of this Court. It was very kind of him, a wine merchant at Stockton, to give himself so much trouble in the matter. But what a state the Court would be in, if any man in the empire could come before it and ask it to rescind its decision in a suit because it had made some mistake! It was, however, in truth, an application by Mr. Berridge for a re-trial, or, at any rate, for a postponement of the execution for the damages until the petitioner returned from India, and could be put into the box and cross-examined. The ground of it was that material facts had not been brought before the Court. But the material facts had been put on the record by the parties, they had made charges against the petitioner in the pleadings, and he had put himself on his trial with reference to those charges. Some evidence was given in support of one of those charges, but the learned counsel for the respondent felt bound to abandon them, and he had most properly abandoned them. Mr. Graham having lent himself to these proceedings, and not having condescended to tell from whom he received his information, and not having substantiated a single fact of importance, he must pay the costs occa-**[158]**-sioned by the intervention, and the Court would not suspend its decree.

[An application was subsequently made by Mr. Berridge, the co-respondent, to the Queen's Bench for a prohibition against the Judge Ordinary making the decree nisi absolute, on the ground of want of jurisdiction. The Court of Queen's Bench granted a rule nisi, and on a motion being made by Mr. Mundell for the decree nisi to be made absolute, the Judge Ordinary said he had been served with a copy of the rule nisi obtained in the Queen's Bench, and that he must decline making the decree absolute until the Queen's Bench had decided the question of jurisdiction. Cause was subsequently shewn against the rule nisi obtained in the Queen's Bench by Mr. Lush, Q.C., and Mr. Gibbons, for Major Forster; Dr. Deane, Q.C., appeared for the Judge Ordinary, and Mr. Coleridge, Q.C., Mr. Mellish, Q.C., Dr. Tristram, and Mr. Willoughby, in support of the rule, when the Court discharged the rule nisi with costs, on the ground that Mr. Berridge had not such an interest in the suit as to entitle him as a matter of right to a prohibition, and had not made out such a case as would justify the Court in the exercise of its discretion to grant one.]

FORSTER *v.* FORSTER AND BERRIDGE. June 16 and 23, 1863.—Decree Absolute.—Directions as to the Disposition of Damages.—The Court directed the £5000 damages awarded in this case to be paid to the petitioner's solicitor; £1000 to be paid by him to the petitioner; out of the residue an annuity of £120 to be purchased for the respondent's life, to be paid to her "dum casta vixerit," with **[159]** remainder to two of her daughters; and the remainder to be invested in an annuity for these two daughters.

The Court, on the motion of Mr. Mundell, now made the decree nisi absolute.

Mr. Mundell then moved for directions as to the application of the £5000 damages assessed against the co-respondent. He proposed that £1000 should be paid to the petitioner, to be applied by him in defraying the extra costs incurred by himself in the case, and in paying certain costs incurred by the husband of a lady with whom the petitioner had been charged on the record with adultery, who, to protect his wife's honour, had instructed counsel to watch the case on her behalf.

*The Judge Ordinary*: The husband of the lady referred to was at liberty, if he chose, to instruct counsel to watch the case, but I have no authority to make an order for the payment of his costs.

Mr. Mundell proposed that the remainder of the £5000 should be invested for the benefit of the respondent and two of her daughters, who persisted in living with her against the wish of Major Forster. Cur. adv. vult.

June 23.—*The Judge Ordinary*: This was an application to the Court to make an order directing how the £5000, assessed by the jury as the damages to be paid by the co-respondent, should be disposed of. The authority I am called upon to exercise in this matter is given by the 23rd section of the Divorce Act. I think that the money should be paid to the petitioner's solicitor, to be applied by him as follows:—£1000 to be paid over to the petitioner, as he has been put to extra costs which he cannot

recover against the co-respondent; out **[160]** of the residue of the damages I direct an annuity of £120 to be purchased for the life of the respondent, to be paid to her "dum casta vixerit," and in the event of her forfeiting it by the breach of this condition, to be paid over to the two daughters, who are living with her; the rest of the residue I direct to be invested in the purchase of annuities payable to these two daughters during their lives. The money to be invested in the name of a trustee; and there should be a clause in the deed against anticipation.

The order made by the Court was in the following terms:—

"The Judge Ordinary having taken time to deliberate, directed that the sum of £5000, being the damages assessed in this cause, be paid to the petitioner's solicitor, to be by him applied in the following manner:—that £1000 be paid to the petitioner for his own use; that an annuity for £120 a year be bought in the names of two trustees on the life of the respondent, and that such annuity be paid by the trustees to the respondent so long as she shall lead a moral and respectable life; but should the respondent not lead a respectable and moral life, then that her interest in the annuity should be forfeited, and that the trustees should pay such annuity to the two daughters of the marriage, in equal portions, or to the survivor of them; and that the residue of the said sum should be invested in the purchase of equal annuities for the use of the two daughters of the marriage on their own lives; and that a deed should be prepared and settled by one of the conveyancing counsel of the Court of Chancery, whereby this order should be effectually carried out through the intervention of trustees, and anticipation of the annuities should be prevented."

**[161]** (Before the Full Court.—*The Judge Ordinary, Martin, B.*, and *Willes, J.*)

MATTHEWS *v.* MATTHEWS. June 1860.—Suit for Judicial Separation.—Cruelty.—Deed of Separation.—Lapse of Time.—In a suit for judicial separation, brought by the wife on the ground of cruelty:—Held, on appeal, affirming the decision of the Judge Ordinary, that lapse of time, though not an absolute bar, yet taken in connection with other circumstances, e.g. a deed of separation, may shew that the application was not made, bonâ fide, for the protection of the wife, but for some collateral purpose; and that if the Court was satisfied of this, the petition ought to be dismissed.

[Distinguished, *Green* v. *Green*, 1873, L. R. 3 P. & D. 121.]

This was an appeal from a decision of the Judge Ordinary, dismissing a petition filed by the wife for judicial separation on the ground of cruelty. The marriage took place in 1844. In 1848 the husband bought a house and shop at Chipping Norton, where he carried on the business of a grocer, and the trustees of his marriage settlement advanced on it £1000 of the wife's property. The husband took to drinking, and according to the petitioner's evidence, between 1848 and 1853 he frequently struck her. In July, 1853, he sold the business to the petitioner's brother, and in October, 1853, they separated, when a deed of separation was executed, by which he gave up his interest under marriage settlement, covenanted to allow her to live apart, as if she were a feme sole, and gave her the custody of the children. The respondent denied that he had ever struck the petitioner; but her evidence was corroborated by three witnesses.[1]

*The Judge Ordinary* by his decree dismissed the petition, and from this decree the petitioner appealed.

**[162]** *The Judge Ordinary* reported the evidence as laid before him at the hearing, and said that his judgment was as reported in 1 Swab. & Trist. p. 500.

Dr. Phillimore, Q.C. (Mr. Prentice with him), appeared for the appellant, and cited *Ferrers* v. *Ferrers*, 1 Hagg. Cons. 130; *D'Aguilar* v. *D'Aguilar*, ibid. 134 n.: and *Mordaunt* v. *Mordaunt*, ibid. 135 n.

Dr. Spinks (Mr. Field with him), for the respondent, cited *Mortimer* v. *Mortimer* 2 Hagg. Cons.; *Coode* v. *Coode*, 1 Carl. 755; *Bettington* v. *Bettington*, 1 Eccl. & Adm. 200; *Sanders* v. *Rodway*, 16 Beav. 207.

*Martin, B.*: The decision of the Judge Ordinary must be affirmed. I am not satisfied upon the then existing evidence of facts, that an Ecclesiastical Court would, in 1853, have granted a decree. In the first place, what are the facts? The circumstances we are investigating occurred eight years ago. I should be sorry to say that

[1] See also 1 Swab. & Trist. 500.

the petitioner came here to give evidence, which she believed at the time not to be strictly consistent with truth; she is speaking, however, of what occurred at a time very distant, and the law says that you cannot place implicit reliance on such statements. There is often misunderstanding and exaggeration in detailing what happened a long time ago, and experience has taught us the danger of relying upon such evidence as the ground for judicial decisions. I agree with Dr. Phillimore that lapse of time is no bar: that is, it would be a bad plea to say that admitting the facts to be true, they occurred so many years ago. The petitioner is corroborated as to some of the facts by servants in the house, who would be inclined to take a strong view of what was done to their mistress. No doubt, they state with perfect sincerity what they believe to be true; but the petitioner never complained of her husband's conduct to **[163]** the medical man, who lived next door. I do not say that she is saying what is untrue, but I think that having talked the matter over with her friends, she has arrived at her present opinion, which varies from what really took place. A young man, who lived near them, never heard anything about it; and the very fact of the husband being a drunkard would have made his actions all the more notorious. I therefore doubt the existence of such acts of cruelty as would have justified a judge in 1852 in granting a divorce à mensâ et thoro. You must also take into consideration the deed of separation; I do not say that it is an estoppel; I cannot, however, shut my eyes to the fact that the husband has never interfered with her since the execution of the deed, and has acted upon it as binding upon him; and she never moved in the matter until an Act of Parliament is passed, which places her in a very different position with regard to property. I cannot but think that these proceedings have been taken not for the real bonâ fide purpose of protecting herself against the cruelty of her husband, but to put her in a position with regard to certain property different from that which she occupies under the deed of separation; and I believe, that if I had been sitting alone, I should have arrived at the same conclusion as the Judge Ordinary did.

*Willes, J.*: I am of the same opinion. Assuming that the witnesses on both sides are worthy of belief, the balance of probability is against the petitioner. Assuming that her case of cruelty was made out, I think that the sentence of the Judge Ordinary was correct, for the reasons given by him. I cannot but think that this suit was not instituted for the protection of the petitioner, but for a less legitimate object. This is a case which we ought not to encourage; we ought to carry out the law as far as we can, and the object of the law is to protect women from cruelty, and not to enable them to effect by by-ways that which is not the real object in a cause. **[164]** The delay, taken into consideration with the deed, shews that there was no such apprehension of danger as is now alleged. A suit for this purpose must be sincere, I mean sincere in a legal sense. The case of *Bettington* v. *Bettington* is very strong on this point, if, indeed, it is necessary to cite authorities. Dr. Lushington, in his judgment in that case, said:—"As relates to the right of the husband to prosecute a suit of this description, time, with other facts, deserves great consideration. The law affords a remedy to those who are really aggrieved, and sensible of their grievance, and then only vigilantibus, non dormientibus. The remedy is given on account of the loss sustained and the evil felt, not to promote or assist other purposes having no relation to it." I think this last expression is applicable to the present case. The lapse of a considerable time ought to induce the Court to use vigilance to see that the suit has been instituted for the real purpose. If the lapse of time occurs under such circumstances as to satisfy the Court of the insincerity of the suit, it ought to pronounce against the application. Adopting the language of the Judge Ordinary, I do not mean to put the lapse of time as an absolute bar, but I think that taken in connection with the deed of separation, it shews that this is not a bonâ fide application made for the protection of the wife, but for some collateral purpose, and that the Court ought not to grant the prayer of the petitioner.

Decree affirmed.

**[165]** IN THE GOODS OF WILLIAM HUTCHESON (deceased). April 21, 1863.—Confirmation and Probate Act (1858).—Eik.—Seal of Court.—New Confirmations.—Practice.—The seal of the Court will not be affixed to an eik or additional confirmation.—Where the original confirmation obtained in a Commissary Court of Scotland is incomplete, it is requisite, for the purpose of obtaining the seal

of the Court of Probate, that there should be a new confirmation, including the whole of the personal estate in England and Scotland.

[S. C. 35 L. J. (P.) 167; 11 W. R. 772. Distinguished, *In the Goods of Ryde*, 1870, L. R. 2 P. & D. 86.]

William Hutcheson, a domiciled Scotchman, executed in Scotland a disposition and settlement, or will, of his whole estate, and died on the 13th of March, 1862.

On the 13th of January, 1863, the executor nominated in the will obtained a confirmation in the Commissary Court of Fife. The inventory stated the whole personal estate as amounting to £1444, and did not state that any part of it was in England. On its being subsequently ascertained that part of the funds which made up this total were invested in shares (valued at £100) in an English company, an "explanatory note" to the inventory was lodged, in which the amount **[166]** in Scotland and in England was correctly distinguished, as directed by the 21 & 22 Vict. c. 56, s. 9. On the 28th of January, the Commissary Court of Fife "allowed the foregoing explanatory note to be added to the inventory of the defunct's personal estate, and to be added and eiked to his testament as part and portion thereof, and ordained these presents to be granted in manner under written"; and then proceeded to grant confirmation of the executrix in common form, without further reference to the prior confirmation. On the same date the Commissary, by his Interlocutor, found that the deceased died domiciled in Scotland. On the two confirmations being presented to the Registrar of the Court of Probate for resealing, under sect. 12 of the statute above cited, he declined to affix the seal of the Court, on the ground that he had no power to seal more than one confirmation.

March 12.—Mr. Boyd Kinnear, for the executrix, moved the Court for an order on the Registrar to affix the seal of the Court to the confirmation. The case *In the Goods of Gordon*, 2 Swab. & Trist. 622, does not apply to this, as there the confirmation was prior to the passing of the statute; and both in that case and in the case of *In the Goods of Wingate*, 2 Swab. & Trist. 625, the eik or new confirmation was in the nature of an addition, and contained only the part of the estate situated in England which had been wholly omitted from the original inventory, and hence did not, as required by the statute, include both the estate in Scotland and that in England. Here the original inventory contained both the Scottish and English estates, and the second inventory contained in the "explanatory note" was in conformity with the statute. The new confirmation obtained upon it merely recited the first confirmation, and was otherwise independent and complete. Cur. adv. vult.

*Sir C. Cresswell*: I have considered this case, and I think **[167]** I ought not to direct the seal of the Court to be affixed to the eik or additional confirmation. If the Commissary Court in Scotland had granted a new confirmation, including the property in England, instead of an eik, the seal might have been affixed. The Scotch Court does not choose to grant a new confirmation including this property, and I do not choose to seal this grant until this has been done.

IN THE GOODS OF JOHN ALLNUTT (deceased). March 17 and May 5, 1863.—Codicil.—Erroneous Reference to a Previous Codicil.—The testator duly executed a will and five codicils. The first executed codicil, dated the 25th of March, 1848, commenced, "This is the second codicil to the will of A.," and ended, "In all other respects I confirm my said will, save only so far as the same is unrevoked by my first codicil thereto, and I do hereby confirm the said codicil." It did not appear that the testator had executed any codicil to his will prior to this one, described as the second codicil to his will; but his solicitor, after the date of the will, and before the date of this codicil, forwarded to him for his perusal a draft codicil, which, when he prepared this codicil, he erroneously concluded had been executed, and therefore described it as a second codicil. The draft codicil was, after the testator's death, found tied up in a parcel containing the will and five executed codicils.—Held, that the draft codicil was not sufficiently identified as the paper intended to be referred to by the deceased in his first executed codicil, and could not be admitted to probate.

[S. C. 33 L. J. (P.) 86; 9 Jur. (N. S.) 581.]

John Allnutt, late of Clapham, Surrey, died on the 12th of January, 1863, having duly executed a will and five codicils, and thereof appointing his wife Eleanora, his son John Allnutt, his son-in-law Henry Carr, and Robert Baxter, trustees and executors.

His will was dated on the 19th of May, 1841; the first codicil the 25th of March, 1848; the second, the 21st of January, 1854; the third and fourth, the 18th of **[168]** April, 1854; and the fifth, the 17th of May, 1859. The first codicil commenced as follows:—"This is the second codicil to the will of John Allnutt the elder, of Clapham Common, in the county of Surrey, Esquire. Whereas by my said will, after making provision for the payment and satisfaction of divers pecuniary and specific legacies, I gave, devised, and bequeathed unto my trustees and executors therein named, all the residue and remainder of my real and personal estate, upon trust," etc. He then gave directions as to certain tontines and policies of insurance, and concluded:—"In all other respects I confirm my said will, save only so far as the same is unrevoked by my first codicil thereto: and I do hereby confirm the said codicil." Mr. Woodgate, of Gray's Inn, solicitor, stated that he had acted for Mr. Allnutt for thirty-five years, and had prepared for him the will and five codicils; that in the month of March, 1848, by direction of the deceased, he prepared a draft of a codicil, and sent the deceased the copy of it now before the Court; that such codicil was never executed by the deceased, but the substance of it was embodied in another codicil, which was executed on the 21st of January, 1854; that in the month of March, 1848, by direction of the deceased, he prepared the codicil dated the 25th of March, 1848; that at the time this last-mentioned codicil was prepared, it was supposed that the draft codicil had been completed and executed by the deceased, and, therefore, the codicil dated the 25th of March, 1848, was therein stated to be a second codicil to the will, and that such a reference was a mistake; that he had never prepared, between the date of the will and the codicil of the 25th of March, 1848, or at any other time, any other codicil or testamentary document, except the above-mentioned draft codicil and the five codicils the deceased executed, and that he did not know of any other person having been employed for such purpose; that a few days before his death the deceased directed the deponent to take out of a table-drawer in the drawing-**[169]**-room a parcel; that, in that parcel, the copy draft codicil was tied up with the will and five codicils. No papers were found of a testamentary character to which the words in the codicil dated the 25th of March, 1848, could refer, except the above-mentioned draft codicil.

Dr. Swabey moved for probate of the will and five codicils, together with the draft codicil, as having being confirmed by the first executed codicil. [He cited *The Countess Zichy Ferraris* v. *The Marquis of Hertford* (3 Curt. 468; on app. 4 Moo. P. C. 339; 3 N. C. 150); *Ingoldby* v. *Ingoldby* (4 N. C. 493); *In the Goods of S. F. Phelps, deceased* (6 N. C. 695); and *Allen* v. *Maddock* (11 Moo. P. C. 427).]

*Sir C. Cresswell*: I must assume that the deceased knew the contents of the papers he executed, and that he intended in the codicil of the 25th of March, 1848, to confirm some earlier document. The question is, then, whether the draft codicil is sufficiently identified as the paper he so intended to confirm. I am not satisfied that it is, and I decline to include it in the probate.

DAY *v.* THOMPSON. IN THE GOODS OF JAMES ALEXANDER FRAMPTON (deceased). June 23 and 30, 1863.—Administration de bonis non.—Assignee of Creditor.—F. died in 1836, leaving a will and one codicil, and therein appointed three executors and residuary legatees in trust. Two renounced, and the third took probate, but died in 1853, intestate. All the residuary legatees named in the will and codicil then renounced except T., and on his being cited and not appearing, a grant de bonis non (will annexed) was made to K., as a creditor. He died in 1858, leaving personalty of F. unadministered. F. was indebted to his **[170]** co-trustees of the marriage-settlement of D. in respect of certain trust-moneys misappropriated by him, which had been the subject of certain proceedings in Chancery. By indenture of 28th of December, 1860, the executors of the surviving trustee agreed with the persons beneficially entitled to the trust-fund to transfer all their right and title to sue, etc., on receiving discharges from such person; and the Court, on T. being cited and not appearing, granted to the nominee of the assignees of the executors of the surviving trustee administration de bonis non, will annexed, of F., limited to revive and substantiate the proceedings in Chancery.

James Alexander Frampton, late of New Inn, and of Tavistock Square, St. Pancras, Middlesex, Esq., died on the 28th of September, 1836, having made his will with one codicil, and thereof appointed his brother William Hamwood Frampton, and two

others (who renounced) executors and residuary legatees in trust. W. H. Frampton took probate, but died December 3rd, 1853, intestate. All the residuary legatees named in the will and codicil then renounced except William Thompson, who was at the time abroad, and on William Thompson being cited and not appearing, administration (with the will annexed) de bonis non was granted to Henry Knight as a creditor. Henry Knight died May 10th, 1858, leaving personalty unadministered. In July, 1862, a citation issued from the Court of Probate against William Thompson, at the instance of Frederick Frampton Day, stated to be a creditor, calling upon Thompson to take administration (with the will annexed) de bonis non, or shew cause why it should not be granted to F. F. Day, as a creditor. An abstract of this citation was inserted in the papers under the direction of the registrar.

The deceased James Alexander Frampton was one of the trustees of three indentures of settlement of Mr. and Mrs. Day, dated the 3rd and 4th of November, 1816, and January 1st, 1817. The other trustees were James Alexander, who died in November, 1823; Matthew White, who died on March 11th, 1840; and John Benthall, the surviving trustee, **[171]** who died June 7th, 1852. John Benthall made a will, and appointed as executors Frances Benthall, John Benthall, and Francis Benthall, who took probate.

On the death of James Alexander Frampton, in 1836, it was found that he had misappropriated the trust-funds under the above settlements to the amount of £7100. Thereupon a suit in Chancery was instituted to administer his estate, entitled *Alexander* v. *Foster and others*, and John Benthall, on behalf of the then surviving trustees, proved the said debt of £7100 against the estate of J. A. Frampton. On July 30th, 1856, the Master to whom the cause stood referred certified that a sum of £7259, 4s. 8d. was due to the executors of John Benthall, the surviving trustee of certain indentures dated the 3rd and 4th of November, 1816, and January 1st, 1817, for moneys had and received by the said testator James Alexander Frampton, as one of the trustees of the said last-mentioned indentures, and applied by him to his own use, being the sum of £7100, with interest and costs. By an order made at the hearing of the said cause of *Alexander* v. *Foster and others* for further directions, dated the 24th of June, 1857, it was declared that the sum of £7100 was a specialty debt of the said James Alexander Frampton, not binding his heirs. By an indenture dated the 28th of December, 1860, made between and executed by all the parties interested, it was stated to have been ultimately agreed that the executors of John Benthall, the surviving trustee, should receive the dividends remaining to be received on a sum of £466, 13s. Three per Cent. Annuities, and should sell and dispose of the principal sum, and should pay the produce of the sale and the above-mentioned dividends, together with a further sum of £600, part of the personal estate of John Benthall, to Sarah Day, Frederick Frampton Day, and Everett Bardwell jointly, on behalf of themselves and the other children of Sarah Day, and should execute such power of attorney for enabling the said Sarah Day (widow), F. F. Day, and Everett Bardwell to **[172]** recover and receive the said principal sum of £7259, 4s. 8d., and to commence and carry out, at their own costs and charges, all such proceedings for enforcing payment thereof, or of any part thereof, as they should think proper, and that the said Sarah Day, F. F. Day, and Everett Bardwell should thereupon give a full discharge to the said executors in respect of the trust-funds under the indentures of settlement of Mrs. Day, and in respect of any breach of trust acquiesced in by John Benthall. It then proceeds to constitute Sarah Day, F. F. Day, and Everett Bardwell, attorneys for the said executors, for the purposes above-mentioned, and finally to release the said executors in respect of the trust property.

No proceedings could be taken to recover the debt against the estate of James Alexander Frampton in the Court of Chancery until a fresh representation was taken out to him.

The Court of Chancery having determined that the executors of the surviving trustee were creditors of the estate of the deceased on behalf of those beneficially interested in the trust-fund, Mrs Day and her children, and as by the indenture of the 28th of December, 1860, Mrs. Day, F. F. Day, and Everett Bardwell were constituted representatives of the trust-fund in the place of the executors of the surviving trustee, the Court was asked to look upon Mrs Day, F. F. Day, and E. Bardwell as creditors in equity, and grant administration to one of them as such.

Dr. Middleton moved the Court to grant administration to Everett Bardwell, as a

creditor, instead of Frederick Frampton Day (*Maidman* v. *All Other, etc.*, 1 Phill. 51). The Master in Chancery had found that a debt was due from the estate of Mr. Frampton to the trust fund of Mrs. Day, and that fund was now represented by Sarah Day, Frederick Frampton Day, and Everett Bardwell.

*Sir C. Cresswell*: It appears to me that this case falls **[173]** under the rule laid down in *Baynes* v. *Harrison* (Deane, 15), and *Depit and Chapot* v. *Delerieleuse* (2 Swab. & Trist. 131).

Dr. Middleton submitted that there was a material distinction. In those cases the debts had been sold absolutely after the death of the deceased; in this, the parties beneficially interested were the same at the time of death, at the date of the Master's report, and of the application,—the representatives of the trust fund only had been changed.

*Sir C. Cresswell*: John Benthall, quà trustee, was a creditor of the deceased's estate, and so were his executors. The new trustees under the original settlement, or the executors of the surviving trustee, may be entitled to administration as creditors, but not the mere attorneys of the latter.

Dr. Middleton then applied for a grant of administration to Everett Bardwell, as a nominee of Sarah Day, Frederick Frampton Day, and Everett Bardwell, limited to revive the suit and carry on the proceedings in Chancery.

*Sir C. Cresswell*: I will look into the papers with a view to this question.

Cur. adv. vult.

June 30.—*Sir C. Cresswell*: A grant limited to revive and substantiate proceedings in Chancery may be made in this case.

IN THE GOODS OF AMELIA FOZARD (deceased). June 30, 1863.—Probate.—Cessat Grant.—Amount of Bond.—Probate Act, 1857, s. 82.—F. appointed S. residuary legatee and executor, and in case of his decease leaving the directions of the will unperformed, substituted **[174]** P. as executor. In August, 1850, probate was granted to S. who died in December, 1862, leaving certain legatees of income for their lives under the will surviving. P. renounced probate, and the widow of S. renounced administration with the will annexed. One of the legatees for life was entitled to administration with the will annexed, technically a cessat grant, on which bond is usually required in double the amount[1] of the deceased's property at time of death.—The Court, under 82nd section of Probate Act, 1857, directed a bond to be taken in the same amount as would have been required if the grant had been one de bonis non.

[S. C. 32 L. J. (P.) 160; 9 Jur. 756; 8 L. T. 702; 12 W. R. 19.]

In this case Amelia Fozard, late of Penn, Buckinghamshire, spinster, deceased, died on the 10th of July, 1850, having duly executed her last will and testament dated the 11th of October, 1849, and appointed therein Thomas Staveley executor and residuary legatee, and in case of his decease during her lifetime, or after her decease leaving any of the directions contained in the said will unperformed, the testatrix appointed William Pulteney Scott to be such executor. Amongst other things, the testatrix, by her will, made the following bequest:—"I direct my executor to receive the interest on my two shares in the Medway Canal Company, and to pay the same unto Mrs. Mary Anne Jones during her life, and after her death unto her daughter, Mrs. Elizabeth Lloyd Phillips, during her life, and after the decease of the survivor of them, the said Mary Anne Jones and Elizabeth Lloyd Phillips, to sell the said two shares and divide the proceeds amongst all the daughters of Elizabeth Lloyd Phillips." On the 6th of August, 1850, probate was granted in the ordinary form to Thomas Staveley, and the property was sworn to be in value under £3000. Thomas Staveley died on the 8th of December, 1862, having made a will, and thereof appointed his wife Eliza Wowski Staveley sole executrix, who took probate of the same. On his death William Pulteney Scott, the substituted executor, renounced probate of the will of Amelia Fozard, and Mrs. Staveley, as representing the residuary **[175]** legatee, renounced administration with the will annexed. Mrs. Jones, as legatee for life of the two Medway Canal shares, applied for administration, with the will annexed, of the estate of the deceased Miss Fozard. The registrars considered that the grant she

[1] See Coote's Common Form Practice, p. 136, 4th edit.

applied for was a cessat grant, and that she must, according to the ordinary practice, give security to double the amount of the whole property, namely, £6000.

Dr. Spinks admitted that the grant applied for was a cessat grant, inasmuch as Mr. Staveley was only appointed executor for life, and could not transmit the office to his own executors; but he asked the Court to exercise its powers under 20 & 21 Vict. c. 77, s. 82, and allow security to be given to the amount of £600, being double the value of the two shares, the only property not distributed.

*Sir C. Cresswell* thought the safest arrangement would be to order the administratrix to give the same security as would have been required if the grant could have been taken as a grant of administration of the estate left unadministered by Thomas Staveley.

IN THE GOODS OF OUCHTERLONY (deceased). June 30, 1863.—Probate.—Embodying Papers referred to by Will.—A will made in November, 1861, contained a clause—"I make no specific bequest to my brother's children, etc. Upon this subject I refer my wife to my annulled will, dated the 11th of February, 1851." The annulled will contained no bequest to those children; in it the testator stated that in the present aspect of affairs there was every prospect that they would be left well provided for: but that if any reverse should overtake them, he trusted and felt sure that his wife would share her all with them. Upon motion for probate of the will of November, 1861,—Held, that the annulled will did not raise any implied trust in favour **[176]** of the said children, and that therefore it need not be embodied in the probate.

John Ouchterlony, a lieutenant-colonel in the Madras Engineers, died in the East Indies, on the 29th of April, 1863. After his death there were found in an envelope, in the possession of his widow, then residing in England, two testamentary papers: a will, dated the 11th of February, 1856, revoked by the deceased; and another unrevoked will, dated November 23rd, 1861.

By the will of 1861 the deceased devised and bequeathed all his property, real and personal, to or for the benefit of his wife and children, subject to some small pecuniary bequests, and to the payment of an annuity of £50 to his mother for her life, and after her decease to his sister, and appointed his wife, his brother James, and J. G. Johnston, his executors. The will contained the following clause:—"I make no specific bequest to my brother's children, because at the time of my writing this it is difficult to say whether or not my wife and children will inherit from me much more than a bare adequate support. Upon this subject I refer my dear wife to my annulled will, dated the 11th of February, 1856, feeling sure should any of them ever want, she will share her last crust with them." The cancelled will contained this clause:—"Under the present aspect of affairs, there is every prospect that my brother James will attain affluence, and that his family will be left well provided for: but, should any of those reverses which fortune sends to the most favoured overtake them, I trust and feel sure my wife will share her all with them and his. The same remark applies to my brother Thomas and his family; and I make no specific provision for these contingencies, both on account of their remoteness and because I feel sure my wife's heart will dictate what it needs not my solemn injunction to ensure. In the same spirit I have made no stipulation regarding any members of our own family who may need her aid, and who, I well know, will **[177]** not seek it in vain where their circumstances warrant her rendering it without prejudice to the interest of her children, which I solemnly but with perfect confidence entrust to her keeping."

Upon application in the registry for probate of the will of November 23, 1861, the question was raised whether the annulled will should not be incorporated in the probate, in consequence of the reference to it by the later will.

Dr. Spinks now moved the Court to direct that probate of the will of 1861 should be granted without incorporating in it the annulled will. [*Sir C. Cresswell*: Is there any authority shewing that such a vague clause as that in the annulled will would, in the Court of Chancery, be considered to have raised a trust in favour of the deceased's brothers and their families?] Courts of equity frequently hold that an implied or constructive trust is created by mere recommendatory or precatory words of a testator, but I know of no case which would be an authority for holding that such a trust was created in the present case.

*Sir C. Cresswell*: In the absence of such an authority, it seems to me that in the

present case no implied trust would be created. Probate of the will of 1861 may therefore be granted without embodying it in the annulled will.

Motion granted.

IN THE GOODS OF RIPPON (deceased). July 14, 1863.—Probate.—Testator, British Subject, dying abroad after 24 & 25 Vict. c. 114.—Will executed in England in Accordance with the Law of England.—Domicil.—When a British subject dies abroad after the passing of the 24 & 25 [178] Vict. c. 114, leaving a will executed in England in accordance with the law of England, upon motion for probate it is not necessary to consider whether he had or had not acquired a foreign domicil.

John Abraham Rippon, formerly of Dulwich, in the county of Surrey, late of the borough of Durban, Port Natal, in South Africa, died on the 28th of February, 1863, at Durban aforesaid.

On the 11th of October, 1861, the deceased at the same time duly executed two testamentary papers: the one (A.) conditional, i.e. to take effect only in case the vessel "Marrieta," in which he and his family were about to sail to Port Natal, should be wrecked, and himself and family lost; the other (B.) an absolute will, by which he gave all his property to his wife, and appointed her sole executrix. On the 12th of October, 1861, he and his family sailed for Port Natal, and arrived there in January, 1862.

Dr. Spinks now moved the Court to grant letters of administration, with the paper writing (B.) annexed, to R. O. Rippon, as the attorney of the deceased's widow, the sole executrix, for her use and benefit, until she should duly obtain probate of the said will. Paper B. is solely entitled to probate; paper A., although executed at the same time, being conditional, to take effect only upon an event which never happened.

*Sir C. Cresswell*: 24 & 25 Vict. c. 114, which was passed on the 6th of August, 1861, has rendered it unnecessary to consider whether or not the testator had changed his domicil.

[179] (Before *Sir Cresswell Cresswell.*)

MORTON *v.* THORPE AND OTHERS. IN THE GOODS OF ASHTON MORTON (deceased). July 16, 1863.—Will.—Administration.—Parties interested under Will cited and not appearing.—Practice.—Where parties interested under a testamentary paper have been cited to appear and propound it, and have not appeared and propounded it, the Court will grant administration as to an intestate, or probate of an earlier will, as the case may be, in common form:—Quære, ought not the will, in respect of which the parties are cited, to be filed in the registry, if in the possession or power of the party applying?

In this case the deceased, Ashton Morton, died on the 31st of January, 1863, a bachelor without a parent, and leaving John Morton and Martha Richardson, widow, his natural and lawful brother and sister, and his only next of kin and the only persons entitled in distribution in case he died intestate. After his death, a will bearing date the 22nd of November, 1862, was produced, wherein the said John Morton and John Thorpe were appointed executors; and various persons of the names of Brown, Thorpe, and Richardson, including the said Martha Richardson, were legatees.

The will had been filed in the registry, and a citation, founded on the affidavit of John Morton, had been served on the other executor and the legatees, calling upon them to cause an appearance to be entered for them in the Court, and to propound the said will in solemn form of law, or to show cause why the said will should not be declared null and invalid, and why letters of administration should not be granted to John Morton, as the brother and next of kin of the deceased, with intimation that in case of the parties cited not appearing and propounding the will, the Court or its [180] registrars would proceed in the premises, their absence notwithstanding.

Mr. Pritchard moved the Court accordingly.

*Sir C. Cresswell*: Did not Sir Herbert Jenner, in *The Goods of Watts* (deceased), 1 Curt. 594, refuse to set aside a will on the consent of parties interested, observing that no person's consent can make a will no will? You had better consider this point.

Mr. Pritchard renewed the motion. In the case referred to it does not appear that the parties interested under the will had been cited to propound it. In a later case, where that was done, Sir Herbert Jenner approved the course adopted, and granted probate of a will of earlier date, passing over one of later date: *Palmer and*

*Brown* v. *Dent and others*, 2 Rob. 284. Counsel also referred to certain unreported cases: *Boddicoate* v. *Gossip and others*, 15th Dec. 1849; *Hawker* v. *Hawke and others*, 19th March, 1850; *Westcott* v. *Langworthy*, 13th Nov. 1852, in support of the practice. There was also an affidavit of one of the attesting witnesses to the effect that he placed his signature to the will on the 1st of February, 1863, after the deceased was in fact dead.

*Sir C. Cresswell*: If you intend to rely on this affidavit, I should certainly require further information.

Mr. Pritchard: I rely on the cases cited, and submit that where the parties interested have been cited the Court need not have any information as to the validity or invalidity of the paper. Cur. adv. vult.

June 30.—*Sir C. Cresswell*: I have considered this matter, and think that there is a substantial distinction between citing **[181]** parties interested to appear and propound a will, and merely bringing in their consents to the will being passed over. As the parties cited in this case have not appeared, I think administration may go to the brother as prayed.

IN THE GOODS OF WILLIAM COLES (deceased). July 14, 1863.—Official Assignee of Creditor of Deceased.—Assignment of Debts to Purchaser.—24 & 25 Vict. c. 134, s. 137.—Assignment by such Purchaser.—Limited Grant to the Assignee of Official Assignee.—A., in 1813, assigned certain bills of exchange and negotiable instruments to B., who was, in 1833, adjudicated a bankrupt. In 1862, C. being his official assignee, assigned the sums remaining due and to become due on the said bills of exchange and the negotiable instruments to D. as purchaser, under the Bankruptcy Act, 1861, s. 137, and D. sold and assigned them to E.—The Court declined to make a grant of administration of the personal effects of A., limited to the aforesaid sums (the next of kin of A. having been cited and not appearing) to E.; but made the grant to D., as assignee of the official assignee.

[S. C. 9 Jur. (N. S.) 1080; 9 L. T. 519, and (nomine *Macnin* v. *Coles*) 33 L. J. (P.) 175. Applied, *In the Goods of Galbraith*, 1879, 3 L. R. Ir. 169.]

William Coles, late of Mincing Lane, in the City of London, merchant, died in February, 1835, intestate, leaving his widow (since deceased) and three children—Mr. William Coles, the Rev. George Coles, and Mrs. Hale—his only next of kin. No letters of administration of the personal estate and effects of the deceased had been taken out by any of his next of kin, or by any other person.

On the 20th of May, 1813, the following letter was handed by William Coles the intestate to Meir Macnin, of New Broad Street, in the City of London, merchant:—

"Meir Macnin, Esq.

"Sir,—You having this day accepted two bills of exchange, **[182]** the one for £4500 at twelve months' date, and the other for £900 at twenty-four months' date, both drawn by me upon you, I do hereby undertake to pay to you all and every sum and sums of money which shall have been received by me for or in respect of certain bills of exchange and other negotiable instruments, this day assigned to me, under your directions, by the late firm of J. and A. Anderson and Co., to enable you to provide for and take up your said acceptances on the same respectively becoming due; and in the event of my not having received or paid over to you a sum of money equal in amount to your said acceptances on their respectively becoming due, I do further undertake to pay unto you at the respective times aforesaid, out of my own proper moneys, a moiety or half of the deficiency of such amount, whatever the same may happen to be. I do further also agree and undertake that on the said acceptances being taken up and paid in manner aforesaid, that I will deliver up and assign over to you such of the several bills of exchange and other negotiable paper specified in the schedule of the said assignment by the late firm of John and Alexander Anderson and Co. to me, as shall be in their or my possession or custody, together with all benefit to be derived therefrom, on your releasing me from all claims and demands for or in respect of the same.—I am, Sir, your most obedient servant,

"WILLIAM COLES."

By virtue of an indenture made on the 20th of May, 1813, between Alexander Anderson, Alexander Wilson, and George Wilson of the first part, the said Meir Macnin of the second part, and the said William Coles (the intestate) of the third

part, the said intestate became entitled to several bills of exchange, promissory notes, and other negotiable paper, referred to in the above letter as assigned to him, and all right, title, and claim whatsoever, both legal and equitable in respect thereof, and all powers and remedies for the recovery of all [183] and every the matters aforesaid, in trust nevertheless upon the happening of certain events (which have all since happened) for the said Meir Macnin.

The bills of exchange mentioned in the letter of the 23rd of January, 1813, were duly paid by the said Meir Macnin at maturity respectively.

The said Meir Macnin was, in January, 1833, adjudicated bankrupt within the intent and meaning of the then law of bankruptcy, and Alexander Brymer Belcher (since deceased) and J. A. de Buck (also since deceased) were duly appointed the official and creditors' assignees, and Hatton Hamer Stansfield was subsequently duly appointed the official assignee, under the said bankruptcy, in the room of A. B. Belcher, deceased.

The said Hatton Hamer Stansfield, on the 13th of October, 1862, presented his petition to the Court of Bankruptcy, in London, whereby, after stating the bankruptcy of the said Meir Macnin, and his appointment as such assignee as aforesaid, and that there then remained some outstanding debts and other property due and belonging to the estate of the said bankrupt, which could not be collected and received without unreasonable expense and delay; and that the petitioner, as such assignee as aforesaid, had, subject to the approbation and direction of the said Court of Bankruptcy, contracted and agreed with Henry Grua to sell and assign to him such outstanding debts and other property at or for the price therein-mentioned, it was prayed that the said petitioner might be authorized to carry out the said contract, and to sell and to assign the said outstanding debts and other property, and also such of the books of the said bankrupt relating to his trade, dealing, and estate as were within the possession or power of the said petitioner accordingly.

On the 5th of October, 1862, the said petition came on to be heard before the said Court of Bankruptcy, and it was ordered that the petitioner, as such assignee as aforesaid, be [184] authorized to carry into execution the said contract, and to sell and assign the said outstanding debts and other property of the said bankrupt accordingly.

By an indenture, bearing date the 27th of October, 1862, and made in pursuance of the said agreement and under the authority of the said Court of Bankruptcy as aforesaid, the said Hatton Hamer Stansfield did sell, assign, and transfer unto the said Henry Grua, his executors, administrators, and assigns, all the outstanding debts and other property due and belonging to the estate of the said Meir Macnin, with full power and authority, but in the name of the said Henry Grua, to ask, demand, sue for, recover, receive, and give effectual receipts, releases, and discharges for the said outstanding debts and other property, and all right, title, interest, property, claim, and demand of him, the said Hatton Hamer Stansfield, into or upon the said outstanding debts and other property and premises thereby assigned or intended so to be unto the said Henry Grua, his executors, administrators, and assigns, to and for his and their own use and benefit absolutely.

By an indenture, bearing date the 20th of November last, and made between the said Henry Grua of the one part, and David Cohen Macnin of the other part, the said Henry Grua did assign, sell, and transfer unto the said David Cohen Macnin, his executors, administrators, and assigns, all the said outstanding debts and other property due and belonging to the estate of the said Meir Macnin, with full power and authority to ask, demand, sue for, recover, receive, and give effectual receipts, releases, and discharges for the same; to have, hold, receive, and take the said outstanding debts and other property and premises thereby assigned, or intended so to be, unto the said David Cohen Macnin, his executors, administrators, and assigns, to and for his and their own use and benefit absolutely.

There were still moneys due in respect of some of the said bills of exchange and other negotiable paper comprised in the [185] said indenture of assignment of the 20th of May, 1813, and there were also still in the hands of certain of the official assignees of the Court of Bankruptcy, or other proper officer of such Court entitled to the custody thereof, certain moneys, being dividends in respect of some of the said bills of exchange, promissory notes, and other negotiable paper, and which the legal personal representative of the said William Coles (the intestate) alone could lawfully

sue for, recover, receive, or give a sufficient discharge for respectively; but the said Messrs. William and George Coles, and Mrs. Hale, had not, nor had either or any of them, as such next of kin of the said intestate William Coles as aforesaid, any beneficial interest whatsoever in the matters hereinbefore referred to or any part thereof.

Dr. Twiss, Q.C., moved for a grant of letters of administration of the personal effects of William Coles, deceased, to be granted to David Cohen Macnin, limited to his right under the said indenture of assignment of the 20th of May, 1813, to the dividends and other money due or to become due or payable in respect of the said bills of exchange and other negotiable paper thereby assigned.

*Sir C. Cresswell*: There are two difficulties in the way of my making the grant. The children of William Coles have not been cited or filed consents to the motion.

Dr. Twiss: The children of the deceased take no interest in this property.

*Sir C. Cresswell*: The next difficulty that occurs to me is, can a person who has bought up a debt after the death of a party, thereby become entitled to a grant of administration of his effects? What is the practice?

Dr. Twiss: A party cannot by buying up a debt due from **[186]** the deceased entitle himself to a grant in the character of a creditor. But the official assignee is not clothed with the character of a mere creditor. The whole of the bankrupt's estate by Act of Parliament vested in him, he is enabled to act in all respects on behalf of the estate; in fact, he represents the bankrupt quoad his estate, and an assignment made by him should be treated as an assignment made by the deceased himself. (*Drew* v. *Long and others*, 1 Spinks, Eccl. & Ad. Reps. 400.)

*Sir C. Cresswell*: The case must stand over for the next of kin to be cited.

June 23rd.—The next of kin of the deceased having been cited and not appearing, the motion was now renewed.

Dr. Twiss: Meir Macnin was a creditor of William Coles the deceased. Macnin became bankrupt. His official assignee represents him as if he were alive. The official assignee has sold and assigned the estate of the bankrupt to Henry Grua, who has assigned it over to David Cohen Macnin, who is the only person now interested in the property for which this limited grant is required. He submitted the grant might be made to David Cohen Macnin.

*Sir C. Cresswell*: I have no authority to exercise a discretion in this matter. If I were to make the grant to David Cohen Macnin, the debts due to a bankrupt, after they have been assigned by the official assignee, might be sold twenty times over, and the twentieth assignee might come and ask for the grant. If I had a discretionary power in the matter, and in the exercise of it were to make such a grant, it appears to me that it would be a very inconvenient mode of administering the estate of deceased persons. I must reject the application.

**[187]** Dr. Twiss now moved the Court to decree a grant of administration, limited to the dividends and other money due or to become due and payable in respect of the bills of exchange and other negotiable paper assigned to Meir Macnin by the indenture of May 20th, 1813, to Mr. Henry Grua, the assignee of the official assignee of Meir Macnin's (the bankrupt) estate. The assignment of these debts was made to him under the authority of the Court of Bankruptcy, and by the 137th section of the Bankruptcy Act (1861), (24 & 25 Vict. c. 134), when the debts of a bankrupt have been assigned by the official assignee to a purchaser, such purchaser shall, by virtue of the assignment, have power to sue in his own name for the debts assigned to him, as effectually as the assignee himself. He submitted that the words of this section were sufficient to authorize the Court to make the grant prayed.

*Sir C. Cresswell* decreed the grant to Mr. Henry Grua as prayed.

MOSS AND OTHERS *v.* BARDSWELL (on opposed Motion). March 19 and April 25, 1860.—Will.—Executor.—Trustee.—Power to Appoint other Trustees.—B. made C. his executor and trustee, with power to appoint by deed or will other persons as co-trustees or succeeding trustees. B. died, C. did not take probate, but by will, referring to B.'s will, appointed E. and F. to be succeeding trustees in respect of B.'s will, after his (C.'s) death. F. proved C.'s will, and was called upon, as executor substituted according to the tenor, to take probate of B.'s will. —The Court held, that in the language of the two wills the distinction between

trustee and executor was so marked, that F. could not be called upon to take probate of B.'s will.

[S. C. 29 L. J. (P.) 117; 6 Jur. (N. S.) 589; 2 L. T. 300; 8 W. R. 503.

Distinguished, *In the Goods of Delacour*, 1874, Ir. R. 9 Eq. 86.]

Henry Davies (therein described as of New Park, in the **[188]** county of Tipperary), by his will, dated the 21st of June, 1856, devised and bequeathed all his property, real, freehold, or personal, to his brother William Davies, his heirs, executors, administrators, and assigns, upon certain trusts. And he authorised his brother "to appoint by deed or will, when as he shall see fit and proper, any other person or persons he shall think proper, to be a joint trustee with himself, if he shall think it necessary, or to be a succeeding trustee or trustees, for the purpose of this my will;" he also appointed his brother residuary devisee, and legatee, and sole executor. This testator died on 7th January 1857. William Davies never proved the will.

William Davies, by his will, dated 12th of August, 1857, devised and bequeathed all his real and personal estate to which he should be beneficially entitled at the time of his decease, or over which he had any power, appointment, or disposition, to Charles Hamilton and James Hamilton Bardswell, whom he also appointed trustees and executors of his will, upon certain trusts, etc. He further devised and bequeathed "unto the said C. H. and J. H. Bardswell, their executors, administrators, and assigns, all estates which at the time of my decease shall be vested in me upon any trust, or by way of mortgage, subject, etc. And whereas, by the will of my late brother Henry Davies, of New Park, in the county of Tipperary, whereof I am the sole trustee and executor, I am empowered to appoint by deed or will any other person or persons I shall think proper, to be a joint trustee with myself, or to be a succeeding trustee or trustees for the purpose of the said will; now I do hereby appoint the said Charles Hamilton and J. H. Bardswell to be succeeding trustees after my decease, for the purposes of the said will, and with all the power and authorities therein expressed and contained."

William Davies died on the 14th of August, 1857, and his will was proved in the Diocesan Court of Chester (sworn under **[189]** £1500) by Bardswell, Charles Hamilton having renounced probate thereof, in October of the same year.

The present application against Mr. Bardswell was made on behalf of a Liverpool banking firm, under the title of Moss and Co.

Prior to 1848, Henry and William Davies carried on business in Liverpool as the firm of Henry Davies and Co., and kept a banking account under the name of H. Davies and Co., with Messrs. Moss. In 1848, Henry Davies and Co. became bankrupt, and a large sum of money was then due from that firm to Messrs. Moss, and till a final dividend was declared, the banking account of Henry Davies was kept open in Messrs. Moss's books.

Messrs. Davies recommenced business after their bankruptcy under the same title, and opened an account with Messrs. Moss, which, for distinction's sake, was kept in the name of W. and H. Davies. It was supposed that in 1854, Henry Davies, as between the partners, retired from the firm; but his name continued to be used in the business till his death in January, 1857, and no notice of dissolution of partnership had been given to Messrs. Moss. In January, 1857, the balance due from Henry Davies and Co. to Messrs. Moss on the banking account was over £10,000, and various railway shares and other securities, belonging to the firm of H. Davies and Co., were held by Messrs. Moss as security. This balance was subsequently altered. At the date of this application, Messrs. Moss claimed a balance of more than £12,000, and stated that certain shares, to the value of about £6290, belonging to the estates of Henry and William Davies, remained in their hands, within the jurisdiction of the Court, subject to the account between themselves and the estates of Henry and William Davies. They also alleged that Henry Davies, at the time of his death, was possessed of other personal estate above the value of £5, within the jurisdiction of the Court, viz. a balance to his credit in the partnership books of Henry Davies **[190]** and Co. to upwards of £10,000. They further alleged that William Davies never proved his brother's will, but had possessed himself of his assets, or a portion thereof, and had assumed the duties of executor and trustee, and if alive would be compellable to take probate.

In pursuance of an order made in February, 1860, on motion, upon Mr. Bardswell,

who opposed the motion, but was condemned in the costs thereof, the original will of Henry Davies was now in the registry of the Court.

In default of a personal representative to Henry Davies, the plaintiffs, Messrs. Moss, were unable to take necessary proceedings in Chancery to obtain payment of the debt alleged to be due from the estate of Henry Davies, or to confirm their title to the securities in their hands by foreclosing the equity of redemption thereto against the representatives of the said Henry Davies.

Mr. W. D. Griffith moved the Court to order James Hamilton Bardswell to take probate of the will of Henry Davies, or to take out letters of administration to his estate and effects with the said will annexed. He contended that by taking probate of William Davies's will, the defendant had accepted all the trusts therein contained; that this, in conjunction with the terms of Henry Davies's will, would be sufficient to entitle him as substituted executor according to the tenor. He referred to Williams on Executors, 213-14, and cases there cited.

Dr. Phillimore, Q.C. (Mr. R. Pritchard with him), contrà.

The following authorities were cited:—Williams on Executors, part 1, book iii. ch. ii.; and part 1, book iv. ch. i. s. 2. *Grant* v. *Leslie*, 3 Phill. 116. *In the Goods of Lighton*, 1 Hagg. Ecc. 235. *In the Goods of Deichman*, 3 Curt. 123. *Jackson and Gill* v. *Paulet*, 2 Rob. 344. *The King* v. *Stone*, C. T. R. 395. *Brazier* v. *Hudson*, 8 Sim. 67.

Cur. adv. vult.

**[191]** *Sir C. Cresswell*: The question is, whether Bardswell was bound to take probate of the will of Henry Davies because he had proved the will of William Davies. Henry Davies made a will, appointing his brother William Davies, executor. It appeared also that he had made William Davies, and, I think, his father, trustees under the will for certain purposes, and he gave him power to appoint, by deed or will, substituted trustees to act with him or to succeed him. William Davies, by his will, appointed Bardswell as trustee to act under Henry Davies's will. Bardswell proved William Davies's will; thereupon it was contended that he had accepted the trusts of Henry Davies's will, and that those trusts were of such a character that he was to be treated as executor according to the tenor, and having accepted the trusts of the will, he was bound to prove it. In the first place, Henry Davies began his will by directing that his debts and funeral expenses should be paid; the trusts were not introduced till afterwards. He did not give all his property upon trust for certain purposes, and, amongst others, for the payment of his debts, but began by directing that his debts and funeral expenses should be paid as soon as possible. He then devised and bequeathed his realty and personalty to certain trustees, and then made William Davies executor. He therefore distinguished between the appointment of William Davies as trustee and his appointment as executor. If the will had been in another form, if he had introduced in the first instance the appointment of William Davies as executor, and had then gone on with the trusts, there would have been no pretence for saying that William Davies had anything to do as trustee with the payment of the debts, etc. There is no executor according to the tenor. If William Davies had proved the will, there was no power given to him to appoint another executor to act with him or in substitution, but it is supposed that such a power was given to him incidentally and by reference. But I think that as, if he had proved the will, he would have acquired no **[192]** power to appoint an executor, he could not do it by appointing an executor of his own will. I have not the will of William Davies before me, but the effect of it is that he appointed Hamilton and Bardswell trustees of Henry's will; he did not assume to appoint them to be executors, nor do I find that Bardswell has done any act as executor. He is not appointed executor, and has not acted as executor, and cannot be compelled to take probate. Bardswell had to pay the costs of his ineffectual opposition to the motion for the production of the will, and Moss must pay the costs of this ineffectual attempt to make him take probate of it.

IN THE GOODS OF M. A. E. J. STEWART (deceased). March 17, 1863.—Probate.—Incorporation of Unattested Paper.—The deceased duly executed a Will and two Codicils. The Will contained the following clause:—"I direct my executors to distribute . . . . all pictures, books, and other articles according to any list or lists signed by me." A paper was found, without any date, but which was executed before the second Codicil, headed "List referred to in my

Will and Codicils." By this paper a picture was given to a nephew; wearing apparel, one year's wages, and mourning to a servant; and directions to the executors as to the inscriptions on the tombstone. The second Codicil commenced:—"This is a Codicil to the last Will and testament, with other Codicils annexed, of me. . . . I hereby confirm my said last Will, with all the Codicils thereto duly signed by me."—Held, that the unattested paper was sufficiently identified and referred to in the Will, and having been signed before the execution of the Codicil, was entitled to be admitted to probate as a portion of the Will confirmed by the Codicil.

[S. C. 32 L. J. (P.) 94; 9 Jur. (N. S.) 417; 11 W. R. 540. Not followed, *In the Goods of Mathias*, ante, p. 100. Referred to, *In the Goods of Lady Truro*, 1866, L. R. 1 P. & D. 201. Discussed, *In the Goods of Smart* [1902] P. 242.]

Mrs. Mary Ann Elizabeth Jane Stewart, widow, formerly of No. 33, Upper Brunswick Place, Brighton Sussex, died at **[193]** Pau, in France, on the 6th of January, 1863, having made a will, dated the 24th of May, 1861; a codicil, dated the 23rd of September, 1861; and a second codicil, dated the 29th of November, 1862. She appointed the Rev. Thomas Graham Smyth and Charles Stewart, Esq., executors. By her will she gave (amongst other bequests) to her nephew, Thomas Bendyshe, the picture of her father in uniform, and her German and Italian books; and she directed her executors as follows:—"I direct my executors to distribute to the parties whose names may be inscribed upon the same, such packets as I may leave for that purpose; and also all pictures, books, and other articles according to any list or lists signed by me." Several packets were found so inscribed, but no application was made to the Court in reference to them. The only paper answering the description contained in the latter part of the above clause was in the handwriting of Mrs. Stewart, and signed by the deceased before the 29th of November, 1862. It was unattested, and was as follows:—"List referred to in my will and codicils. I give to my nephew, Thomas Bendyshe, barrister-at-law, my father's portrait in uniform. I desire that the following inscription may be placed on my tombstone:—viz. S. T. M. of Mary, widow of the late Captain William Stewart, of the Royal Artillery, and only daughter of Richard Bendyshe, Esq., of Barrington Hall, in the county of Cambridgeshire. 'Even as they that sleep in Jesus shall God bring with him.' The tomb to be like dear William's, in railing, etc. etc. I give to my maid, Eliza Matthews, all my common wearing apparel, except shawls, dresses, or other things. I also direct she may have a suit of mourning, and that her expenses may be paid to her own home, in case she shall desire to return to England; also that she may be paid a full year's wages over and above what may be due at the time of my death. All this in addition to the legacy of five pounds, provided she be in my service at the time of my decease.—**[194]** Mary Stewart. I desire to be buried in the same grave with my late husband, William Stewart, in the Cimetière de Montmartre, at Paris.—Mary Stewart." The instructions for this paper were also found in the handwriting of Mrs. Stewart, headed "Mem$^{m}$, Pau, February 2, 1862." The codicil, dated the 29th of November, 1862, commenced,—"This is codicil to the last will and testament, and with other codicils annexed, of me, Mary Ann E. J. Stewart, widow, now temporarily residing at Pau, France. I hereby confirm my said last will, with all the codicils thereto, duly signed by me, excepting as follows," etc. No other testamentary papers were found.

Dr. Middleton moved the Court to decree probate of the will and two codicils, together with the unattested list, as together containing the will of the deceased. The list was sufficiently identified by the will, and was in existence when the will was confirmed by the second codicil. [He cited *In the Goods of the Rev. George Hunt* (2 Robert. 622)[1].]

*Sir C. Cresswell*: The list hardly conformed to the description of it in the will, but I think the decision of Sir John Dodson's is sufficient to authorize me to grant probate of it as a portion of the will confirmed by the codicil of the 29th of November, 1862. But for that decision I should have had considerable doubts about granting the motion.

[1] But see a later case. *In the Goods of Lydia Mathias*, 3 Swab. & Tris. p. 100.

IN THE GOODS OF THE MARQUIS OF LANSDOWNE (deceased). May 12, 1863.—Embodying in Probate Documents referred to in Will.—Practice.—L. by his Will bequeathed certain leaseholds to trustees upon the **[195]** same trusts as declared in a certain indenture of settlement. With a slight exception, the whole of these leaseholds were included in the settlement, which was of great length. The Court granted probate without requiring the settlement to be embodied in it, upon an affidavit being filed describing and giving the date of the settlement.

[S. C. 32 L. J. (P.) 121; 9 L. T. 22; 11 W. R. 749. Referred to, *Quihampton* v. *Going*, 1876, 24 W. R. 917.]

The Marquis of Lansdowne died on the 31st of January, 1863, leaving a will, dated the 10th of June, 1862, and two codicils. The will, among other things, bequeathed certain leasehold property to trustees, upon the same trusts as were declared in and by an indenture of settlement dated the 18th of March, 1834.

This indenture had been enrolled in the Court of Chancery, and was of great length, the trusts alone taking up about 150 folios.

The only part of the leasehold property not included in the said indenture was part of the site of Lansdowne House.

Dr. Spinks moved for probate of the will and codicils, without embodying in the probate the indenture of settlement. The ordinary practice of the registry might require the settlement to be engrossed, but the Court may, according to circumstances, exercise a discretion in such matters.

*Sir C. Cresswell*: I will grant this application. The whole subject of embodying in a probate documents referred to in the will is difficult and embarrassing. It was discussed in *Sheldon* v. *Sheldon*, 1 Rob. 81, by Dr. Lushington, who there says that he, when at the bar, communicated privately on the subject with Sir J. Nicholl, who stated his opinion that the embodying documents in a probate should not be required when the expense would be great. Dr. Lushington also, in that case, points out the distinction between cases in which documents may, on the application of the parties, and those in which they must be set out in the probate. That **[196]** distinction seems to me to apply to the present case. If the Marquis of Lansdowne had merely directed that the leaseholds should be disposed of according to the trusts declared in the indenture, the leaseholds would have vested in the executors, who would have required a knowledge of those trusts in order to perform their duty, and it might, on that account, have been necessary that the trust-deed should be embodied in the probate; but he gives the leaseholds to trustees, and they must see the trusts duly executed. Therefore, for the reason given by Sir John Nicholl and that assigned by Dr. Lushington, I shall grant the application, on an affidavit being filed in the registry, giving the date and a description of the deed enrolled.

In *Sheldon* v. *Sheldon*, Dr. Lushington, in commenting upon the case in the House of Lords, points out that it was in the discretion of the House of Lords to have sent back the probate to be amended by engrossing in it a document referred to and not embodied in it, and that in the event of litigation it might be sometimes necessary to adopt that course. I do not see that this would be necessary if there were litigation in this case. Probate may go as prayed, upon the affidavit I have mentioned being filed.

IN THE GOODS OF MARY BUDD, widow (deceased). April 16, 1862.—Two Wills partially Inconsistent. — Probate. — Practice. — *Stoddart* v. *Grant and others*, 1 Macq.'s H. of Lords Cases, 169.—Where a testator executed two Wills partially consistent and partially inconsistent, by the first Will disposing of certain property over **[197]** which she had a power of appointment, bequeathing certain legacies and the residue, and appointing W. H. and J. H. executors; and by the second Will, which contained no revocatory clause, bequeathing certain specific legacies, disposing of the residue, and appointing the said J. H. and two other persons executors: The Court granted probate to the said J. H. of the two instruments, so far as they were not inconsistent, reserving power to W. H. and the two other executors appointed in the second Will to come in and take probate.

Mary Budd, late of Calne, in the county of Wiltshire, died on the 25th of December, 1861. Under the will of John Tuckey (her father) she had a special

power of appointment, by will or deed (in the events which have happened), over the sum of £2000. By deed-poll dated the 22nd of March, 1859, she made an absolute appointment of one moiety of the above £2000. By a will dated the 13th of April, 1860, she made an absolute appointment of the remaining moiety of the above £2000 to her sister, who is still living, Mrs. Jane Hodgson, if she should survive her. This will also contained several specific legacies and a disposition of the residue of the estate, and she appointed "William Hodgson and John Henderson executors of this her will." The deceased subsequently executed another will, dated the 10th day of June, 1861, also containing several specific bequests and a disposition of the residue of her estate, and "she thereby appointed Richard Tuckey, John Henderson, and Broome Pinniger, executors of this her will." This will commenced,—"This is the last will and testament of me, Mary Budd;" but it contained no reference to the former will or to the power of appointment given her by her father's will, or any clause expressly revocatory of former wills or revocatory of the appointment of executors contained in her former will.

Mr. Pritchard moved the Court, on behalf of Mr. John Henderson, for probate of so much of the will of the 13th of April, 1860, as related to the exercise of the power of ap-[198]-pointment therein referred to, and of the will of the 10th of June, 1861, to be granted to Mr. John Henderson, as one of the executors. They were two partially inconsistent instruments. It had been decided by several cases that a subsequent will inconsistent with the provisions of a former will, though it contained no express revocatory clause, would revoke such former will. (*Helyar* v. *Helyar*, 1 Lee, 472; *Plenty* v. *West*, 1 Robert. 264; *Cutto* v. *Gilbert*, 9 Moo. P. C. C. 131; *Hughes* v. *Turner*, 4 Hagg. 52.) It was for the Court to decide whether the last will was or was not revocatory. (*Brenchley* v. *Lynn*, 2 Robert. 441.) The two documents were only partially inconsistent; but in so far as they were consistent, the Court, he submitted, should grant probate of them as together containing the last will of the deceased. (*Stoddart* v. *Grant and others*, 1 Macqueen's H. of Lords' Cases, 169, 170.)

*Sir C. Cresswell*: I do not see any difficulty regarding probate of both on the terms asked.

Dr. Spinks, for Mr. Tuckey and Pinniger, asked for probate of the last will only. William Hodgson, who was named executor in the first will, was not named an executor in the second will. From this it might be inferred that the deceased did not intend the first will to operate. The omission to name him an executor in the second will was at least an implied revocation of his appointment.

*Sir C. Cresswell*: I think I ought to grant probate of the two instruments to Mr. John Henderson, as prayed, with power reserved to the three other executors to come in and take probate.

[199] IN THE GOODS OF HIS LATE MAJESTY KING GEORGE III. November 18, 1862.—Sovereign's Will.—Jurisdiction.—The Court of Probate has no authority to inquire into the validity or invalidity of the Will of a Sovereign of this realm.

In the year 1822 an application was made to the Prerogative Court of Canterbury, on behalf of a person who styled herself Her Highness Olive, the natural and lawful daughter of his Royal Highness Henry Frederick, the then late Duke of Cumberland, deceased, whilst living, the natural and lawful brother of his late Majesty King George III., for permission to cite Iltid Nicholl, Esq., the then King's Proctor, for and on behalf of his late Majesty King George IV., as heir and successor of his late Majesty King George III., to see the last will and testament or testamentary schedule of his Majesty King George III., propounded and proved in solemn form of law. Sir J. Nicholl, the then Judge of the Prerogative Court, rejected the motion, on the ground that he had no jurisdiction to issue such a citation. (1 Add. 255.) The document which it was intended to propound was in these terms:—

"GEORGE R. "St. James's.

"In case of our royal demise, we give and bequeath to Olive, our brother of Cumberland's daughter, the sum of £15,000, commanding our heir and successor to pay the same privately to our said niece for her use, as a recompense for the misfortunes she may have known through her father.

"June 2, 1774.

"Witness, J. DUNNING. "CHATHAM. WARWICK."

Mrs. Olive Serres, widow, the person above mentioned as Princess of Cumberland,

died on the 21st of November, 1834, having made her will, dated the 5th of July, 1834, and therein appointed her daughter, Lavinia Jeanette Horton Ryves, widow, one of her executors.

**[200]** Mr. Gibbons, on behalf of Mrs. Ryves, now asked for permission to cite Arthur Richard, Duke of Wellington, as personal representative of the late Arthur, Duke of Wellington, whilst living the surviving executor of his late Majesty King George IV., the heir-at-law of his late Majesty King George III., and also her Majesty's Attorney-General, as representative of her present Majesty, the heir-general of his late Majesty King George IV.

*Sir C. Cresswell*: The present Duke of Wellington is in no way the representative of King George IV., inasmuch as he is not executor, but administrator only (the will being annexed to his administration) of his late father.

Mr. Gibbons said he would limit the motion to citing her Majesty's Attorney-General.

*Sir C. Cresswell*: This question was decided by Sir J. Nicholl in 1822, and I am in no way inclined to disturb his decision. I consider I have no jurisdiction in the matter. I reject the motion.

GWILLIM AND ANOTHER *v.* GWILLIM AND OTHERS (COLLINS AND OTHERS cited to see proceedings). November 4, 1859.—Will.—Acknowledgment.—Memory of Attesting Witnesses Defective.—Due Execution Presumed.—Where the attesting witnesses to a Will duly executed on the face of it did not recollect having seen the testator's signature to the Will when they subscribed their names as witnesses, the Court held that it was at liberty to judge from the circumstances of the case, whether it was probable that the testator's name was on the Will or not at **[201]** the time of the attestation, and being of opinion that it was, pronounced for the Will.

[S. C. 29 L. J. (P.) 31. Distinguished, *Croft* v. *Croft*, 1865, 4 Sw. & Tr. 10. Followed, *In the Goods of Huckvale*, 1867, L. R. 1 P. & D. 378; *Beckett* v. *Howe*, 1869, L. R. 2 P. & D. 1; *In the Goods of Janaway*, 1874, 44 L. J. (P.) 6. Referred to, *Olver* v. *Johns*, 1869, 39 L. J. (P.) 7; *Pearson* v. *Pearson*, 1874, L. R. 2 P. & D. 453. Discussed, *In the Goods of Gunstan*; *Blake* v. *Blake*, 1882, 7 P. D. 102. Adopted, *Wright* v. *Sanderson*, 1884, 9 P. D. 153.]

In this case, the will of the Rev. John Gwillim, who died on the 16th of May, 1859, was propounded by the plaintiffs as the executors named therein; and its validity was contested by the defendants, as the persons entitled in distribution to his effects in the event of his having died intestate, on the ground that it was not executed according to the provisions of 1 Vict. c. 26.

Elizabeth Collins, who, with others, was cited to see proceedings, also contested its validity on the same ground.

The cause was heard before Sir C. Cresswell. The will was written on the first two sides of a sheet of letter-paper, and was headed, "October 6, 1853." On the top of the third side was written,—

"1856
"Mch. 31 My Will and Testament.
"Brange
"Mch. 31, 1856
"JOHN GWILLIM.
"Witnesses
"E. R. GWILLIM
"HARRIET GWILLIM."

On the fourth side of the sheet was written,—

"Will, 1857."

The evidence was as follows:—

*Harriet Gwillim*: "I am the widow of a brother of the deceased. My sister, E. R. Gwillim, the widow of another of his brothers, was, in March, 1856, living at 'The Brange,' near Sedbury, and I was on a visit to her. In that month the deceased came on a visit there. His visit continued a fortnight. One evening during his visit he produced a paper to myself and Mrs. E. R. Gwillim. We were then in the breakfast room. No one else but we three were present. He came into the room, and requested us to sign his will. I don't **[202]** remember whether this was before or after he

produced the paper; I know nothing that was done, except our signing it and his leaving the room afterwards. I signed the paper. Elizabeth signed first. (Will produced.) I see my signature there. That was the paper I then signed: I and Elizabeth both signed it at the same time, whilst deceased was in the room. After we had signed, he left immediately. He took the paper in his hand. The interview lasted about ten minutes. I didn't see whether deceased wrote the word will at the time. I never witnessed a will before. After we had signed the document, the deceased made no observation to us. The will was not signed by the deceased in my presence."

Cross-examined: "The will was not folded down."

*By the Court*: "I don't recollect noticing any writing on the same side of the will as that I signed. I don't recollect the day of the month. I think it was in March, 1856. I signed my name in that part because it was under my sister's."

*Elizabeth R. Gwillim*: "In March, 1856, the deceased asked me to sign a paper. The paper was then on the table. I did not see him put it on the table. I was by the window, and the table was by the fire. He said nothing about the paper before he asked me to sign it. I had not noticed the paper before he asked me to put my name to it. I saw it for the first time when I sat down to sign it. An inkstand, which usually stood on a cheffonier in another part of the room, was on the table. I did not sign my name under anything else. The deceased told me where to write my name. I believe the will was folded as it is now. (The first sheet, on which the will was written, was folded back.) I cannot recollect if the word 'witnesses' was there when I signed my name. I don't know whether 'John Gwillim' was there when I signed. I cannot say it was not. I did not know what it was. I did not ask. He was a close man. I can't say if the inkstand was there when he came in."

**[203]** Mr. Manisty, Q.C. (with him Dr. Tristram and Mr. Pritchard), for the defendants, contended that as the deceased did not sign in the presence of the witnesses, in order to make out that there was an acknowledgment in their presence, it should appear that his signature was on the will when the witnesses signed; but that there was nothing on the face of the paper, nor any facts which would lead to such a presumption. (*Shaw* v. *Neville*, 1 Jur. N. S. 408; *Ilott* v. *Genge*, 4 Moo. P. C 265; and *Blake* v. *Knight*, 2 Notes of Cases, 337.)

Dr. Phillimore, Q.C., argued on the same side for the intervener.

Dr. Deane, Q.C. (with him Mr. Hawkins and Dr. Wambey), submitted that the reasonable inference from the evidence was, that the testator must have known that it was requisite that he should first sign, and therefore that he did so. He knew two witnesses were requisite, produced a paper, correctly dated, to them, asked them to sign his will, and told them where to sign; that if the witnesses had been dead, the presumption would have been omnia rite esse acta; and that, as they were unable to say whether or not the deceased's signature was there,—their memories as to that being merely blank,—they might be considered as dead. Cur. adv. vult.

November 11. *Sir C. Cresswell*: This case stood over in order that I might have an opportunity of looking over the case of *Lloyd and Hart* v. *Roberts* (since reported; see Moo. P. C. C. 158), decided by the Judicial Committee. Mr. Moore has been kind enough to furnish me not only with the printed papers in it, but also with notes of the judgment of Dr. Lushington. The question in the present case is, as to the due execution of the will of the Rev. John Gwillim. The **[204]** will appears, on the face of it, to have been regularly executed. It is rather a curious document. Part of it seems to have been written at one time and part at another. On the third sheet is written,—"1856—Mch. 31.—My last Will and Testament"; then underneath that, "Brange—Mch. 31, 1856—John Gwillim"; and at one side of it the names of the two attesting witnesses, "Elizabeth R. Gwillim" and "Harriet Gwillim." These are two old ladies, who are related by marriage to the Rev. John Gwillim, the testator, being the widows of his two brothers. They state that about the time when the will purports to have been executed, they were altogether at a house called Brange, belonging to Mrs. E. Gwillim; that the alleged testator one morning came into the room where they were sitting, and asked them to witness his will. They state that they did accordingly write their names as he told them, but neither of them recollected seeing his name on the paper at the time. They did not deny that it was there, but they say they do not recollect seeing it there One of them, Harriet, states that when he asked them to witness the will, he was at a table near the fire, and that

when she looked at the table the will was on it, and also an inkstand, which generally stood on a cheffonier in another part of the room. If the attesting witnesses to a will are dead, the presumption is that everything has been rightly done. But these ladies, who are the witnesses to this will, not being dead, I will not say that everything must be assumed not to have been rightly done that they do not remember to have seen. The objection to the execution was, that there seemed to have been an imperfect acknowledgment of the signature. If it were necessary to have direct evidence that the name of the testator was on the will, when he acknowledged it by asking them to witness his will, the proof of the execution would fail; but that certainly is not necessary, for the contrary was decided in *Cooper* v. *Bockett*, 4 Moo. P. C. C. 419. The other case in the Judicial Committee to which I **[205]** have alluded, went a great deal further, because there the only surviving attesting witness denied the existence of a will at the time of the attestation. In that case, *Lloyd and Hart* v. *Roberts*, one of the two attesting witnesses was dead; there was an imperfect attestation clause, and the other attesting witness was examined. He stated, at first, that he was asked by the testator to witness his will, but afterwards, on being cross-examined as to whether the testator himself asked him, he said that a female servant of the testator had come and said to him that the testator wanted him to witness the will. He further stated that on entering the room he saw a paper, and on that paper he saw the name of the testator in the testator's handwriting, so far proving affirmatively the existence of the signature; but he went on to state that the attestation was not there, and, further, that nothing whatever was written above the testator's name. The will, a very short one, was, in fact, written above the testator's name, and therefore the witness denied the existence of the will at the time when the signatures were attached to it. But from the whole circumstances of the case, the Judicial Committee were perfectly satisfied that the will was there at the time, and that it was probably duly executed.

That case goes a good deal further than this. I am, therefore, at liberty to judge, from the circumstances of this case, whether the name of the testator was on the will at the time of the attestation or not. It is hardly likely that this testator, who knew that there must be two witnesses to the will, did not also know that he must sign it before they did, and either sign it or acknowledge it in their presence. Then if I look at the position of the words, I find at the top of the third page, "My will and testament, 1856, March 31st." Under that comes "Brange, March 31st, 1856," that being the time and place at which the old ladies say they were asked to sign the will. Under that comes "John Gwillim," and then the word "witness," a little below on the left-hand side, **[206]** where one would expect to find it. I cannot, therefore, but think that the name of the testator was written at that time, and that by asking those old ladies to witness his will, he did acknowledge his signature.

Mr. Manisty applied for costs of the opposition out of the estate.

*Sir C. Cresswell* allowed the costs of all the parties to be paid out of the estate.

**[207]** LAWRENCE *v.* LAWRENCE. February 24, 1863.—Dissolution of Marriage.—Order as to Settled Property.—Notice of Application.—After a decree nisi for dissolution of marriage the petitioner filed a petition praying for an order to vary a marriage-settlement. Before the decree was made absolute, the respondent was served abroad with a copy of the petition, and with a notice that after the decree was made absolute, the Court would be moved to make the order as to the settled property. The respondent had not appeared at any stage of the proceedings:—Held, that the Court had power to vary the marriage-settlement in the absence of the respondent.

This was the wife's petition for dissolution of marriage, on the ground of the husband's adultery and desertion. The respondent did not appear. On the 11th of June, 1862, the Judge Ordinary made a decree nisi, which was made absolute on the 27th of January, 1863. After the decree nisi had been made, the petitioner filed a petition praying for an order as to settled property. A copy of this petition, before the decree was made absolute, was served upon the respondent in **[208]** New Zealand, notice being at the same time given to him that after the decree had been made absolute the present application would be made.

Dr. Wambey (Dr. Deane, Q.C., and Mr. Browning with him) now moved, under the 5th section of 22 & 33 Vict. c. 61, to make such order.

*The Judge Ordinary*: It appears that not only notice of the intended application

was given to the respondent, but that a copy of the petition praying for an order as to the settled property, was also served on him. I think that is sufficient to enable me to entertain the application in the absence of the respondent. If a petition had not been filed, I think that notice of the petitioner's intention to apply to the Court would hardly have been sufficient. His Lordship then made an order as to the application of the settled property.

DART *v.* DART. March 24, 1863.—Judicial Separation by Reason of Wife's Cruelty. Provision for Wife.—The Court has no jurisdiction to order that a husband who obtains a decree of judicial separation by reason of his wife's cruelty, should make any provision for her maintenance.

[S. C. 32 L. J. (Mat.) 125; 9 Jur. (N. S.) 474; 11 W. R. 551.
Overruled, *Prichard* v. *Prichard*, p. 523, post.]

This was the husband's petition for judicial separation on the ground of cruelty. The respondent denied the cruelty, pleaded provocation, and a counter-charge of cruelty. The issues joined on these pleas were tried by a common jury, who found a verdict for the petitioner. The case had been adjourned for formal proof of the marriage.

**[209]** Dr. Wambey now tendered the requisite proof, and asked for decree of judicial separation.

Mr. G. C. Clarkson, for the respondent, asked the Court not to pronounce the decree except on condition that the petitioner should make some provision for the respondent. In *White* v. *White*, 1 Swab. & Tris. 591, the Court held that where a judicial separation is decreed on the ground of the cruelty of the wife, she is not entitled to permanent alimony. I do not ask for alimony, but submit that the Court has a discretionary power to grant the decree of judicial separation, and that under the circumstances it would be reasonable to make it only on condition of some provision being made for the wife. The wording of the 16th section of the Divorce Act does not make it imperative on the Court to make a decree: "a sentence of judicial separation may be obtained either by husband or wife." I must admit that there is no precedent to shew that the Ecclesiastical Court ever granted alimony in such a case; but there is nothing to shew that they would have refused to do so. If the Court has the power, it is a reasonable case for its exercise. The wife brought her husband some property, and if no provision is made for her, she will be thrown on the parish.

*The Judge Ordinary*: I think I have no jurisdiction to grant alimony to a wife who is separated from her husband on the ground of her cruelty. I should not have been sorry to have found that I had jurisdiction, but I have not, and I do not agree with the maxim, boni judicis est ampliare jurisdictionem. I therefore decree a judicial separation, and make no order as to alimony.

**[210]** SUTHERLAND (falsely called CROMIE) *v.* CROMIE. March 24, 1863.—Entitling Affidavits.—Practice.—Affidavits in a cause must be entitled strictly as the cause itself is entitled.

[S. C. 32 L. J. (Mat.) 125; 9 L. T. 23.]

This was the woman's petition for a decree of nullity of marriage. The respondent was served with the citation and copy petition in North America; but the affidavit of service was entitled *Sutherland* v. *Cromie*.

Dr. Swabey, on moving for directions as to mode of trial, contended that the variance between the title of the affidavit and that of the cause, in consequence of the omission in the former of the words "falsely called Cromie," was immaterial, as being only a descriptive addition.

*The Judge Ordinary* held the variance to be material, and rejected the affidavit.

SPILSBURY *v.* SPILSBURY. March 24, 1863.—Pleading.—Amendment.—Re-service.—Practice.—Adultery as the ground of a petition should be distinctly alleged. It is not sufficient that the petition alleges information and belief of the petitioner that the respondent has committed adultery.—When leave to amend such a petition is granted, where there has been no appearance, it must be re-served.

[S. C. 32 L. J. (Mat.) 126; 9 L. T. 23.]

This was the husband's petition for dissolution of marriage by reason of the wife's adultery. The petition contained no **[211]** direct averment of adultery, but alleged

that the petitioner was informed, and believed, that the respondent had committed adultery. The respondent had not appeared.

Dr. Spinks, for the petitioner, moved to amend the petition by charging adultery in distinct terms.

*The Judge Ordinary*: The petition may be amended, but it must be re-served as amended.

SPERING *v.* SPERING. April 21, 1863.—Suit for Restitution.—Agreement to live separate.—An agreement between husband and wife to live separate is no bar to a suit for restitution of conjugal rights.

[S. C. 32 L. J. (Mat.) 116; 9 L. T. 24; 11 W. R. 810.]

This was the wife's petition for a decree of restitution of conjugal rights. The husband's answer alleged, among other matters, that he and his wife had agreed to live separate, and that he should make the wife an allowance; that in accordance with such agreement they had for several years lived separate, and that the allowance had been duly paid.

Demurrer.

Dr. Spinks: An agreement to live separate is no answer to a suit for restitution of conjugal rights. [*The Judge Ordinary*: Has not a great authority held that it is?] *Hunt* v. *Hunt*, 31 L. J. N. S. Prob. & Mat. 172, in which the present Lord Chancellor restrained by injunction the petition in a suit for restitution from proceeding here, differs from the present case, which is a bare agreement between husband and wife to live separate. In *Hunt* v. *Hunt* there **[212]** was a formal separation deed, and the husband covenanted with trustees that he should not compel his wife to live with him.

Dr. Swabey, for the respondent, said that, as he understood the L. C.'s judgment, the present answer could not be sustained. In *Hunt* v. *Hunt*, though he restrained the individual, the L. C. admitted that even a formal separation deed was, in the Matrimonial Court, no answer to a suit for restitution.

*The Judge Ordinary*: Then there will be judgment for the petitioner on the demurrer.

STONE *v.* STONE AND APPLETON. April 21, 1863.—Practice.—Notice of Application for New Trial.—Decree Nisi.—When the petitioner in a suit for dissolution has obtained the verdict of a jury, it is no ground for refusing to make a decree nisi that notice of an intended application for a new trial has been given.

This was the husband's petition for dissolution of marriage, on the ground of the wife's adultery, and for damages. The respondent denied the charge. The co-respondent did not appear.

The issue was tried before the Judge Ordinary by a special jury, who, on the 28th of March, 1863, found that the respondent had committed adultery with the co-respondent, and assessed the damages at £2000.

The Queen's Advocate (Mr. H. Lopes with him) now moved for a decree nisi.

**[213]** Mr. R. Searle, for the respondent: Notice has been given that the respondent intends to apply for a new trial. Until that application has been disposed of, the decree nisi should not be pronounced. In *Lewis* v. *Lewis*, 2 Sw. & Tr. 394, the Court said that it doubted whether, after a decree nisi had been pronounced, it had power to dismiss the petition upon the application of the parties. If in this case a new trial should be granted, and the respondent should obtain a verdict, the decree nisi on the present verdict would still remain, and might cause embarrassment.

*The Judge Ordinary*: I think that in such a case the decree nisi would occasion no difficulty, as it would be done away with altogether. I pronounce a decree nisi, and condemn the co-respondent in costs.

BAKER *v.* BAKER. March 18, 1863.—Evidence.—Cross-examination of Petitioner as to matters not in Issue.—Evidence in Contradiction.—A respondent who, in his answer, simply denies the cruelty charged in a petition, may cross-examine the petitioner, if called, as to her general conduct, for the purpose of impeaching her credit, but her answer as to any matters not bearing upon the issue cannot be contradicted.

[S. C. 32 L. J. (Mat.) 145; 9 L. T. 117; 11 W. R. 502.]

This was a suit by a wife for dissolution of marriage on the ground of adultery, coupled with cruelty and desertion.

The respondent denied the cruelty and desertion, and alleged that the petitioner had been guilty of adultery.

Issue having been joined, the cause came on now for trial, before the Judge Ordinary, by a jury.

**[214]** The Queen's Advocate (Sir R. Phillimore, Q.C.) and Mr. R. Pritchard for the petitioner.

Dr. Spinks, Mr. Sleigh, and Mr. Searle for the respondent.

Dr. Spinks, in cross-examining the petitioner, who was examined in support of the charge of cruelty, asked her if she had ever been guilty of violence towards the respondent.

The Queen's Advocate objected. The question is inadmissible, as the respondent has not recriminated cruelty or provocation.

Dr. Spinks: If the petitioner should admit that her conduct has been as violent as that of the respondent, and has caused his violence, the plea denying the cruelty would be proved. If she denies that she has been violent, and I can shew that she has, her credit will be impeached.

*The Judge Ordinary*: The petitioner may be cross-examined as to matters not in issue for the purpose of testing her credibility, but her answers to such questions will be conclusive, and you cannot call witnesses to contradict her.

The petitioner was then cross-examined as to transactions which were not charged in the petition. The Court refused to allow her statements with reference to them to be contradicted.

NICHOLSON *v.* NICHOLSON AND RATCLIFFE. June 2, 1863.—Dissolution of Marriage. —Wife's Costs.—New Trial on Wife's Application.—Husband to pay Costs on both sides.—Alimony pendente lite.—Where a new trial is granted on the application of the wife, the Court **[215]** cannot impose upon her the terms of payment of costs, if she has no means, but the husband must pay the costs of both parties. In such case, alimony pendente lite continues without any fresh order.

This was the husband's petition for dissolution of marriage.

The co-respondent did not appear.

The respondent appeared and denied the adultery, and also charged the petitioner with cruelty.

On the 12th of March these issues were tried by a jury, who found that the respondent had been guilty of adultery, and that the petitioner had been guilty of cruelty.

*The Judge Ordinary*, after taking time to consider, on the 24th of March granted the decree nisi. He said that it appeared that the respondent, with the assistance of others, had plundered the petitioner to a considerable extent. The petitioner's violence had been caused by his wife's misconduct, and had not led to her adultery; he was therefore entitled to a decree.

Mr. Littler (Mr. C. Russell with him), on behalf of the respondent, obtained a rule nisi for a new trial, upon affidavits, against which

The Queen's Advocate (Sir R. Phillimore) and Mr. Digby shewed cause.

*The Judge Ordinary*, after taking time to consider, now made the rule for a new trial absolute.

Mr. Littler: Will there be a new trial also as to the cruelty?

*The Judge Ordinary*: Yes; I was much dissatisfied with the verdict upon that issue.

Mr. Littler: Will it be necessary to get another order for alimony? Alimony pendente lite has been allotted.

**[216]** *The Judge Ordinary*: No. The order for payment of alimony pendente lite will still remain in force.

The Queen's Advocate: Will the new trial be granted on the terms of payment of costs?

*The Judge Ordinary*: I cannot make the wife pay the costs of the first trial; the husband must pay the costs of both parties. The husband's liabilty for the wife's costs is a subject which has caused me much embarrassment and anxiety; but it would be a mere mockery to grant a new trial upon the terms of payment of costs by a wife who has no means.

The Queen's Advocate: Will the husband be liable for costs to a greater amount than that for which he has given security?

*The Judge Ordinary*: At present he will not; but hereafter an application that he give security for a further amount may be made.

SMITH *v.* SMITH. July 7, 1863.—Practice.—Respondent cited by Advertisement.—Amendment of Petition.—Advertising amended Petition.—Where a respondent is cited by advertisement, and leave to amend the petition is afterwards granted, the amended petition need not be advertised.

[S. C. 32 L. J. (Mat.) 145; 9 L. T. 118.]

This was a suit, by a husband, for dissolution of marriage. Personal service on the respondent was dispensed with, and the petitioner had obtained leave to proceed without making **[217]** a co-respondent. The respondent had been cited by advertisement, but had not appeared. The petition was heard by the Judge Ordinary in Hilary Term, 1863, but the hearing was adjourned for further evidence as to the adultery.

Mr. Searle, on behalf of the petitioner, moved for leave to amend the petition by inserting charges of adultery which had come to the knowledge of the petitioner since the petition had been filed.

*The Judge Ordinary* granted the motion.

Mr. Searle: I presume it will not be necessary to serve the petition or advertise it.

*The Judge Ordinary*: You cannot serve it, as you cannot find the respondent. I think it is not necessary to advertise the amended petition, inasmuch as it is the practice to advertise the citation only, and not the petition, and the citation does not specify the charges of adultery.

BROWN *v.* BROWN AND SIMPSON. July 14, 1863.—Alimony.—Refusal to allot Alimony where Husband's Property is small.—Where the husband had no property, and his only property was a legacy of £500, not payable until eleven months after the application for alimony, the Court refused to allot alimony pendente lite.

Mr. Pritchard, on behalf of the wife, moved for allotment of alimony pendente lite. It appeared from the husband's answer that he had no income, being maintained by his **[218]** father in return for his services in his father's business; but that under the will of a deceased uncle, he was entitled to a legacy of £500, payable twelve months after the death of his uncle, which took place on the 31st of May, 1863. The legacy has a marketable value, and alimony should therefore be allotted on it.

Dr. Spinks: No alimony should be allotted. Suppose the husband could raise money upon the legacy, its present value would not, if invested at 5 per cent., bring in more than about £20 a year, and there would be difficulty in his raising money on it.

*The Judge Ordinary*: De minimis non curat lex. I think that I ought not to allot alimony upon the legacy.

HARE *v.* HARE. November 4, 1862.—Practice.—Omission of Petitioner to set down Cause for Trial.—Respondent setting it down.—Settling Record.—Rules 22, 24.—Where five months had elapsed since the Court had directed that a cause should be tried without a jury, and the petitioner had not set down the cause for trial, the Court, on the application of the respondent, gave him leave to set it down for trial if the petitioner should not do so within a fortnight.

The respondent in a suit by a wife for dissolution of marriage, moved the Court to order that the petitioner should set down the cause for trial. The answer was filed in March, 1862, and a replication in April. Alimony pendente lite has been allotted at the rate of £70 per annum. On the 27th of **[219]** May the Court directed that the cause should be tried without a jury, but since that time no step has been taken by the petitioner.

Dr. Spinks, for the petitioner: It is the respondent's own laches that the cause has not been set down. He might have set it down himself under Rule 24: "The petitioner shall file the record and set down the cause as ready for trial, and on the day upon which it is set down, shall give notice of his or her having done so to each party for whom an appearance has been entered; and if the petitioner delay filing the record and setting down the cause as ready for trial for the space of one month from the day on which the record was finally settled, the respondent may file the record and set the cause down as ready for trial, and give a similar notice, etc."

The respondent (in person): Under that rule the respondent can only set down the cause as ready for trial after the record has been settled for the jury.[1]

*The Judge Ordinary*: The practice in the registry has not been to construe that rule as applicable only to cases in which the record has been "settled." If the petitioner does not within a fortnight set down the cause for trial, the respondent may do so.

STUART *v.* STUART. December 16, 1862.—Delay in Prosecuting Petition.—Course open to Respondent.—If the petitioner delay filing the record and setting down the cause as [220] ready for trial for the space of one month from the final settling of the record, the respondent may file the record and set the cause down as ready for trial (Rule 24); or the respondent may take a rule to shew cause why the petition should not be dismissed.

[S. C. 32 L. J. (Mat.) 110; 8 L. T. 703; 11 W. R. 463.]

On the 12th of December, 1861, the wife filed a petition for a judicial separation, on the ground of the alleged cruelty of her husband. The respondent filed an answer on the 24th of July, 1862, denying the adultery; and on the 2nd of December, 1862, the Court, on his motion (the petitioner having failed to take further steps in the suit), directed the cause to be tried before the Court by a common jury.

On the 1st of December, 1862, the respondent's solicitor received a note from the petitioner's solicitor, informing him that the petitioner did not intend to proceed further in the cause.

A copy of this note annexed to an affidavit was before the Court.

The Queen's Advocate (Sir R. Phillimore), for the respondent, moved the Court to dismiss the petition.

*The Judge Ordinary*: You are not in a position now to ask me to dismiss the petition. The note received from the petitioner's solicitor is not a sufficient authority for the Court to act upon. The respondent has two courses open to him. He may, under 24th rule, if the petitioner fails to file the record and set the cause down for trial within one month from the day on which the record is settled, file the record, and set down the cause for trial himself; and then when the cause comes on for hearing, if the petitioner were not to appear, the respondent would be in a position to ask the Court to find the issues raised in his favour, and to dismiss the petition. Or you may, if you prefer it, take a rule nisi for the petitioner to shew cause why the petition should not be dismissed, and if she does not appear and shew cause, then I will dismiss [221] it; but if she were to object to its being dismissed, I could not do so.

DAVIES *v.* DAVIES AND HUGHES. January 28 and February 10, 1863.—Dissolution.—Separation previous to the Adultery charged.—Discretion of the Court.—Sect. 31 of the Divorce Act, 1857.—A husband and wife were in domestic service in the same family at the time of their marriage. Shortly after the marriage the husband went into service elsewhere, leaving the wife in the same service, where the wife soon contracted an adulterous connection with another manservant.—The Court held that he had not been guilty of desertion or of wilful separation without reasonable excuse, and that he was entitled to a dissolution of his marriage by reason of her adultery committed subsequent to the separation.

[S. C. 32 L. J. (Mat.) 111; 9 Jur. (N. S.) 828; 8 L. T. 703; 11 W. R. 402.]

Dr. Spinks conducted the petitioner's case.

The facts were shortly these:—Petition by a husband for a dissolution; no appearance. Marriage at Wolverhampton in 1842, when the petitioner was a valet and the respondent was a cook, both in the service of the same family in the neighbourhood of that town. A few years after the marriage the husband left the service and entered alone the service of a family, with whom he had remained ever since. The co-respondent was a footman in the family where the respondent lived.

*The Judge Ordinary*: The case requires a great deal of consideration. A man in service marries twenty years ago, and of his own accord leaves the service, in order, as he says, to better his situation; and there is not the slightest evidence [222] that,

[1] By Rule 22, whenever a case is to be tried before a jury, the Judge Ordinary shall direct the questions at issue to be stated in the form of a record to be settled by one of the registrars.

from that hour, he ever communicated with his wife, or attempted to go and see her. Cur. adv. vult.

*The Judge Ordinary*: This was a suit for dissolution by a husband in consequence of the adultery of the wife. The parties were married many years ago, being then both in the same service. Not very long after the marriage the husband left the service and got a place in London, where he has been living ever since. One person who was examined said he knew nothing of the reason of his going, and another said he had left in order to better himself. Upon the hearing, I thought it deserved great consideration whether it was a case in which I was bound to act in the exercise of the discretion given to me by the 31st section of the Divorce Act, and to withhold a divorce, on the ground that the husband had wilfully separated himself from her. It appeared that very soon after the petitioner's successor came into the service where the wife was left, she began to show partiality for him, and to allow him to take considerable liberties with her. There was nothing to shew that at that time the absence of the husband was unreasonable, or that the wife objected to it. After she had formed the intimacy with the co-respondent she lived in open and notorious adultery with him, and bore him several children. One circumstance that had an effect upon my mind at the hearing was, that there was no proof that the petitioner had gone into the country to see her after his removal to London; but, for aught I know, that may be accounted for by her course of life having been brought to his knowledge. The adultery having been proved, and none of the circumstances established which give the Court power to withhold a decree, I am bound to pronounce a decree nisi, with costs against the co-respondent.

**[223]** (Before the full Court.—*The Judge Ordinary, Williams, J.*, and *Channell, B.*)
CHICHESTER *v.* MURE (falsely called Chichester). January 22 and June 8, 1863.—Dissolution of Marriage.—Second Marriage of one of the Parties.—20 & 21 Vict. c. 85, s. 57.—Where, after a decree of dissolution of marriage, one of the parties to such marriage was married in fact within the time limited by 20 & 21 Vict. c. 85, s. 57, and during the lifetime of the other party to the marriage, the Court held the latter de facto marriage to be null and void in law.

[S. C. 32 L. J. (Mat.) 146; 9 Jur. (N. S.) 779: 8 L. T. 676; 11 W. R. 990.]

This was a suit for a declaration of nullity of marriage under the circumstances in the following petition stated, which was demurred to, and joinder in demurrer:—

"The petition of George Augustus Hamilton Chichester, of 39 Wigmore Street, in the county of Middlesex,

"Sheweth, that on the 9th day of August 1859, your petitioner was married in fact to Lucy Virginia Elizabeth Mure, then lately the wife of William Mure, Esq., Her Majesty's Consul at New Orleans, under her maiden name of Lucy Virginia Elizabeth Oliver, and now falsely calling herself Lucy Virginia Elizabeth Chichester, at the British Consulate Office at Paris, in the Empire of France.

"That upon the said 9th day of August, 1859, the said Lucy Virginia Elizabeth Mure was by law incapable of entering into the contract of marriage, by reason that she had been lawfully married to the said William Mure, Esq.; that the said William Mure, Esq., was still living; that although Her Majesty's Court for Divorce had, on the petition of the said William Mure, Esq., pronounced its decree dissolving the marriage between the said William Mure, Esq., and the said Lucy Virginia Mure, such decree was made and pronounced upon the 1st day of July of the said year 1859, and not before; that no appeal had **[224]** been presented against the said decree; that the statute 20 & 21 Vict. c. 85, by virtue whereof such decree was made, provides that an appeal from any such decree may be presented to the House of Lords within three months after the pronouncing thereof; and further provides that, when the time thereby limited for appealing against any such decree dissolving a marriage shall have expired, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death, and that consequently the time limited for appealing against the said decree dissolving the said marriage, pronounced upon the said 1st day of July, 1859, had not expired upon the said 9th day of August, 1859.

"That by reason of the premises, the said marriage so contracted in fact between your petitioner and the said Lucy Virginia Elizabeth Mure, was in law null and void to all intents and purposes whatsoever.

"Wherefore your petitioner humbly prays that your Lordships will be pleased to decree that the marriage in fact but illegally celebrated between your petitioner and the said Lucy Virginia Elizabeth Mure, was and is null and void, and that your petitioner is free from all bond of marriage with the said Lucy Virginia Elizabeth Mure, and that your petitioner may have such further and other relief in the premises as to your Lordships may seem meet. And your petitioner will ever pray, etc.

"GEORGE A. H. CHICHESTER."

Demurrer.

The respondent, Lucy Virginia Elizabeth Chichester, by George Francis Cooke her attorney, saith, that the petition is bad in substance on the grounds that on the 1st of July, 1859, the marriage between the respondent, Lucy Virginia Elizabeth Chichester and William Mure, was dissolved by decree of this Court, and from the date of such decree she, the respondent, became and was a feme sole for all purposes, and **[225]** more particularly she was capable of contracting marriage. That the statute 20 & 21 Vict. c. 85, does not declare null and void the marriage of one whose previous marriage had been dissolved by decree of this Court, and who has entered into a new contract of marriage before the time limited in the said statute for appealing against the decree dissolving the previous marriage has expired, or before such appeal, if any, has been dismissed, or before it has been determined by a decree confirming such dissolution.

The 24th of December, 1862. Joinder in demurrer.

The petitioner, by John Vallance his attorney, says the petition presented by him is good in substance, and therefore he humbly prays as before.

The decree dissolving the original marriage was in the following terms:—

"1859, 30th June.—The Judges having taken the oral evidence of the witnesses produced on behalf of the petitioner, and heard Counsel thereon, by their final decree pronounced and declared the marriage had and solemnized on the 10th day of November, 1856, at Dumfries, in North Britain, between William Mure, the petitioner in this cause, and Lucy Virginia Mure, then Lucy Virginia Oliver, the respondent in this cause, to be dissolved, by reason that since the celebration thereof the said Lucy Virginia Mure, the respondent, had committed adultery with Geo. Aug. Hamilton Chichester, the co-respondent in this cause, and condemned the said co-respondent in costs."

The Queen's Advocate (Sir R. Phillimore), Dr. Middleton with him, now argued in support of the demurrer.—This is a case primæ impressionis. By the 56th section of the Divorce Act, either party dissatisfied with the decision of the full Court on any petition for the dissolution of a marriage, may within three months after the pronouncing thereof appeal therefrom to the House of Lords, if Parliament be then **[226]** sitting, or if Parliament be not sitting at the end of such three months, then within fourteen days next after its meeting. By sect. 57, when the time hereby limited for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such a decree, or when any such appeal shall have been dismissed, or when in the result of any appeal any marriage shall be declared to be dissolved, but no sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death. The question is, whether the words of the statute make such a marriage had before the time limited, null and void. We submit, first, that in construing a statute relating to marriage, the same words may bear a different construction from what they would bear applied to any other contract. Secondly, that prohibitory words are not equivalent to nullifying words. Thirdly, that no nullifying words are to be found in the statute. Fourthly, that if the Court has any doubt, it will incline in favour of the marriage. Fifthly, that at common law the effect of an appeal on the sentence of an inferior court is nothing as regards the course of proceeding in that inferior court. In the Ecclesiastical Court the mere averment of an appeal does not stay the Court below, but the service of an inhibition from the Court above has that effect. We rely upon the reasoning of Dr. Lushington in *Catterall* v. *Sweetman* (falsely calling herself Catterall), 1 Rob. 404; the marginal note is: "A marriage purporting to have been had under an authority of the Colonial Act of New South Wales, passed on the 4th of July, 1834, held not to be invalid, by reason of a non-compliance with its provisions, there being no words therein expressly creating a nullity. Query, unless there be in a marriage Act such words, whether any other words could be held

to import a nullity." As to the parties in this particular case, Mr. Mure, the plaintiff in the original suit, would never have appealed from the decree in his favour. The other [227] parties, the respondent and co-respondent, by their intermarriage, must have renounced their right. As matters then stood, before the Queen's Proctor's Act, who could have interfered with sentence of dissolution? It is sufficient to satisfy the words of the Act that the appeal should have determined howsoever.

Dr. Spinks (with whom was Mr. Hume Williams) in support of the petition: We agree that it is a case primæ impressionis, but deny that it is decided by *Catterall* v. *Sweetman*. The statutes commented upon in that case referred to forms and ceremonies of marriage, without which, before the statutes, marriages would have been valid; and it was necessary to show that by those statutes, which introduced such forms and ceremonies, the marriages were made invalid. Here the status of the person, her capacity to contract a marriage during the life of the man whose lawful wife she once was, depends entirely on the Divorce Act. The benefit or freedom conferred by that Act must be taken with the limitations which the Act imposes. The Act says certain persons may marry, who, under the old state of the law, were incapable of entering into that contract, but not before a certain time. A construction should be put on the statute on general principles—is such a person free, or not free, to marry before the time limited?—and not on any consideration of the probability or possibility of an appeal having been in fact made in this particular case.

*The Judge Ordinary*: The Court does not affect to feel any great difficulty in this matter, but as the point to be determined is one of great practical importance, it thinks it better that its opinion should be given in writing. Cur. adv. vult.

*The Judge Ordinary* delivered the following judgment of the Court:—This case came on for hearing on a demurrer by [228] the respondent to a petition by George Augustus Hamilton Chichester, whereby he prayed that a marriage in fact had between himself and the respondent, in the petition called Lucy Virginia Mure, but which marriage the petitioner alleged had been illegally contracted, might be declared null and void. The facts, as they appear in the petition, and admitted by the demurrer, are, that on 9th of August, 1859, the petitioner and the respondent were married in fact at the British Consulate Office at Paris, in the empire of France; that the said respondent had been, before the said 9th of August, lawfully married to William Mure, Esq., who at the time of the marriage between the petitioner and the respondent was still living; that on the 1st of July, 1859, a decree was made and pronounced by this Court on the petition of the said William Mure, dissolving the marriage between the said William Mure and the respondent, and that no appeal had been presented against such decree.

The question that arises is, whether the marriage in fact had and celebrated between the petitioner and the respondent on the 9th of August, 1859, within three months after the decree dissolving the respondent's marriage with Mr. Mure, there having been no appeal against such decree, was a valid marriage? The answer to this question depends on the construction to be placed on the statute 20 & 21 Vict. c. 85, s. 57.

The case was argued in January last by the Queen's Advocate and Dr. Middleton for the respondent in support of the demurrer, and by Dr. Spinks and Mr. Hume Williams for the petitioner. The question being new, and one of great and general importance, the Court took time to consider its decision. On behalf of the respondent it was not disputed that the marriage now appealed against, if valid, must owe its validity to the statute 20 and 21 Vict. 85. Nor was it, nor could it be denied, that the contract was in opposition and disobedience to express words contained in the 57th section of [229] that statute. But it was contended for the respondent that the statute contained no words nullifying,—that is, expressly declaring a marriage contracted and celebrated within the prohibited time null and void; and that, in construing a statute which relates to a contract of marriage, a different rule of construction ought to prevail from that which might properly enough be applied to statutes relating to a subject-matter other than a contract of marriage; and that, in construing a statute relating to a contract of marriage, it is not enough to invalidate the marriage to show a disregard of enactments merely negative and prohibitory, but the marriage must be held good, unless there are words expressly declaring that it shall be null and void. The case of *Catterall* v. *Sweetman* (*falsely calling herself Catterall*), decided by Dr. Lushington, in the Consistory Court of London, in the year

1845, reported in 1 Rob. Eccl. Rep. 304, was mainly relied upon in support of the construction contended for by the respondent. That case was urged upon us as an authority that ought to govern the decision of this Court upon the precise question before us.

But the case of *Catterall* v. *Sweetman* (falsely calling herself Catterall) is very different from the present. The marriage in that case was solemnized in New South Wales after the passing of an Act of the Governor and Legislative Council, on the 4th July, 1834, and which was "An Act to remove doubts as to the validity of certain marriages, and to declare the law respecting such marriages for the future"; and then came a declaratory and enacting clause, "that marriages solemnized in a certain manner before the Act shall be valid." Dr. Lushington held that the word "such" referred to past marriages. The second section related to future marriages, and enacted that marriages solemnized in the manner mentioned should have the same force as if solemnized before a clergyman of the Church of England; with this proviso: "Provided always, that from and after the passing of this [230] Act, no such marriage as last aforesaid shall be had and solemnized, until both or one of such persons, as the case may be, shall have signed a declaration in writing in duplicate, stating that they, or he, or she, as the case may be, are or is members or a member of, or hold communion with, the Presbyterian Church of Scotland, or the Roman Catholic Church respectively, according to the form hereunto annexed." There were no words declaring such marriage void, if the proviso were not complied with. Dr. Lushington came to the conclusion that such a marriage, if good before the Act passed, would not be rendered void by the statute, but if not good before, would not be aided by it; that the object of the statute was not to make any marriage void that would have been valid without its aid, and the proviso only had the effect of preventing parties from deriving any benefit from the Act unless they complied with its requisitions. The libel was framed on the supposition that the statute rendered the marriage void; that libel he rejected, leaving it open to the parties to assail the marriage, on the ground that it was void by law independently of the statute.

If the case of *Catterall* v. *Catterall* is to be taken only to have decided that where parties not incapable of contracting marriage who are under no disability at all, but who, professing to contract and solemnize the marriage in some new manner or form provided by statute not open to them before, and who, in making the contract, and with reference to the solemnization thereof, disregard some prohibitory enactments in such statute, that then the marriage is not thereby made void unless there are words nullifying the marriage, we see no reason to question the correctness of the decision. It is, however, quite a different question, whether, in construing a statute which gives the very right to contract at all, we are then to hold that the marriage is good, notwithstanding a disregard of words negative and prohibitory, which relate to the very capacity to contract, because there are no words expressly nul-[231]-lifying the contract. The Ecclesiastical Court had no power to dissolve a marriage which was a valid marriage at the time when it was contracted, so as to give the parties a right to marry again. Such a dissolution could be effected, and the right of either of the parties to marry again during the lifetime of the other could be obtained, only by Act of Parliament.

By 20 & 21 Vict. c. 85, power is given to this Court in certain cases to dissolve a valid marriage, and by the 57th section a capacity or right is given to a party divorced to marry again during the lifetime of the other. This right is not general, but limited to certain cases. First, when the time limited for appealing to the House of Lords against the decree of this Court shall have expired (as to which see sections 55 and 56), and no appeal shall have been presented. Secondly, when any such appeal shall have been dismissed. Thirdly, when in the result of the appeal the marriage shall be declared to be dissolved, then, but not sooner, the parties divorced may marry again, as if the prior marriage had been dissolved by death. In this case the time for appealing to the House of Lords had not expired when the marriage in question took place.

The form invariably adopted by the Legislature in divorce Bills implies a doubt whether the dissolution of a marriage by Act of Parliament was of itself sufficient to enable the parties to marry agrin. The form is found in Macqueen's Practice of the House of Lords, 507. The first clause enacted that "the bond of matrimony being violated and broken by, etc., is hereby from henceforth dissolved, annulled, vacated,

and made void to all intents, constructions, and purposes whatever." The second clause enacted "that it shall be lawful for the complainant, at any time after the passing of the Bill, to marry again as freely in all respects as if the party convicted of adultery were actually dead."

The introduction of such a clause into divorce Bills probably caused the Legislature to make express provision as to the [232] consequences of a decree of dissolution of marriage pronounced by the Court about to be created. If no express power to marry again had been given, it might have been argued, from the practice in divorce Bills, that no such power was conferred by the decree of the Court; and certainly, if no such power had been expressly given, and it had been enacted that it should not be lawful for the parties to marry again until a certain time had elapsed after the making of the decree, a marriage solemnized before that time would have been void, for the parties would have been thereby rendered incompetent to contract. Thus, if by the 57th section it had been enacted "that it shall not be lawful for the respective parties to a marriage dissolved by a decree of this Court to marry again before the expiration of a certain time," no doubt could have existed as to the prohibitory effect of those words; it seems to us their meaning and effect must be held to be the same, although they are preceded by words making it lawful to marry after the expiration of that time.

We have considered the case principally with reference to the proper construction to be placed on the statute, and the weight to be given to *Catterall* v. *Sweetman*, as an authority for the construction contended for by the respondent. Some other cases were cited, and a reference was made to text-books, particularly to Bishop's "Treatise on Marriage and Divorce." We think it unnecessary to notice all these authorities. One of the cases cited was that of *Stallwood* v. *Tredger*, decided by Sir John Nicholl, whose decision was in the result supported by the Court of Delegates, and is reported in 2 Phill. Rep. 287, and commented upon at some length by Dr. Lushington in *Catterall* v. *Sweetman*. On what ground the Court of Delegates supported the decision of Sir John Nicholl is not stated, but Sir John Nicholl himself pronounced for the validity of the marriage on the ground that the publication of the banns, though in fact such publication took place in the parish of St. George's, Southwark, must, under the [233] particular circumstances, be considered legally as having taken place in the parish church of St. Mary, Newington, in which parish the marriage was solemnized. Assuming that to have been the ground of the decision, the case affords little, if any, assistance in determining the present. The case of *Rex* v. *The Inhabitants of Birmingham*, 8 B. & C., was a decision upon a marriage contract. In that case it was held that the want of the consent of the father of the husband, who was a minor, which consent was required by the statute 4 Geo. IV. c. 76, in case of the marriage of a minor by licence, did not render the marriage void. There was there no previous impediment creating an incapacity to contract at all. There were no nullifying words in sect. 16 of the 4 Geo. IV. c. 75, applicable to the question then under consideration; there were not even prohibitory words. The case depended on the 16th section (construed with reference to other sections in the statute), and the 16th section merely required a consent, and that requirement was held to be directory only.

It was further argued before us that this particular case ought to be determined as if the time for appeal had run out; that the time allowed by the 56th section was allowed for the protection of a party dissatisfied with the decree of this Court dissolving the marriage; that Mr. Mure, the petitioner in the former proceedings, having obtained a decree in his favour, he could not appeal; and the only other party, viz. the now respondent, for whose protection the right to appeal was given by the statute, might renounce a right which under the circumstances of the case continued to exist for her advantage only. We think that we ought not to decide the question on any such view, and that we are called upon to determine the broad and general question whether a second marriage, within three months of the decree dissolving the first marriage, by one of the parties to that first marriage during the lifetime of the other, or before the happening of the other events mentioned in the 57th section, is a good marriage.

[234] After a full consideration of the case and the arguments submitted to us, we feel bound to say that we think the marriage in question was prohibited by the statute 20 & 21 Vict. c. 85, sect. 57, and we therefore decree that such marriage was null and void. It is a satisfaction, however, to know that all difficulty in the way of an appeal from our decision is now removed by the 21 and 21 Vict. c. 108, s. 17.

N——— *v.* N———. June 12 and 13, and July 15, 1852.—Judicial Separation.—Cruelty.—Charges of Unnatural Connection and of Infection.—Weight given by the Court to the wife's evidence of unnatural connection had, or attempted to be had, with her by the husband, and to evidence tending to prove the existence of gonorrhœa, and of its wilful communication by husband to wife.

[S. C. 9 Jur. (N. S.) 1203; 9 L. T. 265. Referred to, *Browning* v. *Browning*, [1911] P. 168.]

This was the wife's petition for judicial separation.

The petition alleged:—1. Marriage on the 14th day of July, 1860. 2. That after said marriage your petitioner lived and cohabited with her said husband at Sunbury, in the county of Middlesex, the residence of her parents, and that the said petitioner and her said husband have had issue of their said marriage one daughter, born on the 15th of March, 1861, and that the said petitioner is now again pregnant by her said husband (it was stated in evidence that the second child was born on the 4th of April, 1862). 3. That on divers occasions since their marriage the said G. G. N. has in divers ways, at their said residence, treated your petitioner with cruelty, as hereinafter set forth. 4. That the said G. G. N. frequently swore at and abused your petitioner in foul and offensive lan-**[235]**-guage, and on several occasions, the dates whereof your petitioner is unable to set forth, threatened to take your petitioner's life. 5. That on an occasion happening about the month of February, 1861, the said G. G. N. threw your petitioner down violently on the bed, and, in order to terrify your petitioner, seized a razor and drew it across her throat, as if to cut it. 6. That the said G. G. N. constantly kept loaded pistols in his bedroom, and that on an occasion happening about the month of September, 1861, he presented a loaded pistol at your petitioner, and said, "By God I'll shoot you." 7. That about a month before the birth of your petitioner's said child, the said G. G. N. kicked your petitioner out of bed, and about a week before the said birth violently assaulted your petitioner and threw her down. 8. That on another occasion, happening about the month of July, 1861, the said G. G. N. violently assaulted and struck your petitioner in the breast. 9. That on two several occasions, happening about the months of May and June, 1861, the said G. G. N., in spite of your petitioner's remonstrances, attempted to have sodomitical intercourse with your petitioner, and thereby seriously hurt her. 10. That some time in or before the month of August, 1861, the said G. G. N., knowing himself to be infected with the venereal disease, communicated the same to your petitioner.

The respondent's answer denied the alleged acts of cruelty and alleged condonation, on which issue was joined and taken.

The case was tried by the Court itself.

Dr. Phillimore, Q.C., and Dr. Spinks, for the petitioner.

Mr. Macaulay, Q.C., and Mr. R. Pritchard, for the respondent.

As to the 9th paragraph, the petitioner stated in evidence to the following effect:—"In May and June, 1861, I was co-**[236]**-habiting with my husband; there was something peculiar about my husband's intercourse at that time; towards the beginning or end of May he had improper intercourse with me. I remonstrated and entreated him to desist; he said it was usual between man and wife. On three occasions he made the attempt; the second time he did desist through my expostulations, because I was suffering so much from the first occasion; on the third occasion I had to use all my strength to prevent him." On cross-examination as to whether she and her husband had not been in the habit of trying strength against each other, she said, "On one occasion we did try strength, and I was the strongest then."

The respondent denied on oath that he had done or attempted to do any such thing.

The substance of the evidence on the 10th paragraph is sufficiently given in the following judgment, which is reported principally for the remarks therein on the subject-matter of these two paragraphs. Cur. adv. vult.

July 15.—*The Judge Ordinary*: This is a suit for judicial separation. The petition and evidence raised some questions of a very disagreeable nature, and I could have well wished to be relieved from the necessity of discussing them. Many people are of opinion that the publication of matters disclosed in this Court cannot but be prejudicial to society. In some cases that is probably true; but, on the other hand, I am satisfied that a calm consideration of the state of feeling that results from matrimonial quarrels, and of the utter disregard of public opinion, and of the shame

and disgrace which must attach to them, often manifested by both parties, must produce a beneficial influence upon all who are not blinded by their vindictive feelings.

In this case the wife seeks for a judicial separation, and it appears, by the evidence of Mr. Parker (of whose veracity there can be no doubt), that the same object which would be [237] obtained by such decree might, and probably would, have been accomplished by private arrangement, but for some dispute about pecuniary matters, over which the Court has no control. The case having come before the Court, the petitioner must have known that she was liable to be asked questions respecting ante-nuptial conduct, which must for ever hereafter deeply affect the social position of herself and her mother. On the other hand, the respondent, for no intelligible purpose save that of injuring his mother-in-law (for he expressly stated that he had no complaint whatever against his wife), caused a public disclosure to be made of his wife's ante-nuptial frailty, and imputed to her mother connivance at her daughter's dishonour —an ungenerous course, which, I should imagine, would impress upon himself a stain at least as deep as that by which he sought to degrade them.

The marriage was solemnized in July, 1860; the final separation took place in September, 1861. In the interval several acts were done by him which the Court might have thought sufficient to establish a charge of cruelty, but the parties continued to cohabit as man and wife, and therefore all such acts down to September last were condoned, and the case turned upon a revival by some subsequent act. In that month, as was deposed by the wife, he took up a pistol and threatened to shoot her; she looked firmly in his face, and he then lowered his hand and did not fire, and that she was so much alarmed that she resolved to leave him. The respondent did not deny the act, but alleged that it was not done in anger, but that both had been in the habit of firing his pistols, that on the occasion in question they had been romping together (which did not appear to have been unusual with them), and that the threat was uttered in jest. The wife, on cross-examination, stated that she never told any one of his threat, but that her alarm and other things caused her to refuse to live with him again as his wife; but when pressed she would not swear positively that she had not afterwards slept with him, or that [238] she had on the same day, after the alleged threat, gone out for a drive with him. A week after, Mr. Parker, the respondent's solicitor, was sent for, and during an interview of several hours the subject of a separation was discussed; many charges were made against the respondent by the petitioner and her mother, but it did not appear that the pistol was mentioned, and I am not satisfied that any threat was uttered by the husband in such manner as to shew that future cohabitation would be unsafe, nor in such a manner as to cause in the wife a reasonable apprehension of violence; I cannot, therefore, come to the conclusion that the former acts of which he was accused were thereby revived.

But there were two other charges of such a nature that it is necessary to take special notice of them. The first is, that in the month of May, 1861, the respondent committed an unnatural crime on her person; that she did not complain of it, labouring under the erroneous belief that he had a right so to treat her if he pleased. Now it is remarkable that the petition charged an attempt to commit, and not the commission of such a crime; the respondent denied the act and the attempt to commit it. There was not on either side any corroborative evidence, nor could it well be expected that any could be adduced. In all cases where a crime is imputed, the presumption of innocence must prevail until guilt has been proved; and in proportion to the gravity of the charge and the rare occurrence of the crime imputed, it is reasonable to require more cogent evidence to overthrow the legal presumption of innocence. The crime here imputed is so heinous and so contrary to experience, that it would be most unreasonable to find a verdict of guilty where there is simply oath against oath, without any further evidence, direct or circumstantial, to support the charge. I cannot therefore come to the conclusion that this charge was proved.

Another charge was that the respondent had communicated [239] to the petitioner a loathsome disease. A medical man, who was consulted about a week after the separation, deposed that he then examined the petitioner, and found her labouring under gonorrhœa in a violent form, and that she must have had it some time; that she was suffering much pain, and that such pain was generally experienced in ten or twelve days after the disease shewed itself. The petitioner, when examined as a witness, deposed that she never had sexual intercourse with any one but her husband;

she did not state when she first had any of the symptoms observed by the medical men, nor was the existence of such symptoms assigned as a reason for refusing further cohabitation with her husband. The only corroborative evidence given by the petitioner was, that she had seen him use a syringe with powdered alum and water or water alone. The laundress employed to wash for the family deposed that in May or the beginning of June she observed marks on the linen of the respondent, which might be supposed to indicate that he was suffering from gonorrhœa in a virulent stage, and that she soon afterwards noticed similar marks on the linen of the petitioner. Now they did not separate until September, nor was any assertion made that connubial intercourse did not continually take place between them until that time, which is utterly inconsistent with the supposition that both were during that period, viz. from June to September, affected by disease. The respondent was never subjected to medical examination, and he positively denied the existence of such disease. It was not made the subject of complaint during the long interview with Mr. Parker, and when Mr. Kingsford attended her before the separation nothing was said that intimated to him the existence of any such cause for her illness. Upon this evidence I cannot feel satisfied that the disease ever existed, and therefore I cannot find the respondent guilty of this act of cruelty. If I had been of opinion that she suffered from real and not simulated gonorrhœa, two questions would remain—first, whether it was wilfully communicated, as to **[240]** which the Court has nothing to guide it but mere conjecture; and secondly, had it been condoned?

If I were to assume it to be proved by the evidence of the laundress that both had the disease in June, the wife to be sufficiently awake to the subject to notice the use of the syringe, I must also assume that she knew the nature of the disorder, and then I must hold that it was condoned by subsequent cohabitation.

In the result, I have arrived at the conclusion that there has been no uncondoned act of cruelty upon which a decree of judicial separation can be founded. There appears to have been much in the conduct of both parties upon which they may well reflect with deep regret. As far as this Court is concerned, they must continue to reside together. They are both young, and if they sincerely desire to control their tempers and amend their habits, many years of happiness may still be in store for them; that depends upon themselves: from this Court they are dismissed.

S——— (falsely called E———) *v.* E———. June 15 and 16, 1863.—Petition for Nullity.—Impotence.—Medical Report and Evidence.—Curability.—S., a woman, married E. on 22nd of July, and lived with him till 23rd of September. She petitioned for a decree of nullity by reason of his inability to consummate the marriage. He did not appear. The report of medical inspectors negatived any apparent and incurable defect on his part, but ascribed the non-consummation to incapacity caused by a long-continued habit of self-abuse, which (as further explained by their vivâ voce evidence) they considered might possibly, but not probably, be cured; the question being one of moral restraint. There was no report of inspectors as to the condition of the **[241]** woman, and their vivâ voce evidence was equivocal as to proof of non-consummation from examination of her person. The Court refused to make the decree:—Semble, the Court would not, at all events, make such a decree without a report from sworn medical inspectors as to the condition of the woman.

[Referred to, *Scott* v. *Scott*, [1912] P. 281.]

This was the petition of the woman for a decree of nullity of marriage by reason of the impotency of the man. The substance of the petition is sufficiently stated in the judgment.

Dr. Wambey conducted the petitioner's case.

The report of the sworn medical inspector as to the respondent's condition was as follows:—

"26th January, 1863.

"We, the undersigned medical inspectors appointed to examine and report upon the condition of the generative organs of Henry E———, do hereby declare that we have made a careful examination, and find that the external organs, viz. the penis and the two testicles, of the said Henry E———, are perfectly natural and well formed, and, as far as we are able to judge, fully competent to perform their functions. However, it appears that Henry E———, who is twenty-nine years of age, has been

the subject of fits since he was five years old, and that he has practised excessive self-abuse, masturbation, and has continued to do so since his marriage in 1861. Considering the foregoing facts, we cannot but believe that there is a want of proper virile power. The long continuance of the fits has no doubt induced great deficiency in the nervous system, but there is not a sufficient cause of impotence, as there are many epileptic persons who have married and had children; the more probable cause is one of a mental or moral character, viz. self-abuse; this we know, if carried to any great extent, induces an aversion to the female sex. This cause is **[242]** remediable, and remains entirely at the option of the person concerned. Self-control may restore the natural feeling towards the wife; but the continuance of self-abuse will leave matters as they are.

"ALFRED POLAND,
"SAMUEL BAYFIELD."

The learned Judge pointed out that there was no report of medical inspectors as to the condition of the petitioner.[1]

Evidence of the marriage on 2nd of July, 1861, was given, and the petitioner deposed to the following effect:—

I am twenty-seven years old; first became acquainted with E——— in the year 1860; became engaged to be married to him in about eight months; had no talk with him about his epileptic fits before marriage. On the marriage we went to my mother's house at Marlborough, in Wiltshire. I thought him strange the whole of that day; he was ill in the evening, had a fit; we did not sleep together that night. The next night we slept together; he went to sleep, made no attempt to have intercourse. We continued to sleep together till 22nd or 23rd of September. On 2nd of August he attempted intercourse, but did not penetrate me; he made one other attempt without having intercourse; he said nothing. On the other nights he only went to sleep with his back towards me. I left him some time in September. I never resisted my husband's attempts to have intercourse, I was willing that he should. I was ill in September; my aunt fetched me away. I began to recover soon after I left. I have not lived with him since.

Mr. Bayfield, one of the inspectors, deposed: I am a surgeon practising in Southwark. I have directed my attention to diseases of the generative organs. On the 20th of January, **[243]** I, with Mr. Poland, examined the respondent, when we found no malformation. I asked him the reason he did not perform the functions of a married man; he hesitated in answering; and on my repeating the question, he said he did not much care, he did not know why. I asked whether any better reason, or any cause. On his declining to answer, I at once said, "You are addicted to an unnatural practice"; he said, "Yes." I asked how long. He said from a very early age. I asked how frequently. He admitted most days; sometimes two or three times a day, sometimes oftener; in one twenty-four hours, five times. I asked why was nothing done on wedding-night? He said because he had a fit. Upon asking why he afterwards made no attempt, he said he did not feel to care about it. From my medical experience I can say that the habit of self-abuse would have a tendency to cause incapacity for sexual intercourse. From what he said I imagine the fact of non-consummation in the present case arises from his habit; in such cases there may be emission without power of sexual intercourse. Such a habit is most difficult to break, but not incurable in a moral sense. I never knew in fact a case to the present extent and of so many years' continuance cured. It depends on the respondent himself. I know the petitioner. I have examined her; there is no malformation and, as far as I could judge, she is a virgin; but it is a difficult question: I believe she is. In some cases you cannot be mistaken, in others you may.

The same witness, in answer to questions put by the Court:—I did examine petitioner sufficiently to say that there was a partial absence of the usual indicia of virginity. As to the habit of self-abuse, I should say that the presence of a woman in bed night after night is not likely to cure the habit. I should think with his best efforts it is possible, but not probable, that a year or two might produce a cure.

Alfred Poland deposed:—I am a Fellow of the College of Surgeons, and one of the surgeons of Guy's Hospital. On **[244]** the 20th of January I was at Mr. Bayfield's house, and there examined the respondent. Mr. Bayfield's account of the interview

[1] See *H.* (falsely called *C.*) v. *H.*, 1 Swab. & Trist. 605; and *Serrell* v. *Serrell and Bamford*, 2 Swab. & Trist. 422.

is correct. He was the mouthpiece on the occasion. Respondent said he had had epileptic fits from a child. I considered the fits to be congenital, but kept up afterwards by his habit of self-abuse. When the habit is contracted to such an extent, there is a bare possibility, not probability, of its being cured. Impotence would result from a long-continued habit of the kind. It is prejudicial to a woman's health to sleep with a man without consummation. I examined the petitioner, but cannot speak as to her condition. The question as to consummation is a difficult one to answer, and in this case I cannot answer it.

Mr. Badger, surgeon, of Gutter Lane, Cheapside, said:—In September, 1861, I was called in to attend the petitioner. She had a severe attack of hysteria on the 24th of September. I saw her on the 25th and 26th. A communication was made to me. I have heard the evidence of the other medical witnesses. I should say that in some constitutions hysteria is very likely to follow non-consummation.

Cur. adv. vult.

June 16.—*The Judge Ordinary*: This was a petition for a decree of nullity of marriage on the ground of the impotency of the respondent. The petition alleged, that on the 2nd of July, 1861, a ceremony of marriage was in fact had between the petitioner and the respondent; that after the marriage, until the 27th of September, the petitioner cohabited with the respondent, but by reason of his malformation he was, and had continued, incompetent to consummate the marriage; that the malformation of respondent is congenital and incurable by art or skill, as on inspection by experts will appear; that the petitioner is a virgin intact, as on inspection by experts will appear. The respondent did not appear. At the instance of the petitioner, inspectors were appointed, who examined the **[245]** person of the respondent, and made the following report. [The learned Judge here read the above report.] No report was made as to the state of the petitioner; but she appeared as a witness, and deposed that during her cohabitation with respondent, he made two attempts to consummate the marriage, but did not accomplish it. The medical men who examined and made a report as to the state of the respondent, examined the petitioner also, and their evidence was equivocal as to her state. Had I deemed it possible to pronounce a decree of nullity under the circumstances proved before me, I should have desired to have a formal report from the medical men as to her condition. But even assuming her to be a virgin intact, I cannot make the decree prayed, for the medical men negative malformation; they negative impotency from disease or natural infirmity; but they ascribe the non-consummation of the marriage to temporary incapacity, occasioned by the indulgence of a disgusting and degrading habit, and believe that such incapacity will continue until that habit is corrected, but no longer.[1] Moreover, the cohabitation continued but little more than two months. Now, where any manifest and incurable defect exists, the old rule as to triennial cohabitation has been relaxed; but even in such cases the Court has never, that I am aware of, proceeded on so short a cohabitation as in this case. Here I have no right to assume that the incapacity will be permanent; and, however painful it may be to the petitioner to resume cohabitation with the respondent, I feel bound to follow the precedent of Sir George Lee in *Welde* v. *Welde*, 2 Lee, 585, and dismiss the petition. In that case he decreed a monition that the petitioner should return to cohabitation; I am not sure that I ought to do so, unless such process is prayed for by the respondent, and therefore at present abstain from doing it.

**[246]** (Before the *Judge Ordinary*, *Wightman*, *J.*, and *Channell*, *B.*)

COOKE *v.* COOKE. July 8, 1863.—Judicial Separation.—Condonation of Cruelty.

This was an appeal by the husband from a judgment and decree of the Judge Ordinary, by which he decreed a judicial separation, on the ground of the husband's cruelty (see ante, p. 26).

The case was originally tried by the Judge Ordinary without a jury, and the appeal was argued by the Queen's Advocate and Mr. Aspland for the appellant, and by Dr. Spinks and Mr. J. P. Murphy for the respondent, on the notes of the evidence as taken by the learned Judge Ordinary.

In the following short judgment the Full Court confirmed in all points the judgment appealed from, and appear to have agreed with and adopted all the remarks of the Judge Ordinary on the different questions raised.

---

[1] Compare *W.* v. *H.* (falsely called *W.*), 2 Swab. & Trist. 240.

Judgment was delivered by *Wightman, J.*: This is an appeal from the judgment of the Judge Ordinary to the Full Court, in a case in which he had pronounced a decree, in favour of the present respondent, for a judicial separation from her husband on the ground of cruelty.

The appellant in his petition stated four grounds for reversing the decree and dismissing the suit: first, that the alleged cruelty was not sufficiently established; secondly, that if it was, it had been condoned; thirdly, that there was unreasonable and unnecessary delay in instituting the suit; and fourthly, that the petition was brought for collateral purposes, and not for the protection of the person of the wife.

We are of opinion that the appellant has failed in making out either of the above grounds of objection to the decree. It is not necessary to state in detail the circumstances which were proved to establish a case of cruelty, but we are clearly of opinion that the evidence was abundantly sufficient to warrant the decree on that ground.

**[247]** And the next question is, whether the wife had condoned the cruelty which we think had been sufficiently proved; and we are of opinion that there was no such condonation as would afford an answer to the suit. The wife appears to have been willing to condone, provided she was treated by her husband in the manner she had a right to expect, if she returned to live and cohabit with him. She was not, upon her return to him, treated by him in the manner she ought to have been; but, on the contrary, her husband's behaviour then was such, that she might well apprehend that it would not be safe for her to continue to live with him; and, upon non-compliance with that which was a condition of condonation, the offences said to have been condoned were revived. And the second ground of objection also in our opinion fails.

But it is said that there was unnecessary and unreasonable delay in prosecuting the suit, and that, in truth, the object of the suit was not to protect the person of the wife from violence, but to enable her to have more free and frequent access to her children. The case of *Matthews* v. *Matthews*, 1 Swab. & Trist. and 3 Swab. & Trist., 29 L. J. 118, is clearly distinguishable from the present, for the reasons given by the Judge Ordinary in his judgment in this case; and we are of opinion that the reluctance of the wife to prosecute the suit against her husband is no bar to her proceeding, she being willing to have lived with him, if she could have done so with due regard to her personal safety; and that as she could not have such access to her children as she was entitled to have, unless she either returned to live with her husband, or was separated from him by judicial sentence, and her evidence shewed that she had reasonable ground for apprehending personal danger, if she did return to him, we are of opinion that she was well warranted in prosecuting her suit, though one object may have been that she might have access to her children, from which she was debarred by her fear of personal violence, if she returned to live with him. Upon the whole, **[248]** then, our judgment is in favour of the respondent, Frances Judith Cooke.

COOKE *v.* COOKE. July 14, 1863.—Judicial Separation for Husband's Misconduct.—Custody of an Idiot Child.—Jurisdiction of Court.—Where a wife had obtained a decree for judicial separation by reason of the husband's misconduct, the Court refused to give her the custody of one of the children of the marriage, who was an idiot and of the age of twelve years, on the ground that the Court would only deprive the father of the custody of his child in favour of the innocent wife, when it was for her solace that she should have such custody.

In this case the Judge Ordinary had pronounced a decree of judicial separation on the petition of the wife by reason of the husband's cruelty. This decree was affirmed on appeal to the Full Court. An application was now made on behalf of the petitioner (the wife) for the custody of one of the children, a boy of the age of twelve years, who had been an idiot from his birth, in order that she might place him in an asylum.

Dr. Spinks appeared for the wife: It was a matter entirely for the discretion of the Court.

The Queen's Advocate (Sir R. Phillimore, Q.C.) for the husband.

*The Judge Ordinary*: I have been in the habit of considering the question of the custody of children with reference to the merits and demerits of the husband and wife. Where the wife has been the innocent party, I hold that she ought not to be deprived of the solace of having the custody of her children. **[249]** The question raised in reference to the custody of this child would involve the Court in considera-

tions which are foreign to its jurisdiction. I think this is a question which would more properly belong to the Court of Chancery.

The Queen's Advocate stated that there was an affidavit of a gentleman, who had been the medical attendant of the family for thirty years, from which it appeared that the child was under proper care.

*The Judge Ordinary*: I decline to interfere.

BREMNER *v.* BREMNER AND BRETT. May 12, 1863.—Petition for Alimony.—Wife in Possession of Husband's Property.—Allegation by the husband, in answer to the petition for alimony (inter alia), that the wife had taken from his house furniture, etc., of the value of from £800 to £1000. The Court refused to make any order for alimony pendente lite on such a state of things, the wife declining to accept the sum offered by the husband, but allowed the wife to reply to the above allegation in the answer.

In this case, the husband's answer to a petition for alimony pendente lite admitted an income of £600 per annum, and contained the following paragraph:—"I have no furniture, books, pictures, etc., above the value of £10, inasmuch as the said Sarah Bremner (the wife), during my absence, left my said house and removed all my valuable furniture and property, which I then estimated at £800 or £1000, and left me a few articles, which were afterwards valued and sold by me, for £50 or thereabouts."

**[250]** Mr. G. H. Cooper now moved the Court to allot to the wife alimony pendente lite at the rate of £120 per annum, being one-fifth of the income admitted by the husband in his answer.

Dr. Spinks: The wife is not entitled to one-fifth, as she is in possession of property of the husband which she has wrongfully taken. The husband is willing, however, that alimony at the rate of £60 per annum should be allotted, if she will return the property.

Mr. G. H. Cooper: The paragraph in the answer is consistent with what I am instructed is the case, viz. that the wife took possession of the furniture with the husband's consent. [*The Judge Ordinary*: I think that paragraph is not consistent with consent; and if you do not accept the offer of the husband, as the wife is charged with the possession of property which would enable her to maintain herself pending the suit, she must, for the satisfaction of the Court, give some account of it before alimony is granted.] Taking the value of the furniture, £800, the husband in respect of it is entitled only to deduct from the sum that would otherwise be allotted, 4 per cent. interest on £800. [*The Judge Ordinary*: No. The furniture must not be taken as the wife's capital. As you refuse to accept the offer, I decline to allot alimony at present.] I am instructed that if the wife is allowed to answer the allegation in the answer, it can be proved that the furniture is of much less value than that stated, and that it was taken with the husband's consent.

*The Judge Ordinary*: I will allow the motion to stand over, in order that the wife may answer the statement in the answer; but I will not allow her the costs of this motion.

Affidavits were afterwards filed on behalf of the wife, and **[251]** on the 27th of May alimony pendente lite was allotted by consent.

(Before the Full Court,—*The Judge Ordinary, Willes, J.*, and *Channell, B.*)

HOOPER *v.* HOOPER. May 12, 1863.—Suit for Judicial Separation.—Compromise.—Reference to Arbitration.—Fraud.—Error.—Where a wife, a petitioner in a suit for a judicial separation, had entered into a compromise, by which the record was withdrawn from the jury, and the terms of the separation were to be settled by an arbitrator, it was held on appeal, affirming the judgment of the Judge Ordinary, that the petitioner was not at liberty to repudiate the agreement, except on the ground of fraud, or of such an error in the terms of the agreement that she ought not to be bound by it.

This was an appeal from a decision of the Judge Ordinary. Mrs. Hooper, the petitioner, had filed a petition for a judicial separation by reason of the alleged cruelty of her husband, who, by his answer, denied the cruelty. The case came on for hearing before the Judge Ordinary and a special jury, on the 16th of June, 1859. Before the jury were sworn, it was arranged between the parties that the subject of dispute should be a matter of private arrangement. The jury were accordingly

dismissed, and the following memorandum of agreement was drawn up and signed by counsel on behalf of the respective parties:—

"In the Divorce Court, *Hooper* v. *Hooper*: record withdrawn, proceedings to be stayed, and the suit not moved; Mr. Hooper paying the present alimony of £250 per annum ordered by the Court, and agreeing to add thereto £50 per annum. Mr. Brabant to be requested to settle the **[252]** terms of a separation by deed, with full power over the question of income.

"(Signed) K. MACAULAY.
MONTAGUE SMITH."

There was some delay in bringing the matter before Mr. Brabant. In the course of December, the agents of both parties met before him, when Mrs. Hooper's solicitor seems to have expected Mr. Brabant to go into the question of cruelty, alleging that the intention of the reference was to substitute Mr. Brabant for the Court, and that the question of cruelty or no cruelty might have a bearing upon the amount of income. He also urged that Mr. Hooper should pay Mrs. Hooper's costs as between solicitor and client. Mr. Hooper's Proctor, on the contrary, urged that Mr. Brabant's duty was to arrange the terms of a separation without going into the previous conduct of the parties. Mr. Brabant apparently took this view of his authority, and, under the circumstances, considered that he could proceed no further in the matter, and so informed them.

Mr. Wilde, Q.C., moved the Court for leave to re-enter the record and have the cause set down for trial.

This application was opposed by Mr. M. Smith, Q.C.

*The Judge Ordinary* rejected the application. (See 1 Swab. & Trist. p. 602.)

Mrs. Hooper appealed from this decision.

Mr. J. D. Coleridge and Mr. A. Staveley Hill, for the appellant: The terms of the agreement were not known to the Judge Ordinary. He relied entirely on the discretion of counsel that it was a reasonable one between the parties. No formal or definite step was taken by the Court upon the memoran-**[253]**-dum; its terms were only known to the counsel who drew it up. They were not known to the appellant until after the jury was withdrawn. We don't contend that counsel exceeded their authority, and made the arrangement without the sanction of their client, but that the terms in which it is framed are not clear. The interpretation put upon it by the respondent is not that which was put upon it by the appellant at the time it was made. The interpretation put upon it by the appellant is a reasonable one: she says, that the case is still in Court; that she cannot obtain in her present position the redress which she would have had, and that therefore she is remitted to her legal remedy. [*Willes, J.*: What are the benefits stipulated for by Mrs. Hooper which she cannot now obtain?] She has not been allowed to prove cruelty before Mr. Brabant for the purpose of increasing alimony; and also her claim for costs. She is willing to be bound by the terms of the agreement, if they are capable of no other interpretation than that put upon them by Mr. Brabant. It is clear, looking at the terms used by her counsel upon the 16th of June, that it was always intended that the question of cruelty should be gone into before the referee. [*Willes, J.*: Is alimony to be allotted in the ratio of the cruelty proved?] We contend that it is. The judgment in *Smith* v. *Smith*, 2 Phill. 235, is to that effect, and so in *Otway* v. *Otway*, 30 L. J. 109. [*The Judge Ordinary*: Those were all applications for permanent alimony, and not for alimony pendente lite. There having been no decree in this case, an allotment of alimony would not be of permanent alimony, and no such question can be raised in an application for alimony pendente lite.] Assuming that to be so, it is upon the principle that the Court will not decide upon the amount of alimony, because the facts upon which it is sought to obtain the decree have not been proved; and we contend that by the referee not going into an investigation of the cruelty, the appellant is, as regards permanent alimony, placed in the same position as she **[254]** would be had the question been the minor one of what amount of alimony pendente lite should be allotted to her. The Judge Ordinary was mistaken in speaking of the course pursued by the parties as being confirmed by "an order of the Court;" there has been no order made in this matter. The difficulty with regard to costs is, that no mention having been made of them in the argument, according to the view taken by Mr. Brabant, he was prevented from going into that question. The Judge Ordinary, however, refused to make any order for

the taxation of costs, so that the appellant has, in fact, no means of obtaining them. It may also be a matter of grave consideration how far legally the wife may be considered, for the purposes of the suit, to cease to be under the control of her husband, so as to admit of her being empowered to restrict herself from any remedy she may lawfully have against him.

Mr. Montague Smith, for the respondent, said that Mr. Hooper was perfectly ready to pay costs as between party and party. (He was not further called upon by the Court.)

*Willes, J.*: This is an application for a fresh trial, on appeal from the decision of the Judge Ordinary. The decision appealed from proceeded on the ground that when parties to a suit enter into an agreement for the withdrawal of proceedings, they are entirely bound by such an arrangement. This decision is now objected to on several grounds; first, and this has not been strongly urged, but I deal with it now as first in order of reasoning, that such a settlement is inadmissible, and that it is void by reason of the policy of the Matrimonial Law. This ground of objection is a novelty to my mind. I always thought that parties to a suit might settle that suit by private arrangement, and that if they did so, the Court before which such suit was depending would recognise that arrangement. Such a transaction is, in fact, equivalent to a judgment in the suit; and a court of common law would treat as **[255]** a breach of faith any attempt to proceed after that transaction, and would set aside anything done upon such an attempt. There is no difference, in point of principle, between suits in courts of common law and a suit here for a judicial separation, and no such distinction has been pointed out. When a matter is in litigation, and there is such a prospect of success on each side that an arrangement between the parties is a valid transaction, the Courts will always recognize such arrangement, and consider the parties to it bound by it; and when such an arrangement has been entered into between parties, neither of them can get rid of it, unless some of the causes which ordinarily invalidate an agreement can be established. Such causes would be either fraud, or a clear error of the party as to the nature of the agreement by which it is sought to bind him. Fraud being out of the question here, the learned counsel for the appellant must rely upon this, that there was such an error as to the terms of the agreement, that she ought not to be bound by it.

It is said that, in the first place, the costs were not provided for by this arrangement. I think that they are; but even if they were not, I do not say that the appellant could insist upon that omission as a sufficient cause for her not being bound by the agreement. She has made no such statement. I understood Mr. Smith to say that the respondent ought to pay the costs of suit in the ordinary way; that he undertakes to do so. That objection is therefore disposed of.

The next objection has no existence in point of fact. It is that, by the terms of the arrangement, Mr. Brabant was to draw up a settlement by deed, and to allot alimony having regard to the respondent's income. As matters stand at present, the appellant is precluded from going into the question of cruelty to show that it was of such a character as to render necessary an increase of alimony. It was to be taken as a conceded fact, that the cruelty was such as to entitle Mrs. Hooper to the relief prayed, and that instead of that **[256]** relief being given her by this Court, a deed was to be drawn up by Mr. Brabant; that, in addition, she was to have a sum as auxiliary to this alimony of £300 per annum, but that Mr. Brabant was to be at liberty to fix the amount. He was to have full power either way over questions of income. Mr. Brabant was not by that arrangement to go into any question already disposed of; he could not therefore go into the question of cruelty at all, and the appellant must make out that before she can sustain this objection. The appellant says, however, that these terms do not correctly represent what it was that she agreed to, and that it was the whole question in the cause which she intended to refer. It is upon the face of the question which thus arises, that unless she make out that the amount of cruelty affects the amount of alimony, she fails. Upon this point many cases have been cited; it is an important question, and one which ought not to rest simply upon obiter dicta. Alimony is granted for the purpose of giving a wife a subsistence. It has been considered, both in the ecclesiastical courts and in the courts of common law, that a husband who compels his wife to depart from him by his misconduct is liable to support her. It has been said at common law, that the husband sends his wife out with his authority to obtain everything necessary for her comfortable subsistence,

having regard to his income and position; in neither court does the wife obtain damages against her husband. (*Cooke* v. *Cooke,* 2 Phil. 45.) This doctrine is traceable to the obvious principle that nothing can compensate a wife for the injury thus done to her, and the law, with wise policy, attempts no such compensation. That which cannot be given in a lump by way of compensation, cannot be given yearly by way of increased alimony. The Court may, perhaps, through infirmity of human nature, not be able to resist the influence, which the proof of great cruelty may have upon it; and some cases may therefore be found where the result that is contended for on behalf of the appellant may **[257]** appear to have followed. I have inquired into the authorities, and I should have received any that could have been cited to me with the highest respect; and I should have also, without acquiescing in it, submitted to any enactment to that effect. None such can, however, be cited. *Smith* v. *Smith* was a very peculiar case: the judge was there dealing with property which had been transferred to the husband by the wife "to buy off his cruelty." He did not decide, however, that the extent of that cruelty was to determine the amount of the alimony. The question of the maintenance of children was also a material feature in that case. Sir John Nicholl speaks of alimony as a comfortable subsistence in accordance with the husband's income. This is the principle upon which both the ecclesiastical courts and the courts of common law have acted, and upon which we ought to act. I am clearly of opinion that it never intended that alimony should be aggravated by the number of blows given, and that neither in this nor in any other case ought it to be held, that the Court can give incidentally to the wife damages for injuries, when by law no such damages can be given. The foundation, therefore, for this objection fails.

I abstain from commenting upon the evidence by which it is sought to sanction this objection, further than to say that Mr. Clarke's affidavit shows that it was not intended originally to take any such objection, and I can only attribute this attempt to resist a solemn agreement to a mere afterthought.

I am clearly of opinion that the Judge Ordinary was right, and that this appeal must be dismissed.

*Channell, B.*: I agree with my brother Willes that the agreement, to which reference has been made in this case, justified the order made by the Judge Ordinary.

As to the costs, I see no ground for supposing that the appellant was to have costs as between attorney and client; that **[258]** question is now, however, disposed of. It has been said that this suit is still alive, and I do not say that it is dead, so that, under no circumstances, could any proceedings be taken in it. It is not necessary to go so far, and to determine whether this agreement is equivalent to a judgment of the Court; nor do I doubt, that if the referee had refused to proceed, the parties might have come before this Court again, as they would do in a court of common law, when a reference in any manner becomes defunct.

The appellant says that the referee refused to proceed in the way that it was intended, and that she has a right to call upon him so to proceed; and the 32nd section of the 20 & 21 Vict. c. 85, which directs that the judge, in allotting alimony upon a decree of a dissolution of marriage, is to have regard to "the conduct of the parties," has been relied on as presenting an analogy to the present case. It is argued that by the "conduct of the parties" is intended the amount of the charge proved against a delinquent party. To make the argument applicable here, reference has been made to certain authorities, as showing that the Court has, before allotting alimony, inquired into all the circumstances of the cases, and has allotted it in proportion to the conduct of the parties. Those cases certainly may seem to support that view; but all these inquiries, as far as I understand, have been into the status of the parties. There are certain expressions, however, which give a colour to the arguments of the appellant's counsel. With regard to *Smith* v. *Smith,* I adopt the view taken by Willes, J. In deciding what proportion of the husband's property should be taken, all such inquiries as to the status of the parties appears to be legitimate. In the present case the parties came to a conclusion which was to operate as final, and which would attain the main object of the suit. If this question of cruelty ought to be attended to, it follows that it was to be investigated for the purpose of mulcting the guilty party. I am of opinion, however, that it could not legitimately be so **[259]** used. There is no suggestion of any misrepresentation having been made to the wife before she consented to enter into this compromise, and her authority was, I think,

obtained to that agreement. It seems to me, therefore, that there is no ground for saying that this agreement is not binding.

Appeal dismissed.

(Before the Full Court and a Special Jury,—*The Judge Ordinary, Willes, J.*, and *Hill, J.*)

CALLWELL *v.* CALLWELL AND KENNEDY. May 3, 1860.—Dissolution of an Irish Marriage.—Parties Domiciled in Ireland.—Adultery.—Damages.—Arrangement by Counsel as to Amount.—Settlement of Damages.—Marriage Settlement.—Where a husband was domiciled in Ireland, and had only a temporary abode in England at the date of filing the petition, and the wife appeared and submitted to the jurisdiction of the Court, the Full Court dissolved their marriage, which had been celebrated in Ireland, on the ground of adultery committed by the wife in England and on the Continent.—The Court is not at liberty to recognise an agreement made between the counsel of the petitioner and co-respondent in respect of the amount of damages to be paid, but is bound by the assessment of the jury.—Where the petitioner had entered into a covenant binding his estate with the payment of an annuity to the respondent, in the event of her surviving him, the Court directed the annuity, when recovered, to be paid for the benefit of the children of the marriage.

[Referred to, *Le Sueur* v. *Le Sueur*, 1876, 1 P. D. 143; *Niboyet* v. *Niboyet*, 1878, 4 P. D. 18.]

The petition in this case was filed by a gentleman domiciled in Ireland, William Callwell, Esq., described in the petition "as of Newberry, Kilcullen, in the County of Kildare, Ireland, but at the present time residing at 35 Bury Street, St. James's," for a dissolution of his marriage with the re-**[260]**-spondent, on the ground of her adultery with the co-respondent, from whom he claimed £3000 damages. The respondent and co-respondent had respectively entered appearances, and had filed answers denying the adultery charged.

The case came on for trial before the Full Court and a special jury, when,

Dr. Phillimore, Q.C., and Dr. Tristram, appeared for the petitioner.

Mr. T. Jones for the respondent.

Mr. Serjeant Pigott and the Hon. R. Bourke for the co-respondent.

It appeared by the evidence that the marriage was celebrated in Ireland, according to the rites of the United Church of England and Ireland; that the petitioner and respondent, both before and after the marriage, and up to the time of the adultery complained of, had resided in Ireland. It also appeared that the respondent had, in June, 1858, eloped from Ireland, and had committed the adultery complained of in England and at divers places on the Continent. There were four children born during the cohabitation of the petitioner and respondent, and the respondent had had one son born since she eloped, which was supposed to be the child of the co-respondent.

Pending the trial in Court, an arrangement was entered into between the counsel for the petitioner and co-respondent to the effect, that the damages to be paid should be fixed at £1500; and that if the jury by their verdict gave a larger sum, the damages should be reduced,—and if they gave a smaller sum, they should be increased,—to this amount.

There was some discussion amongst the learned judges as to the jurisdiction of the Court to dissolve an Irish marriage **[261]** upon the facts admitted and proved, but they considered that as the wife had submitted to the jurisdiction of the Court, they might pronounce the decree prayed.

The jury found a verdict for the petitioner, and assessed the damages at £3000.

An application was now made to the Court in reference to the settlement of the damages, and also to alter the marriage settlement, which was an Irish settlement.

By the settlement the respondent was entitled to the life-interest in a sum of £1314, 12s. 3d. after the death of her father, and which was, after her death, settled upon the petitioner absolutely; and the petitioner had also entered into a covenant in the settlement for his heirs, executors, and administrators to pay to her, in the event of her surviving him, an annuity of £400 a year.

A petition had been filed setting forth the purport of the settlement and of the arrangement entered into respecting the damages.

Dr. Phillimore, Q.C. (Dr. Tristram with him), moved the Court to pronounce a decree dissolving the marriage; to settle the damages (£1500) on the respondent, and to declare the covenant contained in the settlement for payment of the annuity null.

Mr. Serjeant Pigott (The Honourable R. Bourke with him) applied that the damages paid and settled should be limited to the sum of £1500 in pursuance of the arrangement.

*The Judge Ordinary*: It would be a most dangerous thing to recognize any arrangement come to between the parties as to the amount of damages to be paid. The jury by their verdict assessed the damages at £3000, and we think the Court and parties are bound by the finding of the jury.

**[262]** *Hill, J.*: The legislature has carefully taken the question of damages out of the hands of the petitioner. They are placed entirely under the control of the Court. The Court cannot be bound by any agreement entered into by the petitioner in respect of them without its sanction.

Mr. T. Jones said the respondent was willing to give up her claim to the annuity of £400, but asked that the sum of money which came to her on her father's death should be settled on her absolutely. Cur. adv. vult.

July 2.—*The Judge Ordinary* now delivered the judgment of the Court.

In this case we were asked to deal with three sums:—£1314, 12s. 3d., to the interest of which the wife is entitled for her life after the death of her father; £3000 damages assessed by the jury; and an annuity of £400, which the petitioner, on his marriage, covenanted should be paid to his wife for her life, in the event of her surviving him.

As to the first sum, we think that section 45 of the Divorce Act gives us no power over the interest of the husband, to whom the principal sum is given after the wife's death, and we do not think it right to interfere with her life-estate in the interest.

Of the £3000, we order £1500 to be expended in purchasing an annuity for the wife, to be settled on her without power of anticipation.

The remaining £1500, less expenses, to be invested in the funds, the interest to be paid to the wife for life; the principal sum after her death to go to the child born since the separation of the petitioner and his wife.

All money recovered by the trustees under the covenant to pay an annuity of £400, to be applied by them to the education and maintenance of the children of the petitioner and respondent born previously to the separation.

**[263]** The Court pronounced a decree dissolving the marriage, and directed the above directions to be embodied in the decree.

Note.—The following was the order as settled in the registry:—

The judges aforesaid made no order with respect to the sum of £1384, 12s. 3¾d., to the interest of which the respondent is entitled for her life after the decease of her father; and with respect to the sum of £3000, being the amount of damages assessed by the jury in this cause, directed the sum of £1500, the half-part thereof, to be placed in the hands of Augustine Hugh Barton, of 23 Fitzwilliam Square, Dublin, Esq., barrister-at-law, and Thomas Barklee, of Inver House, Larne, in the county of Antrim, in Ireland, the trustees agreed upon by the parties, to be by them expended in the purchase of an annuity for the respondent during her natural life, but so that she should not have any power of anticipating the same; and further ordered the sum of £1500, being the remainder of the said sum of £3000, to be placed in the hands of the said trustees, to be by them invested in the funds in their names, and for them to pay the dividends arising therefrom to the said respondent during her life, and after her decease to pay the principal to the child of her, the respondent, born since the separation of the petitioner and respondent; and with respect to the annuity of £400 which the petitioner by his marriage-settlement covenanted should be paid to his wife for her life, in the event of her surviving him, ordered the trustees of such settlement to apply all money received by them under the said covenant towards the maintenance and education of the children of the petitioner and respondent born previously to the separation.

The order then proceeded in the usual terms to pronounce the marriage dissolved.

**[264]** PETERS *v.* PETERS AND WILLETT. June 5, 1861.—Petition for Dissolution.—Several Adulterers.—Leave to proceed without making a Co-Respondent.—Where the wife, the respondent, was alleged to be leading the life of a common prostitute and to have committed adultery with several persons, who were necessary witnesses to enable the petitioner to establish the charges of adultery, the petitioner was allowed to proceed without making a co-respondent.

This was an application on the part of the petitioner (the husband) for leave to dispense with making a co-respondent.

The wife, as it appeared from the affidavit of the petitioner, was leading the life of a common prostitute, and had committed adultery with divers persons, and in particular with Dr. M. M'Dermot, who was the only witness he should be able to produce to establish the identity of the respondent, and with several other persons, whose names were known, but who were the only persons whom he could call to establish the respondent's adultery.

Dr. Wambey moved, on the part of the petitioner, for leave to proceed without making a co-respondent. By the 28th section of the Divorce Act, the Court had authority, on special grounds, to grant such leave. Where the wife is charged with having committed adultery with so many persons, if he were to make them co-respondents, he could not examine them as witnesses, and, under the circumstances, would be unable to establish the adultery.

*The Judge Ordinary*: Under the circumstances stated, the petitioner may proceed without making a co-respondent.

**[265]** THE GUARDIANS OF THE POOR OF THE HAMLET OF MILE-END OLD TOWN AND OTHERS *v.* FINDLAY AND OTHERS. IN THE GOODS OF JANE FINDLAY (Widow), deceased. July 14, and November 3 and 10, 1863.—Next of Kin a Pauper Lunatic.—Administration under sect. 73 of Probate Act to Guardians of the Poor.—J. F. died intestate and a widow, leaving M. F., her daughter, the only person entitled in distribution. M. F. had been for some years in the county lunatic asylum, maintained at the charge of the hamlet of Mile-End Old Town. No committee of person or estate had been appointed.—J. F. left a sum of money, principally in the funds, in the name of her late husband, under whose will she was entitled to it.—After the proper citations, the Court, under sect. 73 of the Probate Act, granted administration of the goods of J. F. to the Clerk of the Guardians of the Poor for the use and benefit of the lunatic, limited till the period of her lunacy; the sureties to justify.

This was an application for a grant of administration to E. J. Southwell, clerk to the above-named Guardians, and their nominee for the present purpose, of the personal estate of the above deceased.

Jane Findlay died on the 19th of August, 1856, intestate, a **[266]** widow, leaving Mary Findlay, spinster, her natural and lawful only child, and the only person entitled in distribution. The deceased left about £450, principally funded property, standing in the name of her late husband, William Findlay, who died on the 3rd of August, 1856, and under whose will she derived the money.

Mary Findlay, aged about forty-eight, had since the year 1852 been of unsound mind, and was still confined in the Middlesex County Lunatic Asylum at Colney Hatch, where she had been maintained as a pauper lunatic at the charge of the hamlet of Mile-End Old Town.

No committee of the person and estate of Mary Findlay had been appointed. The above-named Guardians had incurred charges in respect of the said Mary Findlay to the amount of £237, 2s. 6d. up to the 6th of September, 1861, the only security for which was an order of two justices of the peace for the county of Middlesex, under the 16 & 17 Vict. c. 97, s. 104, directing the said Guardians, or Mr. E. J. Southwell, their clerk, or the relieving officers of the hamlet, to seize so much of any moneys, etc., of the said Mary Findlay, as might be necessary to pay the charges of the said Guardians, and duly to account to the said justices for the same. Certain uncles and aunts were the only next of kin of the said Mary Findlay. They had been cited to take letters of administration of the personal estate of Jane Findlay for the use and benefit of the lunatic and during her lunacy, or to show cause why the same should not be granted to E. J. Southwell, as clerk of the said Guardians. None of the next of kin had appeared to this citation.

A citation had been served on Mary Findlay, the lunatic, in the presence of Mr. Marshall, surgeon of the Colney Hatch Lunatic Asylum, having charge of the said lunatic, and on Mr. W. Robinson, the only next of kin of the said lunatic residing in England. Inquiries had been made as to any creditors of William or Jane Findlay, but it did not appear that **[267]** they left any debts owing at the time of their respective deaths.

Dr. Deane, Q.C. (Mr. Pritchard with him) moved the Court accordingly, stating that he knew of no exact precedent.

*Sir C. Cresswell*: If, as your statement is, Mary Findlay is a pauper lunatic, the parish is bound to maintain her. If the Guardians apply as creditors, to whom do they stand in that position? I must take time to consider the application.

Cur. adv. vult.

The motion was renewed before Sir J. P. Wilde on the 3rd of November.

*Sir J. P. Wilde*: I think it is reasonable that the money which belongs to the pauper should be applied in payment of her subsistence; and if it can be done in no other than the mode now asked, I should wish, if I can with propriety, to grant this motion, but as no principle or conclusive authority has been cited, I must take time for consideration.

Cur. adv. vult.

November 10.—*Sir J. P. Wilde*: This is an application for letters of administration to be granted of the goods of Jane Findlay, who died a widow and intestate on the 19th of August, 1856, to Mr. Southwell, as clerk to the Guardians of the Poor of the hamlet of Mile-End Old Town. It appears that Mary Findlay, spinster, was her only child, and the only person entitled to her personal estate.

In 1852 Mary Findlay was admitted into the County Lunatic Asylum at Colney Hatch as a pauper, and from thence to the present time has been confined and maintained there at the expense of the before-mentioned hamlet. No committee of her person and estate has ever been appointed. The expenses incurred on her behalf by the hamlet amounted to **[268]** £237, 2s. 6d. On the 6th of September, 1861, the Guardians of the Poor for the hamlet obtained an order from two magistrates to seize and sell so many of the goods of Mary Findlay as might be necessary to pay the above sum of £237, 2s. 6d. The order recites that it has been proved on oath that the said Mary Findlay was entitled to a sum of money in the Bank of England, and another sum of money in the Poplar Savings Bank. It is also sworn on affidavit before the Court that Jane Findlay, the mother, left personal estate of the value of £450. It is also sworn by the nurse and the medical attendant at the asylum, that there is no hope of the recovery of Mary Findlay to soundness of mind. Search has been made for creditors of Jane Findlay, but none found. The next of kin of Mary Findlay have been cited, but have not appeared.

It is under these very unusual circumstances that the Court is asked for a very unusual grant. Those who apply for the grant are substantially creditors of the next of kin of the deceased. That character would not (so far as I have been able to discover) of itself entitle them, according to the practice of this Court, to the grant they seek. There have no doubt been exceptional cases, though none that govern this; but the general rule would require something of a representative character in the person who seeks a grant on behalf of the next of kin. This character is here wanting, and if the Court pronounces for this grant, it must do so under the powers conferred by section 73 of the Probate Act. These powers are exercised with some reluctance; but the true function of the Court is to facilitate the collection and distribution of the estates of deceased persons, and not by any technical rules to impede that distribution.

If the administration now asked is refused, to whom can the estate be confided? The next of kin of the lunatic refuse to interfere, and there is no one who represents her. She is lunatic, and therefore cannot act herself; the grant must therefore go as prayed. It will be made under the powers **[269]** conferred by section 73; it will be for the use and benefit of the lunatic, and limited to the period of her lunacy. Furthermore, an inventory and justified security will be required.[1]

IN THE GOODS OF TYRRWHIT PULMAN (deceased). November 3 and 10, 1863.—Will.—Executors "in India"—"in England."—Form of Probate.—P., by his Will, appointed C. and D. "executors of my Will in India," and W. "sole executrix of my Will in England." On an exemplification of probate granted in Calcutta to C. being sent home, probate was granted in the principal registry to

[1] In *Williams* v. *Allen*, before the Master of the Rolls, 19th of November, 1863, where a person, aged fifty, of unsound mind, though not found so by inquisition, was possessed of a fund in Court, which was her whole fortune, it was ordered to be paid out to her mother, who undertook to maintain her. (9 L. T. R. N. S. 405.)

W., as one of the executors of the Will, reserving power of making a similar grant to the other executors in the Will. The Bank of England objected to the reservation of this power. But the Court refused, on motion on behalf of W., to direct the probate to be altered.

[S. C. 33 L. J. (P.) 20; 9 Jur. (N. S.) 1204; 9 L. T. 347; 12 W. R. 60.]

In this case the deceased executed a will in India, which contained an appointment of executors in the following terms:—"I appoint my said aunt Anna Maria Walker, spinster, my sole executrix in England;" "Lieut.-Col. F. W. Swinhoe and Charles Richard Frances, executors of this my will in India."

Probate was granted to Colonel Swinhoe, at Calcutta, on the 26th of May, 1863. An exemplification of this probate was sent to England, and a grant was made at the principal registry to Miss Walker, as one of the executors of the will, **[270]** power being reserved of making a similar grant to Swinhoe and Frances, the other executors in the will. On presenting this probate in the Bank of England, it was objected that the reservation of the power of granting probate to Swinhoe and Frances was wrongly inserted, and the bank refused to act on the probate.

Dr. Spinks now moved the Court to direct the probate to be altered, by striking out the reservation of the power or to issue a fresh probate omitting it. Miss Walker is the only person entitled to represent the deceased in England.[1] It is understood that there is a difficulty felt in the registry as to the term "sole executrix in England," viz., whether it is equivalent to "sole executrix for England." It is submitted that it can only be construed as a full equivalent. If so, the reservation of the power is wrongly inserted, and as the executors resident in India may, under this power, obtain probate in common form on their return to this country, Miss Walker is entitled to be protected against that. In case of her death leaving an executor, it is submitted that such executor would be the proper representative of the deceased in this country, and not the deceased's executors in India, who, under the power reserved in this probate, must take the grant. Cur. adv. vult.

November 10.—*Sir J. P. Wilde*: This is an application made by Miss Anna Maria Walker to revoke a grant of probate, which was made to and accepted by her, of the will of Mr. Tyrrwhit Pulman, dated the 6th of February, 1863, and for the grant of a new probate of that will to her, or in the alternative for an alteration of the probate so already granted. The existing grant is "to Anna Maria Walker, one of the executors named in the will, etc." And then follow these words:—"Power is reserved of making the like grant to F. W. S. and C. R. **[271]** F., the other executors named in the said will." It is this reservation that she now objects to, and the substance of her prayer is that probate may be granted to her absolutely as sole executrix.

Now the above persons are no doubt named in the will as executors, but her contention is that, according to the construction of the will, they were intended to be executors for India only, and not for the assets in this country. The registrar of this Court took a different view of the testator's meaning, and inserted the above reservation accordingly, in order that if the other executors at any time came forward and desired to act in this country, there should be no impediment in the way of such claim. The Court does not propose to itself to decide on the present occasion which view of the testator's intention was correct, for it is unnecessary to do so. The grant already made to Miss Walker gives her every power which any probate can give her over the estate in this country, and by entering a caveat she can secure to herself the opportunity of challenging the right of the other executors to a similar grant, should they claim it.

What, then, is the objection to the probate as it now stands? Why simply this, that the Court has reserved a power of granting probate also to the other executors if they should claim it, and if the Court should, after hearing their claim, consider them entitled to receive it. What Miss Walker asks is, that the Court, without hearing the other executors, should bind itself not to entertain their claim. But, singular as this demand is, after she has already accepted the grant which she now wishes to alter, the reason for making the demand is more singular still. It is as follows:—The Court learns, with some surprise, that some person at the Bank of England has felt himself called upon to exercise his judgment in construing the will,

[1] See Williams on Executors, 219, 5th edit.

and has come to the conclusion that Miss Walker's probate ought to have been granted in a different form, and entertaining this opinion, he has therefore refused to act upon **[272]** it. This is a misfortune, the remedy for which does not lie within the province of this Court to point out, but it forms no reason whatever for the alteration of the present probate, and the application is therefore refused.

IN THE GOODS OF CHARLES ROBERT SPERLING (deceased). November 10, 1863.—Will.—Attestation.—The deceased having signed his Will in the presence of a servant, the latter subscribed "Servant to Mr. Sperling," without any name. A solicitor, the other attesting witness, had directed him to sign as servant to Mr. Sperling.—Held, a sufficient attestation and subscription.

[S. C. 33 L. J. (P.) 25; 9 Jur. (N. S.) 1205; 9 L. T. 348; 12 W. R. 354. Distinguished, *In the Goods of Maddock*, 1874, L. R. 3 P. & D. 172.]

In this case, the deceased died on the 8th of July, 1863, leaving a will bearing date the 28th of March, 1863, to which there was a full attestation clause, followed by the signature "George W. Harris, Solicitor, Halstead, Essex," and then, in a different handwriting, the words "Servant to Mr. Sperling," but no name. Mr. Harris stated on affidavit, that on the 28th of March he attended at Stanmore manor-house to get the will executed, that Mr. Sperling was wheeled into the library, and that Thomas Saunders, who had been for some time in attendance upon Mr. Sperling, was called in and informed that Mr. Sperling was about to execute his will, to which Thomas Saunders's signature, as well as that of Mr. Harris, would be required to be subscribed as witnesses. That the deceased wrote his name in the presence of Harris and Saunders, and Mr. Harris having signed his own name, turned to Saunders and said, "Now sign yourself here as servant to Mr. Sperling," pointing to the part of the paper immediately **[273]** below his own signature. That Saunders then wrote the words "Servant to Mr. Sperling," and Mr. Harris being in a hurry to get to the train, folded up the paper without looking at it and placed it in an iron chest in the deceased's library. Thomas Saunders stated that he wrote the words "Servant to Mr. Sperling," intending such words to be his signature, and because he believed, from the direction given him by Mr. Harris, that it was the proper way of attesting the will.

Mr. Chitty moved for probate. He cited *The Goods of William Oliver* (deceased), 2 Eccl. & Adm. Reps. 57.

*Sir J. P. Wilde*: I think that there is a sufficient attestation and subscription. I am satisfied that Saunders wrote the words which appear on the will, intending thereby an identification of himself as the person attesting.

IN THE GOODS OF GEORGE JAMES HAY (deceased). December 1, 1863.—Scotch Confirmation.—21 & 22 Vict. c. 56.—23 & 24 Vict. cc. 15 and 80.—The schedule (E) annexed to 21 & 22 Vict. c. 56, being the form of confirmation of an executor nominate, runs, "An inventory of the personal estate and effects of the said C. D. at the time of his death, situated, etc.";—But the Court, looking to the provisions of 23 & 24 Vict. c. 80, s. 5,—Held, that the words "at the time of his death" are, since that Act, properly omitted in Scotch confirmations, and directed such a confirmation to be sealed.

The deceased in this case died on the 21st of October, 1862, domiciled in Scotland, having by a certain trust-deed, **[274]** disposition and settlement, and two codicils, appointed Lieut.-Colonel Hay, the Rev. Augustus Handley, and Alfred Atkinson Pollock, executors, who had given upon oath an inventory of the personal estate of the deceased in Scotland and England.

In the testament testamentar tendered to the registrar of this Court for sealing, it was recited that the executors "have given upon oath an inventory of the personal estate and effects of the said Geo. Jas. Hay, Esq., situated in Scotland and England, amounting in value to £ , which inventory has likewise been recorded, etc."

It was objected in the registry that this was not a sufficient compliance with schedule E. annexed to 21 & 22 Vict. c. 56, as it omitted the words, "at the time of his death, situated, etc.," which are contained in the schedule. By the 10th section of the Act, confirmations shall be in the form, or as nearly as may be in the form, of schedules D. and E. thereunto annexed.

Dr. Swabey now moved the Court to direct the testament testamentar to be sealed

in its present form. Admitting, for argument, that the words omitted did form a necessary part of the schedule when that Act passed, there are subsequent Acts to be considered, which, it is submitted, make the form adopted in the present testament testamentar the proper one. The 23 & 24 Vict. c. 15, sect. 6, enacts that money secured on heritable property and by heritable bonds in Scotland, is to be chargeable with probate and inventory duties. The 23 & 24 Vict. c. 80, reciting such enactment, and that it is expedient that the levying and collecting the said duty should be regulated as hereinafter mentioned, enacts by sect. 5 that the special inventory provided by this Act, and the inventory of the personal estate of the deceased containing also the property on which duty is imposed by the recited Act and this Act, shall be stamped with duty according to the value of the property contained therein at the time they shall be respec-**[275]**-tively sworn to, including the proceeds accrued thereon down to that time. And it is hereby provided that the inventory and additional inventory of any person deceased, required to be exhibited and recorded in the proper Commissary Court in Scotland, shall be stamped with duty according to the value of the property contained therein at the time they shall be respectively sworn to, including the proceeds accrued thereon down to that time, etc. The last part of the section quoted seems general in its terms, and not limited to the particular duties imposed by the two Acts.

*Sir J. P. Wilde*: I think that is so, and the confirmation will be sealed in its present form.

MITCHELL AND MITCHELL *v.* GARD AND KINGWELL. (On Motion as to Costs.) November 24 and December 1, 1863.—Will.—Unsuccessful Opposition by Next of Kin.—Misconduct of Residuary Legatee.—General Rules as to Costs.—In considering the question of costs in probate causes, the Court will be guided by the two following rules:—first, if the cause of litigation takes its origin in the fault of the testator, or of those interested in the residue, the costs may properly be paid out of the estate; secondly, if there be a sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent.—In the present case, the Court, holding that the misconduct of the residuary legatee gave the next of kin a reasonable ground for liti-**[276]**-gation, ordered their costs to be paid out of the estate, though they had failed to prove, inter alia, a plea of undue influence.

[S. C. 33 L. J. (P.) 7; 10 Jur. (N. S.) 51; 9 L. T. 491; 12 W. R. 255. Referred to, *In the Estate of Osment*, [1914] P. 133.]

This was a question of costs, arising out of a testamentary suit, the facts of which are sufficiently stated, ante, p. 75.

Mr. Karslake, Q.C. (Mr. H. T. Cole with him) now moved that the costs of the next of kin, the unsuccessful opponents of the will, should, under the particular circumstances of the case, be paid out of the estate. It seems doubtful whether any strict rule has been or can be laid down; but in the 4th edition of Coote and Tristram, Probate Practice, 263-4, the nature of the cases in which the Court has granted costs out of the estate to an unsuccessful suitor is indicated, and we submit the circumstances of the present case are such as to warrant the application, which is in each case within the discretion of the Court.

The Solicitor-General (Sir R. P. Collier) (Dr. Wambey and Mr. Lopes with him) prayed the Court to condemn the next of kin in costs. The case falls within the rule laid down in *Summerell* v. *Clements*, ante, p. 35. Besides the issue of incapacity, undue influence was pleaded and negatived by the verdict of the jury. The parties opposing the will should therefore be condemned in costs, or, at the best, the Court will make no order as to costs. Cur. adv. vult.

December 1.—*Sir J. P. Wilde*: This was a testamentary suit. After a long and careful trial, conducted before Byles, J., at the assizes for the county of Devon, the will was here pronounced for and admitted to probate. The Court is now asked by the plaintiffs that their costs may be allowed them out of the estate, and by the defendants that the plaintiffs may be condemned in costs.

These questions of costs are addressed to the discretion of **[277]** the Court. It is hardly in the nature of discretion that its exercise should be adjusted by exact rule.

No positive regulation could be established that would bear the strain put upon it by the justice or hardship of particular instances. But, where all is not possible, something may yet be done. By acknowledged method and general classification, the suitor may in some measure be enabled to estimate the prospect before him, and foresee the penalties under which he launches into litigation. To this extent it is the duty of the Court, so far as may be, to assist him.

The basis of all rule on this subject should rest upon the degree of blame to be imputed to the respective parties; and the question, who shall bear the costs? will be answered with this other question, whose fault was it that they were incurred? If the fault lies at the door of the testator, his testamentary papers being surrounded with confusion or uncertainty in law or fact, it is just that the costs of ascertaining his will should be defrayed by his estate.

If the party supporting the will has such an interest under it that the costs, if thrown upon the estate, will fall upon him, and he by his improper conduct has induced a litigation which the Court considers reasonable, it is not unjust that the estate should bear the costs of the litigation which his conduct has caused.

But if the testator be not in fault, and those benefited by the will not to blame, to whom is the litigation to be attributed? In the litigation entertained by other Courts, this question is in general easily solved by the presumption that the losing party must needs be in the wrong, and, if in the wrong, the cause of a needless contest. But other considerations arise in this Court. It is the function of this Court to investigate the execution of a will and the capacity of the maker, and having done so, to ascertain and declare what is the will of the testator. If fair circumstances of doubt or suspicion arise to obscure this question, a judicial in-**[278]**-quiry is in a manner forced upon it. Those who are instrumental in bringing about and subserving this inquiry are not wholly in the wrong, even if they do not succeed. And so it comes that this Court has been in the practice on such occasions of deviating from the common rule in other Courts, and of relieving the losing party from costs, if chargeable with no other blame than that of having failed in a suit which was justified by good and sufficient grounds for doubt.

There is still a further class of cases. I speak of those in which, beyond the execution of the will and the capacity of the testator, the opposing party takes upon himself to question the conduct or the good faith of others, and to place on the record pleas of undue influence or fraud. These are affirmative charges; they ought not to be made except upon some apparently very sufficient ground. But though they may and do differ largely in the degree of probability or suspicion to be demanded for their justification, it is not easy to say that they differ in nature from pleas denying execution or capacity. Both classes of defence are addressed to the same question, what was the will of the testator, and both are within the scope of the subject entrusted to the vigilance of the Court. Here, also, it seems just and meet, if the circumstances of the case have rendered the inquiry a proper one, that neither party should be condemned in costs.

From these considerations, the Court deduces the two following rules for its future guidance: first, if the cause of litigation takes its origin in the fault of the testator or those interested in the residue, the costs may properly be paid out of the estate; secondly, if there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent.

I am aware that there are many cases to be found in which **[279]** costs have been granted out of the estate under circumstances different from those I have predicted. I am aware also that in some cases a less liberal view than I have taken of the conduct of parties pleading undue influence and fraud has prevailed; but there are cases to be found pointing both ways. I have sought in vain in the authorities of the Prerogative Court, and especially in the reports of the Judicial Committee, for anything like a general classification or rule. Sir Cresswell Cresswell had to make the same confession in the case of *Broadbent* v. *Hughes*, 29 L. J. 134, Prob. I have also considered the cases reported in this Court. They will be found collected in a most useful and compendious note to the case of *Summerell* v. *Clements*, 32 L. J. 33, Prob. But it is hard to extract a general rule. It is of high public importance that

doubtful wills should not pass easily into proof by reason of the cost of opposing them. It is of equal importance that parties should not be tempted into a fruitless litigation by the knowledge that their costs will be defrayed by others. These opposite reasons appear to have alternately swayed the decisions to be found in the books. It is the desire of the Court to keep both in view, while yielding to neither, and it is in this spirit that the above rules have recommended themselves for adoption.

Of the present case, on the facts, little need be said. I have carefully read the learned Judge's notes, and fully conferred with the learned Judge himself, by whose opinion I am strongly fortified in the decision I am about to pronounce. The Court considers that Mr. Gard, to whom the bulk of the property of the testatrix was bequeathed in a will made by himself, a professional man, has been guilty of improper conduct in the transaction, and particularly so in knowingly omitting from the will legacies which he knew (for so the jury found) that the testatrix had ordered and still desired, but which escaped her memory at the time the will was executed. This conduct, and the suspicions which flowed from it, gave the **[280]** next of kin a fair and reasonable ground for litigation. The Court therefore orders that the costs of the plaintiffs be paid out of the estate.

TWELLS *v.* CLARKE AND OTHERS (on motion). January 16, 1864.—Pleading.—Leave to introduce New Plea.—Plea, "not the Will of Deceased."—Practice.—Leave to introduce a new plea after issue joined will not be given unless the affidavit in support of the motion discloses such facts as, if proved in evidence, would warrant the plea.—If at the trial evidence of such facts were to be given, the Court would allow a corresponding plea to be added to the record, if it could be done without injury to the other party.—Semble, a plea of "not the will of the deceased" means that the deceased signed the paper in question without intending it to operate as a testamentary instrument; and Quære, whether the terms of such a plea ought not to be more precise than "that such a paper is not the will of the deceased."

This was a question arising on the pleadings in a testamentary suit. The plaintiff propounded in a declaration in the usual form the will of Esther Cooke. The plea was incapacity.

Dr. Spinks, on behalf of the defendants, now moved for leave to add the plea, "that the said paper-writing alleged to be the will of the deceased, etc., is not her will." The motion was founded on an affidavit to the effect that, on placing the evidence before counsel to advise on behalf of the defendants, he considered that it would be prudent to apply to the Court for leave to add such a plea.

*Sir J. P. Wilde*: What is now asked can be done at the **[281]** hearing, if the evidence is such as to make the Judge think that such an addition would further substantial justice between the parties. The affidavit before the Court discloses no such facts as would entitle the party to an amendment of the pleadings now.

Dr. Wambey, on behalf of the plaintiff, objected to the form of the plea proposed, on the ground of its vagueness; that, in fact, it involved every plea that could go to the validity of a testamentary instrument; that in *Cunliffe and Ormerod* v. *Cross*, ante, p. 37, where Sir C. Cresswell suggested the adoption of the plea, he seems to limit its meaning to this, that the deceased never signed the paper with the intention that it should operate as his will; if so, the plea should be totidem verbis, as in *Thorncroft and Clark* v. *Lashmar*, 2 Swa. & Tr. 480. In *Mitchell and Mitchell* v. *Gard and Kingwell*, ante, p. 75, the same plea seems to have caused great difficulty, and involved part of the case in considerable obscurity.

*Sir J. P. Wilde*: The proper office of the plea no doubt is, to shew that though the deceased signed the paper in question, he did so without intending that it should operate as a testamentary instrument. In the present case, the whole question will stand over till the trial, for the reason which I have already mentioned. In the meantime I think there is a good deal in what Dr. Wambey says, as to the vagueness of the plea, in the form in which it seems hitherto to have been used.

**[282]** (Before *Sir J. P. Wilde* and a Common Jury.)

LISTER AND OTHERS *v.* SMITH AND OTHERS. December 3 and 22, 1863.—Duly executed Paper, Testamentary on the Face of it.—Absence of Animus Testandi.—Evidence.—A duly executed paper, testamentary on the face of it, is not entitled

to probate, if it is clearly proved, by parol evidence, that it was executed by the deceased without any intention that it should affect the disposition of his property after death.—The Court of Probate, however, will not hold itself bound by the verdict of a jury to that effect, but will itself weigh the evidence on which such verdict was founded.

In this case the plaintiffs, as executors, propounded a will of Ralph Wheeldon Smith, dated October, 1858, and a codicil thereto, dated 27th of July, 1860. Various parties were cited (s.c. 3 Sw. & Tr. 53).

Mr. Macaulay, Q.C., and Dr. Tristram, for the plaintiffs.

Mr. Hayes, Serjt., and Mr. Hance, for Mrs. Julia Mason, one of the parties cited, applied, with consent of the plaintiffs, to amend the pleadings and record. They had been only within a day or two instructed on behalf of Mrs. Julia Mason, a daughter of deceased and one of the parties cited. It appeared that none of the other defendants intended to interfere; she was interested in having the alleged codicil rejected, and the only question she wished to raise was, whether the codicil of the 27th of July, 1860, which the executors felt themselves bound to bring forward, had been executed by the deceased with the intention that it should operate as a testamentary instrument. They therefore asked to amend the record by adding a plea, that the paper-writing of the 27th of July was not the codicil of the deceased.

**[283]** The amendment having been made, with consent of plaintiff's counsel, the following facts were proved by the documents themselves, and the evidence of Thomas Smith, a brother of the deceased, and a Mr. Green, managing clerk to an attorney.

Julia Mason was a married daughter of the deceased, and she took an interest under the will of October, 1858, as did the other children of the deceased. There was some dispute between Mrs. Marshall, the mother-in-law of Mrs. Mason, and the deceased, as to the title to some house property she had occupied for twenty years, and for which he thought Mrs. Marshall ought to pay him rent. An agreement was drawn up, which the deceased wished Mrs. Marshall to sign, admitting his right to the property; she refused, or, in fact, did not sign it. The deceased desired his brother Thomas Smith to get a conditional codicil made for him, with the view of compelling Mrs. Marshall to give up the house, or to come to his terms.

Mr. Green, to whom Thomas Smith came with the instructions, said:—"The condition, as far as I understood it, was that if Mrs. Marshall gave up the house, the codicil was not to take effect; and if she refused, then it was to take effect. I endeavoured to persuade him not to have the codicil made at all, as it might happen that the codicil would be in existence when he died. He said his brother would be very much disappointed if it were not made, and the notion was persisted in. I prepared it in an absolute form (revoking the benefit which Mrs. Mason took under the will, the notion seeming to have been that the Masons, being informed of the codicil, would use their influence with Mrs. Marshall to sign the agreement). I saw nothing more of it after I gave it to Thomas Smith."

Thomas Smith took the codicil, so prepared, to the deceased, who said, "I'll sign it, and put it in your hands to take care of." Before he signed the codicil, Thomas Smith, by his direction, **[284]** wrote to Mrs. Mason. The codicil was read by the deceased before its execution, and duly signed and attested. Thomas Smith asked him whether, in the event of the agreement not being signed or complied with, he intended his daughter Julia Mason, and her children, to be deprived of all benefit under the will of 1858. Deceased said no, he had no intention to alter his will of 1858, but Thomas Smith was to hold the codicil with the view of getting a settlement of the rent question. Thomas Smith kept the codicil till compelled to give it up by subpœna from the Court. The deceased died on the 3rd of April, 1861.

The codicil was as follows:—"I, Ralph Wheeldon Smith, of, etc., declare this to be a codicil to my last will, which will bears date the 26th day of October, 1858. I hereby revoke and make void the gift to or in trust for my daughter Julia, the wife of Edwin Mason; and I direct that the moneys thereby given or provided for her shall fall into or form part of my residuary or trust moneys. In all other respects I hereby ratify and confirm my said will."

Mr. Hayes, Serjt., addressed the jury on behalf of Mrs. Mason.

*Sir J. P. Wilde* made the following remarks to the jury in summing up:—The facts of the case lie in a very small compass, but the question is of great importance. It tends to make the wills of any of us very insecure, if a regularly executed document,

purporting on the face of it to be testamentary, can be set aside by evidence of the sort you have just heard as to the intention of the testator, that such a paper should have no testamentary effect; but I think I must leave it to you to say whether, upon the evidence, the deceased signed the codicil intending it to be an effective instrument, or whether he signed it as a mere sham. I must tell you that the presumption is that he intended it to be an effective in-**[285]**-strument, and it is the duty of those who say it was not so intended, to make out that proposition very clearly.

The jury found by their verdict, that the deceased did not sign the paper intending it to have any testamentary operation, and the Court reserved any question as to the effect of this finding of fact upon the codicil and as to costs.

December 22.—Dr. Tristram, for the executors, now asked the Court to decree probate of the will only. The executors were satisfied that the testator never intended the codicil to be operative, and therefore considered that by asking for probate of it, they would be attempting to defeat his testamentary intentions. It was executed as a mere sham, and purported to affect real as well as personal property. In support of the motion, he submitted two propositions to the Court:—1. That before the last Wills Act, 1 Vict. c. 26, a sham will or codicil was inoperative in respect of both personal and real estate. 2. That there were no words in the last Wills Act altering the law on this point. There was ample authority that before the Wills Act such a will, whether of real or personal estate, was a mere nullity; it being essential to the validity of every testamentary paper that the deceased, at the time of making it, should have animus testandi. Blackstone, in treating of a last will and testament, says, "The definition of the old Roman lawyers is much better than their etymology, 'voluntatis nostræ justa sententia de eo quod quis post mortem suam fieri velit,' which may be thus rendered, 'The legal declaration of a man's intentions which he wills to be performed after his death.' It is called sententia to denote the circumspection and prudence with which it is supposed to be made; it is voluntatis nostræ sententia because its efficacy depends on its declaring the testator's intention." (1 Stephen's Com. cap. xx. Devises.) In 2 Shep. Touch., by Prest. 204, it is said, "The second thing required to the making of a good testament is, that he that doth make it have, at the **[286]** time of making it, animum testandi, i.e. a mind to dispose, a firm resolution and advised determination to make a testament, otherwise the testament will be void. For it is the mind, not the words, of the testator that gives life to the will; since, if a man rashly, unadvisedly, incidentally, jestingly, or boastingly, and not seriously, writes or says that such a one shall be his executor, or have all his goods, or that he will give to such a one such a thing, this is no will, nor to be regarded. And the mind of the testator herein is to be discovered by circumstances; for if at the time he be sick, or set himself seriously to make his will, or require witnesses to bear witness of it, it shall be deemed in earnest, but if it be by way of discourse only, or of somewhat he will do hereafter, or the like, it shall be taken for nothing." The passage at page 14, Swinburne on Wills, p. 1, s. 3, and Bac. Abr. "Wills and Testaments" (C.), are to the same effect. The form of the common condidit used in the Prerogative Court in propounding a will before and after the Wills Act, is in conformity with these authorities, for it alleged that the deceased "having a mind and intention to make and execute his last will and testament," etc. (3 Burn's Ecc. Law, by Phillimore, 196.) The earliest case he could discover in point was that of *the co-heirs of Sir W. Rider* (F. Moore, 874), referred to in Com. Dig. "Devises" (D. 2). The case as reported in Moore is as follows:—"En le Court de Gards inter les co-heires de Sir William Rider fuit declare per Coke, Chiefe Justice del Common Bank, et Tanfield, Chiefe Baron, que si un fait son volunt en escript et dit a donques que il voit ceo alter on adder a ceo, ceo nest son volunt, quia nest compleat ne publish pur son volunt; mes est deferre et delay tanque le alteration on addition vient a ceo; et si la party morust devant l'alteration ou addition, et sans publication que ceo sera son volunt, cest volunt nest son volunt. Mes s'il fait son volunt et ceo publish, et apres ceo il vient en son ment de alter ou adder a ceo mes morust **[287]** devant que il ad fait ascun alteration ou addition uncore le primer estoyera pur son volunt." There are also two cases in the Prerogative Court, *Trevelyan* v. *Trevelyan*, 1 Phill. 149, *Nichols* v. *Nichols*, 2 ibid. 180. In the former, the Court admitted evidence that a testamentary paper was not seriously intended to operate, and in the latter refused probate of a duly-executed will which the testator had drawn up as a specimen of the concise way in which a will might be drawn, without intending it

should operate. He also cited *Wyndham* v. *Chetwynd*, 1 Burr. 414, to shew that devises were looked upon as conveyances of land, and that therefore the same doctrine which was applied to a deed executed as an escrow, might fairly be applied to a will. If such was the law before the passing of the last Wills Act, that Act contained no words altering it.

*Sir J. P. Wilde*: I have referred to the Wills Act, and it does not affect the question.

Mr. Hance asked that the defendants' costs might be paid out of the estate.

*Sir J. P. Wilde*: The case has been very well argued by Dr. Tristram, and the Court is much indebted to him for the authorities which he has collected. It is a most remarkable case, and one which, since the trial, has given me some anxiety.

The question raised is whether a certain codicil is or is not entitled to probate. It is regularly executed by the testator, but evidence was given at the trial that the testator never intended it seriously to operate as a testamentary document. It was proved before the jury that the testator wished one of his family to give up a house which she then occupied, and that to force her to do so, he made pretence of revoking by codicil a bequest which he had made by will in favour of this woman's daughter, and that the paper in question was made with that **[288]** sole object; that the testator gave his attorney instructions to prepare it with that intention, and informed him before it was drawn that he never wished it to operate at all. Further, that the attorney pointed out the folly of executing such an instrument, and would have nothing to do with its execution. It was, however, executed in the presence of the testator's brother, to whom it was then given by the testator with express directions that he was not to part with it, and that it was in no event to operate, or to revoke the bequest made in his will, but to be used only in the manner above described. Similar declarations were made by the testator at the moment of its execution.

A codicil thus duly executed in point of form, and attested by two witnesses, has been directly impeached by parol testimony. It bears all the appearance on the face of it of a regular testamentary act; but on the evidence it has been found by the jury not to have been intended as such by the testator. The momentous consequences of permitting parol evidence thus to outweigh the sanction of a solemn act are obvious. It has a tendency to place all wills at the mercy of a parol story that the testator did not mean what he said. On the other hand, if the fact is plainly and conclusively made out, that the paper which appears to be the record of a testamentary act, was in reality the offspring of a jest, or the result of a contrivance to effect some collateral object, and never seriously intended as a disposition of property, it is not reasonable that the Court should turn it into an effective instrument. And such no doubt is the law. There must be the *animus testandi*. In *Nichols* v. *Nichols*, 2 Phill. 180, the Court refused probate to a will regularly executed, which was proved to have been intended only as a specimen of the brevity of expression of which a will was capable. And in *Trevelyan* v. *Trevelyan*, 1 Phill. 149, the Court admitted evidence, and entertained the question whether the document was seriously intended or not. In both cases the Court held that evidence was admissible of **[289]** the animus testandi. And to the same effect is the authority of Swinb. pt. 1, s. 3; and of Shep. Touch. 404. The analogies of the common law point the same way. A deed delivered as an escrow, though regularly executed, is not binding. And in *Pym* v. *Campbell*, 6 Ell. and Bl., the Queen's Bench held that a regular agreement signed by the party might be avoided by parol evidence that at the time of its signature it was understood that it should not operate unless a certain event happened. There can therefore be no doubt of the result in point of law if the fact is once established. But here I must remark that the Court ought not, I think, to permit the fact to be taken as established, unless the evidence is very cogent and conclusive. It is a misfortune attending the determination of fact by a jury, that their verdict recognises and expresses no degree of clearness in proof. They are sworn to find one way or the other, and they do so sometimes on proof amounting almost to demonstration, at others on a mere balance of testimony; sometimes upon written admissions and independent facts proved by disinterested parties, sometimes on conflicting oaths or a nice preponderance of credibility. And it is difficult to impress them with the enormous weight which attaches to the document itself as evidence of the animus with which it was made. This weight it becomes the Court to appreciate, and to guard with jealousy the sanction of a solemn act.

In the present case, however, the Court finds the evidence so cogent, that it is prepared to act on the finding of the jury that the codicil was executed as a sham and a pretence, never seriously intended as a paper of testamentary operation. But I am far from saying that the Court will in all cases repudiate a testamentary paper simply because a jury can be induced to find that it was not intended to operate as such. The character and nature of the evidence must be considered, as well as the result at which a jury have arrived, and the Court must be satisfied that it is sufficiently cogent to its end. In this **[290]** case the Court is so satisfied, and it therefore pronounces for the will, and against the codicil; the costs to be paid out of the estate.

CLAYTON *v.* DAVIS (IN THE GOODS OF HENRY HAWKINS, deceased). December 22, 1863.—Citing to bring in Will.—Lapse of Time.—Costs.—H. died in 1856; his widow proved his Will in 1860, and died in 1862, making D. her executor, and leaving him all her property. C., next of kin of H., cited D. to bring in the probate of H.'s Will. D. propounded it, and C. pleaded thereto. The jury found the issues in favour of D. On the question of costs, the Court—Held, that though C., on the facts proved, might have had reasonable grounds for opposing the probate when taken, yet he had no right to wait till after the widow's death, who might have given important evidence, and then call in the probate, without being liable to costs in case of failure.

In this case, the plaintiff, as the nephew and next of kin of Henry Hawkins, had cited the defendant to bring in the probate of the will of the deceased, and to shew cause why it should not be revoked. The deceased died in March, 1856, leaving a will, dated 14th of May, 1855, whereof his widow was appointed sole executrix. She took probate in common form on the 13th of September, 1860, and died on the 29th of March, 1862, leaving a will of the 3rd of August, 1861, of which the defendant was executor. Henry Hawkins, by his will, had left all his property to his widow, and she, by her will, had left all her property to Davis.

The defendant propounded the will, and the plaintiff pleaded, first, that it was not the will of the deceased; secondly, that it was not duly executed; thirdly, incapacity.

Issues joined on these pleas were tried before Sir J. P. **[291]** Wilde by a special jury, on the 5th and 9th of December; the jury found a verdict for the defendant on all the issues.

The Queen's Advocate (Sir R. J. Phillimore) and Mr. Searle, for the defendant, moved that the plaintiff should be condemned in the costs. The plaintiff knew that the will had been made within a few days after its execution; but he took no steps to test its validity till after the death of those who could give most important evidence on the matter.

Mr. Hopwood, contrà: The next of kin had a reasonable ground in this case to contest the validity of the will; the chief witness in support of it was the defendant himself, who drew the will and attested it, and there was strong evidence of incapacity before the jury.

*Sir J. P. Wilde*: In this case, the defendant, Mr. Davis, was cited to bring in the will of Dr. Hawkins, which was proved in common form, in September, 1860, by his widow. Mr. Clayton says the will was obtained at a time when the deceased had no capacity to make a will. Though the plaintiff did not plead undue influence, the course necessarily taken at the trial was to intimate that Mr. Davis and Mrs. Hawkins procured a will from Dr. Hawkins, when they knew he was incapable. The verdict was in favour of the will, and the question now is, whether the defendant should pay his own costs, or whether the plaintiff should be condemned in costs. That depends upon whether Mr. Clayton had reasonable grounds for the course he has pursued. If immediately after Dr. Hawkins's death he had disputed the will, I should not, looking at the evidence produced of the extreme state of illness in which Dr. Hawkins was at the date of it, have condemned him in costs; but he waited till after Mrs. Hawkins's death, who could have given most material evidence, and then drags Mr. Davis into Court to support the will. That is not **[292]** the course he ought to have pursued. He says that he did not dispute the will until after the widow's death, because he relied on her promise to leave him the property. If he chose to accept the promise instead of his legal rights, he must take the consequences; he must pay the defendant's costs.

CROSS *v.* CROSS AND OTHERS (THOMAS intervening). January 19, 1864.—Suit for Revocation of Probate.—Intervener.—Right to begin.—Costs.—New Trial.—In a suit for revocation of probate, the party propounding the Will must begin, though the plaintiff has declared, alleging an intestacy.—Verdict of a jury establishing a Will, although the surviving attesting witness swore that when she subscribed her name the testatrix was dead, upheld on the evidence.—It being doubtful whether the unsuccessful plaintiff in a suit for revocation of probate would be able to pay the costs of an intervener, who had propounded the Will, the Court ordered that the intervener's costs should be paid out of the estate.—A next of kin, who unsuccessfully opposed a Will, was condemned in the costs of another next of kin, whom he had cited to see proceedings, and who had appeared and pleaded, but had taken no other part.

[S. C. 33 L. J. (P.) 49; 10 Jur. (N. S.) 183; 10 L. T. 70; 12 W. R. 694.]

This was a suit, instituted by John Berryhill Cross, the plaintiff, for the purpose of obtaining a revocation of probate for the will of the late Harriet Cross, which had been granted in common form, on the 28th of July, 1840. The plaintiff was a brother of the deceased, and he had cited his other brothers and sisters to see proceedings, one of whom, Alexander Cross, appeared and pleaded. Frederick Richard Thomas **[293]** intervened as the assignee of the estate and interest of James Cross, under the will. The pleadings were as follows:—

Declaration by the plaintiff.

That the paper-writing bearing date the 11th of September, 1839, whereof, as being the last will and testament of Harriet (otherwise Harriett) Cross, deceased, probate was, on the 28th of July, 1840, by the Prerogative Court of Canterbury, granted to Hannah Cross, the sister of the said deceased, one of the executors therein named, limited so far as concerned the principal moneys, stocks, etc., and effects which the said deceased and alleged testatrix was entitled to under the will of one Samuel Berryhill, deceased, dated the 23rd of April, 1823, and whereof she had power to dispose, and had, by her said alleged will, disposed accordingly, but no further or otherwise, power having been reserved of making the like grant to the said John Berryhill Cross, the brother of the deceased, and the other executor named in the said alleged last will and testament, when he should apply for the same, and which said probate has been brought into and now remains in the principal registry of this honourable Court, was not executed according to the provisions of 1 Vict. c. 26.

That the name or signature "Harriet Cross" set and subscribed to the said alleged will, was not so set and subscribed by the said Harriet Cross, nor by any other person in the presence of, and by the direction of, the said Harriet Cross.

That the said Harriet Cross died on or about the 16th of September, 1839, intestate, a spinster, without a father, and leaving Mary Cross, her natural and lawful mother and next of kin, and the said John Berryhill Cross, one of her natural and lawful brothers, and one of the persons entitled in distribution to her general personal estate and effects, and also to the said moneys, stocks, funds and securities, dividends, interest, estate, and effects, which the said Harriet Cross was entitled to under the will of the said Samuel Berryhill, deceased, and that the said Mary Cross died on or about the **[294]** 18th of September, 1856, without having taken out letters of administration of the personal estate and effects of the said Harriet Cross.

That by reason of the premises the said probate ought to be revoked, and the said alleged will declared null and void, and letters of administration of the personal estate and effects of the said Harriet Cross, granted to the said John Berryhill Cross.

Pleas by Alexander Cross:—1. That the plaintiff caused the paper-writing bearing date 11th of September, 1839, to be proved by the said Hannah Cross, as the last will and testament of Harriet (otherwise Harriett) Cross, deceased, on the 28th of July, 1840. 2. That on the 31st of August, 1840, the plaintiff caused the said Hannah Cross to take out letters of administration of the rest of the goods, chattels, and credits, of the said Harriet (otherwise Harriett) Cross, deceased.

Replications:—1. To first plea, that the plaintiff did not cause the said paper-writing therein mentioned to be proved, by the said Hannah Cross, as the last will and testament of the said Harriet (otherwise Harriett) Cross, deceased, as therein alleged.

2. To first plea, that the plaintiff was induced by the fraud, covin, and misrepresentation of the said Hannah Cross, and in entire ignorance of the facts stated in the

declaration, as the grounds for disputing the alleged will, to cause the said paper-writing, in such first plea mentioned, to be proved as the said last will and testament of the said Harriet (otherwise Harriett) Cross, deceased, and not otherwise.

3. To the second plea, that the said plaintiff did not cause the said Hannah Cross to take out letters of administration of the rest of the goods, chattels, and credits of the said Harriet (otherwise Harriett) Cross, as therein alleged.

4. And, for a second replication to the said second plea, that the plaintiff, believing the said paper-writing in such first plea mentioned to be the genuine will of the said Harriet [295] (otherwise Harriett) Cross, and the same to have been duly executed according to the provisions of the statute in that case made and provided, and being in entire ignorance of the facts stated in the declaration as the grounds for disputing the alleged will, was induced by the fraud, covin, and misrepresentation of the said Hannah Cross, to cause her, the said Hannah Cross, to take out letters of administration of the rest of the goods, chattels, and credits of the said Harriet (otherwise Harriett) Cross, deceased, and not otherwise.

Rejoinder, joining and taking issue on the replication.

Plea by Thomas, the intervener, that the said paper-writing in the declarations mentioned was executed according to the provisions of 1 Vict. c. 26, and that the name and signature "Harriet Cross" set and subscribed to the said will, was so set and subscribed by the said Harriet Cross, or by some other persons, in the presence of and by the direction of the said Harriet Cross, and that the said Harriet Cross did not die intestate.

Replication taking issue.

These issues were tried before Sir J. P. Wilde and a C. J. on 3rd and 4th of December, 1863.

Mr. O'Malley, Q.C., and Dr. Spinks, for the plaintiff.

Dr. Deane, Q.C., and Mr. Serjt. Ballantine, for the defendant, Alexander Cross.

Dr. Wambey and Mr. Searle, for the intervener, Mr. Thomas.

On a question as to which party was to begin,

*Sir J. P. Wilde* said:—I think counsel for the intervener who propounds the will must begin. Suppose the plaintiff's counsel were to begin and failed to prove what they rely upon, that the will was a forgery, still the main question would be [296] undecided, for a failure to prove the will a forgery would not establish its validity.

The cause then proceeded. Counsel for Alexander Cross appeared, but took no part in the trial. The jury by their verdict established the will. The Court pronounced for the will and reserved the question of costs.

Subsequently Mr. O'Malley, Q.C., and Dr. Spinks with him, moved for a rule for a new trial, on the grounds that the verdict was against the weight of evidence, and upon affidavits referred to in the following judgment, which also disposed of the question of costs.

*Sir J. P. Wilde*: An application was made in this case to set aside the verdict and order a new trial, on the ground of the verdict being against the evidence, and on affidavits. The result of the evidence was as follows:—The plaintiff, Mr. J. B. Cross, had several brothers and sisters, and among them a sister of the name of Harriett, who was entitled to an annuity of £25 a year, under the will of her uncle, a Mr. Berryhill. Over this annuity she had a power of appointment. This power she exercised by will in favour of her mother, and after her death her three younger brothers, Alexander, Francis, and James. The genuineness of this will of Harriett Cross is the question in this suit. It is dated in September, 1839. The plaintiff, J. B. Cross, and another sister, Hannah, were named executors of this will.

It was very plainly made out, contrary to the reiterated statements on oath of the plaintiff, that he, the plaintiff, had from the first accepted this will as genuine. He had it in his possession after his sister Harriett's death, gave instructions to the proctor for proving it, and paid the costs of doing so. The probate was only taken, however, in the name of his sister Hannah as executrix. This woman appears to have absconded upon certain proceedings being taken in Chancery [297] to compel her to account for the funds in her hands. In 1859, the plaintiff told James Cross, who had been abroad, that his sister Harriett had made a will, and left him, James Cross, one-third of the property, over which she had the power of disposal. The plaintiff then accompanied James Cross to the office of Mr. Thomas, an attorney, who is the intervener in this cause, and the two brothers instructed Mr. Thomas to file a bill

to compel the payment of James Cross's share under the will in question. The result of this was, that the fund was paid into court, and a small sum on account actually received by James Cross. Other proceedings were at this time conducted by Mr. Thomas on James Cross's behalf, and a considerable amount of costs incurred. Mr. Thomas had also advanced £145 to James Cross in cash. In February, 1861, James Cross executed a mortgage to Mr. Thomas to cover these claims, by which he transferred his share of the property bequeathed under the will in question, and so Mr. Thomas became interested in the genuineness of the will. Shortly after this mortgage, as Mr. Thomas believes, but long after the proceedings taken in Chancery, as he positively swears, Mr. Thomas was, for the first time, informed by the two brothers that the will of Harriett Cross was a forgery. When did they first know it to be so? John Berryhill Cross swears that he knew it for certain in 1841, when he went to Doctors' Commons and saw the original. James Cross swears he knew it before he went to Mr. Thomas at all, and that John Berryhill Cross told him so. And yet Mr. Thomas swears that they both "treated it as genuine when they induced him to file a bill to enforce it;" and the letter of John Berryhill Cross, forwarding the copy will for Mr. Thomas's use when they gave him his instructions, threw no doubt on its genuineness. But a more cogent document still was put in evidence to show that this story of the two brothers, that they treated the will as a forgery in 1859, is a scandalous falsehood. I refer to a paper of instructions written by James **[298]** Cross and handed to Mr. Thomas in 1859, in which the following passage occurs:—"16th October, 1859. I returned to London and was informed for the first time for a fact, by my brother John Berryhill Cross, that my sister had executed a will before her death, leaving me one-third of her property, and that Hannah Cross had, at her own request, been appointed trustee, and had duly proved the same at Doctors' Commons." James Cross having thus parted with all interest under the will, and Francis Cross being dead, the plaintiff, Mr. John Berryhill Cross, took steps in this Court some time since to call in the probate of the will and revoke it.

The conduct of Alexander Cross, the surviving appointee under the will, who has at last appeared and pleaded in this suit, but not in affirmation of the will, shows that the plaintiff had little opposition to fear in that quarter; and accordingly the Court was applied to twice on motion to revoke the probate. It does not appear that either of the two brothers gave any notice to Mr. Thomas of the steps which were being taken behind his back. The late Sir Cresswell Cresswell, however, refused these applications, and the result has been that Mr. Thomas has had the opportunity of intervening, and is the sole party now supporting the will. If the will is set aside, the sum in Court, upwards of £800, will be divisible among the Cross family, brothers and sisters. A will thus proved twenty years ago, acted upon at the time as genuine by the plaintiff who now impeaches it, and finally acted upon by both the plaintiff and James Cross, by seeking to enforce its provisions in Chancery long after the time when they both now swear that they first knew it was a forgery, would certainly require very strong evidence to set it aside.

Now what was the evidence? The will is produced, and appears to be regularly signed and witnessed with a proper attestation clause. The attesting witnesses are Mary Cross and Louisa Cross. Louisa Cross is dead: Mary Cross, the plaintiff's sister, comes as a witness, and tells this extraordinary **[299]** story—that she did put her name there; that Harriett (the supposed testatrix) was dead when she did so, and that John Berryhill Cross made her do it, not telling her what the document was; that John Berryhill Cross and her sister Hannah were the only persons present, and that she never had an idea, until upwards of ten years afterwards, when she received an anonymous letter, that she had put her name to a forged will. But she proved the signature of Louisa Cross, the other attesting witness, to be genuine, and said she thought, but could not swear, that the signature of Harriett Cross, the testatrix, was genuine also. Was Mary Cross's account to be believed? If it was, John Berryhill Cross was guilty of forgery. But the first witness for the plaintiff was John Berryhill Cross himself, who totally denied Mary Cross's story. What were the jury to think, and what was the probable explanation? It seems possible that Mary Cross, in the description she gave of the occasion and circumstances when she put her name to a paper by John Berryhill Cross's desire, was unconsciously referring to some other paper than the will now in question. This seems possible, for the event was twenty years ago; she did not profess to a very accurate recollection,

and she did not see the contents of the paper she spoke of signing, nor was she aware of its nature. Moreover, John Berryhill Cross was not asked by his learned counsel whether he had ever acted as Mary Cross described in reference to any other paper with which the will might possibly have been confounded. This is one supposition, and probably the only one upon which both witnesses can be acquitted of wilful perjury.

Again, it may be that the jury believed John Berryhill Cross, that he was not guilty of forgery, and being unable to reconcile Mary Cross's testimony with that of her brother, disbelieved the whole story she told. It may be that they were inclined to give more faith to the genuine signatures of the two attesting witnesses, and the language of the attesta-[300]-tion clause, than to a wicked story, which, if true at all, did no less than charge a respectable man, the brother of the witness, with the crime of forgery. But, above all, the jury may have been pressed by the consideration that the persons who alone could have forged this will, if forged it was, were persons who took no interest under it. Hannah Cross, in whose hand it is throughout, took nothing under it; and John Berryhill Cross, who is charged with assisting her, took no interest either, nor did Mary Cross, nor Louisa Cross. In fact, the interest of all these brothers and sisters is the other way. In some considerations, such as these, I think I can see good reason for the verdict the jury have found. Certainly I cannot see that they have been in error, or that the verdict is against the evidence.

The rule was moved also on affidavits, part of which went to show that John Berryhill Cross could not, as appears by his diary, have been at Cheshunt (where Mary Cross swore she witnessed the will) on the day in question. This only proves Mary Cross either mistaken or false, and she is the chief witness in support of the plaintiff's case. The rest of the affidavits bring forward additional evidence as to the handwriting of Harriett Cross, the testatrix. There is no reason, that I am aware of, why this evidence should not have been produced at the trial. But whether this be so or not, it is contrary to all practice to grant a new trial for the purpose of adducing additional evidence upon the known point of contest in the suit. The rule must, therefore, be refused.

With respect to costs, it is clear Mr. Thomas must have his costs, either from the estate or from John Berryhill Cross, the plaintiff. He asks for the former, and as it may be doubtful whether he could get them from the plaintiff, his application is granted. Mr. Alexander Cross was cited and brought into court by the plaintiff, who has not only failed in his suit, but has so acted in the matter as not to entitle him-[301]-self to any relief from the ordinary consequences of failure. The Court, therefore, condemns the plaintiff in the costs of Mr. Alexander Cross.

WHARRAM *v.* WHARRAM. March 22, 1864.—Proof of lost Will by Parol.—Nature of Evidence.—*Brown* v. *Brown*, 8 Ell. & Bl., considered.—Wills Act.—Where probate has been asked of the substance of a lost will, as contained in the parol evidence of witnesses, the Court has never acted but on the fullest and most stringent proof. Where, six or seven years after the death of the alleged testator, the substance of a will was offered for probate as contained in the testimony of the widow, solely interested under the alleged document, her niece, and an attorney's clerk connected by marriage with the widow, the document after execution having been alleged to be in the custody of the latter, but not being forthcoming, the Court held that there was not sufficient proof for it to act upon; but intimated that, if it had thought otherwise, it would have required an argument on the legality of giving effect to a will proved by parol evidence since the Wills Act.—Quære, whether, in *Brown* v. *Brown*, and other cases decided since the Wills Act, the attention of the Court has been sufficiently called to the operation of that statute in this respect.

[S. C. 33 L. J. (P.) 75; 10 Jur. (N. S.) 499; 10 L. T. 163; 12 W. R. 889. Distinguished, *Burls* v. *Burls*, 1867, L. R. 1 P. & D. 472. Referred to, *Silver* v. *Silver*, 1872, 27 L. T. 766. Discussed, *Mahood* v. *Mahood*, 1874, Ir. R. 8 Eq. 365; *Sugden* v. *Lord St. Leonards*, 1876, 1 P. D. 176.]

In this case the widow of the deceased had propounded the alleged will of the deceased under the circumstances sufficiently noticed in the judgment. A son of the deceased appeared in person and opposed the will.

Mr. S. A. Hill conducted the case for the plaintiff.

The defendant appeared in person. Cur. adv. vult.

*Sir J. P. Wilde*: In this case probate is sought for the **[302]** will of Matthew Wharram, as contained in the depositions of certain witnesses. The deceased died in March, 1857, and the proof of the will of which probate is now sought is contained in the evidence of his widow, her niece, and an attorney's clerk connected with Mrs. Wharram by marriage.

It is stated that a week before his death the deceased desired Mr. Milner to prepare a will giving all his property to his wife absolutely; that Mr. Milner did so; that it was duly executed in the presence of the niece and Mr. Milner, who signed it as witnesses, and that Mr. Milner took it away with him. This latter fact is deposed to by the widow and niece, but Milner does not recollect it. The widow further proved that she was continually afterwards with her husband till he died, and that he did not destroy or revoke it. At his death no attempt was made to prove the will, by reason, it is said, of the property being so small. An unexpected accession to it has lately put the widow upon proving it, but it cannot now be found. No draft of it is in existence, and no document that throws light on its existence or contents. Between six and seven years have elapsed since the death, and the entire proof rests on the parol evidence of three witnesses, one of whom is entirely interested in establishing the will, and neither of the others so situated as to be entirely without bias or prejudice in the matter. But all swore to the will and its contents, and it was treated at the hearing as established doctrine that a will so proved was entitled to probate as a matter of course; and I do not say that, on reviewing the cases, there is not some colour for advancing such a proposition; but some reflexion on the subject has given rise to grave doubts in my mind, and opened up some questions of sufficient importance to the community.

Is it competent in all cases to parties, however interested, to claim probate of a will which exists only in parol testimony? May this be done at any time, however remote from the death of the supposed testator? Is the character and **[303]** cause of the loss of the document wholly immaterial? Does the fact that the party chiefly interested in seeking probate destroyed the will himself, voluntarily, or ignorantly, or carelessly, make any difference? and if so, would this difference extend to careless custody, by which this loss was brought about?

These questions are forced upon the Court by the perusal of a case, decided in the Queen's Bench, of *Brown* v. *Brown*, 8 Ell. & B. 886. In that case a supposed lost will relating to real property was placed on the footing of any other lost document, the loss proved as that of a receipt or letter would have been, and secondary evidence of its contents admitted as a matter of course. If this be a sound principle, the consequences are no less obvious than momentous. The existence of a will, in its due execution and its subsequent loss, must indeed be proved, but proved by parol only, and no corroboration required. Furthermore, its contents may be proved from memory. Property, however large, real or personal, may thus be disposed of, in a direction however strange, by the unsupported oath of a single witness. Upon such a system it would be difficult to exclude either fraud or mistake. Fraud—for by as much as false swearing is more easy to perpetrate and more difficult to detect and expose than forgery, by so much are the safeguards which belong to a written will, and the visible signature of the testator and witnesses, weakened or withdrawn. Mistake—for as the same parol evidence which sufficed for the authenticity of a will is held competent to supply its contents, the certainty of writing is replaced by the frailty of memory.

But the danger has a wider range, for the same evidence that may set up a false will may practically revoke a true one. The witness has only to give the former a date subsequent to that of the latter, and insert a clause of revocation, and the evidence, if believed, destroys the first will, however solemnly executed or carefully preserved. A man may thus die with a **[304]** perfectly executed will in his pocket, and the Court or a jury on the oath of a single witness may yet declare him intestate. And this is what actually happened in the above case of *Brown* v. *Brown*. A will perfectly executed was found in the dead man's pocket, and it was set aside by proof of a second will, which was not to be found, and the existence of which was proved by the oath of one witness only; no draft or copy of it produced, and the contents proved from memory by the same witness. The Court ruled that the second will revoked the first, and that the second was itself destroyed by the deceased, as it was in his custody, and not found at his death. The result was an intestacy, and real

property to the value of £40,000 passed to the heir-at-law. The danger of such reliance on parol was forcibly commented upon by the Court in *Cutto* v. *Gilbert*, 9 Moore P. C.:—"And so far we concur in the opinion which has been expressed by very learned persons, that to revoke an existing instrument by parol evidence that another will has been executed, and by such evidence alone, though the law may admit of that course of proceeding, yet it is one attended with danger, and consequently the oral evidence produced must be strong and conclusive."

Now, in all this I venture to doubt if the operation of the statutes relating to wills has been sufficiently considered. To what end, it may be asked, does the Wills Act of 1857 declare that "no will shall be valid" unless it be in writing and signed by the testator in the presence of witnesses, and signed by them in the presence of the testator, if a parol oath and the fiction of a loss can make a will valid without any writing at all? True, the carefully enforced method of execution created by the statute is of some avail to secure a solemn and deliberate act in place of a hasty expression of testamentary desire; but has it no further object? Was not this writing itself, and the triple signatures with the detailed requirements as to position on the paper intended also, as living witnesses, **[305]** to bear visible testimony to the reality of the act and the exact disposition of the property which they were designed to attest? And if so, can the Court dispense with the paper and writing altogether? These matters were not adverted to in the above case, nor was the attention of the Court directed to them in argument. I persuade myself they are worthy of consideration.

Some parallel to the Wills Act may be found in the Statute of Frauds, which, in like manner, enforces writing as requisite to the validity of certain contracts. Has it ever been solemnly decided that a man may recover on a contract within the statute on parol proof that the requisite contract had been signed, but was lost? A very learned judge (the late Baron Alderson), in *The Attorney-General* v. *Sitwell*, 1 Y. & C., observes that, "to reform a written contract by parol, and then enforce it, would be virtually to repeal the Statute of Frauds." Would the substitution of parol evidence for writing in the whole contract be less so? I do not propose to reason out this question, still less to decide it. Before long it may be necessary to do so. Meanwhile the authorities of the Ecclesiastical Court, which are those of this Court also, do not, I think, enforce a decision based on such dangerous ground. They are not numerous, and most of them before the Wills Act of 1837. In *Foster* v. *Foster*, 1 Add. 462, a will had been seen and read after the death. It was torn up; the fragments were put together as far as could be, and the rest made up from the context and memory. In *Martin* v. *Lakin*, 1 Hagg. 245, a will in favour of a child was destroyed by the widow, the draft was proved, and the widow admitted its existence and destruction. In *Knight* v. *Cook*, 1 Lee, 413, a will was torn up after death, and the scraps were pasted successfully together. In *Davis* v. *Davis*, 2 Add. 227, the Court was satisfied of the contents of the will, and that it was not revoked. The deceased had kept it in a box, where an independent witness had seen and read it. At the death it was **[306]** not forthcoming. There are two further authorities in 2 Notes Cases, 105, and 6 Notes Cases, 528, to the like effect. To these must be added the case of *Trevelyan* v. *Trevelyan*, 1 Phill. 152, in which a will was destroyed by the person in whose custody it was, under the idea that it had been executed in jest; but the testator was proved to have spoken of it up to his death as his will. In all these cases probate was granted, and the like has been done twice at least by Sir Cresswell Cresswell since the establishment of this Court, but in both cases on the authority of *Brown* v. *Brown*, in the Queen's Bench, above cited.

Now, here I must observe two things: first, that the current of authority appears to have flowed on past the period of the Wills Act without any notice of that enactment, certainly without serious argument upon its effect in this regard; and, secondly, that the cases themselves were in their facts and sources of evidences such as to entirely satisfy the Court. On the other hand, in *Huble* v. *Clark*, 1 Hagg. 118, Sir John Nicholl refused probate, though the existence and contents of the will were proved by two witnesses, saying that as the will was alleged to have been purposely destroyed after the death, the Court would require "the most stringent evidence" to establish it.

The result of these authorities is, that this Court has been in the habit, without notice of the Wills Act, or any reference to its provisions, of allowing wills to be

proved by parol only. But it has done so in cases fairly free from doubt or suspicion. From this course of practice the Court does not propose in the present case to depart. But at any rate, since the Wills Act, the parol evidence that should be permitted to stand in the place of a written will ought to be of a very cogent character. The Court ought not, I think, to act on less proof than the Court of Chancery has always required, when asked to rectify mistakes in written contracts, and then replace written evidence by parol. In *Henkle* v. *Royal Exchange*, 1 **[307]** Ves. sen. 318, the Lord Chancellor, speaking of such proof, said, "to come at that it is certain there ought to be the strongest proof possible." And again, in *Inchiquin* v. *Inchiquin*, 1 Brown, 341, I find it said, "to be sure it must be strong irrefragable evidence." And again in *Lord Townsend* v. *Stangroom*, 6 Ves. 338, "proper irrefragable evidence" are the expressions used.

Is the evidence in this case of that character? If it were, I should desire that the effect of the Wills Act should be fully argued and considered. But I cannot think it is so. The long delay in applying for probate, the total absence of testimony as to the manner or cause of the loss, the custody of the document, which was that of the agent of the person chiefly interested, the interest of one witness and the natural leanings of the two others, all conspire to infuse doubt when a tolerable certainty ought to prevail, and under these circumstances the Court must refuse the grant.

IN THE GOODS OF WILLIAM KENNETT LOFTUS, deceased. March 1, 1864.—Administration.—Renunciation by A. and B. as Executors and Residuary Legatees in Trust, but not as Testamentary Guardians on certain Contingencies.—Grant to A. and B. as Testamentary Guardians.—R. 50 of Non-Contentious Rules for Principal Registry.—A. and B. being appointed executors and residuary legatees in trust, and also guardians of the children of the testator on the death or second marriage of his widow, renounced their right to a grant as executors and residuary legatees in trust, but not as testamentary guardians of the children, who were beneficial residuary legatees substituted, and a grant of administration (with Will annexed) was made to the widow, as beneficial residuary legatee for life. The **[308]** widow died, leaving part of the estate unadministered, and five children by the testator, all minors. The Court made a grant of administration (with Will annexed) to A. and B. as testamentary guardians of the children, the beneficial residuary legatees of the testator.—The 50th rule of the Rules for the Principal Registry in Non-Contentious Business, which directs that no person who renounces probate or letters of administration in one character, is to be allowed to take representation to the deceased in another character, is for the guidance of the registry, but capable of modification by the Court.—The Court declined to depart from the practice of limiting the grant to the guardians until one of the minors should attain his majority, by the addition, "until he should apply for and obtain the grant."

[S. C. 33 L. J. (P.) 59; 10 Jur. (N. S.) 314; 10 L. T. 240.]

William Kennett Loftus, late of Newcastle-upon-Tyne, died on the 27th of November, 1858, leaving a will dated the 19th of September, 1853, wherein he appointed his friends, Edward Mather and John Gray, his executors and residuary legatees in trust. He thereby also appointed his wife, Charlotte Loftus, guardian of his children during life or widowhood, and on her death or second marriage he appointed the said E. Mather and J. Gray guardians. He gave his residuary estate to his wife for life, and after her death directed it to be equally divided amongst her children. On the 1st of April, 1859, his widow, as beneficial residuary legatee for life, obtained a grant of administration with the will annexed, the said E. Mather and John Gray having renounced their right as executors to probate, and as residuary legatees in trust to letters of administration with the will annexed, but without renouncing their right to letters of administration with the will annexed as testamentary guardians of the children on the death or second marriage of the widow. The widow died on the 10th of December, 1862, without having re-married, leaving part of the personal estate of the deceased unadministered, and five children by the deceased, the eldest, a son, being now of the age of eighteen years.

It appeared by the affidavits that the principal part of the unadministered estate of the deceased consisted of his lease-**[309]**-hold interest in the Newcastle Race Stand, which was mortgaged, and which had, in 1849, been assigned by him to the said

E. Mather and J. Gray and another in trust for certain annuities, the interest on the mortgage, and certain debts; that, from the nature of the property, it was essential for its protection that it should be managed by some one who was on the spot for some time previous to and during the Newcastle races, which took place in the month of June in each year; and that as the eldest son was at sea, and might be absent at the time when he came of age, it was expedient that the grant should not be made to the guardians in the usual form until one of the minors shall attain the age of twenty-one years.

Dr. Tristram moved the Court to decree letters of administration of the unadministered personal estate of the testator, with his will annexed, to be granted to E. Mather and J. Gray as the testamentary guardians of the testator's children, the beneficial residuary legatees, for their use and benefit during minority, until such time as one or more of them should attain the age of twenty-one years, and should apply for and obtain a grant of administration to the unadministered estate of the testator, with his will annexed. There are two questions in the case: first, whether Mather and Gray, having renounced probate and also letters of administration with the will annexed as residuary legatees in trust, are thereby precluded from now taking administration with the will annexed, as guardians; secondly, if they are not so precluded, whether the grant to them can be made in the form asked. (1) When Mather and Gray, in 1859, renounced probate, and also, as residuary legatees in trust, letters of administration with the will annexed, they were not precluded by the renunciation from afterwards asking for administration as guardians of the children, as they did not then hold the character of guardians. *In the Goods of Morrison* (2 Swab. & Trist. **[310]** 129). By the 50th rule of the Rules for the Registrars of the Principal Registry in Non-Contentious Business, "no person who renounces probate of a will or letters of administration of the personal estate and effects of a deceased person in one character, is to be allowed to take a representation to the deceased in another character." But that rule did not come into operation until the 1st of September, 1862, and cannot apply to renunciations previously made. (2) As to the form of the grant: according to the usual practice, the grant would cease upon one of the children attaining the age of twenty-one years; but in this case the nature of the property, and the possibility that the eldest child may be at sea when he attains his majority, make it desirable that the grant should continue until one of the children should take out administration, if the Court has power to make the grant in that form. The decision *In the Goods of Cassidy* (4 Hagg. Ec. 360) shews that the Court may alter the usual form of the grant. Until that decision, a grant to an attorney for the use and benefit of an executor or party entitled to administration then abroad, was limited durante absentiâ, and determined upon the principal coming to this country. Great inconvenience frequently resulted from this practice, as third parties, having no means of knowing when the grant expired, might deal with the attorney at a time when his authority had expired; and Sir J. Nicholl directed that for the future, in such cases, the grant should be limited until the persons for whose use the grant was made should duly apply for and obtain probate or administration. If the form of grant was altered in that case on the ground of convenience, so might it be in the present case.

Cur. adv. vult.

*Sir J. P. Wilde*: In this case an application was made for a grant of letters of administration with the will annexed, de bonis non. The persons applying for the grant were two gentlemen who had been by the will appointed **[311]** guardians of the infant children of the testator after the death of his widow. They were also appointed executors and residuary legatees in trust. On application for the grant, a difficulty was felt in consequence of rule 50 of "The Rules, Orders, and Instructions for the Registrars of the Principal Registry in Non-Contentious Business." It is no doubt most important that the rules of the Court should be strictly adhered to, but it is still more important that the Court should facilitate, as much as it can, the administration of estates in a manner beneficial to the parties entitled to them. If, however, there had been a rule of practice binding on the Court, notwithstanding the benefit to be derived from a departure from it in a particular case, it would be necessary to adhere to it. But on turning to the rule, I find it is one of a class of rules which has this general heading, "General Rules and Orders for the Registrars of the Principal Registry." On inquiry as to the reason for making rule 50, I find that it was directed to a class of cases wholly different from the present. I think it

is competent for the Court to treat the rule as intended for the general guidance of the business in the registry, and capable of modification by the Court, if sufficient reason be shewn for departure from it. In this case it would be extremely unjust to apply the rule in its stringency; for the persons who renounced did not, at the time of renouncing, hold the character of guardians; and they might never hold it. They renounced during the life of the widow. It seems to me it is extremely reasonable to make the grant to them. I shall therefore grant that part of the application. But I was asked to do something more, and to order that the grant might be extended beyond the time of the eldest of the infant children attaining his majority. This part of the application is contrary to the usual practice of the Court, and cannot be acceded to.

**[312]** E——— *v.* T——— (falsely called E———). November 18, 1863.—Suit for Nullity.—Malformation.—Delay.—Where a delay of some years occurs in bringing a suit of this nature, the Court will require an explanation of such delay.

This was a petition for a decree of nullity of marriage by reason of the incurable malformation of the woman, which fact, on the medical evidence, was clearly established; but the Court, adverting to the delay of more than ten years from the date of the marriage to the commencement of the suit, required some explanation of it.

The parties had lived in Devonshire, and one of the medical men who had reported to the Court and gave evidence in Court, had been her regular medical attendant before and after marriage. It appeared that some time after marriage she had undergone an operation at Bristol.

Dr. Spinks, who conducted the petitioner's case, then called the petitioner, Charles Henry E———, who deposed in substance as follows:—I was married in 1851; the morning after the **[313]** marriage I took the respondent to Mr. Griffiths, a surgeon, in Gower Street; he examined her, said it was a curious case, and should advise a further opinion; he named Dr. Reed; I went with her and Mr. Griffiths to Dr. Reed; he examined her, and told me he thought an operation might be successful; she appeared so nervous and excited that he advised her going home for the present; he prescribed some medicines, and said I had better bring her up again in the course of a few months; on her return home she became exceedingly ill, and so remained for the most part till we separated; her state of weakness was so extreme that she was hardly able to dress herself; after the operation at Bristol she came back home, and relapsed into the same weak nervous state; it was impossible for me then to bring her to London; when the rail opened she came to London, and was operated upon by Mr. Baker Brown, in August, 1860; she was in London two or three months, and was very much upset by the operation; soon after her return I told her mother that, as nothing could be hoped from surgical operation, I thought it my duty to separate; she agreed, but said that, as her daughter's health was so bad, if I would let the matter remain for a time, she would acquaint her daughter that I wished for a separation; I expected every week she would have done so, but she did not; in September, 1862, the respondent was stopping with a friend, and my sister told her she thought she ought to separate; she never came back after that.

*The Judge Ordinary*: In this case I think the main fact is proved, but a delay of eleven years before the Court was applied to required to be explained. The principle which guides this Court is, that persons seeking such relief ought to come without marked delay; that is, the Court interferes to relieve the petitioner from a real grievance and the presumption is, that if the alleged grievance is borne with for a long time, the application is not *bonâ fide*, but is made for **[314]** some side purpose. Had it not been for the evidence of the petitioner, the length of time would, in my mind, have been a bar; but his evidence satisfactorily explained the delay. There is no doubt that the woman was in a very feeble state of health. He behaved in a most manly and considerate way, and was not without a hope, on which he acted, that surgical remedies would alter her state In this he was disappointed. Her ill-health continued, and in 1860 he ascertained that nothing was to be obtained from surgical aid or the operations of nature. I see no ground to draw, from the lapse of time, the conclusion that the petitioner is seeking relief on other than the true ground, and the only one on which this Court could give it. I accordingly pronounce the decree of nullity prayed for.

HUDSON *v.* HUDSON. November 12, 1863.—Wife's Petition for Judicial Separation. —Adultery and Cruelty.—Evidence.—Practice.—Legal Cruelty.—The wife petitioned for judicial separation, alleging cruelty and adultery, which the husband's answer traversed. The cause came on before the Court itself, and on objection taken to the admissibility of the petitioner's evidence as to cruelty, the Court ruled that on the issues as they stood it was inadmissible, but struck out the issue of adultery as an immaterial issue, the counsel for the husband not objecting.—The Court will not grant a decree of judicial separation to protect the wife from mere unhappiness resulting from an ill-assorted marriage, nor from the destruction of domestic comfort caused by drunkenness.

[S. C. 12 W. R. 354. Referred to, *Browning* v. *Browning*, [1911] P. 168.]

This was the wife's petition for judicial separation. The petition alleged various acts of cruelty, and a charge of adul-**[315]**-tery with some woman, unknown to the petitioner, in May, 1859. The husband appeared, and traversed these charges. The case now came on for hearing before the Judge Ordinary.

Mr. M. Chambers, Q.C., and Dr. Swabey, for the petitioner.

Dr. Spinks for the respondent.

Mr. M. Chambers, having stated the petitioner's case as to cruelty, proceeded to call her as a witness.

Dr. Spinks objected. There is an allegation of adultery in this petition which is traversed, and the citation calls on the respondent to answer a charge of adultery; it is therefore a suit by reason of adultery within the meaning of the 4th section of the 14 & 15 Vict. c. 99, which excludes the parties "to any proceedings instituted in consequence of adultery" from being witnesses. *Pyne* v. *Pyne*, 1 Sw. & Tr. 178. The 22 & 23 Vict. c. 61, s. 6, only applies to the wife's petition for dissolution of marriage.

Mr. M. Chambers submitted that, as the petitioner could obtain the prayer of her petition on proof of the cruelty alone, on which she was a competent witness, the Court would hear her as to that on the present state of the pleadings, or it would treat the issue of adultery as immaterial, and strike it out.

*The Judge Ordinary*: I cannot think that there is any doubt as to the law applicable to the case as it now stands. The petitioner falls within the exception of the 14 & 15 Vict. c. 99, which generally enables the parties to a suit to give evidence. But the real question, from the counsel's opening of the case, seems to be one of cruelty, though the citation and one paragraph of the petition charges adultery. If there **[316]** is nothing in the practice of the Court which forbids it, I think the issue of adultery ought to be struck out, and the case proceeded with as one of cruelty only, when the wife's evidence will be admissible. If necessary, the alteration must be taken into consideration on taxation of costs.

Dr. Spinks, on the part of the husband, admitted that this was the proper course to take under the circumstances of the present case.

The case then went on as one of cruelty, the wife and husband, and other witnesses on their respective sides, were examined, and the Court took time to consider its judgment, which it delivered on a subsequent day, as follows:—

*The Judge Ordinary*: This is a suit promoted by the wife for a judicial separation from her husband on the ground of cruelty. She was married in 1854, and after eight years passed in cohabitation with him at a farm which he occupied, she withdrew herself from his house upon a false pretence in the month of October, 1862, taking with her their only child. No particular event of a violent character immediately preceded her departure. She left on a visit to which she had obtained her husband's sanction, with a promise of speedy return; her husband accompanied her part of the way, both walking and driving; they kissed at parting, and separated on apparently good terms. She never came back. An attempt has been made to connect her departure with the fact, that he had two men to sup with him (a labourer and a poultry-dealer), with whom, as a farmer's wife, she thought it unbecoming to consort. Ridiculous as an act of legal cruelty, there is a hopeless variance between the date of this event and her departure, and the suggestion wholly failed. Upon the review of her married life which she has placed before the Court, supported by two or three witnesses, who evidently **[317]** sympathized with her, it is impossible not to see that she may have suffered much, both from weak health and distress of mind, and that these sufferings have been to some extent caused, at any rate

increased, by her husband's conduct. But it needs not to be told to those who are familiar with the law which it is the province of this Court to administer, that a wife who seeks to withdraw from the consortism of married life must prove much more than that. I forbear to add another to the numerous attempts to define legal cruelty, which are the work of abler hands than mine. Perhaps exact definition is to be distrusted where all lies in degree and circumstance. Certainly great precision in the rule serves only to beget great laxity in its application. But one feature stands prominent in most, if not all of the decided cases. Personal violence, or the threat of it, and danger to health or life as the result of it. Of the very aggravated cases, if they exist, in which the Court might, according to some dicta, be induced to act on less, it is enough to say that the present is not one. Now, the burthen of Mrs. Hudson's complaint is, that her husband was much given to intoxication; that he was apt to be, on slight provocation, rough and coarse in his language to her at most times, and very violent and abusive to her at some; though of violence to her person she herself gave but two instances, to which I will presently advert. She has convinced the Court that this account of her husband's demeanour is in the main correct. But the Court enjoys the inestimable advantage of seeing and hearing the two parties themselves in these matrimonial disputes. It is this which gives life, force, and colour to the history which falls from their lips; the dry record of hasty words or ungracious speech, a menace used here, or a bad name there, goes for little in the just estimation of a quarrel or the measure of mutual blame. Nay, the true import of the language used must often be sought not in the words themselves, but in the character and demeanour of the speaker. Reading by this light, the Court **[318]** can discover no such danger to her safety, nor even such intolerable hardship in her life, as the petitioner would fain represent. Nor is it led to conclude that the threats and violent language which at times broke from the respondent really portended, or impressed his wife with the fear of any actual danger to her person. If her husband was a bold, rough, and somewhat reckless man, given to sudden outbreaks, and using, when under excitement, strong and unbecoming language, he was, at the same time, neither implacable nor vindictive, and there is a special absence of evidence to show any want of that manly spirit which is the sure safeguard of the weaker sex. There is evidence, no doubt, of hasty suspicion, and ridiculous charges of impropriety, on occasions when he found his wife alone with other men. But the blame was not wholly his, for his wife knew his feelings on such subjects, and did not conform to them. And Mr. Underhill, whose presence brought about the most serious outbreak of which we have any account, had been expressly forbidden the house. It is unnecessary to pursue these matters further. I will glance at the personal violence imputed. There is a great variance between the statements of the petition and the proof. Recurring to Mrs. Hudson's own evidence, I find two acts of violence imputed. She says he threw a bowl of water over her and her maid; and he admits that he did. If her account and that of her maid is taken (though they by no means correspond), it was done without any provocation. If his account is taken, she had very little to complain of. I believe his account; but if I did not, it is difficult to pronounce such an act legal cruelty. But she also swore to a much more serious charge; she declares that on one occasion he upset her, the child, and himself out of a carriage, and that he did this on purpose. She was much bruised and injured on this occasion, and if she could establish the wilful intent which she imputes, it would, no doubt, be an instance of cruelty. But her husband gives a **[319]** very different account. He says, it was an accident; that it took place at ten o'clock at night, in January; that it occurred in going down a very steep hill, and at a spot where the road was very unsound. Finally, that it was raining, and that his wife held an umbrella before his face. I have no hesitation in pronouncing that I believe his account of the matter, and give full credence to him in his assertion, that "he was not likely to imperil willingly the safety of his little child," to whom he was much attached. I pass over what remains of the imputed cruelty, because it is to be found only in the evidence of other witnesses, and not being vouched by the wife herself, the Court naturally leans to the denials which it has received from the husband. In these circumstances the Court can offer Mrs. Hudson no relief from the obligation of her marriage vow. The law is not responsible for her choice, and the Court cannot assist her to recede from it. It cannot be too widely known that this Court has neither the power nor the inclination to deal with the mere unhappiness of ill-assorted

marriages, or the destruction of domestic comfort by the detestable vice of drinking. And if Mrs. Hudson thus suffers, she will do well to seek such remedies as may be found in the force of the natural affections and domestic ties, for it will now be her duty to return to her husband, whom she left without warrant, and with whom she bound herself by her marriage oath to live.

SCOTT *v.* SCOTT. November 6 and 12, 1863.—Verdict of Jury on Cruelty.—Principles of Court in granting or refusing New Trial.—Where the issue of cruelty is submitted to a jury, the Court will not grant a new trial unless it is satisfied that there was error or mis-[320]-carriage on the part of the jury. That, on the evidence, the Court might not with certainty have arrived at the same conclusion as the jury did, is not sufficient.—That the party asking for a new trial could produce corroborate evidence not produced, or not in his possession at the first trial, is no ground for granting a new trial.

This was originally a suit for restitution of conjugal rights by the husband against the wife, who pleaded cruelty, and prayed for a judicial separation. The petitioner took issue on the cruelty.

The issue was tried by a special jury before the vacation, when the jury, by their verdict, negatived the wife's plea of cruelty.

The Queen's Advocate (Sir R. J. Phillimore), Dr. Spinks and Mr. H. T. Cole with him, now moved for a rule nisi for a new trial, on the ground, mainly, that the verdict was against the weight of evidence. Cur. adv. vult.

November 12.—*The Judge Ordinary*: The Court is asked in this case to grant a rule nisi for a new trial. It is a suit by the husband against his wife for a restitution of conjugal rights. Her answer is, that he has been guilty of conduct amounting to legal cruelty. Whether he had or not was the single question of fact in the suit, and was accordingly tried before the late Sir C. Cresswell and a special jury. The jury found that he had not. This finding I am now asked to set aside, on the ground that the verdict was against the weight of evidence.

This is a serious responsibility. The legislature has, in its wisdom, confided the determination of such cases to a jury in place of the Court, upon which it formerly devolved, and a very difficult task it is. In the great variety of questions which in this country are referred to a jury, there are few so difficult to handle as the contentions of an unhappy marriage. In the [321] common run of other cases the inquiry is spread over a limited range of time; the conclusion depends upon the converging effect of independent facts and witnesses, often largely fortified by written documents, and illustrated by the daily practice of trade, or the ordinary events of life; and although the jury is often embarrassed by the collision of directly contrary testimony, they commonly receive much aid and support from those portions of the case that rest in writing, or are plainly and undeniably proved. They are seldom without some guide beyond the credibility of the parties themselves. But in cases of conjugal dispute, when cruelty is the issue, it is far otherwise. The domestic history of years is poured forth by husband and wife in alternate streams of opposite colours; the memory of each is ransacked for the most trivial details; the posture of each mind is antagonistic in the extreme, drawing memory and sometimes imagination after it in the attack or defence. Events are often misplaced in date, and always exaggerated in aspect. Unqualified accusations serve only to elicit absolute denials, and amidst a volume of evidence and at the end of a protracted investigation, the truth, obscured, disfigured, and transformed by prejudice and passion, is hard indeed to find.

Nor does the nature of the case admit of much aid. Corroboration is seldom forthcoming. Those portions of their time which married people spend in quarrelling are not their most public moments. If a third person becomes witness to their outbreaks it is generally a servant, and such persons generally enlist their feelings on one side or the other. Written evidence there is seldom any, save letters, which, though they strongly illustrate the general tone and feelings of the writers, seldom or never assist the proof of a disputed fact. So that in the result the credibility of the parties themselves, their demeanour before the Court, and their general bearing in word and deed, come to be the sole materials out of which the decision must be constructed.

[322] There is probably no tribunal so fit to handle such materials as a body of

men like a jury; though it is not to be expected but that they should sometimes fail. But if it is difficult for a tribunal under such disadvantages to do right, how much more difficult is it upon the same materials to pronounce that it has done wrong? Where so much is obscure, who shall pretend to see plainly? And yet that is what the Court must be enabled to do before it can justify an interference with the verdict which a jury have found.

I will take this early occasion for stating the principles which should guide the Court in the use of this power. New trials are in themselves an enormous evil, though there are cases in which justice demands them. No element in the admistration of justice is so destructive of its efficiency as uncertainty; and no grievance more sorely felt by suitors than that which snatches success away at the moment of its accomplishment, and sets all abroad and in doubt again after one complete hearing and decision. Nothing shakes so much that confidence in the law which it is the first duty of all tribunals to uphold. The Court does not exercise the function of mere appeal from the jury. It is not its duty to go over the same ground with them, and reverse their decision merely because it arrives at an opposite conclusion; it must see its way very plainly, and be satisfied with tolerable certainty that there has been error or miscarriage; failing that, it is bound to accept the verdict as correct.

It remains to consider whether this case is of that class. I do not propose to examine the evidence in detail; a short review will suffice. It appears that the parties lived together on tolerable, if not satisfactory, terms at first; that they afterwards had frequent quarrels, and that their condition at last was that of complete estrangement with violent altercations. The chief foundation of these altercations was discreditable to the husband in the extreme—a greed for money from his wife and her mother. But there were other causes; **[323]** the wife, though she denies it, is proved by independent testimony to have dressed in a manner which the husband appears to have thought, with some reason, to be both extravagant and unbecoming. To this has to be added the frequent intervention of Mrs. Morris, the mother-in-law, who, while resisting the extravagant demand of the husband for money, was the constant refuge and resource of the wife. Ten years of the married life of persons thus inclined and situated, reproduced in evidence, has furnished the jury with a volume of evil words and ungracious, unmanly, if not violent deeds. It was not difficult for the learned Queen's Advocate, in addressing this Court with this evidence in his hands, to hold up a most repulsive picture of the petitioner. With lines and colours from the same source, I am not sure that a likeness of the lady drawn by an adverse hand would be much more attractive. But these are the prejudices which beset the case. The learned and able Judge who presided at the trial warned the jury against them, and it is the duty of the Court to forget them now, save so far as they throw light on the evidence of cruelty in its legal sense. Now, what is that evidence? It may be epitomized thus:—The wife swears to six distinct acts of violence; I will take them in order. First, the beating of the child in her presence in an excessive and cruel manner; secondly, the threat to shoot both children and wife with a pistol; thirdly, an unprovoked blow on the leg with a heavy stick at Inverness; fourthly, three blows on the face, said to have been inflicted on the 28th of January, 1858, at Strontian; fifthly, the twisting of a piece of velvet with violence round her neck about October 7, 1858; sixthly, the blow on the face, said to have been inflicted in 1861, when she refused to come away from the window in London.

These several acts are all, save the last, supported by the wife's oath alone; she called only one of the servants, who from time to time lived in the house with her. This one was Ann Morse, but she entered her service as late as May, 1861, **[324]** and is in her service still. This woman, speaking of May, 1861, says, "she saw her mistress coming upstairs one evening; that her mouth was bleeding very much, and there was a mark on the mouth as of a blow, which continued some days." So stood the wife's case of violence—an amply sufficient one if the wife's oath could be relied upon, which was the real question the jury had to determine.

Now, the husband met all these six charges with an absolute denial. Some he represented as inventions altogether, and some as exaggerations. He admitted beating the child, but said it was with a switch no bigger than a pen, and that not until the child had previously kicked him. He swore the child did not faint, and was not sick (as the wife had stated); he vouched the two servants, M'Ewen and

Charlotte Palmer, who came into the room at the time, both of whom he said were outside the Court, and the latter of whom he called as a witness. She said, "I found the child lying in Mrs. Scott's lap—not crying then; my duty was to wash and dress him. I saw no marks on him. I saw a stick in Captain Scott's hand—a switch. I saw no brandy; did not see him sick; did not see the child faint. He was lying quietly in his mother's arms, not half a minute after I heard him crying and sobbing."

Then, as to the charge of threatening to shoot her, the petitioner swore he did not possess a pistol at the time, and that he made no such threat. The wife, in cross-examination, admitted she did not see the pistol, and said he held it under his coat. And Dr. Wodehouse, speaking of a subsequent occasion, when the charge of threatening to shoot was brought up against the husband by Mrs. Scott and her mother in his presence, says Captain Scott said he had no pistol in his possession at the time. Upon being pressed, Mrs. Scott said it might be something else; she did not say what.

The third charge is of a blow on the leg, which Captain Scott declares to be an invention, and he examines the maid who **[325]** was with her at the time, who answered, in cross-examination, that "she did not remember ever fomenting Mrs. Scott's leg" The fourth charge is met with a total denial, as also is the fifth; and as to the sixth, the petitioner declares he removed her from the window with no unnecessary force, and accounts for the condition of her mouth by saying that "she constantly had something the matter with her teeth and gums—gumboils and swellings of the face."

He also gave general evidence. He called two other servants besides Charlotte Palmer, Selina Morgan and Sarah Wheeler, one of whom was thirteen months in their service. They all three depose that they never heard swearing or bad language on Captain Scott's part, and that they witnessed no violence. In addition to this, the petitioner called Colonel Simmons, who saw a good deal of them in 1861; Mr. Harrison, who often saw them together between 1844 and 1858; Dr. Wodehouse, who saw them in 1853; and Mr. Boultbee, who was with them at the shooting quarters in Scotland. They all give a favourable account of his demeanour to his wife, and expressly deny a habit of using bad language. He examined another witness, Mrs. White (his own sister), who, though she says there were often words between them, says she never heard him swear at or use any violence to his wife.

Surely this evidence presented a case on the husband's part well worthy of attention. Whatever may be said in condemnation of his general conduct, here was surely cogent evidence in denial of those instances of personal violence which were relied upon as sustaining a charge of cruelty. The jury believed the husband. Who can assert that they ought to have believed the wife? They were not without reasons for doubting her entire truth. Not to mention the contradictions she received from the witnesses already named, I have been much struck with the evidence as to her dress. A distinguished officer, Colonel Simmons, C.B., says he saw them **[326]** in 1860 and 1861 frequently; and in cross-examination, he said, "Mrs. Scott was very fashionably dressed; that seemed to outrage Captain Scott's feelings; he spoke to me about it." Now the husband had sworn that "her dress was not such as ladies walk in." Whereas the wife swore positively, "the petitioner did not object that I went too much dressed, but sometimes said he would not walk with me unless I was smarter." The subject was not a very material one, but such discrepancies tend much to break down confidence and invite distrust, and it may be that the jury so regarded them.

I will dismiss in a few words the remaining ground for this application. Three affidavits are offered to the Court. The substance of them is, that after the close of the respondent's case, but before the trial was concluded, a witness presented himself in Westminster Hall who could have corroborated the respondent upon one or more of the instances of cruelty to which she had sworn. The respondent desires a new trial that she may have the benefit of this evidence. But this is quite inadmissible. The affidavits disclose no surprise, and the proposed additional testimony is not in denial of some point or matter introduced unexpectedly on the other side, but only additional to and in affirmation of the case made, and all along intended to be made, by the respondent herself. It has never been the habit in Westminster Hall to grant new trials on the simple ground that the party could make the same case stronger by corroborating testimony (even though newly discovered) if another trial were allowed. And if it were otherwise, there are few cases that would not be tried a second time.

But in this case there is the further fact that if application had been made to the Judge at the trial he might have allowed the evidence to be given. The result is, that the Court declines to interfere. I am sensible that in so deciding I may be affirming a decision which is erroneous, but the same might be said of an opposite decision had that been arrived at instead. And in the uncertainty which besets **[327]** every step of such an investigation, I feel bound to accept the decision which a jury pronounced after a long and patient trial, and under the guidance of a most impartial Judge.

OSBORNE *v.* OSBORNE. OSBORNE *v.* OSBORNE AND MARTELLI. November 17 and 24, 1863.—Same Issues in Cross-Suits.—Staying One Suit.—Commission to examine Witnesses.—Practice.—Where the same issues are raised in cross-suits (made necessary by the imperfect powers granted by the Legislature to the Court), the Court will, as a general rule, stay one, and that without reference to their relative positions in the cause-list. In such a case, if a commission to examine witnesses is granted, it will be drawn in such a form as that the evidence shall be available in the stayed suit, should that come to a hearing.

[S. C. 32 L. J. (Mat.) 38; 10 Jur. (N. S.) 80; 9 L. T. 456.]

These proceedings were in the nature of cross-suits. The husband's petition for dissolution of marriage by reason of the wife's adultery with Martelli was filed on the 30th of May, 1862. The respondent appeared and answered, charging the petitioner with adultery, cruelty, and desertion, and praying a judicial separation. Both petition and answer were amended, and on the 27th of May, 1863, the issues were directed to be tried before the Court by a common jury.

In the wife's suit, the petition filed on the 28th of March, 1863, charged adultery, desertion, and cruelty, and prayed a judicial separation. The husband's answer brought the same charges against the wife as contained in his petition. On the 27th of May, 1863, the issues raised in this petition were also directed to be tried before the Court by a common jury. The wife's petition was set down first for hearing in the registry, **[328]** and the causes stood as in the above order, Nos. 54 and 55, in the printed list for Michaelmas Term.

Dr. Spinks, on behalf of the wife, was now instructed to ask for commissions to issue in both suits to examine certain necessary witnesses in Paris, and that the husband should pay a sum of money to meet the wife's expenses in respect of both the commissions. He understood that the learned Judge in chambers had made an order that the wife's petition should be stayed till the husband's petition was disposed of, and ventured to offer the following remarks to the Court on the practice in such cases, and the necessity of the double petition. On a petition for dissolution of marriage, it has been supposed that the Divorce Act only enables the Court to pronounce a decree, or to dismiss the suit. It cannot make any substantive decree on the facts which may be alleged in and proved on the answer; hence the necessity of the two petitions. Again, on a petition for dissolution by the wife (though that is not the present case) her evidence, and that of the husband, is admissible on the issues of cruelty and desertion, but on the same issues raised by her answer their evidence is inadmissible: (22 & 23 Vict. c. 61, s. 6). This double suit is common enough; an instance of it is *Burroughs* v. *Burroughs*, 2 Sw. & Tr. 544, and, however hardly this may bear on the husband in respect of costs, as in *Hepworth* v. *Hepworth*, 2 Sw. & Tr. 414, the Court has not hitherto considered itself at liberty to interfere with the order in which the parties have entered the causes for trial on hearing.

*The Judge Ordinary*: The question raised, though not quite regularly, on the present motion, is one of great importance, and I am much obliged to Dr. Spinks for his remarks. I must take time to consider of the proper course.

Cur. adv. vult.

November 24.—*The Judge Ordinary*: This was an application for two **[329]** commissions to issue in two suits. The husband's suit was commenced first. The wife's suit was not begun till after a lapse of ten months, but was first set down for hearing. I made an order in chambers that the wife's suit should be stayed. The necessity of the double suit is undoubtedly caused by the defective power given to this Court by the Legislature. The Court has no power, on a petition for dissolution, to make a substantive decree in favour of the respondent; and the same evidence is admissible or inadmissible, as it applies to issues raised on the petition or on the answer. In the previous cases referred to by counsel, the wife's suit was the first

instituted, so that they do not strictly apply; I do not, however, rely upon that distinction. I shall adhere to the order that the wife's suit shall be stayed, because I cannot help seeing that, if the husband's suit is decided one way, it would, if not legally, yet practically, put an end to the second. Wherever there are two suits in which the same issues are raised, and I can find a legitimate reason to stay one or the other, I will do so. The order for the commission in the husband's suit may be drawn up in such form as that the evidence may be available in the wife's suit if that comes to a hearing.

(Before *The Judge Ordinary* (*Sir C. Cresswell*), and a Special Jury; and before *Sir J. P. Wilde* (*Judge Ordinary*), on Rule for New Trial.)

BOULTING *v.* BOULTING. July 11, November 7, December 8, 1863, and January 16, 1864.—Wife's Suit for Judicial Separation.—Adultery of Husband.—Connivance.—Delay.—A. married B. in 1833. A. since 1835 lived apart from B., her husband, under an ordinary separation deed. About 1842, B. commenced an **[330]** adulterous cohabitation with C., which continued to the date of the trial. A. was aware of the fact of the adulterous cohabitation in 1843, and thenceforward. A. petitioned for judicial separation, and issues of connivance and undue delay were found against her by the verdict of a special jury. A rule nisi for a new trial, on the ground of insufficient evidence of connivance, was granted, but discharged on argument.—Semble, undue delay cannot be pleaded in bar to a suit for judicial separation; but lapse of time between knowledge of the conduct complained of and the commencement of the suit requires explanation, and may, along with the circumstances of the case, induce the Court to withhold the relief sought. In such cases the Court will require to be satisfied of the sincerity of the complaint of the petitioner.

[S. C. 32 L. J. (Mat.) 33; 10 Jur. (N. S.) 182; 9 L. T. 779; 12 W. R. 389.]

This was the wife's petition for judicial separation by reason of the husband's adulterous cohabitation, since the year 1859, with one Ann Attfield. The respondent answered, that he had been ever since the year 1842 living in adultery with Ann Attfield, and that the petitioner knew ever since the year 1843 that he had been so living in adultery, and that the petitioner had acquiesced in and connived at such adultery, including the adultery alleged in the petition, and that the petitioner had been guilty of unreasonable delay in presenting the petition. The replication traversed knowledge in and since 1843, and acquiescence, and connivance, and unreasonable delay; and these issues were tried before Sir C. Cresswell, by a special jury, on July 11, 1863, when the following facts were proved:—The petitioner, then Ann Saul, was married to the respondent in March, 1833, Boulting's father being an ironmonger and smith, which business he (the respondent) had since followed, the wife's father being a greengrocer and coaldealer. The parties finally separated under an ordinary separation deed, dated the 14th of November, 1835, by which the husband agreed to allow the wife 7s. a week. About five or six years after the separation, the husband began to cohabit with Ann Attfield, and had continued to do so since. From July or August, 1843, the wife was aware, from the in**[331]**formation of persons who asserted a direct knowledge of the fact, and that they would swear to it, that her husband was living with Ann Attfield. During part of the interval between the separation and the petition, both parties and their families were living not far from each other, in the neighbourhood of the Middlesex Hospital; but it did not appear that the wife had ever entered the husband's house since 1835, or in any way consorted with him or Ann Attfield.

The Queen's Advocate (Sir R. J. Phillimore), Mr H. Mills, Q.C., and Dr. Swabey, for the petitioner.

Mr. A. Staveley Hill, and Mr. Cohen, for the respondent.

*Cresswell, Judge Ordinary*, in substance told the jury that if they thought, from the facts proved, that the wife had given a willing consent to the adultery of which she now complained, that was in law connivance; and the jury found all the issues in favour of the respondent.

November 7.—Before *Wilde, Judge Ordinary*. The Queen's Advocate (Dr. Swabey with him) moved for a rule nisi for new trial, on the ground of misdirection, and that the verdict as to connivance, which they submitted was the only material issue in a suit for judicial separation, was against the weight of evidence.

Cur. adv. vult.

November 12.—*The Judge Ordinary* granted a rule nisi for a new trial, on the ground that there was not sufficient evidence to go to the jury on the issue of connivance.

December 8.—Cause was shown by Mr. Hawkins, Q.C., and Mr. Cohen. They submitted that at least there was evidence to go to the jury as to connivance, and it could not be said, on the facts proved, that their verdict was wrong. The inference was one **[332]** which it was peculiarly their province to draw; but, further, the question of undue delay is one to which sufficient weight has not been given. The Ecclesiastical and this Court, up to the present time, has always taken into consideration delay in bringing forward the complaint in cases of judicial separation, and it would seem that where the delay is considerable and unexplained, the Court is not bound to entertain the suit or grant relief. As to connivance, they cited *Phillips* v. *Phillips*, 4 N. C. 523; *Thomas* v. *Thomas*, 2 Sw. & Tr. 113. As to undue delay: *Walker* v. *Walker*, 2 Phil. 153; *Angle* v. *Angle*, 6 N. C. 192; *Matthews* v. *Matthews*, 1 Sw. & Tr. 499. In *Cooke* v. *Cooke*, 3 Sw. & Tr. 130, though Sir C. Cresswell considered undue delay as not of itself a bar to the suit, yet, as combined with other circumstances, he said it might be a sufficient reason for dismissing a petition.

*The Judge Ordinary*: If there is such delay, taken with the other circumstances of the case, as to induce the Court to refuse the relief prayed, there would certainly be no use in sending the issue of connivance to be tried by a fresh jury.

The Queen's Advocate and Dr. Swabey, in support of the rule. None of the cases cited, nor those decided in the present Court, go to the extent that connivance is constituted by a bare knowledge of the misconduct of the other party. There must have been an intention that the guilt complained of should follow the course of action or inaction of the party against whom connivance is alleged (*Allen* v. *Allen and D'Arcy*, 2 Sw. & Tr. 108, note; *Marris* v. *Marris and Burke*, 2 Sw. & Tr. 530). Again, more stringent proof of such guilty intention or consent is necessary where the adultery did not take place during the cohabitation of the husband and wife (*Rogers* v. *Rogers*, 3 Hagg. 72). As to unnecessary delay, in some of the cases cited, the remarks of the learned judges apply to delay in the prosecution of a suit after proceedings **[333]** commenced, or the cases are cases of cruelty where the cohabitation and acts of cruelty had ceased for various periods before the complaint made. In *Angle* v. *Angle* (which is a case of adultery), 6 N. C., at p. 198, Dr. Lushington said, "As to delay, if the husband had been resident in England, the delay would have been no bar." But whether weight may have been given in other cases to delay, the present is a case of continuing injury; the husband is now living in adultery, and in regard of that adultery the wife must be entitled to a decree of judicial separation, unless her conduct amounts to a legal bar. Unless, then, the delay since the wife first knew of a fact of adultery amounts, with other facts proved, to connivance, it is immaterial in the present case, for she complains of adultery of quite recent date. In the cases of *Baker* v. *Baker*, before the Court in 1859–60, unreported, and *Wilcock* v. *Wilcock*, November, 1859, reported on a question of alimony only, 32 L. J. 205, Prob. and Mat., the wives obtained a decree of judicial separation in circumstances very like those of the present case. Cur. adv. vult.

January 16.—*The Judge Ordinary* gave the following judgment:—This is a suit promoted by the wife against the husband for a judicial separation on the ground of adultery. It was commenced on the 20th of December, 1861. The adultery was proved at the trial, when the following facts were also established:—The respondent was by trade an ironmonger, at first in partnership with his father. His marriage with the petitioner took place in 1833. After one or more previous separations, attributed by the husband to the drunken habits of his wife, they finally agreed to live apart, he allowing her 7s. a week. This took place in 1835. As early as 1841, the respondent commenced living with a woman named Ann Attfield. This woman lived with him at his lodgings in all respects as his wife, in the same street and within a few doors of the petitioner, who had **[334]** taken up her abode with her relatives. It was proved that, as early as 1843, and probably earlier, Mrs. Boulting was aware of this circumstance, and on several occasions, between 1843 and October, 1861, the persons who took her weekly allowance from her husband conversed with her, or in her presence, about this adulterous connection. These conversations, as detailed by the witnesses, were in terms of complete indifference on her part.

It thus appears that, for a period of seventeen years, the illicit cohabitation on which the petitioner grounds her suit as an intolerable grievance, existed under her

close observation; never at any considerable distance; for long in the same street, when she resided with her relatives, and within a few doors of her abode. With what feelings did she regard it? This is the all-important question. Did she resent it as an outrage on her marriage rights? Did she chafe at the idea of her place being occupied by another? Was she angry? Was she jealous? Was she moved by a consciousness of indignity, or stung by a sense of wrong? Perhaps not; for she had long since voluntarily withdrawn from cohabitation with her husband, and was living apart upon an allowance he made her. But if she felt none of this, was the converse her condition of mind? Did she view with apathy and indifference a relation set up with another which had ceased to exist for herself? Was she willing that her husband should continue his mode of life, provided he gave her the means of continuing her own? Was she satisfied, acquiescent, content, well pleased, quieta non movere,—not averse to maintain her separation and allowance, and accept the condition of things? I know of no tests of inward feelings but the outward signs of act and speech. How did she act? What did she say? For seventeen years the petitioner did nothing to abate the evil, and took no steps, legal or otherwise, to assert her rights. She did not apply to the ecclesiastical tribunal. When this Court was established she forbore to apply to that. She made **[335]** no complaint, and offered no remonstrance to her husband. She had friends and close relatives, but she did not invite their intervention. Nay more, she does not appear to have uttered to any human being a single word of anger, reproach, or even displeasure when the subject was mentioned in her presence. And yet she was living among her own family and subject to no restraint. Fortified by the sure sympathy of those around her, she was exactly in the position in which one would expect her natural feelings to break from her in speech, or find vent in action.

It is said that, as a poor and ill-educated woman, legal proceedings were scarcely within her reach. But an angry ejaculation, a menace or a hard word levelled at her husband or the woman with whom he was living, these, alas! are within the reach of all, and too natural for their absence to be overlooked, if she were really outraged by her husband's misconduct. The case was submitted to a jury. The judge told them, that if the conduct of the party shows that she has no objection to it, that is willing consent. Was she willing to accept a provision and that her husband might live with that woman provided he paid the allowance? And they found that the petitioner connived at this adulterous connection.

Now, connivance is an act of the mind; it implies knowledge and acquiescence. I prefer the word "acquiescence" to "consent," because the latter in some respects carries with it an idea of leave or licence conveyed or signified to the erring party. As a legal doctrine, connivance has its source and its limits in this principle, volenti non fit injuria: a willing mind, this is all that is necessary. Such is the result of the decisions. They are brought together in Sir Herbert Jenner's judgment in *Phillips* v. *Phillips*, 4 Notes of Cas. 528. But how is knowledge and acquiescence to be proved? The answer is, like any other conclusion of fact. It may be proved by express language or by inference deduced from facts and conduct. And so in this case, the jury, having all the circum-**[336]**-stances before them, and looking to what the petitioner said and did, and perhaps still more at what she forbore to say and do, were convinced that she did in fact connive and acquiesce for a long time in that connection which she now after seventeen years denounces. In this conclusion I cannot say that they were wrong, and the verdict must therefore stand.

I might stop here, but other ground has been opened in argument—the long delay. This has been argued as a bar to the suit. I agree with the Queen's Advocate that it is not so. But it is a most material matter, which unexplained would lead the Court to conclusions fatal to the petitioner's relief. The true effect of delay in these suits is well expounded by Lord Stowell in *Mortimer* v. *Mortimer*, 2 Consist. 313. The first thing which the Court looks to "when a charge of adultery is preferred is the date of the charge relatively to the date of the criminal fact and knowledge of it by the party, because if the interval be very long between the date and knowledge of the facts and the exhibition of them to this Court, it will be indisposed to relieve a party who appears to have slumbered in sufficient comfort over them, and it will be inclined to infer either an insincerity in the complaint or an acquiescence in the injury, whether real or supposed, or a condonation of it. It therefore demands a full and satisfactory explanation of this delay in order to take it out of the reach of

such interpretations." Thus, though delay of itself goes for little, the conclusions to which it may give rise may go the full length of barring the remedy. All depends on the other facts of the case. And in this case it had its effect, no doubt, on the jury in determining the question of connivance. A wider ground remains. It is impossible to read the judgments of those who have administered the ecclesiastical law without appreciating the jealous care and reluctance with which they interfere with the obligations of the marriage vow. They never lose sight of the fact that, as cohabitation is the first object of marriage, separation should **[337]** be the last expedient of the law. This expedient they therefore applied with a large and cautious discretion. Hence the doctrines of condonation, connivance, and recrimination. Before the Court interfered, it ever insisted upon clean hands—a real grievance —a very present wrong,—and, above all, sincerity—sincerity in the purpose for which the suit is instituted. The petitioner must feel and suffer under the wrong of which complaint is made, and the Court must be satisfied that the remedy is sought as a genuine relief from the pressure of that grievance. Such is the beaten track of the decisions. It is impossible to tread too faithfully in footsteps so wisely placed. For seventeen years has this wife been passive. What is the cause of her present attitude? It may be that a judicial separation would yield an alimony, in her husband's present circumstances, greater than the allowance she has been content to receive so long, or there may be other reasons. But the Court looks in vain for any legitimate cause why she should suddenly regard her husband's conduct now in any different light from that of past days. Her husband has not interfered with her, has not changed his conduct towards her, or his own mode of life. So far as the evidence went, the entire situation of the parties has remained wholly unchanged. Does the wife desire separation? She has it, in fact, already. Does she require support? She has that too, and upon terms arranged by herself. The Court cannot believe in the sincerity of such a suit, and must withhold from Mrs. Boulting any relief now founded upon an adulterous connection over which for years she seems to have "slumbered with sufficient comfort."

**[338]** ROWLEY *v.* ROWLEY. March, 1861, July and November, 1863, and January, 1864. — Petition for Dissolution. — Compromise. — Subsequent Misconduct.— Subsequent Suit.—On a wife's petition for dissolution of marriage, certain issues of cruelty and adultery came on for trial on the 12th of March, 1861, when an agreement was signed by the respective counsel of the parties, by which, inter alia, a separation deed was to be executed, and the petitioner agreed not to take further proceedings in this Court. The petitioner moved the Court to set down the case again for trial, on the ground that the agreement was not signed by counsel with her consent; the Full Court, on appeal, confirmed the Judge Ordinary's rejection of this motion. In 1863, the petitioner filed a fresh petition, alleging the same acts of adultery as in the former petition, certain other acts previous to March, 1861, which she alleged had only come to her knowledge in the early part of 1863, certain other acts of adultery since March, 1861, and various acts of cruelty, some alleged to be different from those contained in the former petition. In the result, the Court held that the petitioner was bound by the agreement of March, 1861, not to take any proceedings in the Court in respect of any matter before that date; and as the subsequent acts of adultery, to which the Court held the agreement not to extend, would not of themselves support the wife's petition for dissolution, refused to give any directions as to the mode of trial.

[Affirmed, 1866, L. R. 1 Sc. & Div. 63.]

In this case the wife, by her petition dated the 9th of May, 1863, asked for a dissolution of marriage by reason of her husband's adultery and cruelty. The petition stated the marriage to have taken place in 1844, and that the cohabitation of the parties finally ceased in November, 1854.

The charges of cruelty and adultery alleged in the petition may, for the present purpose, be classed as follows:—1. Acts of adultery before the 12th of March, 1861, of which certain specified acts were alleged not to have come to the knowledge of the petitioner till early in the year 1863. 2. Acts of adultery since the 12th of March, 1861. 3. Acts of cruelty during cohabitation, i.e. before November, 1854.

**[339]** The respondent's answer, filed the 5th of June, 1863, stated:—1. That the

petitioner did, by her petition bearing date the 25th of February, 1860, petition this honourable Court for a dissolution of her marriage with the respondent on the ground of his alleged adultery and cruelty, and the issues raised on such allegations of adultery and cruelty between the petitioner and the respondent came on for trial before this honourable Court and a special jury on the 12th of March, 1861, when, with the consents respectively of the petitioner and the respondent, a memorandum of agreement to the following effect was drawn up and signed by the counsel for the respondent and petitioner respectively:—

"In the Divorce Court.—*Rowley* v. *Rowley*.—A juror withdrawn, and the petitioner to move at the proper time to have the petition taken off the file, the respondent consenting to the application; the respondent undertaking to execute a deed of separation, with covenants with a trustee to be named by the petitioner not to molest the petitioner, nor to put in force the sentence of the Privy Council, and other usual covenants in such a deed, including a covenant to allow the petitioner to choose her own place or places of abode. The deed to be prepared by the solicitor for the petitioner, and at her expense, the respondent bearing his own costs attendant on the execution and settling of the deed. Mr. Dart to settle the deed if solicitors differ. The petitioner undertaking not to institute other proceedings in the Divorce Court; each party to pay his own costs of this suit.

(Signed) J. P. Deane, for the respondent.
Wm. Atherton, for the petitioner."

By reason of the aforesaid consents and agreements the aforesaid issues were not submitted to the jury.

2. That the petitioner has not taken any step to have the said petition, bearing date the 25th of February, 1860, removed from the file of this honourable Court.

3. That this petition is filed by the petitioner in breach of **[340]** her undertaking not to institute other proceedings in this honourable Court.

4. That the acts of adultery alleged in (certain) paragraphs of the petitioner to have been committed by the respondent with A. G., are the same acts of adultery as were alleged by the petitioner against the respondent in the said petition bearing date the 25th of February, 1860.

5. That the acts of cruelty in the present petition alleged, other than those alleged by the petitioner in her said petition bearing date the 25th of February, 1860, were known to the defendant on the 25th of February 1860.

6. General traverse of adultery alleged.

7. General traverse of cruelty alleged.

8. That the petitioner is in receipt of the yearly income of not less than £700, secured to her separate use, and independent of the control of the respondent by an indenture of settlement, etc.

Prayer:—To decree that the petitioner ought not to be allowed to prosecute this petition, to dismiss the petition, and condemn the petitioner in costs.

To this the petitioner, on the 16th of June, 1863, filed a replication, stating,—1. That the petitioner denies that the said memorandum of agreement in the first paragraph of the answer mentioned was signed by her counsel, with the consent of the petitioner, as in the said first paragraph pleaded, and the petitioner takes issue thereon. 2. That the petitioner denies that the petition in this suit is filed by her in breach of the undertaking not to institute other proceedings in this honourable Court, as in the third paragraph of the answer alleged, and petitioner takes issue thereon. 3 and 4 joined issue on the traverses of adultery and cruelty.

On this state of pleadings the Court was moved on behalf of the petitioner, during the sittings after Trinity Term, 1863, to order the issues raised to be tried before itself by a special jury, and the Judge Ordinary refused to make any order as **[341]** to the mode of trial till the allegations of adultery and cruelty, which had been contained in the petition of 1860, had been struck out.

Early in Michaelmas Term, 1863, the petitioner obtained an order on summons from the Judge Ordinary to amend her petition, by striking out such allegations of adultery and cruelty.

Subsequently the Court was moved by Dr. Swabey, on behalf of the respondent, to strike out the remaining paragraphs of the petition. He submitted that the petition, as amended, contained charges under three heads:—First, acts of adultery before the 12th of March, 1861, said not to have come to the petitioner's knowledge

till the early part of the year 1863; secondly, acts of adultery since 12th of March 1861; thirdly, acts of cruelty which, on the face of the petition, must have been known to the petitioner in 1860 and 1861. That the agreement of March, 1861, precluded the petitioner from any further proceedings against her husband in respect of misconduct, whether before or after the date of the agreement. That if the agreement did not go to that extent, it at least hindered her proceeding in respect of all adultery before that date, and of all cruelty, whether alleged to be the same or different acts from those charged in the petition of 1860, for they were obviously all within the knowledge of the petitioner in 1860, and in March, 1861; and it never could be intended that a wife should make such an arrangement in respect of certain alleged acts of cruelty, and then be at liberty to re-open the whole matter. The issue which the petitioner now wishes to submit to a jury, as to whether the agreement of March, 1861, was signed by her consent, was, in fact, decided by the Full Court on the 4th of June, 1862, on appeal from an order of the Judge Ordinary, rejecting a motion of the petitioner that the petition of 1860 should be again set down for hearing. The form in which the question now comes before this Court is perhaps unusual, but on behalf **[342]** of Mr. Rowley, it is a great object to save expense. From the affidavit of Mr. Duncan, the respondent's solicitor, it appears that the respondent has observed, as far as in him lay, the conditions of the agreement.

Mr. Karslake, Q.C. (Dr. Tristram with him), contrà. The issue on the question, whether the agreement was binding or no, cannot be got rid of on a motion of this sort. Where the equitable interference of the Court is sought, it must be at as early a stage of the proceedings as possible. We should also contend that the acts of adultery alleged to have taken place since March, 1861, would revive the acts of adultery and cruelty which were the subject-matter of the petition of 1860.

*The Judge Ordinary*: As I have been pressed to give my opinion on the questions raised on the present form of the proceedings, I will do so, as far as I can. I do not think that the agreement of March, 1861, precludes the wife from complaining of the subsequent misconduct of the husband, but I think it extends to all matter of complaint before that date. It is stated that the question of Mrs. Rowley's consent to the agreement of March, 1861, was decided by the Full Court. The respondent had better file a rejoinder, pleading that decision. When that appears on the record, I shall be able to deal with all charges before the date of this agreement.

A rejoinder was accordingly filed on the 30th of November, 1863, stating that the issue raised by the first paragraph of the petitioner's replication herein was decided between the same parties in favour of this respondent, by the several decrees of this honourable Court, given by the then Judge Ordinary, and on appeal from the decision of the then Judge Ordinary by the Full Court, of which decrees the minutes extracted from the Divorce and Matrimonial department of the principal registry of Her Majesty's Court of Probate are hereinafter set out.

**[343]** The last of such minutes was in substance as follows:—

"June 4, 1862.—Before the Right Hon. Sir Cresswell Cresswell, Kt., etc., the Hon. Sir William Wightman, Kt., etc., and the Hon. Sir James Shaw Willes, Kt., etc., three of the Judges of Her Majesty's Court for Divorce and Matrimonial Causes, sitting in open Court at Westminster.

"The Judges having heard Mary Ann Jephson, otherwise Jephson Rowley, the petitioner, in person, pronounced against the appeal interposed on her behalf from an order of the Judge Ordinary, made on the 12th of June, 1861, whereby he rejected a motion made on behalf of the said petitioner for a rule ordering John Jephson, otherwise Jephson Rowley, the respondent, to shew cause why the petition should not be put upon the file again for hearing, and a new trial granted."

The petitioner's surrejoinder, filed the 7th of January, 1864, stated:—1. That petitioner denies that the issue raised by the first paragraph of her replication was decided in favour of the respondent, by the several decrees referred to in the said rejoinder. 2. And the petitioner further saith, that the several allegations of adultery and cruelty set forth in the amended petition filed by her in this cause, were not, nor was any of them, set forth in the petition filed by her in the said former cause, nor were all, nor was any of them, in issue in the pleadings in the said former cause.

On this state of pleadings the Court was moved on the 19th of January, 1864, by—

Dr. Tristram, on behalf of the petitioner, to give directions as to the mode of trial. Adverting to the opinion expressed by the Court on a former occasion, he

submitted that acts of cruelty which might have been within the knowledge of the petitioner before the 12th of March, 1861, would be revived by the proof of the subsequent adultery, and that therefore she had a right to go to a jury on the issues of cruelty now alleged in the petition, and the subsequent adultery.

**[344]** Dr. Swabey, contrà: The doctrine of revival cannot apply. This was an agreement to settle certain matters in dispute, and live separate. Condonation brings the parties together again after a wrong done; and for the protection of the party injured, the law annexes the condition of revival in case of any subsequent marital offence of which the Matrimonial Court can take cognizance. If the Court should be of opinion that the subsequent acts of adultery are the only ones which the petitioner has a right to go upon, there is no use in submitting that issue to a jury in the present form of the petition, which is for dissolution alone. Cur. adv. vult.

January 26.—*The Judge Ordinary* gave the following judgment:—In this case the Court was applied to for directions as to the mode of trial. The case is a remarkable one in its circumstances, and illustrates in a forcible manner the oppression which may be worked by the misapplication of the salutary powers of this Court. The petitioner is the wife of Mr. John Rowley. She was married to him on the 2nd of July, 1844. In October, 1848, she left his house, alleging cruelty on his part; this statement appears on her own petition. In January, 1849, she returned to him. In September, 1849, she appears to have left him again, and refused to return. Mr. Rowley then took steps to enforce her return. He commenced a suit for restitution of conjugal rights in the Consistory Court of York. This was in October, 1852. To this Mrs. Rowley set up, by way of defence, that he had been guilty of adultery and cruelty, and she prayed that a decree of divorce à mensâ et thoro should be pronounced in her favour on those grounds. The cause was carried by appeal to Her Majesty in Council, where it was ultimately decided, and the result was, that on the 29th of December, 1853, an Order of Council was made, on the recommendation of the Judicial Committee, to the effect that Mrs. Rowley had failed in proving the cruelty and adultery pleaded, and that she must return to her husband. **[345]** In January, 1854, she did so, but she left him again in November of that year, and has never cohabited with him since.

On the 25th of February, 1860, Mrs. Rowley filed her petition in this Court, and prayed for a divorce, on the ground of cruelty and adultery. In this petition she did not confine her charges of cruelty and adultery to occasions subsequent to the above suit, but adduced several charges, dated in 1848 and 1849, which either were or might have been adduced in the former suit, which had been decided against her. The respondent having pleaded to this petition, the cause came on for trial before the late Judge Ordinary and a special jury, on the 12th of March, 1861, when the cause was withdrawn from the jury, with the consent of both parties, and the following memorandum drawn up and signed by their respective counsel. Mrs. Rowley has contended that it was not binding upon her, but the Full Court of Divorce, after hearing the parties, has decided that it was. [The learned Judge here read the agreement as set out above.] It is sworn in the affidavit of Mr. Duncan, and not denied by Mrs. Rowley, that Mr. Rowley has faithfully observed this agreement on his part. But Mrs. Rowley is not content. On the 9th of May, 1863, she filed another petition in this Court, notwithstanding her undertaking "not to institute other proceedings." The prayer was for divorce, and the grounds, adultery and cruelty. In this petition she repeated, in a number of paragraphs, the identical charges she had made in the suit which was compromised, as above stated, and added a variety of others. The late Judge Ordinary, when applied to for directions as to the mode of trial, perceived this, and refused to make any order till these old charges were struck out. They have been so, but a variety of charges of cruelty remain in the petition, which, though not brought forward in the former suit, bear date long before that suit was instituted. And it could not be otherwise, for Mrs. Rowley has never cohabited with her husband since **[346]** November, 1854. The same remark applies to most of the acts of adultery charged, though there are some as late as June, 1861, and April, 1863. To these charges the respondent has pleaded the agreement of March, 1861.

Now, what is the effect of that agreement, and to what extent is the course which Mrs. Rowley has taken consistent with good faith, and an honest adherence to that arrangement? I cannot construe the agreement to mean anything else but that, in

respect to her husband's past conduct at any rate, Mrs. Rowley consented to surrender, and that irrevocably, any legal right she might have to relief in this Court. I say any right she might have, for her case remained to be proved, and she might perchance have been as little successful on that occasion as she was in the previous suit. It is, therefore, in gross breach of good faith, and in violation of express agreement, that Mrs. Rowley has filed her present petition. The foundation of her prayer for divorce is the cruelty she alleges to have been committed by her husband during the cohabitation antecedent to the suit which resulted in that agreement. It is not in the nature of cruelty not to be within the knowledge of the party aggrieved. She has not even, therefore, the excuse that she did not then know the full extent of her then existing grievances.

Upon what ground, then, is it contended that this Court ought to permit Mrs. Rowley thus to withdraw herself from her own engagements? It has been ingeniously argued, that the adultery charged to have been committed in 1862, revived the previous cruelty, as it would do in an ordinary case of condonation. Now, condonation is that species of forgiveness or reconciliation which, in furtherance of the marriage bond, the Court has erected into a bar to legal proceedings for a separation; but which, in the interest of justice, the law has also declared to be only conditional on future good conduct. This has nothing in common with a direct and positive bargain not to resort to the powers of this Court, made between the **[347]** husband and wife, and reduced into writing. The conditions, if any, to which such an agreement is subject, must be found expressed or collected as implied in the language itself. But there is no such condition to be found. The agreement has been violated. Why should not the Court give it effect? There is a class of suits in which restitution of conjugal rights and the aid of the Court to enforce the obligations of marriage is sought, and to such, a voluntary agreement to live separate is no answer. But in cases like the present, where the Court is asked to derogate from, not to enforce, the marriage bond, it is far otherwise. If cohabitation is to be no longer continued, and choice is to be made between the legal and public remedy, and the voluntary and private arrangement, who can doubt between them? Expense, exposure, uncertainty, the exhibition in open Court of vows broken and duties neglected, to the great scandal of the public upon whom it is forced, as well as the parties to whom it is the sole legal resort,—such is the price that must be paid for a remedy which begins by bringing the marriage into disrepute, and ends by impairing or dissolving it. In contrast with this, a voluntary agreement to live apart almost ceases to be an evil, and should find no lack of favour from the Court, when it is designed to replace the greater evil of a public judicial sentence. The result is, that the Court declines to further Mrs. Rowley's suit by giving any directions for the mode of trial, and on proper application will entertain the question, whether the husband is not entitled to be dismissed from this suit.

HALL *v.* HALL. January 29 and February 2, 1864.—Wife's Petition.—Cruelty.—Evidence suggesting Respondent's Insanity.—Where the evidence on behalf of the petitioner discloses facts from **[348]** which the respondent's insanity may be inferred, the Court will require to be satisfied that such facts admit of a different explanation, before it will make a decree in favour of the petitioner.

[S. C. 33 L. J. (Mat.) 65; 9 L. T. 810.]

This was the wife's petition for dissolution of marriage by reason of cruelty and adultery. The husband's answer traversed these charges, and pleaded condonation of the cruelty. The case now came on for hearing before the Court itself.

The Queen's Advocate (Sir R. Phillimore) and Mr. Hannen, for the petitioner.

Dr. Spinks, for the respondent.

The petitioner was examined as to cruelty. It appeared, among other facts, that during the latter part of the cohabitation, the husband had been more or less under the restraint of some persons in the house acting as keepers.

On cross-examination, no questions were put to the petitioner as to acts of violence which she had deposed to; but she was asked, whether she had not known before marriage that her husband was of violent temper and given to drink.

By the Court: After the cross-examination, it does not seem necessary to call other witnesses as to acts of violence; but the question arises, whether the Court can proceed to make a decree in this case where there is strong evidence before it, that the husband is irresponsible for his actions?

The Queen's Advocate: The question does not arise on the pleadings; such a fact or defence must be before the Court in a known legal manner; by the husband's next friend, if he is now insane, or by himself, if now sane, but insane during the time spoken to. In *White* v. *White*, 1 Swab. & Tris. 592, the Court decreed a judicial separation by reason of the wife's **[349]** violence towards the husband, though it appeared that she had been, from time to time, in confinement as insane.

Cur. adv. vult.

*The Judge Ordinary*: In this case the Court desires further evidence, some serious questions having been raised. The sanity or insanity of the respondent is a question of which the Court must satisfy itself, and this, although it has come to light on the evidence, without being raised in the pleadings, for society has an interest in the maintenance of marriage ties, which the collusion or negligence of the parties cannot impair. It was faintly, and with great care not to be too explicit, argued that madness would be no answer, even if pleaded, and cases were cited, to which I have since referred. With danger to the wife in view, the Court does not hold its hand to inquire into motives and causes. The sources of the husband's conduct are, for the most part, immaterial. Thus, I have no doubt that cruelty does not cease to be a cause of suit if it proceeded from "violent and disorderly affections," as said in one case, or from "violence of disposition, want of moral control, or eccentricity," as said in another, or "from a liability to become excited in controversy," in the language of a third; but madness, dementia, positive disease of the mind, this is quite another matter. An insane man is likely enough to be dangerous to his wife's personal safety, but the remedy lies in the restraint of the husband, not the release of the wife. Though the object of this Court's interference is safety for the future, its sentence carries with it some retribution for the past. In either aspect it would be equally unjust to act on the excesses of a disordered brain: in the latter, for the insane are not responsible; in the former, for insanity may be cured and the danger at an end. These positions appear to me, as at present advised, to be reasonable, and should the facts eventually bring this case within reach of them, may be safely acted upon. The case of *White* v. *White*, **[350]** before the late Judge Ordinary, is, I think, in strong accordance with them.

Now, it has transpired in evidence that the respondent, for many months before his wife was obliged to leave him, had constantly a keeper in the house to restrain him; that he was kept without means, and followed by the keeper when he went out alone; finally, that he fled from the house suddenly and secretly with his keeper to York, taking his child with him. The presumption that he was out of his mind flows very naturally from such facts. For aught the Court knows, he may be now actually in confinement or under medical control, for there is no account of his subsequent history. But it is said that all this may be explained by the fact, that he was given to drinking and of violent temper. It may be so, but those who advised and arranged this treatment should be brought before the Court to elucidate that which they alone can explain away. The Court may then appreciate the respondent's condition and its causes. The case stands adjourned that they may do so.

GRAVES *v.* GRAVES. February 6, 1864.—Wife's Petition.—Desertion and Adultery.—Where the intention of the husband clearly was not to live with the wife (he was, in fact, carrying on an adulterous intercourse before and after marriage), the Court held that it amounted to desertion on his part, though the wife actually left the house in which they last resided together, and, after she was aware of the adulterous connection, refused to return unless she was satisfied that such connection was at an end.

[S. C. 33 L. J. (Mat.) 66; 10 Jur. (N. S.) 546; 10 L. T. 273; 12 W. R. 1016. Discussed, *Sickert* v. *Sickert*, [1899] P. 278. Referred to, *Eastbourne Guardians* v. *Croydon Guardians*, [1910] 2 K. B. 24.]

This was the wife's petition for a dissolution of her marriage, on the ground of the adultery of the husband, coupled with **[351]** desertion for two years. The respondent appeared, but filed no answer. The petition (filed the 25th of August, 1863) alleged a marriage on the 29th of May, 1860, in Dublin; that after the marriage the petitioner, at Holyhead, Chester, London, at Sutton Place, near Dartford, Kent, and at Tenby, South Wales, cohabited with her husband, but that there had been no issue of the marriage; that in or about the month of August, 1860, the respondent, without

cause, deserted the petitioner, and had ever since continued so to desert her; that the respondent had, on divers occasions since the 29th of May, 1860, committed adultery with a female named Sarah Williams, at divers places in Wales. The petition now came on for proof before the Judge Ordinary.

Dr. Spinks, for the petitioner.

Mr. G. H. Cooper, for the respondent.

The facts of the case are sufficiently stated in the judgment.

Dr. Spinks, for the petitioner: The conduct of the respondent amounts to desertion from the 21st of August, 1860, when the petitioner first left Tenby. It matters not that the petitioner herself left her home, if her husband, with the intention of bringing about a separation, so treated her as to compel her to leave him. I know of no case precisely in point, but the American law, as stated in Bishop on the Law of Marriage and Divorce, section 514, seems to be correct:—"Where the separation and desertion are concurrent in the time of their commencement, the guilty party is not always, or necessarily, the one who leaves the matrimonial habitation. Thus, to drive away the wife from the house is to desert her; and where a husband sent away his wife to her friends, and then, without any known cause, himself left the country, there having been no difficulty between them, only it was supposed he thought her too old for him, she was **[352]** held entitled to a divorce. So, where it appeared that the parties had some slight misunderstanding, and the husband, having been absent from home a day or two, returned and told his wife to go and see her brother, who was sick at his residence a few miles distant, she went and found that he was well and had not been sick, and then, coming back home, found that her husband was gone,—this was held to be desertion in him. Indeed, it would be difficult to draw any distinction, except in the enormity of the offence, between a husband's openly leaving his wife with the avowal of his intent, and his removing her from him by stratagem or by violence." In sect. 515, he says: "There certainly can be no distinction between his intending to oblige her to leave him, and his intending himself to leave her." If a husband, having the desire and intention to separate from his wife, orders her to leave him, and behaves in such a manner (without actual cruelty) as to compel her to separate herself from him, the separation must be attributed to him, and amounts to desertion. Here the respondent's insulting conduct to his wife, when considered in connection with his abstaining from consummating the marriage, his not supporting her during the cohabitation, his declarations of dislike, and his adulterous intimacy with Sarah Williams, show an intention on his part to separate from his wife, but to make the separation appear to be her act, and not his own. His offers to take her back are not inconsistent with this view, for they were not made bonâ fide, but in such a way that he must have known that they would not be accepted. Even if there was not desertion in August, 1860, there certainly was desertion from the time when the petitioner, in September, 1860, came over to Ferryside and asked to be allowed to return to him. She was always willing to return until she was informed of her husband's intimacy with Sarah Williams; then she was not willing to return so long as that intimacy continued, but expressed to him her willingness to do so on condition that it **[353]** was broken off. *Gibson* v. *Gibson*, 29 L. J. 25, shews that her refusal to return to him, except upon that condition, did not put an end to the desertion. In Bishop, sect. 513, it is said:—"A consent to a separation is a revocable act, and if parties separate by consent and one of them afterwards in good faith seeks a reconciliation, but the other refuses to return, or if they separate for cause and the cause is removed, but one of them declines to renew the cohabitation, or if a wife having left her husband without cause comes back to him, and he will not receive her, this is a desertion in the party so refusing from the time of the refusal. But to entitle a person to a divorce under such circumstances, it must appear that the offer of return was sincere and in good faith, free from any improper qualifications or conditions, and really intended to be carried out in its spirit if accepted. And in all cases the legal desertion ends with the intent to desert, as when the party in the wrong undertakes to come back, but is prevented." He also cited *Lawrence* v. *Lawrence*, 2 Sw. & Tr. 575; and *Oliver* v. *Oliver*, not reported.

*The Judge Ordinary*: The evidence in this case discloses, no doubt, a very painful state of circumstances. The only question is, whether it establishes a case of desertion. Upon the whole, I am of opinion that it does. The word "desertion" is a new one as a legal term, constituting a ground for relief in matrimonial cases, and occurs for

the first time in the Act by which this Court was constituted. It is very difficult to give a precise definition of it. Shortly after the marriage in this case, the respondent, without any fault on her part, brought about a withdrawal of the wife from his society. There was no desire or intention on his part of resuming cohabitation—I do not say conjugal intercourse, for it appears that the marriage was never consummated. The parties lived together from the 10th of July, 1860, until the **[354]** 21st of August of the same year, when, by the husband's conduct, the wife was compelled to leave his house. He made no attempt to get her back. He passed her on the road as she was leaving the house, saw her, but did not stop her. About a month afterwards she came over from Ireland, and tried to induce him to receive her as his wife. He refused, and promised to make some arrangement the next day; but on the following morning she got a letter from him to the effect that he did not wish to see or hear anything more of her, and that she might consider the separation which had taken place as final. Shortly after that she returned to Ireland. On the 26th of November, 1860, she got a letter from him—the last she received in that year—which speaks about a proposal with reference to living apart, but expresses no desire whatever for her return. On the 28th of May, 1861, a proposal was made by Mr. Tomlin, a friend of both parties, to bring them together, and they met at Tomlin's house; and whilst there, for the first time, she learnt that he had been carrying on an adulterous connection with another woman. She said what any woman might be expected to say: "As long as that connection continues, I am not willing to return." More than one proposal was afterwards made on the part of the wife to this effect: "If you will give up this connection, I am willing to listen to what you have to say, and it may be that I will return." No Court of law can say that a wife ought, still less that she was bound, to go back to her husband whilst he was carrying on an adulterous intercourse which would be ground for a separation. The only question therefore is, whether the husband's conduct before the wife became aware of the adulterous connection which he had formed constitutes desertion. I am clearly of opinion that it does. The breach was made by him and was kept open by him. There was no indisposition on the part of the wife to live with her husband, but he had evidently an intention that she should not live with him. When to these **[355]** circumstances are added the facts, that before and after the marriage he was intimate with Sarah Williams; nay, more, that he actually introduced that woman into the house where his wife was living at Tenby, and that he had two children by her, one born in May, 1861, and that the intimacy was continued constantly during the whole of 1860, the case becomes tolerably plain. In short, it appears that from the first the husband determined not to live with his wife. He neglected her, withdrew himself from her, refused her conjugal rights, did not even support her, but left her to pay the expenses of their joint cohabitation, and during all that time was carrying on an adulterous intercourse. I am of opinion that the respondent has been guilty of adultery, coupled with desertion for two years and upwards. There will therefore be a decree nisi, with costs.

GRIFFITH *v.* GRIFFITH. February 16, 1864.—Answer to Suit for Restitution.—Pleading.—Practice.—The question for the Court is wholly different where a pleading is demurred to, and where it is moved to order the amendment or reformation of a pleading; in the latter case, it will consider what form is convenient in the circumstances, and whether the party applying is likely to be injured or obscured in his view of the case by the pleading as it stands, without prejudging the question of the sufficiency of the allegations if established in evidence.

[S. C. 33 L. J. (Mat.) 81; 10 L. T. 308.]

This was a question arising on the following answer to the wife's petition for a decree of restitution of conjugal rights:—

1. That he denies that he withdrew himself from cohabitation with the said Justina Griffith, as set forth in the said petition, without lawful excuse.

**[356]** 2. That from and after the date of his marriage, that is to say, the 23rd of September, 1854, up to the 18th of December, 1860, he has suffered in his health, in his business, in his character, and in his happiness, from the degrading, violent, and cruel treatment of the said Justina Griffith.

3. That at and after his said marriage, it was proper and prudent for him to live in apartments, and he did live with his said wife over or near the shop in which he

carried on his business of a stationer; but the behaviour of his said wife was so improper and violent, that he was compelled to leave lodging after lodging, and to take a whole house, larger and more expensive than he required, and live and carry on his business in the same.

4. That after he had taken, and while he was carrying on his business in a house occupied entirely by himself, the conduct of his wife was so violent and improper that no respectable servant would stay in his family, so that even his shopmen have often been suddenly compelled to do the household work; and, in fact, in the space of two years and three months, the respondent had ten servants in succession, besides seven different charwomen.

5. That his said wife has frequently, during the period aforesaid, interfered with and prevented the business of the said shop, by swearing at and abusing the respondent therein, during the hours of business, so as to deter customers from coming in, and to collect crowds round the door, and has also sometimes come into the shop and sat there nursing the child, to the interruption of business, and at others sent the children into it during business hours, to be there taken care of by him the while she went out unnecessarily.

6. That his said wife has frequently, during the period aforesaid, assaulted and struck him, and threatened to do for him, and on one occasion kept back a knife before supper, and afterwards with violence threatened him with it.

7. That frequently, during the period aforesaid, his wife **[357]** has, without his permission, at times without his knowledge, at other times against his will, gone in the evening to places of bad repute, where dancing of loose and lewd persons of both sexes has been going on, and has danced and consorted with the persons there, and has stayed out till midnight.

8. That, during the period aforesaid, his wife has, against his will and despite his protest, associated with women of disreputable character, and men who were strangers to the respondent, and with some of the latter, whose names are respectively unknown to him, and at times and places unknown to him, committed adultery, as the respondent verily believes.

9. That while the respondent was carrying on a profitable business, which enabled him to support his wife and family, his life was rendered so wretched and uncomfortable by the behaviour of his said wife, that his health began to fail by reason of the agitation and distress of mind caused by such behaviour; and the respondent, fearing that his business would suffer and his creditors be injured, made an assignment for their benefit, and gave up his property to the assignees; but his said wife opposed the assignees in their endeavour to take possession of his business and property, and refused to leave the said house, and in consequence thereof they made him a bankrupt. Wherefore the respondent prays your Lordship to dismiss the said petition, etc.

Mr. W. Murray, on behalf of the petitioner, now moved to strike out the 3rd, 4th, 5th, 7th, and 9th paragraphs of the answer, and the words "without lawful excuse" in the 1st paragraph; to amend the 2nd and 6th, by stating more specifically the acts of cruelty relied on, and the 8th, by making a positive charge of adultery. Under the 1st paragraph, as it stands, any defence might be set up; it gives no information to the petitioner as to the nature of the case to be proved against her. As to the 3rd, 4th, 5th, 7th, and 9th, they con-**[358]**-tain nothing which is admissible as answer to a suit for restitution of conjugal rights (*Burroughs* v. *Burroughs*, 2 Sw. & Tr. 303). From the 2nd and 6th paragraphs it may be gathered that the husband intends to charge the wife with cruelty; but much more specification is necessary. The 8th paragraph, unless it can be amended by a direct averment of adultery, must, it is submitted, be struck out.

Mr. Keane, Q.C.: The answer must be taken as a whole. The first paragraph is a traverse of an allegation in the petition; the paragraphs following the second give some detail of the degrading, violent, and cruel treatment, which the second states generally. It is not necessary that every paragraph of an answer should contain matter on which a decree of separation could be made (*Leete* v. *Leete*, 2 Sw. & Tr. 568). Particulars of acts of violence should have been asked for on summons.

*The Judge Ordinary*: It is very material to bear in mind that what the Court is asked to decide does not come before it on demurrer. But the discretion of the Court is appealed to, to direct the respondent to reform his answer; the Court has, therefore,

to consider what form is most convenient, and to guard against the possibility of the party applying being injured or obscured in his view of the case by the answer as it stands. In some particulars I think this answer must be reformed. The first paragraph, as it stands, might enable a wholly different case to be set up from that which the rest of the answer indicates. The words "without lawful excuse" must come out. At the end of the second paragraph must be inserted "in manner hereinafter mentioned," or some equivalent; and in the eighth paragraph, "as the respondent verily believes," must be struck out. Subject to these alterations, I think the answer should stand; nothing leads to unnecessary expense so much as deciding cases on statements of facts **[359]** in pleadings. I am far from saying that if the respondent goes to trial he will have a case in answer to the petition. I do not wish to prejudge that point, or to enter into minute speculation at this stage of the case; and if I can see a reasonable probability of the sufficiency of the pleading, I will not interfere on motion.

GILL *v.* GILL AND HOGG. November 24, 1863.—Dissolution of Marriage at Suit of Husband.—Alteration of Settlement.—Costs.—22 & 23 Vict. c. 61, s. 5.—When in a suit for dissolution of marriage the co-respondent is condemned in costs, he is liable for the costs of the petitioner and respondent incurred in obtaining an alteration of a marriage-settlement.

In this case, on the 20th of November, 1862, a decree nisi of dissolution of marriage on the ground of the wife's adultery was pronounced, and the co-respondent was condemned in costs.

On the 3rd of March, 1863, the decree was made absolute.

The petitioner afterwards presented a petition, under 22 & 23 Vict. c. 61, s. 5, for an alteration of the marriage-settlement.

The respondent opposed the application, and on the 23rd of June, Sir Cresswell Cresswell (Judge Ordinary) made an order altering the settlement,[1] and ordered that the re-**[360]**-spondent's costs of the proceeding should be paid by the petitioner. In taxing the petitioner's costs against the co-respondent, the registrar allowed as part of the costs in the suit the costs of the petitioner incurred in obtaining an alteration of the settlement, including those of the respondent.

Dr. Wambey moved for an order that the registrar should review his taxation. The co-respondent is not liable for the costs incurred in obtaining an alteration of the settlement. He was no party to that proceeding, and had no notice of it, and Sir C. Cresswell must, when ordering the petitioner to pay the respondent's costs, have considered that the costs of the proceedings were to fall upon the petitioner.

Dr. Spinks, contrà: The registrar was right. The co-respondent was condemned in the costs of the suit. The alteration of the settlement was a fair incident to the suit rendered necessary by the co-respondent's adultery with the respondent, and the costs of the application form therefore part of the costs of the suit. Upon the same principle a co-respondent, when condemned in costs, is liable to the costs of the proceedings to obtain alimony. It is not necessary that he should have been a party to the proceeding. All that Sir C. Cresswell meant by his order was, that as between the petitioner and the respondent, the former should pay the costs of the latter.

*The Judge Ordinary*: In my opinion the decision of the registrar was correct, and the co-respondent is liable for the costs of altering the settlement, as they were a consequence of his misconduct. The principle upon which a co-respondent, when condemned in costs, is liable for the costs of the pro-**[361]**-ceedings to obtain alimony seems to me to be applicable. The terms of the decree nisi, which contains an order that the co-respondent should pay the costs of the petition "incurred and to be incurred," seem also to warrant the registrar's decision; but I do not rest my opinion upon that, as I think that upon principle his decision is right.

---

[1] The terms of the order were as follows:—"Order, that any money which under the covenant of Sir W. M. becomes payable to the respondent, shall be applied for the benefit of the child of the marriage, as Sir W. M. and the petitioner shall jointly think fit. That from and after the death of the petitioner, the trustees of the settlement shall hold the £5000 covenanted to be paid by the executors of Sir W. M., and apply the same, and the interest thereof, according to the settlement, as if the respondent were then naturally dead."

(Before the Full Court.—*The Judge Ordinary, Channell, B.*, and *Keating, J.*)

YEATMAN *v.* YEATMAN. January 20, 1864.—Appeal from Refusal of the Judge Ordinary to make Absolute a Rule Nisi for New Trial.—On such an appeal the other party is properly brought into Court by notice, and the Court will proceed either to discharge or make absolute the rule, but the appellant must begin.

This was originally the husband's petition for a dissolution of marriage by reason of the wife's adultery. Her answer denied the adultery; alleged that in and since the year 1856 the petitioner deserted the respondent, and had refused to cohabit with her; and made a charge of adultery against the husband. Issues joined on these pleas were before Sir C. Cresswell and a special jury in the sittings after Trinity Term, 1863, when the jury found that the petitioner had not proved his charge of adultery against the respondent; that he had deserted or wilfully separated himself from the respondent. No evidence was offered to establish the charge of adultery against the petitioner.

In Michaelmas Term, 1863, the petitioner in person obtained a rule nisi, which was discharged on argument on **[362]** December 1, Mr. Karslake, Q.C., and Mr. A. S. Hill shewing cause. From the order of the Judge Ordinary discharging this rule the petitioner appealed to the Full Court.

The petitioner, in person, appeared in support of the appeal. He submitted that a rule nisi having been granted, and the present appeal being from the refusal to make it absolute, the rule nisi must be taken to be still in existence, and the respondent should shew cause.

*The Judge Ordinary*: Has notice been given to the other side?

Mr. Yeatman: Yes.

*The Judge Ordinary*: The Court is of opinion that on an appeal against the discharge of a rule, the respondent is properly brought into Court by notice, and the Court can deal now with the whole question, and either make the rule absolute or discharge it; but, as in all other cases of appeal, the appellant must begin.

The Judge's notes of evidence were then read by the Judge Ordinary, and the Court, after hearing the appellant, and without calling on Mr. Karslake, Q.C., and Mr. A. S. Hill, for the respondent, dismissed the appeal.

HARRISON *v.* HARRISON. February 2, 1864.—Wife's Petition.—Unreasonable Delay. —31st section of the Divorce Act.—The wife finally left her husband in 1844, who had been guilty of cruelty and adultery; no subsequent acts of adultery were proved; till **[363]** shortly before the petition was filed, the wife had been without the means of proceeding in the Ecclesiastical or this Court; the husband had led a wandering life, without any regular employment.—Held, that the wife had not been guilty of unreasonable delay in presenting her petition.

[S. C. 33 L. J. (Mat.) 44; 10 Jur. (N. S.) 371; 10 L. T. 138; 12 W. R. 808.)

This was the wife's petition for dissolution of marriage by reason of adultery, cruelty, and desertion. The respondent did not appear.

The cause was heard before the Court on the 28th of January.

Dr. Spinks and Mr. Searle conducted the petitioner's case.

It appeared that the parties were married in 1822, the husband then occupying a small farm in Lincolnshire. He soon got into difficulties, and was obliged to give up the farm. He was of drunken and dissolute habits, and treated his wife so cruelly that in 1834 she separated from him. He had previously formed an adulterous connection with a girl in the service of his father. In 1844, on the respondent promising to amend, the petitioner went to live with him again; but after staying a few days, she found that he had infected her with a venereal disease, and she again left him and never returned to cohabitation. He had since led a vagabond life, occasionally employed as a drover, but without regular work or earnings. The petitioner had been supported partly by her family and partly by taking in needlework, and had no means of prosecuting a suit till she came into some property by the death of a brother in 1862.

*The Judge Ordinary* said he set his face against raking up old acts of cruelty and adultery to make a case of them. He was inclined to help the petitioner in the present case, but must take time to consider whether a decree ought to be made so long after the acts complained of. Cur. adv. vult.

**[364]** *The Judge Ordinary*: In this case, the cruelty and adultery of the husband

have been clearly established, and the question is, whether the Court should found a decree upon them, after so great a lapse of time from their commission. Delay is no bar to a suit of this sort; but it may, according to the circumstances of the case, lead the Court to the conclusion either of condonation or connivance, or of a want of sincerity in the suit. But here the delay is satisfactorily accounted for; the wife had no means to go the Ecclesiastical Court before the passing of the Divorce Act, nor subsequently to come to this Court until a short time before the petition was presented. The husband appears to have been leading a vagabond life, with no fixed home, sometimes supporting himself as a drover, and sometimes by any chance employment he could obtain. Under such circumstances it would be a denial of justice to the wife to refuse a decree. Decree nisi.

WELLS *v.* COTTAM (falsely called Wells). Nov. 10, and 17, 1863, and March 1, 1864. —Petition for Nullity by Father of Minor.—Parties to Suit.—Liability to Costs. —If the father of a minor petitions for a decree of nullity of his child's marriage, he must make the other party to the de facto marriage a party to the suit. In such a suit the de facto wife is not entitled to have her costs taxed against the petitioner, as in ordinary cases between husband and wife.

[S. C. 33 L. J. (Mat.) 41; 10 Jur. (N. S.) 444; 10 L. T. 138; 12 W. R. 672.

Referred to, *Gilroy* v. *Gilroy*, [1914] P. 128.]

This was a question arising on a motion for an order to tax costs in a suit for nullity of marriage. The cause was entitled as above, and the petition was as follows:—

"The petition of William Henry Wells, of the Cedars, Putney, in the county of Surrey, the natural and lawful **[365]** father and guardian of George Henry Wells, a minor, sheweth,—first, that on the 14th day of November, 1861, a marriage after banns was in fact celebrated between the said George Henry Wells, being then a minor of the age of eighteen years, and Martha Cottam, spinster, at the district parish church in the district parish of St John the Baptist, Hoxton, in the county of Middlesex. Secondly, that the said George Henry Wells and the said Martha Cottam having, for the purpose of concealing the said marriage from your petitioner, caused the banns for the said marriage to be published in the names of Henry Wells and Martha Cottam, notwithstanding that his true names were George Henry Wells, knowingly, wilfully, and fraudulently intermarried, on the said 14th day of November, 1861, without the due publication of banns."

Prayer, to declare the de facto marriage null and void.

The answer, headed "The respondent Martha Wells, in answer to the petition of William Henry Wells, the natural and lawful father and guardian of George Henry Wells, by William Cottam, her natural and lawful father and guardian, says," traversed the fact of knowingly, wilfully, and fraudulently intermarrying, etc., and prayed for a declaration of the validity of the marriage.

On the 6th of November the cause was directed to be tried by a jury.

Dr. Wambey now moved the Court for an order that the respondent's costs should be taxed against the petitioner. Whenever a fact of marriage is admitted or proved in a suit in the Matrimonial Court, the woman is entitled to have her costs taxed against the other party (*Bird* v. *Bird*, 1 Lee, 210; *Beavan* (by his guardian) v. *Beavan*, 2 Sw. & Tr. 652).

It may be a question whether, in this suit, the de facto husband ought not to have been made a party, as in *Ray* v. *Sherwood and Ray*, 1 Curt. 173.

**[366]** Dr. Spinks, for the petitioner: Here the father of a minor petitions, in his own right, for sentence of nullity of his son's de facto marriage. He is not within the general rule, which makes the husband liable for the wife's costs, and, from the cases, it would seem that to suits for nullity that general rule does not apply, and that the Court will deal with the question of costs, at the end of the suit, in such way as the conduct of the parties may call for. In *Aughtie* v. *Aughtie*, 1 Phill. 203, a marriage was annulled by reason of affinity at the suit of the de facto wife, but no costs given, the parties being very much in pari delicto. In *Fellowes* v. *Stewart*, 2 Phill. 260, the Court, at the conclusion of the cause, gave costs against the de facto husband. In *Brown* v. *Brown*, 2 Rob. 302, the guardian of a minor wife was condemned in costs. In an *Anon.* case, Deane, 299, Dr. Lushington said, "If either pary, cognisant of

disability, married, the Courts have considered the so doing such a wrongful act that they have condemned the party in costs."[1] Cur. adv. vult.

November 17.—*The Judge Ordinary*: In this case application was made for the wife's costs to be taxed, in the usual way, against the petitioner. Upon investigation, I think the form of proceeding is altogether irregular. There are two forms of suit known to this Court to obtain a decree of nullity of marriage celebrated by minors. The minor, through his father, as guardian, may petition, or the father may sue in his own right and interest, as in *Ray* v. *Sherwood and Ray*. This suit is in neither form. The second irregularity is, that the wife, a minor, having **[367]** been cited, appears by guardian, though there has been no election of guardian, nor any order in the registry appointing any one as curator ad litem. Till the suit is put into some form known to the Court, the question as to costs cannot be decided. If the father intends to proceed in his own right, his description as "guardian" must come out, and he must then cite his son as well as the de facto wife. I hold, on principle, that in such cases the petitioner must cite both the parties.

Dr. Spinks: The petitioner intended to sue in his own right, and the ambiguity created by the insertion of the word "guardian" shall be removed. As to the son not being cited, such citation was refused in the registry.

*The Judge Ordinary*: I think it must issue.

Subsequently, the following order was made on summons on the 15th of December: —"Upon hearing counsel on both sides, I do order that the petitioner be at liberty to proceed in this cause as the natural and lawful father of George Henry Wells, to cite the said George Henry Wells to answer the petition in this cause; and that as against Martha Cottam (otherwise Wells), the respondent, the petitioner be allowed to proceed in this cause as if she had not entered an appearance to the citation served upon her or filed an answer to the said petition, unless she shall, within fourteen days after the service of this order, duly elect a curator or guardian for the purposes of this suit; and the said curator or guardian shall then forthwith enter an appearance to the said citation, and file an answer to said petition on behalf of the said Martha Cottam (otherwise Wells); and further order, that the said Martha Cottam (otherwise Wells) shall be at liberty to proceed in this suit by her curator or guardian, without liability to the costs incurred in this cause by the petitioner."

**[368]** The de facto wife having appeared by William Cottam, her father, as her guardian, the proceedings amended accordingly, and the cause entitled *Wells* v. *Wells and Wells*.

On March 1, Dr. Wambey moved to have the wife's costs taxed against the petitioner.

Dr. Spinks, on behalf of the petitioner, contrà.

*The Judge Ordinary*: I am of opinion that there is no authority for this application; nor does it appear warranted by the principles put forward. In the more ordinary suits in this Court, the husband, whether petitioner or respondent, is supposed to have all the property, and therefore is liable to have the wife's costs taxed against him; but this rule has no application where a third person is suing both husband and wife,—a case common enough in the Common Law Courts. Nor do I think that there is anything in this particular case to call for the extension of the particular rule of this Court. From the affidavits it is clear that the husband is not colluding with his father, the petitioner.

(Before the *Judge Ordinary*, in Chambers and on Motion.)

CODRINGTON *v.* CODRINGTON AND ANDERSON. January 16, February 23, and March 1, 1864.—Husband's Petition.—General Charge.—Particulars.—Evidence. —Co-respondent.—In answer to an order for particulars of a general charge of adultery, the petitioner gave the name of M., as the alleged adulterer, in respect of such general charge. On application for further particulars **[369]** of time and place, it was stated that the petitioner depended on written admissions of the

[1] See *Portsmouth* v. *Portsmouth*, 3 Add. 63, and, for the conclusion of the cause, 1 Hagg. 374. The Ecclesiastical Court has held that it could not allot alimony until a fact of marriage was either proved against, or admitted by, the husband (*Smyth* v. *Smyth*, 2 Add. 254); but see rule 25 of the original rules of the Court, and those dated 11th January, 1860.

wife as to this charge, and the Judge Ordinary ordered that if particulars were not given to the respondent's attorney earlier than ten days before the trial, the petitioner should be confined to documentary evidence. Issue being joined, and directions as to the mode of trial taken, the respondent applied for and obtained a commission to examine M., then in India, as a material witness; the petitioner then moved to amend his petition by making M. second co-respondent, but the Court refused, holding that in the circumstances of the case the application was not bonâ fide, but with a view to shut M.'s mouth after the petitioner knew of the respondent's intention to examine him as a witness.—Semble, if M. had himself applied to be made a co-respondent, so as to enable him to take part in the suit, the Court would have granted the application.

This was the husband's petition for dissolution of marriage. The third paragraph was as follows:—"That on divers occasions since the 1st day of April, 1859, the said H. J. Codrington (the respondent) has committed adultery with divers persons." An order for the particulars of the adultery charged in this paragraph having been made on the application of the respondent, the petitioner delivered particulars, in which he alleged that the respondent had committed frequent acts of adultery between 1859 and 1862 with one Lieutenant Mildmay, at Malta, and during a journey in Switzerland, Savoy, Sardinia, and Italy. Application was made on summons for further and better particulars, and it appearing that the information on which the charge was founded was contained in a diary and certain letters of the respondent which had come to the petitioner's hands, the following order was made in chambers:—"Unless the attorney for the petitioner do, not later than the tenth day before the trial of this cause, deliver to the attorney for the respondent further and better particulars of the acts of adultery alleged in the third paragraph of the petition, by setting out the dates and occasions of the adultery charged to have been **[370]** committed by the respondent with Lieut. Henry St. John Mildmay, at Malta, and also as to the occasions and places of adultery charged during the journey to Switzerland, Savoy, Sardinia, and Italy, the petitioner be precluded at the trial of this cause from offering any save documentary evidence in support of the said third paragraph of the said petition."

The respondent then traversed the allegations of the petition charging adultery, and on the 9th of February the case was directed to be tried before the Court and a special jury.

February 23.—Mr. Searle moved, on the usual affidavits, on behalf of the respondent for a commission to examine Lieut. Mildmay, who was stated to be in the Punjaub in India.

Dr. Spinks, contrà: The application must be to delay and harass the petitioner. The evidence of a man in Lieut. Mildmay's position can be of little real value.

*The Judge Ordinary*: I think I cannot in justice refuse the commission, but you may take three days on behalf of the petitioner to consider whether you abandon the third paragraph of the petition.

March 1.—Dr. Spinks, for the petitioner, moved to amend the petition by making Lieut. Mildmay a co-respondent.

Mr. Inderwick, contrà: It has been considered that the 28th section of the Divorce Act is sufficiently complied with if one co-respondent is made. The present motion is obviously with the view to defeat the respondent's expressed intention to examine Lieut. Mildmay as a witness.

*The Judge Ordinary*: The position of men charged with adultery by the husband in his petition for dissolution is most **[371]** anomalous: if made a co-respondent, as one, generally speaking, must be, his mouth is shut, but he may appear by counsel and take part in the trial of the case; if not made a co-respondent he can take no part in the trial, but may be called as a witness, if the other parties choose. One co-respondent was originally made on this petition, and there was a general allegation of adultery besides; of this particulars were asked, when Lieut. Mildmay's name was given, with a very general statement as to time and place. On application for further particulars, it was stated that the petitioner could not give any, as his proof consisted of written admissions by the wife. I directed that particulars, if discovered, should be given, but that if none such were given by ten days before the trial, then the petitioner should be restricted to documentary evidence. Directions as to mode of trial were then taken, and a commission to examine Lieut. Mildmay in India asked for; on this being granted, the petitioner now asks to make him a co-respondent. I

cannot help seeing that this application is made with the object of shutting his mouth. One object of the section I take to be to protect the alleged adulterer. In this case, if Lieut. Mildmay had applied to be made a co-respondent, I should, as at present advised, have allowed him to take part in the suit in that character; but here the petition asks, as I think, without bona fides, and I shall reject the motion.

**[372]** STONE *v.* STONE AND BROWNRIGG. March 1, and 8, 1864.—Settlements.—Money in Possession or Reversion.—22 & 23 Vict. c. 61, s. 5.—Costs.—An interest under a marriage-settlement which may never be realized is not property in "reversion," within the 45th section of the Divorce Act.—Semble, moneys settled in the hands of the trustees of a separation-deed between husband and wife might be dealt with under 22 & 23 Vict c. 61, s. 5.—The co-respondent is liable to costs of a successful application to deal with property under settlement; but if part of such an application fails, and the costs of that part can be separated from the other costs, they ought not to be thrown on the co-respondent.

This was an application to deal with a post-nuptial settlement, in respect of which no difficulty arose. The petitioner further stated that the respondent was entitled, under the marriage-settlement of her father, to £1000, or some other considerable sum of money; that previous to the petition for dissolution of marriage, a separation-deed was entered into between the petitioner and respondent, which, amongst other matters, recited that certain sums of money (other than those affected by the post-nuptial settlement) had come into the hands of the petitioner in right of his wife, and were then represented by £1000 Caledonian Railway Stock standing in their joint names; this stock they covenanted to transfer to the trustees named in the separation-deed on certain trusts ultimately for the benefit of the children of the marriage. The separation-deed contained a stipulation that, in case a dissolution of the marriage were obtained, the trusts under the deed should be null and void. In due time after the decree of dissolution, the respondent and co-respondent intermarried, and the trustees of the separation-deed, to whom the £1000 stock had been transferred, had sold it, and paid the proceeds to the respondent.

**[373]** The Queen's Advocate (Dr. Swabey with him), on behalf of the petitioner, now asked the Court either to make some order in respect of the £1000 stock for the benefit of the children of the marriage, treating it as a post-nuptial settlement, and so within the scope of 22 & 23 Vict. c. 61, s. 5; or to order the interest of the respondent under her father's marriage-settlement to be settled for the benefit of the children of the marriage under the 45th section of the Divorce Act, which enables the Court to deal with the property of the wife either in possession or reversion; and to condemn the co-respondent in the costs. Cur. adv. vult.

Mr. Karslake, Q.C., contrà.

March 8.—*The Judge Ordinary*: This was an application after a decree of dissolution to deal with certain sums of money. As regards the first sum, which consisted of the petitioner's own money brought into settlement, there will be no difficulty in directing that the settlement should be read as if the respondent were naturally dead; but to the other part of the application very different principles apply. The 45th section enables the Court, where a decree of dissolution is made by reason of the wife's adultery, to deal with her property in possession or reversion; these are well-known legal terms. On looking at the marriage-settlement, under which, it is said, the respondent has a reversionary interest, it appears that she may never have any share of the moneys settled; she cannot therefore be said to have any property in reversion, and I have no power to deal with her interest, whatever it may be. Then as to the £1000 Caledonian Stock, is that, as described in the petition, within the 5th section of the Amendment Act? I am not prepared to say that the separation-deed was not a post-nuptial settlement within the meaning of that section; undoubtedly property was settled, and I think the section should be liberally construed. But the settlement **[374]** was made on certain conditions, namely, that its trusts should be at an end in case of a decree of dissolution, which seems to have been then contemplated by the parties, and which has since occurred. There is therefore now no settlement with which I can deal. If the trustees have wrongfully sold the stock, and handed the proceeds to the respondent, the remedy against them must be sought elsewhere. The co-respondent must pay the costs as regards the first part of the application which has been granted; but if the costs as regards that part of the application which has failed can be separated from the other, these ought not to be cast on the co-respondent.

COOKE *v.* COOKE. March 8, and 15, 1864.—Wife's Petition by Reason of Cruelty.—Taxed Costs.—Items disallowed.—The Court will not interfere with the discretion of the Registrar in respect of particular items allowed or disallowed on taxation, unless it can be shewn that the taxation proceeded on an erroneous principle.

[S. C. 33 L. J. (Mat.) 79; 10 L. T. 141.]

This was originally the wife's suit for judicial separation by reason of the husband's cruelty, in which she obtained a decree, and her costs had been taxed against the husband.

On the 8th of March, Dr. Spinks moved the Court to order the registrar to review certain items of the wife's costs (specified in the Registrar's report hereunder), which had been disallowed on taxation against the husband.

Cur. adv. vult.

**[375]** On the 17th of March, the sitting registrar, by direction of the Judge Ordinary, read the following report from the registrar who taxed the bill of costs:—

The further bill of costs of the petitioner, filed 11th of January, 1864, was taxed according to usual practice as between party and party, and in the presence of the agents of petitioner and respondent, on the 8th of February, 1864.

1. Instructions to counsel to advise on answer. Never allowed. The counsel has a copy of the petition and answer, and no further instructions are held to be necessary for the purpose of enabling him to advise as to the sufficiency of answer.

2. Journey to Seamer and thence to Bilderstone and other places for the purpose of getting evidence in support of petition for custody of children and expenses. The only affidavits filed in support of this petition were those of the petitioner and her two daughters (both of whom were resident in London), and of Emily Butcher, resident at Bilderstone, therefore the journey of the agent proved useless, except for the purpose of procuring this last affidavit. It is unusual when a case is heard upon affidavits to allow more than 6s. 8d. for instructions for each affidavit, and in case the deponent resides at a distance, the expense of employing an agent on the spot to read over and settle the affidavit with the deponent, and to have her sworn. These expenses are allowed in pages 2 and 3 of the bill as regards the affidavit of E. Butcher; and there being no other evidence used on the motion for custody of children to which the journey in question could apply, the expenses of the same were disallowed.

3. Instruction and fee to counsel to settle affidavits, and advise if sufficient. It is contrary to the usual practice to allow for settlement of affidavits by counsel or advice as to their sufficiency.

4 and 5. Drawing and copying observations for counsel on motion for custody of children, and on motion for alimony. **[376]** The only allowance made for motions, according to usual practice, is for a case or statement for the Court, which, if not necessarily exceeding seven folios in length, is by the table of fees limited to 10s., and for a copy of that case or statement, and of all documents referred to in it, for counsel. Observations in addition to those in the case for motion are therefore disallowed.

6. Attending in Court, 21st of April, 1863, when motion for alimony was directed to stand over. This motion was for an order for permanent alimony, and it appears by the minutes that it was directed to stand over until the appeal had been determined. The notice of the appeal had been served on the petitioner and filed in the registry on the 9th of March, 1863, and as no order for permanent alimony could be made pending the appeal, and the motion was therefore premature, the attendance was disallowed.

7. Attending in Court, 21st of April, 1863, on motion for custody of children. This motion was also directed to stand over until the appeal had been determined, and being premature, the attendance was disallowed.

8. Conference with Dr. Spinks, when he advised that petitioner might safely go to hearing on the present evidence and his fee. No conference with, or advice of counsel as to sufficiency of affidavits in support of a motion is usually allowed on taxation between party and party, and as it did not appear that there was any necessity for this conference to except it from the usual practice, it was disallowed.

9. Conference with Dr. Spinks, when he advised a motion for an interim order for access to children, and motion for same. This motion, 30th of June, 1863, failed. It appears by the minutes that the judge refused to make any order. Under these circumstances, all expenses of the motion and of the advice which led to it were dis-

allowed as against the respondent. The adjourned motion for custody of children was afterwards (8th of July) heard, and an order made upon it, **[377]** but the expenses of that motion are fully allowed for when it was brought on (see page 4 of the bill), except the attendance in court of the practitioner, which is allowed for on the 8th of July (page 7 of the bill).

10. Attendance in Court and refresher to counsel on adjourned motion for custody of children, 14th of July, 1863. This appeared to be a renewal of the adjourned motion, which had in fact been disposed of on the 8th of July; but whether the object of it was to procure any alteration of the order then made, or any additional order, it failed, as the judge refused to make any order on the application, and therefore the attendance and refresher were disallowed.

11. Refresher to counsel on renewing motion for alimony. This motion was premature when originally made. If the fee to counsel had been paid when the motion could properly have been disposed of,—namely, after the decision on the appeal on the 8th of July, no refresher would have been payable, therefore it was disallowed.

12. Observations for counsel and conference on renewal of motion for alimony. Nothing had occurred to affect the motion for permanent alimony in the interval since the adjournment of it. And these expenses were therefore disallowed.

Motions for permanent alimony:—

21st of April, 1863.—Ordered to stand over until appeal had been determined.

14th of July, 1863.—Order postponed.

Motions for access to and custody of children:—

21st of April, 1863.—Ordered to stand over until appeal had been determined.

30th of June, 1863.—No order.

8th of July, 1863.—Ordered, that the petitioner have the custody of her youngest child.

14th of July, 1863.—No order.

CHARLES J. MIDDLETON, Registrar.

**[378]** *The Judge Ordinary* said: I see no need to interfere with the taxation of the registrar in this case, and I must take the opportunity of saying, that it is an inconvenient and unusual course to bring before the Court certain items dealt with on taxation of costs, unless it can be pointed out that the principle upon which the taxation proceeded is wrong.

BREMNER *v.* BREMNER AND BRETT. January 16, 1864.—Alimony.—Practice.—Attachment.—Costs.—Where there was a balance due from the petitioner (the husband) for alimony and costs, and there had been an arrangement between the parties that the balance should be paid by monthly instalments of £20, and that an attachment should be granted against him to remain in the registry until he made default in payment of one of the instalments, the Court dismissed the petition, and decreed an attachment on the terms arranged.—The Court has power to enforce an attachment after the suit has been dismissed.—Where the co-respondent is found to have been guilty of adultery, he is not, as a matter of course, relieved from payment of the costs of that issue, merely by reason of the husband having been guilty of such adultery as to induce the Court to dismiss the petition.

[S. C. 33 L. J. (Mat.) 202; 10 L. T. 99; 12 W. R. 444. Followed, *Waudby* v. *Waudby and Bowland*, [1902] P. 85.]

In this case the husband had petitioned for a dissolution of his marriage by reason of his wife's adultery with the co-respondent. The respondent and co-respondent had filed answers denying the adultery, and the respondent had also recriminated adultery. The questions at issue were tried before the late Judge Ordinary and a common jury in July, 1863, when the jury found that the respondent had been guilty of adultery with the co-respondent, and also that the petitioner had been guilty of adultery. There was a balance **[379]** due from the petitioner to the respondent for alimony pendente lite, and also to her proctors for costs in the suit. On December 16, there was a motion for attachment against him for non-payment of this balance; in answer to which the petitioner filed an affidavit, stating his inability to pay the whole sum at once. The Court directed the motion to stand over.

Dr. Spinks, for the petitioner, moved the Court to dismiss the petition. It had been arranged between the parties that an attachment should be granted, but that it

was to remain in the registry until the petitioner should make default in payment of the £20 per month in liquidation of the sums due for alimony and costs.

*The Judge Ordinary*: I have read the judge's notes of the evidence taken at the trial; and the adultery proved against the husband is not of that character that would induce me to say that the petition ought not to be dismissed.

Mr. W. G. Harrison, for the respondent, asked that the petition should be dismissed conditionally, on the payment of costs and alimony due. If it is dismissed unconditionally, the Court will not have power to enforce payment of alimony and costs.

Dr. Spinks: There is nothing to prevent the Court from enforcing a compliance with its orders after the petition has been dismissed.

*The Judge Ordinary*: I will dismiss the petition to-day. This will not prevent the Court from afterwards enforcing payment of the sums due by attachment. I will decree an attachment. It must lie in the registry, and is not to issue until the petitioner shall have made default in the payment of **[380]** £20 per month for the balance due for alimony, and for the wife's costs up to the present time.

Dr. Spinks asked the Court to condemn the co-respondent in the costs of the issue found against the respondent. By sect. 34 of the Divorce Act, it was in the discretion of the Court to make such order as to costs as it should think fit.

Dr. Swabey: There is no instance of the Court condemning the co-respondent in any part of the costs when it dismissed the petition. The contrary has been the practice (see *Seddon* v. *Seddon and Doyle*, 2 Sw. & Tr. 640).

*The Judge Ordinary*: There are expressions at the commencement of the judgment in *Seddon* v. *Seddon and Doyle*, shewing that the husband in that case had been very grossly in fault, which would distinguish it from the present case. My own opinion is, that when a jury has found a verdict of adultery against a co-respondent, he is primarily liable for costs, and that he ought not to be relieved from the payment of them, merely because the husband has been guilty of adultery with another woman. It seems to me that the petitioner in this case is entitled to the costs asked for. I condemn the co-respondent in such costs as were incurred by the husband in respect of the issue of adultery found in his favour.

(Before *The Judge Ordinary.*)

WINSCOM *v.* WINSCOM AND PLOWDEN. February 9, 1864.—Husband's Petition.—Adultery condoned.—Subsequent Misconduct.—Evidence.—Semble, condoned adultery may be revived, so as to found a sentence **[381]** of dissolution, by subsequent misconduct and improprieties, short of, but tending to adultery.—A charge of adultery not sustained by the evidence.

[S. C. 33 L. J. (Mat.) 45; 10 Jur. (N. S.) 321; 10 L. T. 100; 12 W. R. 535.)

This was the husband's petition for dissolution of marriage. The petition alleged marriage on the 15th of February, 1849; cohabitation at various places in India and England, and the birth of one child. The third and fourth paragraphs stated—3. That in or about the year 1853, the respondent, at Jubbulpour, had sexual intercourse with some man other than your petitioner, and thereby committed adultery.[1] 4. That in and during the months of February, March, April, and May, 1861, the respondent, without the knowledge of the petitioner, had frequent clandestine meetings at night with F. D. Plowden in and near to the grounds belonging to your petitioner's then residence at Palmacottah, and in the said residence at Palmacottah, and on divers of such occasions, committed adultery with the said F. D. Plowden. The respondent traversed both the charges of adultery and pleaded condonation. The petitioner's replication traversed the condonation, and alleged that the adultery charged in the third paragraph of the petition had been revived by the subsequent misconduct and adultery of the respondent in the fourth paragraph alleged. The rejoinder took issue. The co-respondent denied the adultery, and pleaded condonation. The replication took issue.

The case was heard by the Court itself on the 3rd and 4th of February, 1864.

---

[1] Upon this paragraph the respondent obtained an order on summons for particulars of the acts of adultery therein alleged. The particulars delivered were acts of adultery committed with Lieutenant (now Major) Edward Clark, of the 4th Madras Light Cavalry, at Jubbulpour, in February or March, 1853.

Mr. Karslake, Q.C., Dr. Spinks, and Dr. Tristram for the petitioner.

**[382]** The Queen's Advocate (Sir R. J. Phillimore), Mr. Hawkins, Q.C., and Mr. G. Francis for the respondent.

Mr. Coleridge, Q.C., and Dr. Swabey for the co-respondent. As to the adultery alleged in the third paragraph, evidence was given of admissions made by the respondent, and a passage in one of her letters was also relied on. Besides the correspondence between the petitioner and his wife, referred to in the judgment, a correspondence between the petitioner and the co-respondent was put in evidence, in which the latter admitted that an undue intimacy had subsisted between himself and the respondent, but did not in terms either deny or admit adultery. The other evidence given on behalf of the petitioner is sufficiently noticed in the judgment.

Cur. adv. vult.

*The Judge Ordinary*: In this case the really material question is, whether the adultery alleged to have taken place at Palmacottah, in India, between the respondent and co-respondent, is satisfactorily established. That great (and improper) intimacy sprang up between these parties during the petitioner's absence in the spring of the year 1861, is plainly proved. The evidence of Augusta Morrison shews that they used to walk in the high road together in the evenings after dark, and the candour of the respondent herself has added to this the familiarity of kissing each other on more than one occasion. On the 13th or 14th of May, 1861, a disclosure of this intimacy was made to the petitioner by Augusta Morrison. He did what an honourable and just man would do. He declined for some days to sleep with his wife. He investigated the facts as far as he could; he asked questions of the nurse, and talked the whole matter over with his friend Colonel Middleton. The result was, that both gentlemen came to the conclusion that though great impropriety had been committed, still there was no adultery. The petitioner then made **[383]** the co-respondent promise not to speak to his wife again, and resumed cohabitation with her. He continued from that time to cohabit with her, sleeping in the same bed for upwards of a month. I think it right to pause here, and remark, that if the petitioner had taken a different course, he might probably have entitled himself to relief from the Court; for it is alleged that his wife had, in 1853, been guilty of adultery with a person named Clark, which he had condoned. We know nothing of the circumstances, and the fact is proved only by implication. But condonation would hardly have been an answer to a suit founded on that adultery in the face of these familiarities with Lieutenant Plowden, had he not condoned them also. It is not necessary to decide the point; but, as at present advised, I am of opinion that this latter misconduct would have enured to revive the original guilt, if that had been made out to the satisfaction of the Court.

I pursue the course of events. The petitioner determined to remove his wife to Aden as a temporary measure.[1] He accompanied her as far as Point de Galle, in Ceylon, staying at his friends' houses on the way, and parting with her in terms of strong affection. Whilst at Aden, where the respondent remained for six or seven months, a correspondence[2] took place, **[384]** which has been studied at great length

---

[1] This was consequent on a discovery made by the petitioner that the respondent (who had promised him on his resuming cohabitation with her never again to communicate with the co-respondent) had subsequently written to him.

[2] December 15, 1863. Dr. Wambey moved the Court for an order to inspect the letters written by the respondent to the petitioner in the years 1861, 1862, and 1863.

Dr. Spinks and Dr. Tristram, contrà: The letters of the respondent may be made evidence against her, but she cannot make them evidence to prop up her own case. The application is a fishing application, to ascertain what case the petitioner may be able to make out against her (see 2 Chitty's 'Archbold Practice,' 10th ed., 1369), and ought therefore to be rejected.

Dr. Wambey, in reply: The respondent is entitled to put in evidence the petitioner's letters, and to call for her letters to which they are in answer. In this way she may make them evidence.

*The Judge Ordinary*: The letters written by the respondent must be filed in the registry, in order that the Court may see them, and judge whether the respondent is entitled to inspect them; or the petitioner must file an affidavit, shewing that they are not in his possession.

December 23rd. The Judge Ordinary made the following order:—

by the Court. The burden of the petitioner's letters seems to be as follows:—"I still love you, and long for your love. I will summon you to rejoin me on one condition, that of true religious repentance. Go to my sister in England; she will help you to repent. You have never loved me, and are ungrateful for my past leniency." The tone of these letters is that of very stern reproach, mixed with much religious exhortation, equally stern. Mere penitence will not suffice. His wife is to "abhor herself in dust and ashes." She is to undergo deep humiliation and self-abasement before her repentance can be real. But there is a strong yearning for her affection, and in the earlier letters an evident wish to satisfy himself that he might take her back with safety.

On the side of the wife, the letters may be thus epitomized:—"I won't pretend to an amount of religious feeling which I don't entertain. I can never sympathize with what I consider the extreme views of yourself and your sister in matters of religion. Still, I am most truly sorry. I am but a sinful, wicked woman; but I do sincerely repent of past [385] misconduct. Pray take me back to live with you. I feel more true longing for your society than ever. But I make no pretences; you must take me, if at all, as a weak, sinful woman, who will try hard to do all you wish, and who earnestly repents conduct which she now sees in its true light."

Complete submission, absolute prostration before her husband's will, and tender entreaty, on the one side; reiterated reproaches, bitter words, an austere and uncompromising censure, on the other; with a vast amount of religious allusion on both sides—these are the principal features of this most distressing correspondence. It came to a cruel end. For six or seven months had the hope of being received again been held before the eyes of the wife. In December that hope appeared to be realized. The husband wrote letters which, as interpreted by himself, actually offered her the option of return to his home. She misunderstood them, and waited for a more sure welcome. Then came the letter of the 31st of December. It was a final blow to all for which the wife had yearned, an explicit withdrawal of all that had been held out to her. What was the true reason of the change? His next letter, of the 20th of January, 1862, explains it:—"Your letter of the 26th spoke volumes of the total unfitness you possess to rejoin me, and now I must request you to take this letter as final. Go home." But on referring to that letter, the Court looks in vain for words to justify such a reception or character. "I try to keep myself," says the wife, "from thinking of the coming mail, and pray to be resigned. From the softened tone in which you have written to me lately, I feel sure God has heard my prayer, and it is an encouragement." And again, in her next letter of the 5th of December, probably also received before the 20th of January:—"I pray God with the deepest earnestness to permit me to return to my husband and protector, if he sees fit, but I try to leave it entirely in his hands." There is no-[386]-thing here to induce the change of feeling which had now possessed itself of the petitioner's mind. Driven from this explanation, and forced to conclude that the reason put forward by the petitioner was hardly the real one, the Court looks in another direction. The letter of the 20th of January, 1862, goes on to say:—"I am willing to believe that you have some desire to do your duty and atone for the past; and, because I believe this, I will just take at present no further steps towards procuring a divorce, which would render your conduct public. I will tell you I have taken the opinion of one of the best lawyers in the Divorce Court, and he is of opinion that I can get a divorce on the ground of adultery with Lieut. Plowden, for though that cannot be proved, adultery with Major Clark can; and if I prove that you were in the habit of meeting Plowden at night, and that familiar intercourse, such as kissing, etc., existed, that you had the opportunity of committing adultery, then the Court would consider the condonation of adultery with Clark cancelled, and that would revive; and that, in conjunction with your behaviour with Plowden, would be taken as actual adultery committed with Plowden, for not

---

The Judge Ordinary having deliberated, ordered that the respondent be permitted to inspect, in the registry, the original letters written by herself to the petitioner, such letters having been brought into the registry in obedience to an order of the Court, dated the 15th of December instant, and that the respondent be permitted to take copies of such letters, or so many of them as she may select.

On January 19, 1864, a similar order was made on the respondent, in reference to the letters written by the petitioner to her during the years 1861 and 1862.

having scrupled to commit adultery with Clark, it is not to be supposed that you would scruple to do so with Plowden. And I can prove that Plowden is not a man likely to scruple to do so with you, both from hospital returns of sickness and from sentiments expressed by him at mess. All this I knew when I promised you on the 21st of December in my letters from Virduputti to receive you back."

This solves the difficulty. "I have taken the opinion," etc. The petitioner had communicated with England for advice as to his legal rights. He had learned for the first time that the full charge of adultery could be legally brought home to his wife; whether he had really learned this as early as he says may be doubted. He did not, however, believe the fact of adultery himself; it is his case in this Court that he did not, and **[387]** necessarily so, for its doors would otherwise be closed by his own condonation, and the Court gives entire credence to that denial. Now it is somewhat painful to reflect that the communication with England which produced this legal opinion must probably have passed contemporaneously with his urgent entreaties to his wife to repent and make herself fit to return to him; so that, while holding out to her the hope of return, he was consulting others as to his power to put her from him. Would that the legal opinion had never been asked or given! Relying on his own judgment, and obeying the dictates of his affection, all most probably would have been well. But the possibility of divorce opened new views, and this suit is the result. The petitioner, no doubt, assigns a far different reason. He says that, after he came to England, he first learned of the two occasions when his wife went to the gate in her dressing-gown. And it is argued that the condonation in India only extended to what the petitioner then knew—that he did not then believe in adultery, and did not therefore condone it; but that this additional evidence, if true, completed the case against his wife, and made adultery the only reasonable conclusion. This contention is open to many difficulties.

But, first, is it true that the nurse withheld this information from the petitioner in May, when she told him all the rest? The date she gives to the first of these meetings is two or three days before the 14th of May. The second was after that, and also before the 14th of May. On the 13th of May, which thus must have been immediately upon the occurrence of these meetings, she executed what she had before threatened, and exposed Mrs. Winscom's conduct to her husband. Is it likely that she would keep back all mention of the very meetings which had thus brought about the climax and induced her to break silence? But what was the petitioner's conduct when thus told? The nurse says, "That very evening he went out about ten o'clock from the house. She was going to undress"; and she then describes that he went to the **[388]** gate, found Plowden there, and came back and charged his wife. Now, what induced him to go out that night? Would the knowledge that she used to meet Plowden while he was away from home account for it, or does his conduct point to a knowledge that these meetings had continued since his return, and at about the time for their retirement for the night? This is the first difficulty. But, again, does the nurse tell us the whole truth? The fact of Plowden being found at the spot on the night of the 13th is strong to shew that there was some truth in the story, in reference to the two previous nights. But is it the whole truth? Did the servant who had threatened to tell her master before, and who certainly told him a day after, really shut down the window and refuse to see what became of her mistress after she got to the gate? And this not on one occasion, but on two succeeding nights? Or did she stay where she was, and see her mistress return after a few minutes, or remain in sight talking to Plowden till her return, as on former occasions? These are momentous questions, for it is this abrupt ending of the nurse's account of these nights which gives them their sting and significance. She conducts the wife to the gate and then leaves her open to every charge, and subject to the worst interpretations. It is this shutting down of the window that creates the cloud of doubt, mystery, and suspicion, in which the dishonour of the husband is said to stand revealed.

The Court cannot think this testimony natural or reliable, and here is a second and graver difficulty; but it is not the last. For, suppose it all true, is adultery thereby clearly or with reasonable certainty established? That there was a most improper intimacy is not denied; that it had already proceeded so far as evening meetings at the gate, and some personal, though not indecent liberties, is also admitted. What is there in the character of the two meetings now under discussion essentially different from the previous familiarities from which the petitioner himself drew no such con-

clusion? All is to **[389]** be surmised; nothing is proved. Whether she found Plowden at the gate when she went (as no doubt she expected), whether they were together one minute or an hour, whether they passed the time (whatever it was) at the gate, or walking on the road as on former occasions, or elsewhere—duration of time, place, and even the presence of the paramour; none of these are in proof, all in the region of suspicion.

Can the Court reasonably condemn the wife upon such materials? But, then, the wife's dress. To a suspicious mind it would seem to have been studiously adopted to favour the worst designs. But is not a more natural and less degrading solution at hand? May it have been that, since her husband's return home, she had no opportunity of getting out in the evening before she had attired herself for the night? Constantly in his presence up to that time, the interval between then and the moment when her absence in the tent would be remarked offered her, perhaps, the sole occasion for escape. Bearing this in mind, together with the country and climate, and that Mrs. Winscom had necessarily to cross the compound in this dress to get to the tent where they slept, it requires no great amount of charity to acquit her of a guilty design in this dress about which so much has been said. And if so, the last feature of suspicion is removed. The result is, I do not believe Mrs. Winscom committed adultery with Lieut. Plowden. With a most anxious desire to hold the balance fairly, assigning full weight to the facts proved, and casting the alleged sin of 1853 into the scale of guilt, my mind still vibrates back to the conclusion which the petitioner and Colonel Middleton formed at the time—much levity—great misconduct—no actual adultery. And it is therefore my duty to declare that the respondent is dismissed from the suit.

It is impossible not to feel the deepest interest in the future fate of this unhappy couple. If the petitioner is disappointed at the end arrived at, he will bear in mind that while human judgment is always fallible, he has no cause to quarrel with **[390]** the means. The case has been most fully sifted, and with the most earnest attention of all who had it in hand. And the thought is not without some solace, that human judgment impartially applied has absolved his wife and confirmed his own early conclusions. Thus fortified, he may safely take her back to his home. No one can read the entire submission and pitiful appeal of his wife without indulging the conviction that the future will not be with her as the past. She owes all to his generosity and forbearance, and she will not disgrace that which does him so much honour. May it be so! And should the day come when peace and mutual confidence be established between himself and the mother of his only child, haply he may not regret that it has not been permitted to this Court to undo the most solemn and sacred act of his life. "Forsan et hæc olim meminisse juvabit." As to the co-respondent, I forbear to say anything, except that he must pay his own costs.

HALL *v.* HALL. February 23, 1864.—Wife's Costs for Hearing.—Fund paid into Registry.—Death of Husband before Trial.—Claim of Wife's Solicitors upon Fund.—Where the husband had paid a sum into the Registry to meet the wife's costs of the hearing of the petition, and had died shortly before the time appointed for the hearing, the Court made an order for the taxation of the costs incurred for the hearing by the wife's solicitors, and the payment to them of such taxed costs out of the fund in the Registry, with leave to the solicitors of the husband's executor to attend the taxation.

This was an application for an order to tax the wife's costs under the following circumstances. The petitioner (the hus-**[391]**-band) filed a petition for judicial separation on the ground of cruelty of the wife. The wife filed her answer, denying the cruelty, and charging her husband with adultery. The case was set down for trial before the Court and a common jury, and had been in the cause list, and counsel and witnesses were in attendance in Court for several days in the month of July, 1863, but was not heard, in consequence of the accident to the late Judge Ordinary. In January, 1864, the petitioner paid into Court to the credit of the cause a sum of £127, to meet the wife's costs of the hearing, in compliance with an order made at chambers. The respondent's solicitor immediately took steps to prepare for the hearing of the cause, but the petitioner died on the 7th of February, 1864, before the cause came on for hearing. He had made a will, in which he appointed Mr. Harding, his son-in-law, sole executor. The Registry felt a difficulty in acting in the matter without the sanction of the Court, inasmuch as by the terms of the order the sum "was paid into

the Registry to pay the costs of and incidental to the hearing of the cause," and the cause could not be heard in consequence of the death of the petitioner. Notice of the motion had been given to the solicitor of the petitioner and to the solicitors of the executor.

Dr. Tristram moved the Court to dismiss the petition, by reason of the death of the petitioner, and that the costs, charges, and expenses of the solicitors for the respondent, including the costs of this motion, should be taxed by the proper officer of the Court, and paid out of the fund in Court. The practice of paying a sum into the Registry for the purpose of meeting the costs of the wife, was substituted for the old practice of paying the wife's proctor his costs before the hearing. It never was intended by the new rule to place the wife's solicitor in a worse position than he would have been under the practice of the ecclesiastical courts.

**[392]** Dr. Wambey appeared for the executor, and submitted that as the costs must come out of the estate, the executor's solicitor was the proper person to be present at the taxation, to protect the estate.

*The Judge Ordinary*: The solicitors for the respondent have a claim on the fund paid into the Registry for their costs. I will make an order for their costs to be taxed and paid out of the fund. There should be some one present at the taxation to protect the estate of the petitioner. The executor is the proper person. The solicitors of the executor will therefore have leave to attend.

COOPER *v.* COOPER. February 23 and March 1, 1864.—Wife's Petition.—Return to Husband.—Costs.—Where the wife has petitioned against the husband and the proceedings are ended, before hearing, by her return to cohabitation, the petition will be dismissed, on the husband's application, only on payment of taxed costs.

[S. C. 33 L. J. (Mat.) 71; 10 L. T. 275.]

In this case the wife's petition for judicial separation on the ground of cruelty was filed on the 20th of January, 1864; on the 26th the respondent appeared, and on the 2nd of February applied for particulars of the alleged cruelty. On the same day the petitioner returned to her husband, and had since been living with him. No order for payment of the wife's costs had been obtained.

Dr. Waddilove, on behalf of the respondent, now moved to dismiss the petition.

Dr. Tristram, for the petitioner, consented to this on payment of her taxed costs.

**[393]** Dr. Waddilove: No order for payment of costs had been obtained, and the whole matter is at an end by the wife's return to cohabitation, and thereby condoning the cruelty, if there were any. If these costs are to be taken as necessary expenses incurred by the wife, that would depend on the propriety of instituting the suit, whether there was reasonable cause for it (*Brown* v. *Ackroyd*, 5 El. & B. 819; *Baylis* v. *Watkins*, 2 De G. J. & Sm. 91; 33 L. J. Ch. 300).

Dr. Tristram: Generally speaking, in this Court the wife's solicitor relies on his right to recover taxed costs against the husband; without this right, no professional man would take up the wife's case. The practice has been, not to dismiss a petition at the instance of the husband unless on payment of costs. If it were otherwise, the wife's solicitor must resort to the vexatious process of taxation, de die in diem.

Cur. adv. vult.

March 1.—*The Judge Ordinary*: In this case the wife, after she had instituted a suit for judicial separation, returned to cohabitation, and the husband therefore applied to have the petition dismissed. The wife did not oppose that application, but asked for her costs. I have considerable doubt whether, strictly speaking, she has a right to these costs; but if she had, in accordance with the usual practice, applied as the suit went on to have her costs de die in diem, she would, undoubtedly, have got them. Therefore, if I were to refuse the application, she would be deprived of her costs simply because she had omitted to comply with that practice, and the result would be, that the extreme system of taxation de die in diem must be adopted in all cases, or otherwise the wife's attorney would be in peril as to her costs. Unnecessary taxation is always to be deprecated. The petition will be dismissed upon payment of costs.

**[394]** CLEMENTS *v.* CLEMENTS AND THOMAS (EAMES AND BURROUGHS intervening). March 22, 1864.—Dissolution of Marriage.—Intervention.—23 & 24 Vict. c. 144, s. 7.—At any time before a decree nisi for dissolution of marriage is made absolute, it is competent for one of the public to intervene, although three

months may have elapsed since the decree was pronounced.—The Court will not act upon affidavits filed in opposition to a decree nisi, unless it is satisfied that an intervener is properly before the Court.—An appearance was entered for A., and affidavits were filed in opposition to a decree nisi. Affidavits were then filed by the petitioner, showing that A. had never authorized the intervention. An appearance was then entered for B., and further affidavits were filed.—The Court refused to take notice of the intervention of B., and being satisfied that A. had never authorized the intervention in his name, made the decree absolute.—Semble, that the Court will not act upon an intervention, when satisfied that it is made at the instance of the respondent or co-respondent.

This was a petition by a husband for dissolution of marriage. The respondent and co-respondent did not appear.

On the 27th of November, 1863, the Judge Ordinary pronounced a decree nisi for the dissolution of marriage. On the 3rd of March, 1864, search was made in the registry, and an affidavit of no appearance was filed. On the 5th of March an appearance was entered for William Eames, of Newport, innkeeper, under the 7th section of 23 & 24 Vict. c. 144, and affidavits of the respondent, co-respondent, and of other persons were filed, showing cause against the decree being made absolute. The effect of these affidavits was, that the respondent and the co-respondent had not been guilty of the adultery charged; that the petitioner had induced the respondent to invite the co-respondent to her house in order to ob-**[395]**-tain evidence against them; and that the petitioner had been guilty of several acts of adultery and of other misconduct, and had condoned the respondent's adultery.

Dr. Spinks, for the petitioner, moved that the decree might be made absolute, notwithstanding the appearance entered and the affidavits filed in the name of Eames. An intervention by one of the public under the first branch of the 7th section of 23 & 24 Vict. c. 144, is limited to the three months from the date of the decree nisi, and three months having expired on the 23rd of February, the affidavits ought not to have been received. The affidavits of the respondent and co-respondent cannot be read, as they are not competent witnesses in the original suit; and the Court will not allow them to do by a side wind now what the law prohibits in the first instance. There is no intervener before the Court, for William Eames has sworn, on affidavit, dated the 17th of March, stating that he had never given instructions for an appearance to be entered on his behalf.

Mr. Searle, for the intervener: It has been held in *Bowen* v. *Bowen and Evans*, that the Queen's Proctor may intervene at any time before the decree nisi is made absolute, and one of the public stands in the same position. If the Court is satisfied of the truth of the facts stated in the affidavits, it will not make a decree absolute without further inquiry. A respondent and a co-respondent have a right to give evidence in support of an intervention (*Cox* v. *Cox*, 2 Swab. & Tris. 306). As to the question whether instructions were given by the intervener, time should be given to answer his affidavit.

*The Judge Ordinary*: I am disposed to think that the affidavits of the respondent and the co-respondent are admissible on the question of collusion, but it is not necessary to decide that point. The case must stand over for a week, in **[396]** order that I may know whether any intervener is before the Court.

An affidavit was then filed by Mr. Batchelor, a solicitor at Newport, whose London agent had, by his instructions, entered the appearance for Eames. Mr. Batchelor stated that, although he had received no written retainer, Eames had authorized him to act for him in protecting the respondent, and had paid £1, and had given an I O U for two guineas on account of the costs. Since the last motion an appearance had also been entered for Richard Burroughs, an innkeeper of Newport, on a written retainer.

March 15.—Dr. Spinks moved that the decree should be made absolute; and contended that, Eames having disclaimed his authority to Batchelor to intervene, the Court could take no notice of the affidavits.

Mr. Searle: It appears from the affidavits that Eames did instruct Batchelor, and he cannot, after having filed affidavits, withdraw from the intervention without leave of the Court. Even if Eames is not before the Court, there is now another intervener (Burroughs) in his place.

*The Judge Ordinary*: The Court will never sanction such a substitution of one

intervener for another. The case must stand over, and the petitioner and his attorney are at liberty to answer the matters contained in the affidavits.

Affidavits were accordingly filed by the petitioner, denying the adultery and misconduct with which he was charged, and the other allegations in the affidavit; and by Mr. Pain, the petitioner's solicitor, corroborating Eames, and stating the circumstances under which Eames disclaimed the intervention.

March 22.—Dr. Spinks renewed the motion for a decree absolute.

**[397]** Mr. Searle, contrà: If the Court is satisfied that the petitioner has been guilty of the misconduct charged in the affidavits it will not take not make the decree absolute, no matter from what source the information is derived, or by what motives the persons giving it were actuated. If the Court has any doubt upon the affidavits, it will require further information.

*The Judge Ordinary*: I think that this application comes before the Court in such a way that it cannot be entertained. The respondent and co-respondent have not set up the defence now put forward in the usual course. I am satisfied that if Eames did intervene, he was virtually intervening for the respondent and co-respondent. *Stoate* v. *Stoate*, 2 Sw. & Tr. 384, is an authority that they have no right to shew cause against the decree being made absolute. Can they put forward a third person for that purpose? It is not necessary to decide that question, because I am satisfied, upon the affidavits, that Eames never intervened, and never intended to intervene. The decree, therefore, will be made absolute. I shall make no order as to costs, for, although I cannot act on the affidavits, I cannot help seeing that the petitioner's conduct gives some ground for the intervention.

FITZGERALD *v.* FITZGERALD. December 17, 1863.—Admissibility of Depositions of a Deceased Witness —Reasonable Time for Cross-Examination.—Practice.—The deposition of a deceased witness is admissible on condition, not only of its having been taken under the sanction of an oath, but also of sufficient notice having been given to the party against whom it is tendered, to have enabled him to attend and cross-examine the witness. Where notice was given, about two p.m. on a Saturday, **[398]** to the respondent's solicitor in London, that a witness was to be examined at Bath on Monday, under an order of the Court obtained by the petitioner—Held, that the notice was insufficient to enable the respondent's solicitor to attend and cross-examine, and that the evidence so taken without cross-examination was inadmissible.

This was the wife's petition for dissolution of marriage by reason of the husband's cruelty and adultery. The question was the admissibility of the depositions of a man of the name of Kelly, since dead, taken on oath under an order of the Court, dated the 22nd of November, 1862, made by virtue of the 47th section of the Divorce Act, on motion of counsel for the petitioner, a notice of such motion having been given to the respondent's solicitor on the previous evening. The respondent's solicitor had not instructed counsel on this motion. The order stated no day or time for the examination. About two o'clock on the 22nd of November (Saturday), the respondent's solicitor was served with a copy of the order, and a notice that it was intended on behalf of the petitioner to examine Kelly on Monday at Bath. No one attended at Bath on behalf of the respondent, and the examination in chief of Kelly was proceeded with under the order.

Mr. Freshfield, the respondent's solicitor, was sworn, and deposed to some of the above facts; and further stated, that he had entered an appearance on the 11th of November, 1862, for the respondent; that on the 15th of November, he received notice of an examination of Kelly, described as of the "Bath and Cheltenham Gazette" office, but then in the Bath hospital, under an order of the Court, dated the 7th of November; that he wrote to petitioner's solicitor, objecting to such evidence being used; that on the 21st and 22nd of November, he was without any instruction from his client for materials as to cross-examination, and did not know who Kelly, so described as above, might be, or what he was to speak to. Mr. Fitzgerald was in Ireland.

**[399]** Mr. M. Chambers, Q.C. (Dr. Wambey with him), in support of the admissibility of the evidence, cited *Fynney* v. *Beazley*, 20 L. J. Q. B. 395.

The Queen's Advocate (Sir R. J. Phillimore) (Mr. Huddleston, Q.C., and Dr. Spinks with him), contrà, objected that the order was made before issue joined, and

that the respondent's solicitor had no time to prepare for the cross-examination of Kelly.

*The Judge Ordinary*: The foundation of the admissibility of any evidence before a jury is, that it should be on oath, and that the party against whom it is tendered should have had a reasonable opportunity of cross-examination. This rule has prevented the depositions, even on oath, of dying persons from being used as evidence. The order in this case was made by power given to the Court by statute. It is said that such orders are never made before issue joined; that is no doubt the general rule, as stated in *Shaw* v. *Shaw*, 2 Sw. & Tr. 642, but subject to reasonable exceptions, as where the questions in the cause are well understood, and a witness is dangerously ill. In this case I think the order is good; but the party against whom it was made should have had reasonable notice for cross-examining. I think nothing of Mr. Fitzgerald being in Ireland—when a man has appeared in a suit, it must be taken that he furnishes his solicitor with the necessary information to conduct the cause; nor of the misdescription of Kelly, if it were a misdescription: the only question is, whether a reasonable time was given to admit of cross-examniation.

On Friday the 21st, notice was given to Mr. Freshfield that on the 22nd an order for the examination of Kelly would be applied for; that application was not opposed, and the order was made. At two o'clock on Saturday, notice was given that the witness would be examined on Monday at Bath. There **[400]** is no particular time prescribed by the rules of the Court as to a notice in such cases. But with regard to summonses which present the only analogy I can find, the 3rd Rule directs that the service must be one clear day at least before the summons is returnable, and before seven p.m.; on Saturday, before two p.m. In the present case, I think the notice did not allow a reasonable time for preparing a cross-examination, and I rule against the admissibility of this evidence.

(Before the Full Court—*The Judge Ordinary*, *Channell*, *B.*, and *Keating*, *J.*, on appeal from the decision of the Judge Ordinary, refusing rule nisi for a new trial.)

FITZGERALD *v.* FITZGERALD. April 27 and 28, 1864.—Motion for New Trial.—Adultery and Cruelty.—Order to examine Witness.—Time for Cross-Examination.—Decision of Judge at Trial on Matter not within the Province of the Jury.—Where it is necessary for the petitioner to establish two points in order to obtain the prayer of the petition, the Court would not, even if dissatisfied with the verdict of the jury on one point, send that down for a new trial, because, if a different verdict were found on that point, it would not be sufficient to ground the relief prayed.[1]—The Judge Ordinary had held that notice given to the opposite solicitor at a quarter before two p.m. on Saturday, in London, of an examination of a witness to be held at Bath at two p.m. on the following Monday, was not a reasonable and sufficient notice to enable such solicitor to attend and cross-examine, and had therefore refused to admit evidence so taken.—In the circumstances, the Court refused to interfere with the ruling of the Judge Ordinary.—Per *Channell*, *B.*: When a question to determine the admissibility of evidence has been decided by a judge presiding at a trial by jury, **[401]** the decision of the judge on such question may be reviewed by a court of appeal.—*The Judge Ordinary*: Quære, whether such decision of a judge presiding at a trial is properly subject to the revision of a court of appeal.

This was originally the wife's petition for dissolution of the marriage, by reason of the cruelty and adultery of the husband. The husband's answer traversed these charges, and the issues raised were, by a verdict of the jury, found in favour of the respondent at the sittings after Michaelmas Term, 1863.

On the 9th of February, 1864, Mr. M. Chambers, Q.C. (Dr. Wambey with him), moved the Judge Ordinary for a rule nisi for a new trial, which was refused, and from which refusal the present appeal was brought.

Sir F. Kelly, Q.C. (Dr. Wambey with him), in support of the appeal: We claim a rule nisi for a new trial on four grounds:—1. Improper rejection of evidence. 2. Verdict against weight of evidence. 3. Surprise. 4. New evidence discovered since the trial. (The decision of the Court is here reported on the two first points only.) The

[1] See also the case of *Cartlidge* v. *Cartlidge*, decided by Sir C. Cresswell, and reported post, note, p. 406.

evidence rejected was the deposition of a man named Kelly (who died before the issues were tried), under the following circumstances:—The petition was filed on the 30th of October, 1862. On the 2nd of November, Mr. Capes, the petitioner's proctor, was informed that Kelly was ill at Bath. On the 4th, he heard by telegram that Kelly was dangerously ill in the hospital at Bath. On the 7th, and before the respondent had appeared, the Court was moved for an order to examine Kellly, which was made, and an examination took place under the order. On the 11th of November, Messrs. Freshfield entered an appearance on behalf of the respondent. On the 12th, Mr. Capes gave notice by letter to Messrs. Freshfield of the order obtained, and of the examination. On the 14th of November, the depositions so taken were filed in the registry. On the 15th, **[402]** Mr. Capes wrote again to Messrs. Freshfield, stating what had taken place, and that Kelly was dangerously ill. On the 17th, Messrs. Freshfield wrote to Mr. Capes, to the effect that they refused to interfere in the examination of Kelly, and should object to evidence so obtained being used at the trial. On Friday, the 21st of November, about two p.m., Messrs. Freshfield received a notice that the Court would be moved, at its sitting on Saturday, to examine Kelly again on the following Monday, or as soon thereafter as might be. Messrs. Freshfield took no notice of the intimation, and did not instruct counsel to appear on the motion. A second order was accordingly made on the Saturday morning, and drawn up in general terms for the examination of Kelly, without any limitation of day or time. At 1.45 on the Saturday notice was served on Messrs. Freshfield that the examination of Kelly under the second order would take place at Bath, at two p.m. on Monday. Messrs. Freshfield took no step in consequence of this notice, and were not represented at the examination of Kelly. At the trial, the Judge Ordinary held that the order made on Saturday the 22nd was a good order; but that the notice to Messrs. Freshfield on the Saturday did not give them a reasonable time to prepare for and attend the examination on Monday. We submit that Messrs. Freshfield were bound to have done something in consequence of the notice of Friday, knowing how ill Kelly was; and as they let the matter pass without any interference, it was their own fault that no cross-examination took place, and the evidence ought to have been admitted.

A question was here raised by the Court, whether the decision of the judge who tried the cause, determining a collateral question (such as whether due notice had been given to enable the opposite party to cross-examine), was, or was not liable to be reviewed by the Court of Appeal, and the Court adjourned for the day.

**[403]** On the following morning, Sir F. Kelly, on the point last mentioned, cited *Whyte* v. *Hallett*, 28 L. J. Ex. 208; *Cleave* v. *Jones*, 7 Exch. 421.

*Channell, B.*: In the last case in the Queen's Bench, the Court determined that they must clearly see that the judge at the trial was wrong before they interfered with his ruling; this implies that they had the power to review it.

Sir F. Kelly then went at length into the evidence on the issue of adultery, and contended that the verdict on that issue was unsatisfactory. He did not feel that he could contend successfully for a new trial on the issue of cruelty, and did not lay much stress on the third and fourth grounds of his motion.

*Channell, B.*: This is an appeal from the decision of the Judge Ordinary, who refused a rule for a new trial. I am of opinion that there should be no rule nisi.

It was a case in which Mrs. Fitzgerald petitioned for a dissolution of her marriage. To obtain such a decree, it was necessary for her to prove both adultery and cruelty. I understand the practice of the Court to have been, that if on such a petition adultery were proved, but not cruelty, the petition might be amended at the hearing, and a decree for judicial separation made. Nothing of this sort was done in the present case, and the petitioner went to issue on her petition for a decree of dissolution, taking her chance of obtaining such a verdict on both issues as would entitle her to the decree prayed. The rule has been moved on four grounds; the most important is, whether the verdict of the jury on the issue as to adultery is so far against the weight of evidence as to call upon the Court to grant a new trial. It seems that the jury expressed a strong opinion on the point of adultery at the close of the respondent's case, and at once called upon **[404]** the petitioner's counsel to reply. The jury were not, in the opinion of the judge who presided at the trial, precipitate in the view which they took; and the judge is not dissatisfied with the verdict as to adultery. When the verdict of the jury finds the fact of adultery, and such a verdict is sought to be set aside as unsatisfactory, the Court would probably be more ready to interfere

by granting a new trial than when the verdict acquitted the party charged. I am not satisfied by the able arguments of the counsel for the petitioner, that my duty compels me to form an opinion against the verdict and the opinion of the judge before whom the issues were tried. During the course of a four days' trial, many things may have occurred which would give a colour to the facts which is wanting when the evidence is detailed before the Court for the purpose of asking a new trial. But if I thought otherwise on the question of adultery, yet, as the verdict in favour of the respondent on the question of cruelty is wholly undisputed, I think no rule should be granted. It is sought to disturb the finding of the jury on one particular point only; but had the verdict on that one point been the other way, the verdict on the other question standing, the petitioner would not be entitled to the decree asked for.

The second question is, whether certain evidence was improperly rejected. Though the admissibility of evidence is a question for the judge, not the jury, at the trial, yet if this Court clearly saw that the evidence had been improperly rejected, and that the rejection had led to a miscarriage of justice, I am of opinion that it would have the power to review the decision of the judge who presided at the trial; but we must see our way very clearly. The order to examine is not so precise as is usual in the Common Law Courts. No time was fixed by it, nor did it contain the usual terms and conditions. The main point is, whether proper and reasonable notice of the intended examination was given. That must depend on all the circumstances of the case. If I **[405]** felt called upon to decide whether notice on Saturday at two, Sunday being a dies non, to attend an examination on Monday at two, were sufficient, I should be inclined to think that a twenty-four hours' notice is not a reasonable notice, and that the judge did right in rejecting the evidence; but I need not express a positive opinion on this point, for the evidence in question only goes to one of the two issues in the cause. It does not affect the question of cruelty, the finding on which, in favour of the respondent, disentitles the petitioner to the relief prayed. (The learned Judge also disposed of the other points on which the rule was moved.)

*Keating, J.*: I am also of opinion that there should be no rule nisi.

The petition was for dissolution of marriage; in order to obtain that, the petitioner is obliged to satisfy the Court both as to adultery and cruelty. Those two questions were tried by a special jury, and their verdict was against the petitioner on both points; we are asked to grant a rule for a new trial, so far as regards the verdict on adultery, as being against the evidence in the case. The evidence on which Sir F. Kelly laid chief stress consisted of letters written by the respondent, and of admissions by word of mouth said to have been made by him. As to such evidence, it must be remembered that the respondent cannot be asked whether or no he made the admissions, nor to explain the letters, and the jury have a right to bear this in mind. The Judge Ordinary, who had the advantage of hearing and seeing the witnesses, was not dissatisfied with the verdict on that point. As to the rejection of evidence, it comes at last to the question, whether under the circumstances sufficient notice was given. If the case had turned on what answer the Court should have given to that question, my present impression is, that the time mentioned was not unreasonable; it is a question of fact, and judges as well as other men may differ. But it is not necessary that I **[406]** should express a judicial opinion, because I agree with my brother Channell, that we ought not to grant a new trial on one point which does not go to the whole case.

*The Judge Ordinary*: I have very little to add. All the questions raised to-day applying to the verdict on adultery (that on cruelty remaining unimpeached), it would be useless to send that point by itself to another jury. The mode in such cases has been to apply at the trial to alter the prayer of the petition; but if otherwise, so far as I am concerned, I should still be of the opinion I held at the trial, that there was quite as cogent evidence on one side of the case as the other. As to the rejection of evidence, I only wish to observe in addition, that on Monday the 17th, the respondent's solicitor gave notice to the petitioner's solicitor that he would not be bound by the examination then taken; no step was taken by the petitioner's solicitor till the Friday. No explanation has been given of this delay, and the man, though on what proved his death-bed, did not die till the Thursday week following. It is not necessary to decide the point; if it were, I should have wished the question to be argued, whether the decision of a judge at a trial sitting as judge of a matter of fact, ought to be subject to the revision of a court of appeal.

CARTLIDGE *v.* CARTLIDGE. May 5, 1863.—Verdict finding Cruelty and Adultery.—Rule for New Trial refused.—Query, if several distinct issues are found in favour of the petitioner, and the Court, on motion for new trial, is of opinion that the verdict ought not to be disturbed on some issues, but was incorrect on others, should it grant a new trial as to the latter only?—And if so, might not the petitioner elect to abandon so much of her petition, and ask for such relief as she would be entitled to at the hands of the Court on the issues found in her favour.

This was originally the wife's petition for dissolution of marriage, on **[407]** the ground of adultery and cruelty. The issues raised were found in her favour by the verdict of a jury, and The Queen's Advocate (Sir R. J. Phillimore) had moved for a rule nisi for a new trial; and

*The Judge Ordinary* (Sir C. Cresswell) now gave the following judgment:—This was a petition by Ann Cartlidge against Joseph Cartlidge, for a dissolution of marriage by reason of cruelty and adultery. The jury found that both charges were proved. The Queen's Advocate moved for a rule for a new trial, on the ground that the verdict was not supported by the evidence. As to the adultery, it was deposed to by three females, who swore to his having had connection with them. One was corroborated to a certain extent by a witness, who deposed to having seen them walking together near the place where the adultery was said to have been committed. Another was corroborated by the evidence of a young man, formerly in the respondent's employ as shopman, who swore that he was an eye-witness to the act committed in the respondent's wareroom; and the same witness stated that he had seen a similar act committed by the respondent with some other female whose name is unknown. It is very true that the female witnesses were all prostitutes, but their evidence is not therefore to be rejected. The jury were cautioned against believing it without careful consideration; but I cannot at all find fault with the verdict which they found on that issue. This state of things raises at once a very important question with reference to trials of this description, viz. whether, there being two issues, the verdict on one satisfactory, the other not, the Court ought to grant a new trial as to both? By analogy to the usage of common law courts, if a petition is founded on several grounds, and some are fully established, and as to others, a new trial applied for by the respondent, the petitioner might abandon them, and ask for a decree on so much of the petition as was fully proved; and here, if the wife elected to abandon her claim to a dissolution of marriage, and ask for a judicial separation on the ground of adultery, as at present advised, I think I ought to grant it; and there is much reason for saying, if there are two questions raised for the determination of a jury, which are independent of each other, the Court ought not to order a new trial as to both, if it is satisfied as to one. But it is not necessary to decide that point; for although I should probably have hesitated myself to find that the charge of cruelty was established, yet there was, undoubtedly, affirmative evidence fit for the consideration of the jury, and there was that in the manner and demeanour of the witnesses who gave evidence to negative **[408]** it, which might well injure their credit with the jury. I cannot, therefore, go so far as to say that I am dissatisfied with the verdict, and I think that I ought not to disturb it.

(Before *The Judge Ordinary* and a Special Jury, and on motion for a new trial.)

NARRACOTT *v.* NARRACOTT AND HESKETH. February 18, March 22, and May 3, 1864.—Petition for Dissolution and Damages.—Conduct of Cause.—Evidence.—Verdict for Petitioner on Issue of Adultery.—Jury discharged on Issue of Cruelty raised by Co-Respondent.—Application of Damages.—The husband petitioned for dissolution of marriage, and prayed damages.—The co-respondent traversed the adultery, and charged the husband generally with cruelty to his wife, which latter fact might call for the exercise of the discretion of the Court under the 31st section of the Divorce Act. During the petitioner's case, some witnesses were asked as to the general terms on which he lived with his wife.—On the part of the co-respondent, witnesses deposed to certain acts of violence committed on the wife by the husband, and the Court admitted evidence in reply limited to those particular acts and occasions.—The jury found a verdict for the petitioner on the issue of adultery, and assessed the damages at £2500. On stating that they could not agree on the issue of cruelty, they were discharged by the Judge

Ordinary.—On motion for a new trial, the Court held that it had rightly discharged the jury from giving a verdict on the issue of cruelty, as it was ultimately a question for the opinion of the Court under the 31st section of the Divorce Act. If the facts ascertained by the verdict are sufficient for the Court to found a decree on, the function of the jury is discharged.—**[409]** The Court, being of opinion that cruelty was not proved against the husband, but being dissatisfied with his conduct towards his wife, directed the damages, after payment of the surplus costs of the petitioner, if any, to be settled on the respondent dum casta vixerit, and for life; after her death, or on breach of the above condition, the fund to go to the two children of the marriage.—Semble, in some cases the Court would grant a new trial on the ground of excessive damages.

[S. C. 33 L. J. (Mat.) 132; 10 Jur. (N. S.) 640; 10 L. T. 389; 12 W. R. 1064.]

This was the husband's petition for dissolution of marriage, and for damages. The respondent did not appear. The co-respondent's answer traversed the adultery, and charged the petitioner, in very general terms, with cruelty. The issues and assessment of damages came on for trial before the Judge Ordinary, by a special jury, on 17th of February.

Two witnesses were called for the petitioner, who deposed that he lived on good terms with his wife till he had reason to suspect that she had committed adultery. For the co-respondent several witnesses were examined, who spoke to the specific acts of cruelty inflicted by the petitioner.

At the close of the co-respondent's case, the Solicitor-General (Sir R. P. Collier) (Mr. Karslake, Q.C., and Mr. Beresford with him), on behalf of the petitioner, proposed to call witnesses in reply, to contradict the evidence of the co-respondent's witnesses upon the charge of cruelty.

The Queen's Advocate (Sir R. J. Phillimore) (Dr. Spinks with him) objected to the admission of such evidence at that stage of the trial. If the petitioner's case had been confined to the proof of adultery, we admit he might now be in a position to give evidence in reply; but as the Solicitor-General touched on the question of cruelty, he was bound to give, in the first instance, all the evidence he had on that point.

Cur. adv. vult.

*The Judge Ordinary*: The question raised yesterday is **[410]** one which presents very great difficulty, and for this reason, that the proceedings in this Court are not strictly analogous to those in common law courts, and no decision in this Court has laid down a definite rule on the subject. In common law courts certain issues are raised by the pleadings, and the burden of proof is cast on one or other of the parties, according to the form of those pleadings; but even in those courts questions of great difficulty arise, and the rule has varied as to the extent to which parties should be allowed to give evidence in reply. The proceedings in this Court are of a totally different character, and great difficulty arises from the circumstance that the Act of Parliament, under which these proceedings are taken, confides to the Court and to the jury separate functions. Questions of fact have to be decided by the jury, and at the same time conclusions of fact have to be arrived at by the Court, upon which it is to exercise its discretion. It has not been thought necessary to have two separate inquiries, one for the judge and the other for the jury, and it is obvious that such a system would lead to expense, trouble, and delay. But when the two inquiries are mixed up together, questions of this sort arise. I feel great difficulty in laying down any general rule founded on the authority of preceding practice, and I must look for guidance to the abstract and general justice of the case. I think it was certainly part of the petitioner's case before the Court and the jury, to prove not merely that his wife had committed adultery, but also that he had conducted himself towards his wife in such a manner as to entitle him to relief. He was bound to give evidence of his conduct towards his wife, not only on that ground, but also on the ground that he claims substantial damages, and he must therefore follow the practice in the old action for criminal conversation, in which it was always usual to shew that the husband had treated the wife in such a way that the jury ought to deal liberally with him as to damages. I think, therefore, it was part of the husband's case to go thus far. **[411]** But I cannot shut my eyes to the fact that, after the plaintiff, in an action for crim. con., had gone thus far, the defendant would have been entitled to do what the co-respondent has done in the present case, viz. give evidence of definite acts of cruelty, of which, as there was no plea of cruelty, the plaintiff would

have had no notice. Here the co-respondent is somewhat in fault, because, instead of pleading cruelty, with some specifications of time and circumstance, he has confined himself to a charge of cruelty of the most general character. The petitioner is also in fault, by having omitted to obtain particulars. Both parties are, therefore, somewhat in fault; but still the fact remains, that evidence has been given of acts of cruelty, of which, practically, the petitioner had no notice. It is much more difficult and questionable to reject the evidence than to admit it. Upon the whole, I determine to admit so much of the evidence offered as is in direct contradiction of the cruelty proved by the co-respondent. Upon the analogy of common law practice, and on the reason of the case, I think that is the proper course. I find that the petitioner examined two witnesses for the purpose of showing the terms upon which he was living with his wife; thus there was some evidence, though slight, of general conduct, and I ought not to allow him to extend and amplify that evidence, though it is difficult to draw the line. I shall admit evidence to contradict the specific acts of cruelty spoken to, but not as to general conduct.

The jury retired to consider their verdict, and after some time, stated that they were divided as to the cruelty, but were agreed as to the adultery and amount of damages.

*The Judge Ordinary*: That being so, I shall not press you for a verdict on cruelty, as it is a question for the Court to ascertain under the 31st section, though I should have been glad of the assistance of your verdict, if you had agreed on one.

**[412]** The verdict was then taken for the petitioner on the issue of adultery, damages £2500.

The Queen's Advocate and Dr. Spinks moved for a new trial, it having been arranged that the Solicitor-General should shew cause at the same time. First, the co-respondent having raised the question of cruelty, had a right to the verdict of a jury on that issue, as they found for the adultery. By sect. 28 of the Divorce Act, "Upon any such petition (i.e. for dissolution) presented by a husband, the petitioner shall make the alleged adulterer a co-respondent, etc. . . . And the parties, or either of them, may insist on having the contested matters of fact tried by a jury, as hereinafter mentioned." Cruelty has been treated as a question of fact for the jury since the establishment of the Court. The Court has only power to discharge the jury altogether, not as to one issue when they find on the other. Suppose the co-respondent had raised no issue on the question of adultery, and the jury had before them only the issue of cruelty and the amount of damages. [By the Court: Is it clear that if the Court dismissed the petition, the petitioner could not have damages?] It is apprehended that if the petition is dismissed, the whole proceeding fails. Under the 33rd section, the husband may petition for damages alone, without any prayer for dissolution. Secondly, the damages were excessive.

The Solicitor-General (Mr. Beresford with him), contrà.—First, on the 31st section of the Divorce Act, they contended that the cruelty was a matter for the Court to satisfy itself of, and cited *Pearman* v. *Pearman and Burgess*, 1 Sw. & T. 601; *Seddon* v. *Seddon and Doyle*, 2 Sw. & Tr. 640. The Court has power to discharge a jury from finding an immaterial issue (*Rex* v. *Johnson*, 5 A. & E. 488). Secondly, in actions for crim. con. the rule was, not to set aside verdicts because the damages might appear excessive (*Wilford* v. *Berkeley*, 1 Burr. **[413]** 609; *Duberley* v. *Gunning*, 4 T. R. 651). [By the Court: The case of *Chambers* v. *Caulfield*, 6 East, 244, qualifies the former cases, at least where it appears that the jury acted under the influence of undue motives, or of gross error and misconception of the subject.]

Dr. Spinks, in reply, cited *Goode* v. *Goode and Hamson*, 2 Sw. & Tr. 253.

Cur. adv. vult.

May 3.—*The Judge Ordinary*: The jury in this case found the adultery of the respondent and co-respondent to have been proved, and assessed the damages at £2500. The Court is now asked for a rule nisi for a new trial, on the ground that the jury, being equally divided on the question of cruelty, which was also submitted to them, were discharged from giving any verdict on that issue; and it was contended that the co-respondent (the respondent did not appear) was entitled to a verdict on all the issues, or to have the jury discharged on all.

The basis of this argument is a supposed identity, in legal effect, between the written statement of questions of facts to be tried, which is prepared by the direction of this Court, under sect. 38 of the Divorce Act, with the Nisi Prius record in a

common law action. Authority is not wanting, even at common law for the discharge of a jury on one issue while the verdict is maintained on others (*King* v. *Johnson*, 5 Ad. & Ell. 488). But I do not stop to investigate the question at common law, because I am of opinion that the above-mentioned identity does not exist. The common law record—a transcript of the roll in the action—contains the several statements and counter-statements of the parties, put together according to certain technical rules of pleading, and in such fashion that the issues of fact very often do not admit of being determined in part and undetermined as to the rest. Further, there are no means, according to the technical rules which pre-**[414]**-vail at common law, of founding a legal judgment on the record, until all the material issues as to which the parties have put themselves on the country have received their solution from a jury.

But this Court is fettered by no such technical rules. Any "contested question of fact," which the parties desire, or any question of fact "arising on the proceedings" which the Court may desire to be so dealt with, are, under the Act, to be submitted to a jury. And for this purpose all that is requisite is, that such questions should be reduced into writing in such form as the Court shall direct. If the jury determine so many of these questions and in such a manner that the Court can find sound foundation for a decree, the office of the written questions is answered, and the function of the jury sufficiently discharged.

In the present case, the question upon which the jury were unable to agree concerns a matter upon which, under sect. 31, the Court is directed to form an "opinion," and on that opinion to exercise a discretion in refusing or granting a decree. In no other aspect has the question any materiality in the case. It was, however, submitted to the jury, and their verdict, if they had found one, would have been an assistance to the Court in forming its opinion. The inability of the jury to agree upon it deprives the Court of that assistance, but is no reason for sending the whole case to a new trial. The motion for a new trial must therefore be refused.

As the adultery of the respondent was fully proved, I must pronounce a decree nisi for a dissolution of the marriage, with costs against the co-respondent. The cruelty alleged against the petitioner has not been made out to my satisfaction. The evidence of it did not fail from falling short, but rather from going too far. This destroyed it in part and weakened it in the rest, so as not to command the credit of either Court or jury. At the same time, the undoubted conduct of the petitioner towards his wife, as disclosed at the **[415]** trial, could hardly have commended itself to any who heard it; and the damages, after payment of the surplus costs of the petitioner, if any, must be settled on the respondent "dum casta vixerit," and for life. After her death, or breach of the above condition, the fund must devolve on the two children of her marriage.

**[417]** IN THE GOODS OF WILLIAM CAWTHRON (deceased). November 17, 1863.—Will. —Conditional in Terms.—Execution after happening of Event.—A testator wrote and signed a Will on the 14th of August, 1858, beginning, "In the prospect of a long journey, should God not permit me to return to my home, I make this my last Will." He afterwards went on a journey, and returned on the 25th of September, 1858. In February, 1859, he acknowleged his signature to the Will in the presence of two witnesses, who duly subscribed the same.—Held, that the Will was entitled to probate, as it was executed after the completion of the journey contemplated.

[S. C. 33 L. J. (P.) 23; 10 Jur. (N. S.) 51; 12 W. R. 443. Discussed, *In the Goods of Spratt*, [1897] P. 31.]

William Cawthorn, late of Bideford, Devonshire, died on the 19th of March, 1863. On the 14th of August, 1858, he wrote a testamentary paper, which commenced:—"In the prospect of a long journey, should God not permit me to return to my home, I William Cawthron, senior, make this my last will and testament;"—and concluded,

"Witness my hand, this 14th day of August, 1858,

"WILLIAM CAWTHRON,

"Bridgeland Street, Devon."

**[418]** At the end of August, 1858, the deceased, accompanied by his wife, left home on a journey to Shrewsbury, and returned from thence to Bideford on or about the 25th of September in the same year. On the 17th of February, 1859, the

deceased, being very ill in bed, requested Mr. Smale to make certain alterations in the paper above referred to, and particularly to strike out and correct the date thereto. After he had done so, Mr. Cawthorn acknowledged his signature, as previously written at the foot of the will, by tracing it over, with a dry pen in the presence of Dr. Ackland and Mr. Smale, who thereupon signed their names as witnesses. Mrs. Cawthron stated in her affidavit, that in February, 1859, the deceased was not contemplating any journey whatever, and that she is convinced, that when he executed the will, he intended it should operate absolutely.

Dr. Middleton moved for probate to be granted to William Cawthorn and Louisa List, the executors therein named. As the will was not executed until after the event had happened upon which the condition depended, the deceased must have intended it to operate absolutely. He cited, *In the goods of Hobson*, 7 Jur. N. S. 1208; *Roberts* v. *Roberts*, 2 Swab. & Trist. 337. In *Parsons* v. *Lance*, 1 Ves. sen. 189, referred to in *Roberts* v. *Roberts*, Lord Hardwicke, in speaking of a conditional devise says, "The penning of a will then being conditional, collateral or parol proof cannot be taken into consideration, which would be dangerous, and what the Court, since the Statute of Frauds, is not warranted to do; for nothing will set it up, but some act done by him (the testator) after that event to republish the will, or defeat the conditions." Here there was an act done.

*Sir J. P. Wilde*: I think that this will operated absolutely, and must therefore be admitted to probate. This case is much stronger than the two cases cited. At the time the **[419]** deceased set off on his journey, the will was not executed, and if he had died at that time, he would have died intestate. The will had no force at all until after the deceased had returned home, and its validity cannot be limited by that event.

IN THE GOODS OF CATTRALL (deceased). December 15, 1863.—Signature at Foot or End.—Testamentary Dispositions written at different times.—Where a deceased has signed his name in the presence of witnesses at the end of several clauses of a dispositive character, apparently written at different times, the presumption is that the deceased intended to give effect to the whole of what was written at the time he so made his signature.

[S. C. 33 L. J. (P.) 106; 10 Jur. (N. S.) 136.]

The deceased in this case died in July, 1863, leaving a duly executed will, dated the 22nd of May, 1848, written on the first and on the upper part of the second page of a sheet of paper. Immediately beneath the names of the attesting witnesses the following writing appeared:—

"I hereby appoint my second son, John Leigh, to be executor of this my will.

"In consequence of the alterations in my family since writing the above, in deaths, etc., I have thought proper to make the following additions and alterations."

On the third page the writing was continued.

Will continued.—First, I bequeath to Miss Cox, my late wife's sister, the sum of £20 as a legacy, duty free; secondly, I bequeath to all my grandchildren that are living at the time of my death, one sovereign each, and the remainder to be equally divided amongst my sons that should **[420]** be living at my death, after paying my doctor's bill, and funeral expenses, etc.

"N.B. The bonuses that should be added to my life insurance must be included in the above alterations.

"Village of Hale, 19th day of June, 1863.

"THOMAS W. CATTRALL.

"With regard to furniture and personal property, I leave to my youngest daughter a pair of the best mahogany card-tables and the family Bible; to my eldest son I leave my barometer, and the rest to be equally divided amongst them.

"THOMAS W. CATTRALL.

"Signed and sealed in the presence of us.

"MARY SMITH.

"SARAH HIND JOY."

It appeared from Mary Smith's affidavit that the whole of the writing, except the names of the attesting witnesses, was in the handwriting of the deceased, and that shortly before his death the deceased had written the last paragraph in her presence and had duly executed it; the rest of the writing being there at the time.

Mr. G. H. Cooper moved the Court to grant probate of the whole of the paper writing, as a will and codicil, to the executor named in the codicil. A doubt had been felt in the registry whether the part beginning "I hereby appoint," and ending "19th day of June, 1863, Thomas W. Cattrall," ought to be included in the probate. He submitted that all the writing which followed the execution of the will must be taken as a continuous disposition of property, duly executed at the foot or end; that it was written at different times is immaterial. This case is distinguishable from *Willmott (deceased)*, 1 Sw. & Tr. 36.

*Sir J. P. Wilde*: I think the application should be granted. Here is a duly executed will, followed by a number **[421]** of additions and alterations, at the end of which appear the signature of the testator and of attesting witnesses, and an attestation clause. To what do the signatures and attestation clause apply? The presumption is that they apply to all that stood written above them at the time they were placed there; and there is nothing in the affidavit of the attesting witness, or from any other source, to rebut that presumption. Probate of the whole as a will and codicil will therefore be granted.

ROADNIGHT *v.* CARTER AND ANOTHER. December 15, 1863.—Terms of Compromise before Trial.—Rule of Court.—Practice.—When a suit is compromised before trial, the Court will not make the terms of compromise a rule of Court, as it has no power to enforce compliance with the terms; but it will make an order that the contentious proceedings be discontinued, and that the terms of compromise be filed in the Registry.

[Followed, *Hammond* v. *Hammond*, 1873, Ir. R. 8 Eq. 322.]

The defendants were executors of the will and codicil of Thomas Roadnight (deceased), and had taken probate of the same in common form. They had been cited by the plaintiff, as widow of the deceased, to bring the probate in, and to prove the will and codicil in solemn form. They had accordingly propounded the will and codicil in a declaration, to which the plaintiff had pleaded. The case had since been compromised, and the parties had signed terms of compromise in writing, by which it was agreed that the plaintiff should abandon further proceedings; that the probate was to be delivered out to the defendants, and that subject to the payment of the defendants' costs out of the estate, the property was to be divided equally between the plaintiff and E. Carter, **[422]** wife of one of the defendants, the person principally interested under the will and codicil.

Dr. Wambey, for the defendants, moved for the terms of compromise to be made a rule of Court on the plaintiff withdrawing her pleas, and for the probate to be delivered out to the defendants.

Dr. Tristram, for the plaintiff, consented to the motion.

*Sir J. P. Wilde*: There is an objection to making the terms of compromise a rule of Court. If they were made a rule of Court, and not complied with, they might be such as the Court has no power of enforcing; the proper order for the Court to make will be, that contentious proceedings in the suit be discontinued, that the probate be delivered out to the defendants as executors, and that the terms of compromise agreed upon be filed in the Registry.

Order accordingly.

IN THE GOODS OF FRANCIS MORTON. January 16, 1864.—Appointment of Guardian.—Probate.—12 Car. 2, c. 24, s. 8.—Practice.—A paper purporting to be a last Will and testament duly executed, but containing simply an appointment of a guardian of his children by a father, and not disposing of personal property, nor appointing an executor, is not entitled to probate.

[S. C. 33 L. J. (P.) 87; 9 L. T. 809; 12 W. R. 320. Adopted, *In the Estate of Tollemache*, [1907] P. 248.]

Francis Morton, the deceased in this case, made and duly executed a will, commencing, "This is the last will and testament of me, Francis Morton, of Liverpool, etc., which I **[423]** make this 5th day of February, 1857. I constitute and appoint my dear wife sole guardian of all my infant children during their respective minorities." The will did not contain any disposition of property, or the appointment of an executor. The deceased left no other testamentary instrument.

Mr. Kemplay moved the Court to decree letters of administration of the personal

estate of the deceased with said will annexed, to be granted to Mrs. Morton as his widow. It must be admitted that the decisions are against the motion. In *Lady Chester's case*, 1 Ventris, 207, *S. C.* 3 Keble, 30, the Ecclesiastical Court was prohibited by the King's Bench from proving a will simply appointing a guardian. There was a later case (*Gilliat* v. *Gilliat and Hatfield*, 3 Phill. 222), where the Court said that it was not necessary that such a will should be proved.

*Sir J. P. Wilde*: The case in Ventris is conclusive. The principle on which it depends is also clear. The jurisdiction of this Court to grant probate of an instrument is founded on the fact that it affects personal property. This paper does not affect personal property, and therefore is not entitled to probate.

Motion rejected.

IN THE GOODS OF NATH. DAVID SCOTT WALLICH (deceased). February 2, 1864. —Will.—Executors.—Codicil.—Executors in India.—W. made a Will in England in 1861, and appointed B. and C. executors thereof. In May, 1862, being in India, he made a codicil, and on the 9th of June executed a paper, whereby he appointed E. and F. "my executors in this country."—**[424]** The Court held, that the context of the paper, giving the testator's reasons for the appointment of E. and F., shewed that he did not mean them to have any power over his property in England, and granted probate to B. and C., without reserving power to E. and F.

[S. C. 33 L. J. (P.) 87; 9 L. T. 809.]

In this case the deceased, an army-surgeon in India, died at Dugshai, in India, in 1863. When in England, in 1861, he duly made and executed a will, whereof he appointed his brother, G. C. Wallich, and his sister, S. M. Wallich, executor and executrix. On the 26th of May, 1863, he executed a codicil at Dugshai, and on the 9th of June, 1863, he executed a paper in the following words:—"And I further desire that my affairs may not be placed in the hands of the Administrator-General, as is the usual custom in this country, but that they may be managed entirely by my friend Colonel C. T. Chamberlain, 1st Bengal Cavalry, and F. Cooper, Esq., C.B., Deputy-Commissioner of Delhi, whom I hereby appoint my executors in this country, and who are to be responsible only to my executors at home."

The codicil and this latter paper had been sent to England, and—

Dr. Swabey now moved, on behalf of the executors named in the will, for probate of all the papers to be granted to them, without reserving power to the executors appointed by the last paper. The Court will probably be able to decide this case without determining whether the appointment of executors in a country is equivalent to their appointment for a country.

*Sir J. P. Wilde*: I think, from the context of the paper in which the executors in India are appointed, it is clear that the deceased did not intend them to have any power over his property in England, and the probate may go to the executors named in the will, without reserving power to the others.

**[425]** IN THE GOODS OF MORLEY (deceased). March 16, 1864.—Administration to Attorney of Party entitled.—Form of Authority.—If the Court, on the documents before it, is satisfied that the party entitled to a grant of administration desires the person applying to act as his attorney, it will not require a regularly expected power of attorney.

[S. C. 33 L. J. (P.) 108; 10 L. J. 540; 12 W. R. 1064.]

William James Morley died a bachelor, and intestate. His father, who was resident at Victoria, had, by a document which purported to be sealed, but which had no seal upon it, authorised C. E. Morley to take out administration on his behalf. In lieu of a seal there was a small round mark in ink. It appeared from the affidavit of C. E. Morley, and from letters of the father of the deceased, that the application was made bonâ fide, and that it was the intention of the latter that the document should operate as a formal power of attorney, and that the applicant should on his behalf administer the deceased's estate.

Dr. Spinks now moved the Court to grant letters of administration to C. E. Morley, as the attorney of the father, and for his use and benefit, etc. If the Court feels any difficulty in treating the document as a power of attorney, the grant may be made under the 73rd section.

*Sir J. P. Wilde*: If a regular power of attorney had been absolutely necessary, I

am not prepared to say whether I could have acted upon this document, although the Court of Queen's Bench, in *Reg.* v. *The Inhabitants of St Paul's, Covent Garden*, 7 Q. B. Rep. 232, held that an impression in ink made with a wooden block in the usual place for a seal was sufficient where the document purported to be given under the hands and seals of the justices, and was in fact **[426]** signed and delivered by them. The Ecclesiastical Courts, however, have acted upon something much short of a regular sealed power of attorney in such a case as the present, when satisfied that it was intended that the person applying for the grant should act as attorney (*In the Goods of Elderton*, 4 Hagg. 210; and *In the Goods of Ormond*, 1 Ibid. 145). In this case I am quite satisfied that the deceased's father intended to give the applicant power to take out administration, and upon the authority of those cases I will make the grant.

Motion granted.

IN THE GOODS OF BOYLE (deceased).—Executor.—Renunciation.—The renunciation of an executor need not be under seal.

[S. C. 33 L. J. (P.) 109; 10 L. J. 541.]

Andrew Boyle died on the 1st of January, 1864, in London, leaving eight children, all under age. On the 3rd of January, 1862, the deceased, at Calcutta, had executed his will in duplicate. By it he appointed the Administrator-General of Bengal for the time being his executor; and after directing the payment of his debts, etc., he gave one-fifth of all his realty and personalty to his wife, and the residue to the Administrator-General of Bengal for the time being, in trust for the benefit of his children. One of the duplicates was left at Calcutta, the other was in the custody of the deceased's wife. The deceased left personal property in Bengal and in England. The Administrator-General of Bengal, in a letter of the 8th of March, 1864, to the testator's widow, renounced probate of the will in England.

Dr. Spinks moved the Court, under the 20 & 21 Vict. c. 77, **[427]** s. 73, to grant letters of administration of the personal estate in England with the will annexed to the testator's widow.

*Sir J. P. Wilde*: The only question is whether the renunciation of an executor must be under seal. In Williams on Executors, 5th edit., p. 247, it is said, "If the executor send a letter to the Ordinary by which he renounces, and the refusal be recorded, it is sufficient." It seems to me that that is good sense. A power of attorney need not be under seal, and I think that so also a renunciation need not be under seal. Upon the letter of the Administrator-General of Bengal being recorded in Court as his renunciation, the grant may go.

Motion granted.

IN THE GOODS OF SARAH KIMPTON, Widow (deceased). March 15, 1864.—Dispositive Part of Testamentary Instrument.—Position of Signature.—15 & 16 Vict. c. 24.—Where, from the obvious sequence and sense of the context, it appears to the satisfaction of the Court that the signature of the deceased really follows the dispositive part of a testamentary instrument, though it may occupy a place on the paper literally above the dispositive parts or part thereof, such testamentary instrument will be entitled to probate.

[S. C. 33 L. J. (P.) 153; 10 L. T. 137.]

This was a question as to the due execution of a codicil. The will of the deceased, dated the 19th of February, 1861, occupied the first three sides of a sheet of foolscap paper. A codicil of the same date as the will occupied the upper half of the last side. On the fourth or lower quarter of the last side, a second codicil commenced; the words at the bottom of the side being, "In witness whereof, I the said," continued at the third quarter of the last side, as follows: "Sarah Kimp-**[428]**-ton, the testatrix, have hereunto set my hand, the 28th day of December, 1863, as and for a codicil to my said last will; and further, I give all my books of a religious tendency to be equally divided between my said children. "SARAH KIMPTON."

Attestation clause and subscription of witnesses.

So that on the sheet of paper being unfolded, the chief dispositive part of the codicil was literally underneath the signature of the testatrix, though the sequence of the context was obvious enough.

The Wills Amendment Act, 15 & 16 Vict. c. 24, provides that "no signature

under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it."

From the affidavit of Mr. James Fordham Green, solicitor, of Hare, it appeared that he was called in when the testatrix was extremely ill, and having received instructions from her for the codicil in question, began to write it as it appeared on the lower part of the fourth side of the sheet of paper which contained the will and first codicil, and not having room to finish it at the bottom of the side, carried on the writing to the unoccupied part of the paper above; the deceased being then in such a state as made it desirable to get the codicil executed with as little delay as possible.

Mr. Le Breton moved the Court for probate, including the last codicil. The signature, even if literally above part of the codicil, in construction and sequence of sense follows it.

*Sir J. P. Wilde*: I think this codicil ought to be included in probate. It is entirely within the spirit of the Wills Act and the Amendment Act referred to. It may not be possible to lay down any general rule for the construction of the proviso in the Amendment Act, but I am inclined to say that where any portion of the writing appears to the satisfaction of **[429]** the Court to form part of the context, anterior to the signature, it ought to be considered as following that context, though the position it may occupy in the paper may be different. I think, from the case of *Martha Peach, deceased*, 1 Swab. & Trist. 138, that the late Sir C. Cresswell was inclined so to hold, though it does not appear that that case was brought to a final decision.

IN THE GOODS OF WOODLEY (deceased). April 19, 1864.—Will.—Execution.—Signature at Foot or End.—Signature written on last Lines of Will.—1 Vict. c. 26, s. 9.—The testator's signature to his Will was written partly across the last line but one of the Will, and entirely above the last line, with the exception of one letter which touched the last line.—Held, that the Will was signed at the foot or end thereof.

[S. C. 33 L. J. (P.) 154.]

Matthew Woodley died on the 28th of February, 1864, leaving a testamentary paper, bearing date February 23rd, 1864, signed by him and duly attested. The only question was, whether it was signed "at the foot or end thereof."

The last three lines of the will were as follows:—

"to and I hereby appoint
my sister Elizabeth Blackburn,
Executrix of this
my will."

The signature of the testator was written in a direction slanting downwards, commencing just under the beginning of the word "appoint" in the last line but two, and extending downwards, over the latter part of "Elizabeth," in the last line but one, the tail of the "y" at the end of his signature touching the last line.

**[430]** On the 23rd of February, at the request of the deceased, who was then in a dying state, a surgeon who was attending him drew up the will, he then directed the testator to sign his name at the foot or end thereof, and he endeavoured to do so as well as he was able whilst lying in bed.

Dr. Tristram moved the Court to decree that probate of the will be granted to Elizabeth Blackburn as executrix. There is no case precisely in point, but I submit that this will is signed at the foot or end thereof within the meaning of the Wills Act. The object of the Legislature in requiring that a testamentary paper should be signed at the foot or end thereof, was to prevent the possibility of fraudulent interpolations between the will and the signature of the testator after execution (*Smee* v. *Bryer*, 6 Moore, P. C. C. 404).

*Sir J. P. Wilde*: Each case of this description depends upon its own particular circumstances. In the present case the last clause of the will appointing an executrix comes down to the bottom of the paper. Part of the testator's signature touches the last line but one and part touches the last line. Looking at this paper, I think that the signature cannot be said to be otherwise than at the foot or end of the will, and that the last words should be included in the probate, as forming part of the will.

BRAMLEY AND ANOTHER *v.* BRAMLEY. May 3, 1864.—Costs of Unsuccessful Opposition to Will.—No Order as to Costs.—Reasonable Ground for Litigation. —Where the Judge of Assize was satisfied with a verdict for the plaintiffs establishing a Will, but would not have been dissatisfied with **[431]** a contrary verdict, the Court refused to condemn the defendant in costs.

[S. C. 33 L. J. (P.) 111, n.; 12 W. R. 992.]

The plaintiffs propounded a will. The defendant pleaded 1. Undue Execution. 2. Incapacity. 3. Undue Influence. The issues joined on these pleas were tried before J. Blackburn at the Yorkshire Spring Assizes, 1864, and were all found for the plaintiffs.

April 29.—Mr. Kemplay moved the Court to pronounce for the will, and to condemn the defendant in costs.

Mr. J. B. Maule, contrà.

May 3.—*Sir J. P. Wilde*: This case was tried before J. Blackburn at York, and the will was established. A motion was made to condemn the defendant in costs. The learned judge thinks that the verdict was quite right, and is satisfied with it, but at the same time is of opinion that the evidence was such, that had the jury found the other way, he would not have been dissatisfied with their verdict. Under these circumstances I think there was a reasonable ground for the litigation. The defendant therefore will not be condemned in costs.

IN THE GOODS OF GEALE (deceased). June 7, 1864.—Probate.—Testator Deaf, Dumb, and Illiterate.—Evidence of Signs by which Assent to the Will was signified.—Where probate was sought of the Will of a testator who was deaf, dumb, and illiterate, the Court required evidence on affidavit of the signs by which the testator had signified that he understood and approved of the provisions of the Will, before making the grant.

[S. C. 33 L. J. (P.) 125; 12 W. R. 1027.]

John Geale, late of Yately, in the county of Hants, yeoman, died on the 25th of January, 1864, leaving a will of the 4th **[432]** of July, 1861. He was deaf and dumb, and could neither read nor write, and had executed the will by mark. It was in the following terms:—

"This is the last will and testament of me, John Geale, of Yately, in the county of Hants, yeoman. I devise and bequeath all the real and personal estate whatsoever to which I may be entitled, or over which I may have any disposing power at the time of my death, unto my wife, Martha Geale, absolutely; but if my said wife shall die in my lifetime, then I devise and bequeath all the same real and personal estate unto my said wife's daughter Eliza, the wife of William Wigg, of No. 52 Carlton Street, Camden Town, in the county of Middlesex, absolutely; and if my said wife and the said Eliza Wigg shall both die in my lifetime, then I devise and bequeath all the same real and personal estate unto the said William Wigg, absolutely; and if all of them—my said wife and the said William Wigg and Eliza his wife—shall die in my lifetime, then I devise and bequeath all the said real and personal estate to such children or child of the said William Wigg and Eliza his wife as shall be living at my decease, and shall then have attained, or shall thereafter attain, the age of twenty-one years, to be equally divided between them if more than one; and I appoint my said wife, or, if she shall die in my lifetime, then the said William Wigg, and if both he and my wife shall die before me, then the said Eliza Wigg, executrix or executor of this my will. In witness, etc."

Affidavits of Martha Geale, the deceased's widow, and of R. T. Dunning, a wine merchant, and Isaac Hilton, parish clerk, the attesting witnesses, were filed. They deposed that the deceased was shrewd and intelligent, and possessed of considerable mechanical skill and ingenuity. The deponents had all known him intimately for more than thirty years, and he was in the habit of conversing with them, and they with him, by signs, which were well understood by all of them.

**[433]** The deceased had, in August, 1853, made a will, by which he devised and bequeathed all his real and personal estate to his wife absolutely. In June, 1861, he, by signs, told his wife to take the will to Mr. Sheppard, a solicitor, and to instruct him to prepare for him a fresh will to the effect of the will above set out. Mr. Sheppard accordingly drew up the will of July, 1861, and sent it to the deceased.

On the 4th of July, 1861, the attesting witnesses were sent for; the deceased then by signs told them that he was about to make his will, and wished them to witness

it. He then produced the will, and told them by signs how he wished to dispose of his property. Dunning then read over the will, and ascertained that it was in accordance with his instructions, and then by signs explained to the deceased its contents and effect, and he by signs signified his approval.

Dr. Spinks moved for probate on these affidavits, and cited *In the Goods of Owston*, 2 Sw. and Tr. 461.

*Sir J. P. Wilde*: In that case Sir C. Cresswell refused to grant probate on motion of the alleged will of a deaf and dumb person, on the ground that it did not appear upon the affidavits that the deceased had used the deaf and dumb alphabet, or what signs had been used in the conversation with him. The same objection may be made to the affidavits in this case.

Dr. Spinks: I am instructed that the deaf and dumb alphabet was not used. The affidavits, however, shew that the deceased understood and approved the contents of the will. That is sufficient.

*Sir J. P. Wilde*: I shall decline to grant probate on motion upon the affidavits now before me. The deponents must state the nature of the signs used in their communication with the deceased.

**[434]** Dr. Spinks afterwards renewed the motion upon the joint affidavit of the widow and the attesting witnesses; which, in substance, was as follows:—"The signs by which deceased informed us that the will was the instrument which was to deal with his property upon his death, and that his wife was to have all his property after his death, in case she survived him, were in substance, so far as we are able to describe the same in writing, as follows:—viz., the said John Geale first pointed to himself, then he pointed to himself, and then he laid the side of his head upon the palm of his right hand, with his eyes closed, and then lowered his right hand towards the ground the palm of the same hand being upwards. These latter signs were the usual signs by which he referred to his own death, or the decease of some one else. 2. He then touched his trousers pocket (which was the usual sign by which he referred to his money), then he looked all round and simultaneously raised his arms with a sweeping motion all round (which were the usual signs by which he referred to all his property or all things). 3. He then pointed to his wife, and afterwards touched the ring-finger of his left hand, and then placed his right hand across his left arm at the elbow, which latter signs were the usual signs by which he referred to his wife. 4. The signs by which the said testator informed us that his property was to go to his wife's daughter in case his wife died in his lifetime, were in substance, and so far as we are able to describe them in writing, as follows:—He first referred to his property as before; he then touched himself and pointed to the ring-finger of his left hand and crossed his arm as before (which indicated his wife); he then laid the side of his head on the palm of his right hand (with his eyes closed) which indicated his wife's death; he then again, after pointing to his wife's daughter who was present when the said will was executed, pointed to the ring-finger of his left hand and then placed his right hand across his left arm at the elbow **[435]** as before; he then put his forefinger to his mouth and immediately touched his breast, and moved his arms in such a manner as to indicate a child, which were the usual signs for indicating his wife's daughter—he always indicated a female by crossing his arm and a male person by crossing his wrist. 5. The signs by which he informed us that his property was to go to William Wigg, his wife's daughter's husband, in case his wife's daughter died in his lifetime, were in substance, and so far as we are able to explain the same, as follows:—he repeated the signs indicating his property and his wife's daughter, then laid the side of his head on the palm of his right hand, with his eyes closed, and lowered his hand towards the ground as before (which meant her death), he then again repeated the signs indicating his wife's daughter, and crossed his left arm at the wrist with his right hand, which meant her husband, the said William Wigg. He also communicated to us by signs that the said William Wigg resided in London. The said William Wigg is in the employ of and superintends the goods department of the North-Western Railway Company at Camden Town. 6. The signs by which the said testator informed us that his property was to go to the children of his wife's daughter and son-in-law, in case they both died in his lifetime, were in substance, and so far as we are able to describe the same in writing, as follows,—namely, he repeated the signs indicating the said William Wigg and his wife, and their death before him, and then placed his right hand open a short distance from the ground,

and raised it by degrees, and as if by steps, which were his usual signs for pointing out their children, and then swept his hand round with a sweeping motion, which indicated that they were all to be brought in. The said testator always took great notice of the said children, and was very fond of them. 7. After the testator had, in manner aforesaid, expressed to us what he intended to do by his said will, the said R. T. **[436]** Dunning, by means of the before-mentioned signs, and by other motions and signs by which we were accustomed to converse with him, informed the said testator what were the contents and effect of the said will."

*Sir J. P. Wilde* granted the motion.

PARKER *v.* HICK. June 7, 1864.—Practice.—Attachment against a Married Woman.—An attachment will not be granted against a married woman for disobedience of an order for payment of costs, if she has no separate property. But the onus of establishing that fact lies upon her; and if she does not appear upon a motion for an attachment, of which she has had notice, the Court will grant an attachment.

[S. C. 33 L. J. (P.) 154. Referred to, *Morris* v. *Freeman*, 1878, 3 P. D. 68.]

Dr. Spinks moved for an attachment against the defendant, a married woman, for non-payment of costs, pursuant to order. The defendant had had notice of the motion, but did not appear.

*Sir J. P. Wilde*: The only question is, whether, as the defendant is a married woman, an attachment should be granted. At common law a ca. sa. may be sued out against a married woman; but she will be discharged from custody upon proof that she has no separate property. If the defendant has no separate property, she is not liable to attachment. But the onus of establishing that fact lies upon her, and as she has not thought fit to appear on this motion, I shall allow the attachment to issue; but it must lie in the registry for a week.

**[437]** WILLIAMS *v.* DAVIES. IN THE GOODS OF JOHN WILLIAMS (deceased). April 29 and May 31, 1864.—Citation to Accept or Refuse Administration.—Order to Pay Costs.—Attachment.—Assets.—The Court will not consider the question of issuing an attachment for non-payment of a sum of money ordered to be paid, till personal service of the order has been made, or it is shewn that personal service is evaded.—An order on a person as administrator to pay costs is equivalent to an order to pay out of the deceased's estate, and if the assets have been properly exhausted, no attachment will be granted for disobedience to such order.—Semble, an administrator might be guilty of such misconduct as to make him personally liable for costs, but mere delay in taking out administration is not such misconduct.

[S. C. 33 L. J. (P.) 127.]

This was an application for attachment. John Williams, minor, died on the 15th of September, 1862, without child, leaving Mary Williams, his widow, him surviving. She afterwards married David Davies, and was the defendant in this case. On 11th of November, 1863, the plaintiff, a brother of the deceased, took out a citation calling upon Mrs. Davies to accept or refuse administration to the estate of her late husband; Mrs. Davies took administration on the 20th of November, the effects being sworn under £20.

On the 19th of January, 1864, an order was made on summons that the costs of the plaintiff should be paid out of the estate of the deceased, and on the 22nd March an order was made upon the defendant as administratrix of the deceased to pay to the plaintiff's proctor, within six days after service, £11, 4s. 11d., the plaintiff's taxed costs and the costs of the summons.

On the 29th of April Dr. Spinks moved for an attachment **[438]** against the defendant for not having obeyed the above order. The order to pay had not been personally served, but left with the defendant's proctor; for the sufficiency of this service he relied upon the following rules for contentious business:—

27. The entry of the appearance of a party shall be accompanied by an address within three miles of the General Post-Office.

28. Service of Pleadings, etc.—It shall be sufficient to leave all pleadings and other instruments, personal service of which is not expressly required by these rules and orders, at the address furnished as aforesaid by the plaintiff and defendant respectively.

There is no special rule as to the service of an order to pay a sum of money.

*Sir J. P. Wilde*: An attachment is a serious matter. I do not think the rule referred to can apply to the service of an order which is the ground of depriving persons of their liberty. I shall not consider the question of attachment till there is a personal service of the order, or till I am satisfied that personal service is being evaded.

On 31st of May Dr. Spinks renewed the motion, personal service having been effected and the money not paid. The defendant by her delay in taking out administration obliged the plaintiff to have recourse to the process of this Court, and the defendant must be liable for the expense so incurred.

Dr. Swabey for the defendant: The order is upon her as administratrix, she is therefore not liable beyond the assets which have come into her hands as such administratrix. By her affidavit it appears that the only property left by the deceased consisted of £15 worth of household furniture, and that the defendant had paid beyond that sum for the funeral expenses of the deceased, for bills owing by him, and for the **[439]** cost of taking out administration. During the deceased's lifetime he had deposited £100 in the bank, at Abergavenny, in the joint names of himself and the defendant as a provision for her. This sum she was advised belonged to her on the death of the deceased, and formed no part of his estate. The bank had paid it to her on her demand. It is submitted, that in this view, the defendant was at least primâ facie in the right (1 Bright's 'Husband and Wife,' edit. 1849, p. 32). And it lies on the plaintiff to shew that the £100 formed part of the deceased's estate, which he has not done.

*Sir J. P. Wilde*: I am asked to issue an attachment against an administratrix for not having obeyed an order to pay certain costs. An order upon her as administratrix is, I think, equivalent to an order to pay out of the deceased's assets. From her affidavit it appears that she has no assets; that she properly spent more than she received from the husband's estate. The £100 standing in their joint names is hers by survivorship. It is said that she should pay the plaintiff's costs herself, but the order was not asked to that effect, or if it were it was refused. I do not say that there may not be such misconduct of an administratrix as to make her liable out of her own means, but mere delay in taking out the administration is not sufficient.

IN THE GOODS OF THOMAS REED (deceased). May 26, 1864.—Administration Bond. —Limited Grant of Administration to a Party out of Jurisdiction of Court. —Acceptance of Justifying Sureties also Resident without the Jurisdiction of the Court (in Jersey).—Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 18.—Practice.—Where a limited grant of administration had been made to a person **[440]** resident without the jurisdiction of the Court, who was unable to procure justifying sureties within its jurisdiction, the Court accepted sureties resident in Jersey.

[Followed, *In the Goods of Hernandez*, 1879, 4 P. D. 229.]

The deceased, in this case, Lieut.-Colonel Reed, died in Jersey intestate without any known relation, leaving his widow him surviving, who declined to administer to his estate. Shortly before his death he assigned a policy, granted on his own life, for £500, by the Gresham Life Assurance Company, London, to Mr. Philip Le Brun, a merchant in Jersey, for valuable consideration. The Court on motion decreed administration of the personal effects of the deceased, limited to the policy, to Mr. Philip Le Brun as assignee of the policy, and directed that the sureties to the administration bond should justify.

May 3.—Dr. Tristram: Mr. Le Brun has been unable to procure sureties in England who are able and willing to justify. He has tendered two responsible persons resident in Jersey, as sureties, who are willing to justify, but an objection has been taken to them in the registry, on the ground that they should, according to the practice of the Court, be resident within its jurisdiction, as the administrator resided without the jurisdiction of the Court. He was instructed, but he had no affidavit to this effect, that by the law of Jersey there would be no more difficulty in enforcing the bond against the sureties there, than if they were resident in England.

Motion adjourned for Affidavit.

May 26.—Dr. Tristram renewed the motion upon an affidavit by a solicitor practising in Jersey, shewing that proceedings by an assignee of the bond might be taken against the sureties in the Royal Court of Jersey for a breach of the condition of the bond, or on a judgment obtained in England (in an action) on the bond which might be brought, as now by the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 18, the sureties might **[441]** be served with a writ in Jersey. He relied upon the principle of the decision *In the Goods of Ballingall*, deceased, L.J. Pr. Mat. and Adm., in which sureties resident in Scotland had been accepted on the suggestion made by him per incuriam, that they could be served there with a writ under the Common Law Procedure Act.

*Sir J. P. Wilde*: I will grant the motion. The principle laid down in the case of the goods of Ballingall, although inapplicable to the facts of that case, is applicable to the present one, and is an authority, if one were required, for my granting this motion.[1] But without an authority, the good sense of the thing shews that the usual rule may here be relaxed.

---

[1] In the Goods of William Ballingall (deceased). April 28, 1863.—Administration to Attorney out of Jurisdiction.—Sureties out of Jurisdiction.—15 & 16 Vict. c. 76, s. 18.—The Court is at liberty to accept as sureties to an administration-bond persons resident out of its jurisdiction, when the principal, who is also residing without the jurisdiction, is unable to procure sureties within the jurisdiction, provided a writ of summons is servable on the sureties under sect. 18 of the Common Law Procedure Act (17 & 18 Vict. c. 77).

[S. C. 32 L. J. (P.) 138; 9 L. T. 116; 11 W. R. 591. Overruled, *Herbert* v. *Shiell*, p. 479, post.]

William Ballingall died July 18, 1862, leaving a will, whereby he gave all his property to Eliza, wife of John Stuart, and to Geo. R. Ballingall, as tenants in common, and he appointed the said G. R. Ballingall and J. Stuart (one being resident in Bombay and the other in Melbourne) his executors. They had, by a power of attorney, authorized J. Anderson and G. B. Anderson, of Blairgowrie, Perthshire, to obtain letters of administration, with the will annexed, for their use and benefit. The Messrs. Andersons had offered two persons as sureties to the administration bond who also resided at Blairgowrie. The registrar had declined to accept them as sureties, on the ground that both they and their principal were residing out of the jurisdiction of the Court.

Dr. Tristram moved for the grant to pass to the Messrs. Andersons, notwithstanding the sureties to the bond were resident in Scotland. In the Prerogative Court it had been the practice, where a grant was made to an attorney now resident within the jurisdiction of the Court, to require, that the sureties to the bond should be resident within its jurisdiction. This was a reasonable rule, when established, for then, if a bond were assigned for a breach of its conditions, the assignee of the bond could not have served the sureties out of England with process. But this rule did not apply now, as by the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 18, service on a person out of England[1] may be effected. Again, as the whole of the property of the testator passes to the executors, to one in his own right and to the other jure mariti, they do not require sureties to protect them against the acts of their own attorneys. The only object of sureties here would be to protect creditors who would have remedies against the executors, their attorneys and sureties, for a devastavit. As by the 81st section of the Probate Act the Court has power to dispense with sureties altogether, surely it may relax the old rule in this case for the two reasons given.

*Sir C. Cresswell*: I think there is some weight in the argument, that there is not now the same necessity as formerly for requiring that the sureties to the bond should be resident within the jurisdiction of the Court. The circumstances of this case are peculiar, and I think that the sureties proposed may be accepted.

Motion granted.

---

[1] "In any place except Scotland or Ireland."

**[442]** QUICK *v.* QUICK AND QUICK. June 9, 1864.—Will Lost or Destroyed.—Declarations of its Contents by Testator after Execution.—Evidence of the declarations of an alleged testator as to the contents of a Will not forthcoming, made after its execution, is not admissible to prove the contents.

[S. C. 33 L. J. (P.) 146; 10 Jur. (N. S.) 682; 10 L. T. 619; 12 W. R. 1119. Referred to, *Johnson* v. *Lyldford*, 1868, L. R. 1 P. & D. 547. Overruled, *Sugdan* v. *Lord St. Leonards*, 1876, 1 P. D. 154. Referred to, *Woodward* v. *Goulstone*, 1886, 11 A. C. 479.]

In this case the plaintiff, the widow of Henry Brennan Quick, the deceased in the cause, propounded the contents of a will which could not be found. The declaration alleged the due execution, etc., of the will on the 22nd of December, 1860, "and that the said will, never having been revoked or **[443]** destroyed by the testator, nor by any other person in his presence and by his direction, is still valid, but that the same cannot be found. That the substance of the will was and is as follows, to wit:—The said Henry B. Quick, by his said last will and testament, devised and bequeathed to his wife, the said Mary Jane Quick, all his real and personal estate whatsoever and wheresoever, and appointed the said Mary Jane Quick guardian of Louisa Quick, his infant daughter by his former wife."

The defendants, who were infants and appeared by their guardians, amongst other things, pleaded the revocation of the said will by destruction, and, further, that the sum and substance of the said alleged will was not as set forth in the declaration.

June 4.—The cause was tried before Sir J. P. Wilde, without a jury.

The plaintiff stated, in examination: Her husband was a solicitor. She was married to him, at Guildford, on the 22nd of December, 1860. He was then a widower, having a daughter, by his former wife, aged four. There was no settlement made on the marriage. Before the marriage she told him she did not require one, and he thereupon said, "Then I shall make my will." On their return to her house from the church, and before the wedding breakfast, he asked Mr. Charles Bond and Mr. Henry Bond to go with him into another room to attest his will. They accompanied him into the breakfast-room. He told her on that or the next day the contents of the will. He said, "I have left you all mine, as I consider my daughter quite provided for. I have appointed you her guardian." They went first to reside at Waterloo Terrace, London. The deceased was in the habit of attending daily at his office. It was his practice to carry a leather bag to and from his office. He kept the package containing the will in this bag. He once asked her to keep it, in case the bag should be lost; she **[444]** declined. He met with an accident on the 28th of January, 1861. His memory became impaired after that accident. They subsequently went to reside at No. 7 Lawn Road, Haverstock Hill, where they resided until his death, on the 19th of May, 1863. After their removal there, he continued to go to his office, carrying the bag. In February, 1862, she had a daughter born, called Alice. Some time after her birth he said, "I don't know where to put my hand on that will. Did I give it to you?" She said, No. He went into his dressing room to look for it in a place where he thought it might be, but did not find it. Shortly before the commencement of his last illness (which lasted a fortnight), he said to her, "I have left all my property to you, but I wish Alice to have all mine, because her sister is already provided for"; meaning that she was to leave it to her. She suggested that he should make another will, leaving her a life interest in the property. He said he would consider about it, and made a memorandum to remind him of it. A few days afterwards she asked him if he had drawn up a new will. He said, No, he should not alter it. During his last illness he spoke of his will and said it could not be lost, and said if he had the use of his hands (he was suffering from rheumatic fever) he would make another just like it. Their house was broken into on the 16th of December, 1862. She missed her jewel-case, and a dressing-case belonging to the deceased, not the one he had in use. After his death the will was searched for and could not be found. She took out letters of administration to his estate. She did not then know that any one else knew of the contents of the will beside herself.

Charles Kemble, a convicted felon and a notorious burglar, who was now undergoing fifteen years' penal servitude for burglary, stated:—On the 16th of October, 1862, he and another man, whose name he declined to give, broke into the house, 7 Lawn Road, Haverstock Hill. They went into the **[445]** front bedroom and opened a dressing-case found there. There was a large envelope in the central

compartment, indorsed "H. Quick. This is my will." They opened it. It was written on two or three sheets. His companion read part of it and was for keeping it, but at his suggestion it was burnt.

Charles Bond, one of the attesting witnesses, who was examined on commission, stated:—He was present at the second marriage of the deceased (and he then proved the due execution of a will after the wedding). The will was not read over at the time. He never read it. The deceased said nothing then about its contents. About a month after the marriage, the deceased told him he had left all his property to the plaintiff.

— Quick, a brother of the deceased, said he had a conversation with Charles Bond on the day of the deceased's funeral, when he stated he had witnessed the will, but knew nothing of its contents.

Dr. Spinks (with Mr. E. James, Q.C.), for the plaintiff, submitted:—(1.) There was no revocation. No act had been done by the deceased, or by any one else by his direction, revoking the instrument. The evidence of its destruction, together with the evidence of his declarations of adherence to it up to his death, were conclusive on this point. (2.) The contents of the instrument were sufficiently proved. Where an instrument was shewn to have been lost, parol evidence was admissible to prove its contents. Declarations of the deceased were surely admissible for this purpose. In *Brooke* v. *Kent*, 3 Moore, P. C. 334, the declarations of the deceased were admitted to establish the substitution of one word for another. If valid to prove one word, they were equally so to prove the whole of a will.

**[446]** [Per Curiam: You have to grapple with the principle of law, that the contents of the lost instrument should be proved on oath. Here you only prove the declarations of the contents on oath. Is there any authority that declarations of a testator as to the contents of a will are equivalent to a proof of its contents on oath?]

In *Glen* v. *Burgess*, a servant learnt the contents by hearing the deceased read out the will, and was allowed to give evidence of them.

Mr. Karslake, Q.C. (Mr. Searle with him), for the defendants: (1.) There should have been distinct proof of the whole contents of the will. This has not been given. (2.) Declarations of the deceased as to the contents of the will made after its execution are inadmissible (*Doe dem. Shallcross* v. *Palmer*, 16 Q. B. 747; *In the Goods of Ripley*, 1 Sw. & Tr. 68; *Staines* v. *Stewart and Jones*, 2 Sw. & Tr. 320).

Mr. E. James, Q.C., in reply. Cur. adv. vult.

June 9.—*Sir J. P. Wilde* gave the following judgment: In this case the plaintiff, Mary Jane Quick, propounded the will of her late husband, Henry Brennan Quick, as made on the 22nd of December, 1860.

The will is not forthcoming and was not found at his death; but the plaintiff proposed to prove the due execution of the will by the evidence of the attesting witness, and to supply its contents by parol. No draft or copy of the will or any part of it, nor any document throwing any light upon its effect, is in existence; and the case is therefore one of that class in respect of which I made some observations in the late case of *Wharram* v. *Wharram*.

But the state of the evidence in this case will enable the Court to dispose of it without moving the main question there discussed. Mr. Bond proved that immediately after the mar-**[447]**-riage the deceased called him and his son into a separate room, and in their presence executed a will. The plaintiff also proved that before his marriage a conversation was held between them, in which she said she did not require any settlement, and in which he said, "Then I shall make my will." The Court is satisfied that the deceased did execute a will on the day named.

The circumstance of this will not being found is calculated to give rise to many questions, and many difficulties must be successfully encountered before it would be entitled to probate.

The first of these is, what were its contents? I have already said that neither draft nor copy can be produced,—a somewhat remarkable circumstance, as the deceased was an attorney. Recourse was therefore had to other testimony. This testimony consisted entirely of statements or declarations supposed to have been made by the testator after the execution of his will as to the dispositions contained therein. These statements were made to the plaintiff herself and Mr. Bond, who deposed to them, and they were to the effect that he had left all his property to his wife. So far they both agree. Some further statements were made by the plaintiff

alone, relative to a daughter by a former marriage. The Court has sought in vain for any principle or authority to justify the reception of such statements in evidence for the purpose of proving the actual contents of the absent will It is familiar practice enough to receive the unsworn declarations of the testator in evidence, for the purpose of arriving at his general intentions where his competency is in dispute, or where there is any imputation of fraud in the making of his will. For in such cases the state of his mind and affections is in itself a material fact, of which such statement are the fair exponents. But where these declarations are vouched to prove, not only the testator's intentions, but the fact that he had declared and embodied those intentions in a certain will, they have no other title to confidence than the statements of any other person **[448]** who had seen the will and could speak to its contents. In this aspect they become mere hearsay, and open to the well-known rule excluding them as such. On a similar principle it was held, *In the Goods of John Peter Ripley, deceased*, 1 Sw. & Tr. 68, that the testator's declaration, that his will had been duly executed, was not admissible to prove that fact; and to the same effect in the case of *Doe dem. Shallcross* v. *Palmer*, 16 Q. B. 747.

The only case that could be produced to the Court on this point for the plaintiff was that of *Brooke* v. *Kent*, 3 Moo. P. C. But on a perusal of that case it will be found that the argument and judgment in it were both addressed to a very different question. The points then discussed and determined were, whether the will fell within the statute, though made in 1837, and whether the obliterations or alterations must, under the statute, have been made animo revocandi to defeat the original provisions of the will. But no reference was made to the admissibility of the testator's written declarations to prove the contents of the will. On the contrary, the effect of the judgment was only to admit the allegation in which the nature of the alteration was averred, and then the Court added, that "as it was intimated from the bar that the facts as pleaded were admitted," the will might at once receive probate.

These declarations being thus excluded, the Court has no evidence before it to prove what the will really contained. And as the plaintiff has thus failed to prove the sum and substance of the will as set forth in the declaration, there is nothing of which probate could be granted.

**[449]** PODMORE *v.* WHATTON. June 28, 1864.—Administration called in.—Sum and Substance of Will propounded.—Grant of Administration to the Residuary Legatee, who had established the Will.—When the substance of a Will is propounded, the first point to be ascertained is whether such a Will was duly executed. If that is established, the next point is, whether it was in existence at the death of the deceased. If it was not, then the primâ facie presumption that it was destroyed by the deceased, with intention to revoke, arises, which may be rebutted by further evidence.—In the present case the Court was satisfied, on the evidence, that the defendant, who had taken out letters of administration, had possessed himself of the Will after the death of the deceased, and had suppressed or destroyed it, and therefore decreed letters of administration with the Will annexed, as contained in a draft; and as the plaintiff and defendant were the residuary legatees in the Will, and as such equally entitled in usual course to the letters of administration, ordered the grant to be made to the plaintiff.

[S. C. 32 L. J. (P.) 143; 10 Jur. (N. S.) 756; 10 L. T. 754; 13 W. R. 106. Applied *Finch* v. *Finch*, 1867, L. R. 1 P. & D. 371.]

The deceased in this case, Emily Georgiana Whatton, died on the 4th of September, 1859, a spinster, without a parent, leaving the defendant, her brother, and next of kin. He took out letters of administration of the effects of the deceased as dead intestate, immediately after her death.

The grant of administration had been called in by Podmore, the plaintiff, who was a cousin of the deceased, who now propounded a draft of a will as containing the sum and substance of a will alleged to have been executed by her in January, 1853, in which the plaintiff and defendant were named as residuary legatees. This will was alleged to have remained unrevoked at the time of her death. The defendant pleaded a traverse of the execution of the will, and revocation.

The case was heard on the 28th of May and the 2nd of June, before the Court itself.

**[450]** Dr. Spinks and Mr. Pritchard for the plaintiff.

Mr. Huddleston, Q.C., and Mr. Lopes for the defendant.

The defendant and the plaintiff were the nearest surviving relations of the testatrix at the time of her death. Her estate had realized about £470. The will left a legacy of £300 to Mr. Pritt, who had been her legal adviser, and divided the residue between the plaintiff and the defendant. Mr. Pritt, who was appointed executor, had renounced, and he agreed to give up £200 of his legacy to the plaintiff. The contents of the will and its due execution were clearly proved, and the only question was, whether the testatrix had destroyed it animo revocandi, or whether it was in existence at the time of her death, and had then been destroyed or suppressed by the defendant. The evidence on this point is stated in the judgment.

Cur. adv. vult.

*Sir J. P. Wilde*: The evidence in this case has raised an issue casting a duty not free from difficulty upon the Court. The plaintiff seeks probate of a certain draft of a will as containing the sum and substance of the will of Emily Georgiana Whatton. The will itself is not produced.

The first question is, did the deceased ever execute such a will? In the absence of the will itself this portion of the case requires clear, strong and irrefragable evidence, free from suspicion or doubt in its sources, exact and certain in its conclusions. The attorney who prepared it from her personal instructions, together with his partner and clerk who witnessed its execution, speak clearly and positively to the fact. They produce the original draft of the will. The books of the attorney's office are also produced, and the charges for drawing, engrossing, and executing the will are there found, which charges Miss Whatton afterwards paid. This testimony leaves no doubt in the mind of the Court, that a will, of which the **[451]** draft produced contains the substance, was actually and duly executed by Miss Whatton about the autumn of the year 1852.

The effect of the will was to bequeath a legacy to William Pritt of £300, and to divide the residue between the plaintiff, who was her cousin, and the defendant, who was her only brother. Although she thus made the defendant the object of her bounty, there was strong evidence from several witnesses to show that she regarded him with anything but kindly feelings. To more than one person, and on more than one occasion, she spoke of him as a bad son and an unkind brother. On the other hand, there was also strong evidence to shew that she felt under obligations to Mr. Pritt, who had assisted her professionally.

The will having been thus made, the next and most important question is, what became of it? On the part of the plaintiff it was urged that this was an inquiry upon which the Court was not bound to enter; that the will, once made, could only be revoked by the specific methods indicated in the Wills Act; and that, unless the defendant established its revocation, the Court was bound to pronounce it unrevoked, and admit it to probate. On the part of the defendant it was argued that, as the will itself was not forthcoming, and had been last seen in the custody of the testatrix, the law must presume that she had herself revoked it.

The Court cannot accede to either of these views. A material question of fact has to be decided in this case before any presumption arises on either side; and it is this—was the will found at the decease of the testatrix or not? If it was found at her death, and in an unmutilated state, then she did not revoke it. If it was not so found, then there is room and foundation for the revocation which the law will presume in the absence of testimony to rebut it. In most cases the solution of this question presents no difficulty. For the depositories of the deceased are duly searched by those whose good **[452]** faith is not impugned, and who vouch for the fact one way or another. But in the present case it is far otherwise. A large body of evidence has been produced tending directly to question the fair dealing of the defendant, who had sole access to his sister's papers, and the charge of suppressing this will was but thinly veiled, though faintly pressed against him. Into the truth of this it is the duty of the Court with more firmness now to enter. It was proved that the will, when executed, was taken away by Miss Whatton. She had a large black box in her bedroom, of which she spoke to her landlady as containing valuable papers, and that this would be the depository of her will was highly probable. The evidence of

Harriet Roberts converts this probability into certainty. Furthermore, Miss Whatton several times spoke of the will as existing after its execution. Once to Mr. Avison, the attorney and attesting witness, she said, "she thought she should make an alteration in her will, as she did not wish to leave her brother anything." This was in 1856. Hempson, the other attesting witness, says—"She several times spoke of the legacy to Mr. Pritt, that he had been one of her best friends, and that she hoped to reward him and would reward him." He added—"About six months before her death I met her. We went into the subject of Pritt's kindness, and she spoke of it again in the same terms, and of the unkindness of her brother." Mrs. Loosethwaite, who was her oldest friend, says—"She told me she had made a will; she said no more then. Once, almost ten months before her death, she was very ill. I asked her if she had settled her affairs; she said she had, and her mind was quite easy. She mentioned Mr. Pritt, and said she had left him a legacy." These several statements, all in one direction, spoken to by various and independent persons, and covering a considerable space of time reaching up to within six months of her death, which occurred on the 4th of September, 1859, lay firm ground for the supposition that the will had not been destroyed up to that period.

**[453]** The period of her last illness and death brings with it evidence of a yet more cogent character. She was taken ill about Monday, the 28th of August. A Miss Greenwood, with whom she had some acquaintance, was kind enough to accede to her request that she should not be left quite alone, and passed the night in her house to relieve the nurse. "I asked if she had no friends; she said she had a brother, but she did not wish to see him; that he had been an ungrateful son and an unkind brother." And then the nurse was called, a woman with whom she had lodged on former occasions, and whom she seemed to regard with some favour. Her name was Roberts. She gave this account:—"That on the Tuesday or Wednesday before she died she asked the deceased if she should send for her brother. That the answer was, 'No, I don't want to see him.' She said she had made a document and preparation for her death. She said she had made it at Pritt's office. She said she wanted some alteration in the document, and she got out of bed and I helped her into a chair, and she unlocked the box and got out some papers up in her hand. She said she would like to see Mr. Avison. She then put the papers in and locked the box, and I got her into bed. When she had the papers in her hand she said she wanted an alteration in the document, to give more money to Mr. Podmore. She would not let me go to Avison." And then comes this remarkable statement:—"After that she was never out of her bed to the box;" "she could not get out without my help." Miss Greenwood certifies in the like direction, saying, "She became stupefied on Wednesday." These several statements from a consistent body of testimony, to which it is difficult to refuse a mature belief, that the will of this lady was in existence and in her box when she died a few days afterwards. Other evidence carries the case further. It appears that on Saturday before her death, she being then insensible, Miss Greenwood, under the advice of a medical man, took posses-**[454]**-sion of her keys. The next day she telegraphed for the defendant. He came, and the keys were handed to him. Both on the Sunday and on the Monday he had the box open for some time, and was searching, as he said, for a will. Mrs. Simister, the landlady of the house, deposes thus:—"He asked me if there was a will. I said I did not know. I told him I believed she kept all her private papers in a box, which I pointed out to him. It always stood there, and was always locked. I saw him afterwards looking at some papers. He had a piece in his hand. 'Well, Sir,' said I, 'have you found what you were looking for?' 'Yes, I have found something at last.' The paper was as large as a sheet of foolscap, and appeared clean." She was pressed as to the appearance of the paper more particularly, but without result. Harriet Roberts, the nurse, is very explicit to the same effect. She says—"On the Monday he was in the room with the box all day backwards and forwards. He held up a paper in his hand, and said, 'Here it is.' I don't know what he did with it. He said, 'They may all go to hell; I am her only brother, and no one has any right to the money but me.'" His subsequent conduct was pregnant with suspicion. He went to Mr. Avison to ask about his sister's property. Mr. Avison asked where she died. The answer was, "Somewhere in the suburbs of Liverpool." The question repeated only produced the same answer. Then Mr. Avison said there was a will. Defendant got annoyed and denied it. Avison shewed him the draft, and he retreated from the office in a

passion. He had taken the nurse Roberts with him to Avison's office, for what reason does not appear. On coming downstairs he said to her, that Avison had told him there was a will and money left to Pritt, to which he added, "And what do they want with it? No one has any right to the money but me." He afterwards volunteered to Roberts this suspicious statement, "The paper you saw was my grandfather's will"; and to Mrs. Simister, as late as last February, he volunteered a **[455]** similar statement. He came to her, told her she need not be afraid of speaking to him, and added, "The will you saw in my hands was my grandfather's will," and yet it was of this very paper that he had exclaimed at the time, "Yes, I have found something at last." This completes the history of the case.

As soon as the law permitted he made the usual affidavit that there were no testamentary papers found or come to his knowledge, and obtained letters of administration. Nobody was at hand to question his proceedings. Mr. Pritt had retired from business, and had seen nothing of Miss Whatton for years. He did not hear of her death till February, 1860, after the defendant had obtained letters of administration. His interest in the will was not large enough to induce him to embark in litigation. Mr. Podmore, the plaintiff, was in China. His letters to Miss Whatton had been returned marked "gone away," and he knew nothing of the matter till he returned to England in April, 1863. Some deduction must therefore be made from the probable accuracy of the witnesses, especially as regards conversations, owing to the lapse of time. But it must be borne in mind that the three women, Miss Greenwood, Mrs. Simister, and Harriet Roberts, were entirely disinterested in the matter. They have no interest to serve or end to compass, so far as the Court can perceive. In the very able address of Mr. Huddleston much pains was taken to discredit Harriet Roberts, and a comparison between her evidence and her affidavit certainly shewed some striking discrepancies. But the Court can account for that without imputing to her an intention to deceive, and it is difficult to imagine that she could make a mistake about the leading facts she narrates. On the other hand, the defendant is called to deny that he ever saw a will of his sister's, and he repeats the story about his grandfather's will. But he does not deny the various expressions imputed to him.

All this evidence leaves a clear result on my mind. I am **[456]** satisfied this will was in the box of the deceased when she died, and as the keys of that box were at once handed to the defendant, I am also clear that the will passed to his hands. Whether he destroyed it or whether he has it now, or where it is, or what has become of it,—these are needless questions; for if he, as spoliator, has suppressed it, I cannot doubt that the plaintiff is entitled to probate of the draft until the original will appears. It was strongly pressed at the trial that the Court should be cautious almost to timidity in basing its decision upon the ground of the defendant's guilt, and the door was held open to the safe refuge of "not proven." But it is well to bear in mind that there are two parties to the suit, and that undue tenderness to one is denial of justice to the other. And as the facts of the case have forced home on my mind the conclusion that this will came to the defendant's hands, I am bound to act on that conviction by pronouncing for the draft, and condemning him in the costs of the suit.

Dr. Spinks: The grant will be one of letters of administration with the will annexed, to which either the plaintiff or defendant as residuary legatee will be entitled. The Court will perhaps think it right to order that the grant be made to the plaintiff.

*Sir J. P. Wilde*: I think that is a proper order in the circumstances of the case.

VELHO (by his Attorney) *v.* LEITE. January 26, 1864.—Will.—Appointment of Executors in Portugal and in England.—Probate.—Practice.—L., who died domiciled in Portugal, made a Will, containing an appointment (substitutional) of four executors "in Portugal," and **[457]** another appointment (also substitutional) of four executors "in England." The plaintiff, who was named as an executor in both appointments, was resident in Portugal. The Court held, that the words "in Portugal" and "in England," were equivalent to "for Portugal" and "for England."

[S. C. 33 L. J. (P.) 107.]

Jose Pinto Leite, late of Oporto and Moorgate Street, London, died on the 21st of January, 1860, having made his will with a codicil, and thereof appointed executors "in Portugal," in manner following:—

"In the first place, J. P. Leite. In the second place, C. P. Leite. In the third place, A. F. Velho. In the fourth place, S. P. Leite."

He appointed executors "in England," in manner following:—

"In the first place, S. P. Leite. In the second place, M. P. Leite. In the third place, J. P. Leite. In the fourth place, A. F. Velho."

S. P. Leite and M. P. Leite had renounced probate, and a citation had issued, and been personally served on J. P. Leite, the executor in the third place in England, to accept or refuse probate, or shew cause why probate should not be granted to A. F. Velho, the executor in the fourth place in England. To this citation no appearance had been entered.

The original will and codicil were in the possession of J. P. Leite, who resided at Oporto, but a notarial copy had been sent to this country, and an affidavit of a Doctor of Law of the Portuguese University of Coimbra had been filed, proving the due execution of the will and codicil according to the law of Portugal.

The Queen's Advocate (Sir R. J. Phillimore) moved that letters of administration with copies of the will and codicil annexed, limited until the original will and codicil should be brought into the Registry, should be granted to the attorney of A. F. Velho, the executor in England in the fourth place.

**[458]** *Sir J. P. Wilde*: The only question is, whether C. P. Leite, one of the executors "in Portugal," is entitled to probate as to the effects of the deceased in England. If he is, it would be requisite that he should renounce probate or be cited before the grant prayed could be made, for it is contrary to the practice of this Court to grant probate to the attorney of one executor reserving power to another executor. I think, however, that C. P. Leite is not entitled to probate in this country. The fact that the executor, on whose behalf the present application is made, who is appointed one of the executors "in England," is resident in Portugal, satisfies me that by the words "in England" and "in Portugal," in the appointment of the executors, the testator meant "for England" and "for Portugal" respectively. The motion therefore will be granted.

Motion granted.

MARSH AND OTHERS *v.* CORRY. January 26, 1864. — Declaration. — Pleading. — Particulars of Papers to be set up.—Practice.—Where a Will or Codicil is propounded in a declaration in the usual form, and there is ground for suggesting that other testamentary papers, besides those specifically referred to in the declaration, may be included in the probate, the Court will order the party propounding the Will or Codicil to furnish the other party with particulars of the testamentary papers he intends to set up.

[S. C. 33 L. J. (P.) 112; 10 Jur. (N. S.) 159.]

The plaintiffs, in a declaration in the usual form, propounded a will of Charlotte Gell, deceased, dated the 19th of January, 1860, and two codicils, dated respectively the 3rd of February, 1860, and the 19th of July, 1860.

**[459]** The will contained the following clause:—"I give, devise, and bequeath all the rest, residue and remainder of my real and personal estate of every description unto the said Robert Marsh, William Edward Hilliard, and Charles Woodbridge, their executors and administrators, absolutely; any further arrangement I may wish to make for the disposal of my property I shall express by writing in a book, which will be directed to the said Robert Marsh, William Edward Hilliard, and Charles Woodbridge, my three executors, trustees, and residuary legatees." Attached to the affidavit of scripts was a book marked (G), which had been found amongst the deceased's papers. It commenced thus:—"What may be disposed of by will or otherwise, to be sold by auction, and the assets to be invested by my residuary legatees. C. Gell, 29th June, 1859. . . . . 1859. Donations not, I believe, in my will . . . . 1861. For Mr. Cochrane," etc.

Mr. Raymond, on behalf of the defendant, moved the Court to order that the plaintiffs should declare or set forth whether or not, by their declaration, they propounded, as part of the will propounded by their declaration and as being entitled to be incorporated in it, a claim book or script (G) annexed to the affidavit of scripts.

Dr. Spinks, contrâ: The declaration sufficiently describes by dates the papers which the plaintiffs intended to propound. They are all dated in 1860. They could not propound script (G); for the entries in it are either dated before the date of the

will, and cannot, therefore, be the book referred to in the will (which is clearly one the testatrix intended to write, and not one which she had written), or are dated subsequent to the date of the last codicil, and therefore could not be incorporated in it. The plaintiffs cannot at the hearing propound any papers not expressly propounded in the declaration.

**[460]** Mr. Raymond in reply: The plaintiffs handed to the defendant a copy of script (G). Why was that done if they did not intend to set it up?

Dr. Spinks undertook that script (G) should not be set up at the hearing.

*Sir J. P. Wilde*: I think that the application is a reasonable one; but after the undertaking of the plaintiff's counsel I shall make no order. I have inquired what was the practice of the Ecclesiastical Court, and I find that by the old practice, after the scripts were brought in the defendant was bound to say which of them he opposed, and the plaintiff then propounded in an allegation the scripts so opposed. In lieu of that practice, a declaration is now filed, which, in general terms, sets out the testamentary papers of the deceased. It seems to be a matter for consideration whether the practice should not be altered. In future, when necessary, I shall order the party propounding testamentary papers to furnish particulars as to the papers to which their declaration is intended to apply.

QUICK *v.* QUICK AND ANOTHER. March 1, 1864.—Practice.—Mode of Trial.—Refusal of Jury.—Probate Act, sec. 35.—Where the cause, from the nature of the issues of facts raised, is a more proper one to be tried before the Court itself than by a jury, the Court will, on the application of one of the parties, direct it to be heard without a jury, unless such application is opposed by the heir-at-law.

[S. C. 33 L. J. (P.) 108.]

The plaintiff propounded the contents of a lost will as uni-**[461]**-versal legatee named therein. The defendants, amongst other things, pleaded:—(1) That plaintiff was not universal legatee. (2) Revocation. (3) That the contents were not those alleged. Issue joined.

Dr. Spinks, for the plaintiff, moved that the cause might be heard by the Court without a jury. For pleadings and facts, see ante, 442.

Mr. Searle, for the defendants, asked for a special jury.

*Sir J. P. Wilde*: Under the 35th section of 20 & 21 Vict. c. 77, I have a discretionary power to order these issues to be tried by a jury, but I am not bound to do so, and I think this is a case in which it would be better that the issues should be tried by the Court rather than by a jury.

Mr. Searle: The Court has certainly a discretionary power, but the practice hitherto has been to allow a jury upon the application of either of the parties.

*Sir J. P. Wilde*: The questions raised, in my opinion, require more cogency of proof than questions of fact ordinarily submitted to juries. Juries are sworn to find the questions submitted to them in the affirmative or negative, and they sometimes give their verdict upon a mere balance of evidence. I think this a case which ought to be tried by the Court rather than by a jury, and therefore, as I have a discretion, I shall refuse to order that the issues be tried by a jury.

**[462]** SMITH *v.* HOAD AND OTHERS. March 15, 1864.—Practice.—Mode of Trial.—Will.—Question of Presumptive Revocation.—Refusal of Jury.—Where the main question to be decided was presumptive revocation of a Will, the Court (the defendants who were not heirs-at-law opposing) directed the cause to be tried by the Court without a jury.

The defendants in their declaration alleged that Benjamin Smith, the deceased in the cause, made his last will, dated the 8th of August, 1846, and duly executed the same, etc. 2ndly. That on his death the will could not be found, and has not since been found. 3rdly. That the paper writing now remaining in the registry marked with the letter A, commencing, etc, and ending, etc., is a draft will, whence the said will was engrossed for execution, and contains the exact substance of the said will executed by the said testator.

The plaintiff pleaded—1st, That the will alleged to have been executed in the declaration was not executed according to the provisions of Vict. 1, cap. 26. 2ndly. That the said alleged will, howsoever executed, was destroyed by the said deceased in his lifetime with the intention of revoking the same. Issue joined.

Dr. Spinks, for the defendants, moved for the cause to be tried before the Court and a special jury.

Dr. Tristram, for the plaintiff, asked that it should be tried before the Court without a jury. The deceased had left considerable real property in Kent in gavelkind, and the plaintiff and his brother, for both of whom he appeared, were the sole heirs-at-law of the deceased, and were entitled to have a jury, but they did not wish to have one. The main issue raised, namely, what constituted the presumptive revocation of a **[463]** will, was more fitted to be submitted to a judge than a jury, and he therefore asked the Court, in the exercise of its discretion, so to direct the cause to be tried.

Dr. Spinks in reply.

*Sir J. P. Wilde* said, that the main question being one of mixed law and fact, would be more satisfactorily determined by a judge than a jury, and he therefore directed the cause to be tried before the Court without a jury.

WILLIAMS *v.* HENERY AND OTHERS. March 22, 1864.—Postponement of Trial.—Absence of Witness.—Practice.—Quære, whether a party is entitled to have a trial postponed, in order that he may have an opportunity of cross-examining an adverse witness in Court instead of on commission.—The Court refused an application to postpone a trial from the Spring to the Summer Assizes, made on the ground that the plaintiff, a material witness on her own behalf (who was charged with having procured the execution of the Will she propounded by undue influence), and whom the defendant wished to cross-examine in Court instead of on commission, would be prevented by illness from being present at the trial, inasmuch as it was probable, from the medical testimony, that the witness would die before the Summer Assizes.

[S. C. 33 L. J. (P.) 110.]

In this case the issues raised in a testamentary suit had been ordered to be tried at the Monmouthshire Spring Assizes.

Dr. Spinks, on behalf of the defendants, moved the Court to order that the trial should be postponed until the Summer **[464]** Assizes, on the ground that the plaintiff, who it was believed would be a material witness on her own behalf, she being charged in the pleas with having procured the execution of the will propounded by undue influence, was dangerously ill, and would probably not be able to be present at the trial at the Spring Assizes, and the defendants would thereby be prevented from cross-examining her in open Court. A cross-examination on commission would not be satisfactory to the defendants, as the jury would not have an opportunity of judging of the credibility of the plaintiff's evidence by her demeanour.

Dr. Swabey, contrà: There is no precedent for such an application. No good can result from the postponement of the trial, as the witness is in such a state of health that there is little likelihood of her being present at the summer assizes.

*Sir J. P. Wilde*: There can be no doubt that the examination of a witness out of Court is not so satisfactory as an examination in open Court. The effect produced upon the minds of the jury by reading to them the depositions of a witness is undoubtedly not so cogent as vivâ voce evidence. If I saw that before the Summer Assizes the inconvenience was likely to be removed, I might be disposed to grant the motion; but it appears from the affidavits that the witness is likely to die, and I shall therefore decline to interfere. A trial may generally be postponed upon the ground of the unavoidable absence of a material witness, whom the party applying for the postponement intends to call; but this is the first time I have heard of an application for such a postponement on the ground that the applicant expects that a material witness for the other side, whom he does not himself intend to call, will be unavoidably absent at the trial. I must refuse the application.

**[465]** IN THE GOODS OF GEORGE BADENACH (deceased). March 22, 1864.—Renunciation by Executor after Intermeddling.—Renunciation invalid.—Record of it on Probate Cancelled.—Where one of several executors, who after intermeddling in his testator's estate, executed a renunciation, and probate had been granted to his co-executors, the Court, on the application of renunciant, declared his renunciation to be invalid, and directed the record of it on the probate to be cancelled.

[S. C. 33 L. J. (P.) 179; 10 Jur. (N. S.) 521; 11 L. T. 275. Discussed, *In the Goods of Bell*, 1879, 3 L. R. Ir. 230. Dictum adopted, *In the Goods of Stiles*, [1898] P. 14.]

George Badenach, late of Liverpool, Lancashire, fruit and provision broker, died at Liverpool on the 30th of September, 1863, having made a will dated the 14th of August, 1862, and thereof appointed his wife, Christina Miller Badenach, Frederick Robert Lawson, Joseph Woodall, and George William Bahr, executors and trustees. Messrs. Woodall and Bahr, on the death of the deceased, as two of his executors, appointed Mr. William Nisbett, of Liverpool, to attend at, and take charge of, the office and business of the deceased, and to look after the papers and property on the premises. They also took steps to employ an accountant to balance the testator's books, and gave directions for advertisements to be inserted in the newspapers as to the sale of the goodwill, the fixtures, and the premises; they also provided for the acceptances becoming due, and generally held themselves out as executors to persons attending on business at deceased's office. On the 16th of October, 1863, Joseph Woodall executed a renunciation of his right as well to the probate and execution of the will of the deceased, as to letters of administration with such will annexed, which renunciation was filed in the district probate registry at Liverpool; and on the 27th of October, 1863, probate of the will of George Badenach was granted to his widow, Christina Miller Badenach, power being reserved to make a like grant to Frederick Robert Lawson and George **[466]** William Bahr. Subsequently a bill was filed in the Court of Chancery of the County Palatine of Lancaster, on behalf of Walter Thompson Badenach, an infant, by Hezekiah Hingley, his next friend, as plaintiff, against all the executors of the will of George Badenach, for the administration of his estate. In this suit an order was made that Joseph Woodall and George William Bahr had accepted the trusts and executorship of the said will previous to the execution by Joseph Woodall of the renunciation, and that the real and personal estate of the deceased vested in the said Christina Miller Badenach, Joseph Woodall, and George William Bahr, as executors and trustees. Under these circumstances, Messrs. Joseph Woodall and George William Bahr wished to take probate.

Dr. Spinks now applied to the Court to declare the renunciation of the probate by Mr. Woodall to be invalid, he having intermeddled with the estate of deceased before he executed it. Under the old practice, the application would have been for leave to retract the renunciation, but by the statute 20 & 21 Vict. c. 77, s. 79, an executor who has once renounced, can no longer retract such renunciation, and therefore it is necessary that the renunciation should be declared invalid.

*Sir J. P. Wilde*: I do not think that is the object of the clause. There is nothing in it to prevent the Court from allowing a retraction according to the old practice in a case fit for it. In this case the execution of the renunciation was altogether an invalid act.

Dr. Spinks: The act done was one Mr. Woodall was not competent to do, and it would seem to be the proper course to declare it invalid.

*Sir J. P. Wilde*: The ground upon which you rely is **[467]** sufficient to sustain the order applied for. The executor renounced on a statement that he had not intermeddled in the estate of the deceased. It now turns out that he had intermeddled, and, therefore, that he renounced at a time when he was not in a position to execute the renunciation. It was an invalid act. Under these circumstances I declare the renunciation invalid, and I give leave to Mr. Woodall to take probate of the will of the deceased. The record of such renunciation on the probate must be cancelled.

FARRELL *v.* BROWNBILL. April 19, 1864.—Probate Act, sec. 73.—Grant to a Nominee of Parties interested.—The Court will grant administration, with the consent of all the parties interested in the property of the deceased, to their nominee who takes no interest in the property himself.

[S. C. 33 L. J. (P.) 185. Referred to, *In the Goods of Richardson*, 1871, L. R. 2 P. & D. 244. Explained, *Teague & Ashdown* v. *Wharton*, 1871, L. R. 2 P. & D. 361. Followed, *In the Goods of Potter*, [1899] P. 265.]

Henry Brownbill, late of Regent Road, Salford, Lancashire, gentleman, deceased, died on the 3rd of November, 1861, a widower and intestate, leaving surviving him Caroline Farrell, wife of Patrick Farrell (the plaintiff), Thomas Frederick Brownbill, Henry Brownbill (the defendant), Ellen Brown, the wife of George Brown, Elizabeth Shields, the wife of Charles Boynton Shields, and Francis Crockwell, his natural and

lawful children and next of kin, and the only parties entitled in distribution. On the 26th of December, 1861, administration of the property of the deceased was granted to Thomas Frederick Brownbill, one of the above-mentioned children, and he died on the 26th of March, 1863, leaving some of the property still undisposed of. On the 17th of April, 1863, Caroline Farrell applied to the district registry of the **[468]** Court of Probate at Manchester for a grant of administration of the unadministered estate of the deceased, Henry Brownbill, but a caveat was entered against such a grant by her brother, Henry Brownbill. Thereupon Caroline Farrell and her husband filed a petition, and Henry Brownbill his answer, in which (amongst other things) he alleged that his three sisters, Mrs. Shields, Mrs. Brown, and Mrs. Crockwell, desired that the administration should be granted to him, Henry Brownbill, in preference to its being granted to Mrs. Farrell. Other pleadings followed, affidavits were filed on both sides, and the cause was about to be set down for hearing, when the parties came to an arrangement to stop litigation, and finally the consents of all the family were filed for the appointment of Mr. Henry Francis Pankhurst, of Manchester, auctioneer, as administrator of the unadministered estate of the deceased.

Mr. A. Stavely Hill now moved accordingly. The Court had power to make a grant to the nominee of the next of kin, under the 73rd section of the Probate Act, 1857. He understood that in an unreported case (*In the Goods of Joshua Holroyd, deceased*, April, 1858) a similar application had been granted.

Dr. Spinks, for other parties, consented to the grant being made.

*Sir J. P. Wilde*: As all the parties consent, I see no objection to the application.

**[469]** LEAN *v.* VINER AND ANOTHER. April 19, 1864.—Service of Citation upon Minors.—Refusal of their Custodian to be present at Service.—Evasion of Service by Next of Kin.—Where a citation was served upon two minors at the house where they resided, but their custodian declined to be present at the service, and an attempt was also made to serve the citation on the next of kin of the minor, but failed by reason of the process-server not being permitted to see the next of kin, the Court held the service on the minors to be sufficient.

[S. C. 33 L. J. (P.) 88.]

Robert Viner died on the 26th of August, 1853, having made his will, dated March the 9th, 1852, wherein he named his wife, Henrietta Viner, and Noah Crook, executrix and executor, and the said Henrietta Viner universal legatee. On the 4th of January, 1854, the said Henrietta Viner alone proved the will, power being reserved of granting probate to Noah Crook.

Mrs. Viner died on the 16th of July, 1857, intestate, and Noah Crook had subsequently renounced probate. Mrs. Viner left surviving her Anna Viner and Catherine Viner, spinsters, her only children and only next of kin, the only persons entitled in distribution to her personal estate and effects; but no letters of administration of such effects had been granted. The said Anna Viner and Catherine Viner were minors, and resided with a Mrs. Wilkie. H. E. Goodridge was their maternal uncle and one of their next of kin. George Stuckey Lean, a partner in Stuckey's Banking Company, and as such a creditor of the deceased, had extracted a citation calling upon the said Anna Viner and Catherine Viner to cause an appearance to be entered for them, and accept or refuse letters of administration with the will annexed of the unadministered estate and effects of the deceased, or to show cause why the same should not be granted to the said G. S. Lean.

**[470]** It appeared from the affidavit of Hayward, that he had personally served the minors with the citation at the residence of Mrs. Wilkie; that he had requested that Mrs. Wilkie might be present at the service, and that he had been informed by the minors that they had requested her to be present, but that she declined to be so present, stating that she was otherwise engaged. Hayward also stated in his affidavit, that he went to the residence of Dr. Goodridge, at Bath, where he was informed that H. E. Goodridge was staying, for the purpose of serving the citation; that, on asking for the latter, the servant said she would go and see if she could see him; that she went away and another servant came and asked for his name, and he told her he came from Messrs. Stuckey, the bankers. She went away, and shortly returned, saying that Dr. Goodridge said that Mr. H. E. Goodridge must see no one, and that if Hayward went to 7 Henrietta Street, he would find some one there to attend to his business. Hayward afterwards went to 7 Henrietta Street, the office of Mr. A,

Goodridge, another son of Mr. H. E. Goodridge, and requested him to give his father a copy of the citation, and that the latter would indorse on the citation an admission that he had received it, but Mr. A. Goodridge refused to do anything in the matter.

No appearance had been entered on the citation.

Dr. Wambey moved the Court to decree letters of administration, with the said will annexed, of the unadministered estate and effects of the deceased Robert Viner to be granted to the said George Stuckey Lean, as a creditor of the deceased. The only question is, whether there has been a sufficient service of the citation. In strictness it should have been served upon the minors in the presence of Mrs. Wilkie, with whom they reside, and should also have been personally served upon their uncle Mr. H. E. Goodridge; but it appears from the affidavit, that the former had notice of the citation, but, de-**[471]**clined to be present at its service, and it is reasonable to presume that Mr. Goodridge had notice. The grant, therefore, ought to be made.

*Sir J. P. Wilde*: I think you are entitled to the grant.

Motion granted.

WILLIAMS *v.* HENERY AND OTHERS. May 3, 1864.—Probate.—Costs of opposing Will.—Costs out of the Estate.—The costs of an unsuccessful opposition of a Will allowed out of the estate, on the ground that the misconduct of those interested in setting up the Will had given reasonable ground for the litigation.

[S. C. 33 L. J. (P.) 110; 12 W. R. 1015.]

David Williams, late of Tredegar, died on the 30th of July, 1863. His widow, the plaintiff in this suit, propounded a will of the 1st of August, 1858, wherein she was named sole executrix and universal legatee. The defendants, who were next of kin of the deceased, pleaded—1. Not the will of the deceased. 2. Undue execution. 3. Incapacity. 4. Undue influence. The issues joined on these pleas were tried at the Monmouth spring assizes, 1864, before Baron Pigott, by a special jury. The jury found all the issues for the plaintiff.

Mr. Gray, Q.C., Dr. Tristram, and Mr. Dowdeswell, on behalf of the defendants, moved for a new trial, on the ground that the verdict was against the weight of the evidence, and, in the event of a new trial being refused, for an order that the defendants' costs should be paid out of the estate.

The Solicitor-General (Sir R. P. Collier) and Mr. H. James, for the plaintiff, asked the Court to pronounce for the will, and condemn the defendants in costs.

**[472]** *Sir J. P. Wilde* said that before deciding the question he should consult Mr. Baron Pigott. Cur. ad. vult.

*Sir J. P. Wilde*: This case was tried before Mr. Baron Pigott, at Monmouth assizes, and the will was established. Application was made for a new trial, on the ground that the verdict was against the evidence. Application was also made on the part of the defendants, that their costs should be paid out of the estate. I have consulted the learned judge, and I am satisfied that the will was properly established. There will therefore be no rule for a new trial. As to costs out of the estate, I am satisfied that the defendants had reasonable ground for the litigation. Within three or four days after the making of the will, the testator was, no doubt, in a state of insanity, which did not, however, continue. That fact alone, seeing that he afterwards, within six weeks or two months, was confined within a lunatic asylum, where he remained till the day of his death, was almost sufficient to lead people to doubt how soon the signs of insanity shewed themselves, and how far, at the time of the making of the will, he was of sound mind. There is evidence, therefore, in this case to make it a fair question for litigation. The defendants, therefore, ought not to be condemned in costs. Before costs out of the estate can be granted, it is necessary to go further. By the rule which I have laid down for my own guidance, it is necessary to shew, supposing the testator had in no way justified the litigation by his own act, some misconduct on the part of those out of whose pockets costs would come if paid out of the estate. In this case there is improper conduct on the part of the widow, and those acting with her, to justify me in making the order. It appeared that her trustee, Dr. Coates, a medical man, who drew and witnessed the will, had been acting with her after the testator had become subject to fits of insanity, with the view of obtaining a deed, the effect of which would be to vest all the testator's property in her. **[473]** This was in September, in which month he had been more than once in a strait waistcoat, which fact they did not communicate to the solicitor whom they

instructed to prepare the deed. The defendants were, therefore, very naturally led to suspect the fairness of the conduct of the widow and of Coates, and were induced to litigate the will. Their costs, therefore, will be paid out of the estate.

IN THE GOODS OF JOHN BREWIS (deceased). May 3, 1864.—Will.—Probate.—Incorporation.—Identification.—An unexecuted paper writing is not entitled to probate as incorporated, unless it be so described as to leave no doubt in the mind of the Court, on the circumstances proved, that it is the paper writing referred to.—The testator executed a Will on the first side of a sheet of paper, leaving his property after his wife's death to be divided in manner hereinafter named, amongst his nine children. On the second and third sides of the sheet there was a list of absolute devises and bequests to his children, not signed by the testator. The writer of the Will and of the list deposed that the list was written by him at the dictation of the deceased, and read over to him before the execution of the Will, but the attesting witnesses only saw the first side.—Held, that the intrinsic and parol evidence before the Court was not sufficient to justify it in granting probate of this list on motion.

[S. C. 33 L. J. (P.) 124; 10 Jur. (N. S.) 593.]

John Brewis, late of Dunnington, Northumberland, shoemaker, deceased, died on the 30th of August, 1862. He made a will, dated the 1st of July, 1861, and thereof appointed Joseph Brewis, his brother, and John Brewis, his son, executors. By this will he gave to his wife all his property for life, "to be divided at her decease in the manner hereinafter named," amongst his nine children. This will was written and executed on the first side of a sheet of paper. At the top of the second **[474]** side commenced the following paragraphs:—"1. I bequeath to my daughter, Elizabeth Crompton, the sum of £5. 2. I bequeath to my second daughter, Mary Brewis, £27. 3. To my eldest son, John Brewis, a freehold dwelling-house, etc.; and I leave and bequeath to my aforesaid son John, all my stock-in-trade and book-debts in the shoemaking business." The three following paragraphs made bequests to other children in the same absolute way. This part of the will was not signed by the deceased or executed. George Simpson and John Short, the attesting witnesses to the will, stated that they never saw anything but the first side of the sheet. Joseph Brewis, the brother, deposed that he wrote the will and the paragraphs which follow it, in the form and manner in which they now appear, previously to the execution of the will, and according to the instructions of the deceased; and that after the same had been so written, the will, with the addition, was read over by him to the testator, and that the testator approved thereof; that the testator fully meant and intended the said addition to form part of the said will, and that by the words "hereinafter named," the said testator meant and intended to refer to the said addition, and believed that he had referred thereto.

Dr. Tristram moved for probate of the will and of the list on the second and third pages. The list is incorporated in the will. Upon the face of the will, and without having recourse to parol evidence, it sufficiently appears that the list is referred to by the words "in manner hereinafter named among my nine children." At all events the parol evidence of the brother of the deceased, which the Court is entitled to take into consideration, shews that the testator referred to that list. (He cited *Allen* v. *Maddock*, 11 Moo. P. C. C. 444; *Van Straubenzee* v. *Monck*, ante, p. 6.)

*Sir J. P. Wilde*: I must refuse to grant probate on motion **[475]** to the devises and bequests written on the second and third sides of the sheet of paper. The will itself is properly attested and executed. By it the testator leaves everything to his wife for life; then follow the words "to be divided at her decease in the manner hereinafter named, among my nine children to and for their own use and benefit absolutely;" but on the face of the will the manner is not afterwards mentioned. By the parol evidence, it appears that the will was executed in the presence of two witnesses, who did not see the second and third sides of the sheet of paper. Joseph Brewis deposes that he wrote the will and the list of devises and bequests, and he says that the various devises and bequests were written at his brother's desire; and that he read the list over to the testator before the will was executed. Still there is no definite reference in the will to the writing on the second and third pages, because the words in the will are, that the property shall be divided at the death of the wife. If the testator so intended, the bequests on the second and third pages do not carry

out his intention. Before the Court could decide that this list is entitled to probate, it is necessary to use the words of the judgment in *Allen* v. *Maddock*, "that it should be so described as to leave no doubt in the mind of the Judge, on the circumstances as they actually existed and are proved before him, that the paper referred to is the paper propounded." I have great doubts whether this list of devises and bequests is the list referred to. This last imports that the list of devises and bequests are to take effect immediately; from the intrinsic evidence, therefore, they do not correspond with those alluded to in the will, and the testimony of the witnesses does not alter the matter. Neither the intrinsic nor parol evidence would justify me in granting this application on motion.

**[476]** IN THE GOODS OF CHARLES TURNER. May 31, 1864.—Presumption of Death.—A. was not heard of from December, 1846. More than seven years afterwards, namely, in September, 1854, he would, if alive, have become entitled, by the death of a relative, to a share in her residuary personal estate. This share had, in his absence, been paid into the account of the Accountant-General of the Court of Chancery, who, it was stated, was prepared to pay it to A.'s administrator. A. had no other property in this country.—The Court declined to make a general grant of administration to A.'s brother, on the ground that A. must be presumed to have died before the death of his relative, but made a grant limited to substantiate proceedings in the Court of Chancery.

[S.C. 33 L. J. (P.) 180; 10 Jur. (N. S.) 708. Explained, *In the Goods of Tucker*, p. 585, post. Referred to, *In the Goods of Connor*, 1892, 29 L. R. Ir. 265.]

Charles Turner, the supposed deceased, who was born in the year 1805, left his home at an early age, and for a time served on board one of her Majesty's ships of war. He was the son of Robert Turner, of Aston-on-Trent, Derbyshire. On the 21st of June, 1847, a letter from Charles Turner reached his father, dated "U. S. S. 'Princeton,' off Tampico, 8th of December, 1847, and posted as a ship letter at Liverpool on the 21st of June, 1847." No further information was ever obtained of or from him. At the time he was last heard from, besides his father, he had one brother, Robert Turner, his only near relatives. The father died on the 11th of February, 1850, a widower and intestate, and Robert Turner, the son, took administration of his estate. Mary Turner, formerly of Sawbridgeworth, Herefordshire, widow, died on the 26th of September, 1854, having, by her will, bearing date the 11th of September, 1850, bequeathed the general residue of her property to her sister, Ruth Hartley, who died in her lifetime. Such residue then became divisible among the next of kin of Mary Turner, and the children of Matilda Turner, of whom Charles Turner was one, were entitled to one-fourth part thereof. The executors of the will of Mary **[477]** Turner paid one-eighth of the residue to Robert Turner, and another eighth, amounting to £412, 10s., into the account of the Accountant-General of the Court of Chancery in the absence of Charles Turner, and it still continued under the control of the Court of Chancery. There was no other property in England belonging to Charles Turner. The usual advertisements having been inserted, and other steps taken, for the discovery of Charles Turner,—

Mr. Inderwick moved for administration of his estate to be granted to his brother, Robert Turner, on the supposition that Charles Turner had died in or since the year 1846.

*Sir J. P. Wilde* called counsel's attention to the case of *Doe* v. *Nepean* (5 B. & Ad. 86), from which it appears that a man's death is presumed after an unexplained absence of seven years. Charles Turner must be taken, therefore, to have died before the year 1854, and he never had any property to found the jurisdiction of this Court.

Mr. Inderwick contended that although the Court might, it was not necessary that it should, presume that Charles Turner died before 1854. The Court of Chancery would not pay the money except to a representative of Charles Turner. No one was interested in the fund, in any case, besides Robert Turner.

*Sir J. P. Wilde* stated, that in this case the only grant he could make was one limited ad litem to appear and substantiate proceedings in the Court of Chancery. It will be for that Court to decide whether Robert Turner was entitled to any part of the fund standing in the name of the Accountant-General, and if so in what character.

**[478]** IN THE GOODS OF DANIEL LOWE (deceased). June 7, 1864.—Will.—Construction.—Sole Executrix.—Revocation by Inference.—Where the testator in his Will appointed W. L. and W. B. executors, and in a codicil to the Will named his wife "sole executrix of this my Will," the Court held, that the appointment in the Will of W. L. and W. B. as executors was revoked.

[S. C. 33 L. J. (P.) 155. Followed, *In the Goods of Baily*, 1869, L. R. 1 P. & D. 628. Not applied, *In the Goods of Lloyd*, 1872, Ir. R. 6 Eq. 348.]

Daniel Lowe, late of Manchester, deceased, died, leaving a will and codicil. The will, which was dated April the 18th, 1860, contained the following clause:—"I appoint the said William Lowe and William Bell executors of this my will." The codicil, dated April 18th, 1864, revoked a clause of forfeiture in the event of his wife's marriage, and contained the following clause:—"I appoint my said wife sole executrix of this my said will, and in all other respects I confirm my said will." The widow of the testator applied to the Registrar of the Court of Probate at Manchester, for a grant of probate to her as sole executrix, which he refused to grant unless the executors appointed by the will renounced. This the executors declined to do.

Dr. Tristram moved the Court to decree that probate of the will and codicil of the testator be granted to the widow of the testator as sole executrix. The appointment in the codicil of the testator's widow to be "sole executrix" is tantamount to a revocation of the appointment of the executors named in the will, the words "sole executrix" clearly implying an intention that no person should be associated with the widow in the office of executor.

*Sir J. P. Wilde*: The Registrars are always very properly reluctant to take upon themselves to exclude from the probate **[479]** executors whose appointment is revoked only by inference. I think, however, here I cannot give effect to the word "sole" when the testator says in the codicil, "I appoint my wife sole executrix of my said will," without excluding the executors appointed in the will. Probate may therefore go to the widow, as prayed.

Motion granted.

RAWLINSON *v.* BURNELL AND OTHERS. June 7, 1864.—Practice.—Administration to Creditor.—Affidavit of Date of Debt.—The Court will not grant administration to a creditor without an affidavit of the date when the debt became due.

[S. C. 33 L. J. (P.) 123.]

Mr. W. Whittaker Barry moved for a grant of administration to the plaintiff as a creditor.

*Sir J. P. Wilde*: It does not appear on affidavit when the debt was incurred. According to the practice of the Court that is necessary, in order that it may be seen that the debt is not barred by the Statute of Limitations.

HERBERT *v.* SHEILL AND OTHERS. May 26 and June 14, 1864.—Married Woman.—Undue Service of Citation.—Subsequent Renunciation.—Sureties resident in Scotland.—Case *In the Goods of Ballingall*.—Where a citation has not been duly served on a married woman, the Court will act upon a renunciation subsequently executed by herself and husband.—**[480]** The Court will not accept residents in Scotland as sureties.—The case, *In the Goods of Ballingall* (ante, p. 441, note), overruled.

[S. C. 33 L. J. (P.) 142. Not applied, *In the Goods of Houston*, 1865, L. R. 1 P. & D. 85.]

Thomas Sheill died on the 1st of April, 1864, intestate, a bachelor, without parent, leaving Robert Sheill, Margaret Herbert, wife of Robert Herbert, Mary Rutherford, wife of Robert Rutherford, his natural and lawful brother and sisters by the whole blood, and John Sheill and Elizabeth Herbert, widow, his natural and lawful brother and sister by the half blood, his only next of kin.

Robert Herbert, a nephew of the deceased, and one of the persons entitled in distribution, had cited the brothers and sisters of the deceased to accept or refuse letters of administration, or shew cause why the same should not be granted to him.

The citation was served upon all the defendants, but Margaret Herbert and Mary Rutherford had not been served in the presence of their respective husbands. No appearance had been entered.

Mr. G. H. Cooper moved the Court to decree letters of administration of the effects of the deceased should be granted to Robert Herbert.

[*Sir J. P. Wilde*: Two of the defendants are married women, and the affidavits of service do not state that they were cited in the presence of their husbands.]

There is a renunciation executed by those two defendants and also by their husbands.

*Sir J. P. Wilde*: I think that will remove the difficulty. There is a misnomer of one of the defendants in the affidavit. Upon that being set right, the grant may go as prayed.

An affidavit of Robert Herbert was afterwards filed, from **[481]** which it appeared that the deceased's personal estate was sworn under £3000. That the deceased was a native of Scotland, and came to reside in England about nine years ago. That the said Robert Herbert was also a native of Scotland, and came to reside in England about the same time, and that during such period he had not had an opportunity of becoming acquainted with a sufficient number of persons in England to warrant him in requesting any two of them to become sureties for him in so large an amount, but he would be able to do so if the Court should divide the responsibility amongst the sureties by ordering four or any greater number to enter into the administration bond instead of two, and by also ordering that persons residing in Scotland should be included in such sureties.

Mr. G. H. Cooper moved the Court to direct that four or five sureties, instead of two, might execute the administration bond, and further that such sureties might be persons resident in Scotland. The Court had repeatedly limited the liability in the manner asked, under sec. 82 of the Probate Act. *In the Goods of Ballingall*, ante, p. 444 (note), it had accepted sureties under similar circumstances resident in Scotland. But this had been stated *In the Goods of Thomas Reed*, ante, p. 439, to have been done per incuriam, on the suggestion that a writ of summons might be served on persons resident in Scotland, under the Common Law Procedure Act, 15 & 16 Vict. c. 76, sec. 18.

*Sir J. P. Wilde*: I will direct that four or five sureties may enter into the bond, but as the only authority for allowing sureties resident in Scotland is the case cited, and that would seem to be founded on an erroneous view of the Common Law Procedure Act, 1852, I must reject that part of the motion.

**[482]** IN THE GOODS OF ELEANOR WEBB (deceased). May 10, June 7 and 21, 1864. —Will.—Married Woman.—Testamentary Paper in Form of a Deed of Gift.—Practice. — A married woman, having a power to appoint by Will under her marriage settlement, executed on the same day two instruments, the first purporting to be a deed of gift to her sister of all her property, the second, after reciting the contents of the first, expressing a wish that her sister should pay certain bequests out of the property. These two papers were handed by the deceased after their execution, enclosed in an envelope, to the sister in whose custody they remained till her death. It was shewn that the deceased had afterwards spoken of these papers as constituting her Will, and that the property referred to in them had remained under her control up to her death.—Held, that the papers were testamentary, and entitled to be proved.

[S. C. 33 L. J. (P.) 182; 10 Jur. (N. S.) 709; 11 L. T. 277.]

Eleanor Webb, late of Under Dean Larches Awre, Gloucestershire, died the 11th of December, 1863, a widow, having survived her husband, John Webb, who died on the 26th of April, 1862. By the settlement made on her marriage, dated the 5th of December, 1842, certain property settled upon her was directed to be held in trust, in case she survived her husband, for her executors or administrators; but in case she died in his lifetime, for such persons as she should by deed or will appoint; and in default of appointment, for such persons of her blood, living at her death, as would have been entitled under the statute if she had died unmarried and intestate. On the 22nd of September, 1849, she executed on separate papers the following documents, which were in the handwriting of Mrs. Edwards, her sister:—

"This 22nd day of September, 1859, I made this (with consent of my husband, Mr. John Webb) as a gift of all and every portion of my property, of all moneys, with interest due thereon, in the possession of the Forest of Dean Iron Company, or of my husband, Mr. John Webb, or his exe-**[483]**-cutors, with all my silver plate, and all and everything I have, to my beloved sister, Frances Edwards, to her sole use

from this day. In witness whereof I this day sign my name, in the presence of the undersigned witnesses. "ELEANOR WEBB.

"Witnesses—J. WEBB,
HANNAH RAWLINGS.

"Dated September 22, 1859."

"Having made a deed of gift to my dear sister, Frances Edwards, of all my property wherever placed, both of that in the Forest of Dean Iron Company possession, and also of my beloved husband and his executors, on this 22nd September, 1859, I am sure I can depend upon her faithfully fulfilling my wishes in the following bequests:" [The testatrix then made numerous bequests and continued:] "I feel full confidence in my sister's complying with the above most sacredly. I include with my other property all my jewellery, wardrobe, etc., which I have not otherwise disposed of.
"ELEANOR WEBB.

"Witness—J. WEBB,
HANNAH RAWLINGS.

"Dated the 22nd of September, 1859."

At the time these papers were executed, Mrs. Webb was possessed of the sum of £2600 or thereabouts, which was deposited at interest, in her sole name, with the Forest of Dean Iron Company. Part of this sum was money subject to the trusts of the marriage settlement, and part the proceeds of a legacy paid to her under the will of Mrs. Elizabeth Joliffe. She was likewise entitled to a sum of £1700 or thereabouts, the proceeds of the conversion of a portion of the trust funds secured by her marriage settlement, which had been lent to her husband, John Webb, by the trustees. Mr. Webb paid interest for the same, and such interest was from time to time added to the amount of her aforesaid investment with the **[484]** Forest of Dean Iron Company. After the death of Mr. Webb the sum of £1700 having been repaid, was also invested in the same way; so that at the death of Mrs. Webb £4500 or thereabouts, the greater portion of which represented the trust fund, remained in the possession of the Forest of Dean Iron Company, in the name of Mrs. Webb; and besides that, she was possessed of household goods, furniture, jewellery, and wearing apparel. The documents above set out were enclosed in an envelope, and delivered to Mrs. Edwards immediately after they were executed, and remained in her custody until after the death of Mrs. Webb. The deceased frequently told her sister that she thought the will should be written in a more formal manner; on one occasion the second paper was torn, but the deceased would not allow it to be destroyed until a more formal document was completed. Just previous to her death, which was somewhat sudden, Mrs. Webb again addressed her sister, saying, "When is this deed of gift to be reviewed? but I am sure it is all safe and right, and it does not matter." Mrs. Webb never re-executed or republished these documents after the death of her husband.

Dr. Swabey moved for administration, with the two papers annexed, to be granted to the sister as residuary legatee. The papers were clearly executed with a testamentary intention; and the husband had so dealt with the property of his wife as to recognize her right to dispose of it as a feme sole. All her property would, therefore, pass under the will. [He cited on the last point *Haddon* v. *Fladgate*, 1 Swab. & Trist. 48; *Fettiplace* v. *Gorges*, 1 Ves. jun. 46; and *In the Goods of Rebecca Smith, widow, deceased*, 1 Swab. & Trist. 125.]

*Sir J. P. Wilde* declined to dispose of the case without further information.

Mrs. Edwards then made an additional affidavit, in which, **[485]** amongst other things, she stated, that although the first of the two documents was in the form of a deed of gift, it was not intended by the said deceased or herself (the writer) that the same should operate or take effect as an immediate disposition of her property, or until after Mrs. Webb's death; and that the second document was prepared and executed as an addition to the first paper, and contained the deceased's wishes as to the disposal of her property after her death, and it was not intended to operate or take effect otherwise than as her last will and testament in conjunction with the first. That notwithstanding the execution of these paper-writings, none of the property of the deceased did, in fact, pass, or was considered to pass, to the deponent, or to either of the other persons named in the papers, but the whole of the property remained in the possession of Mrs. Webb until her death, and that Mrs. Webb had no intention of divesting herself of her property, or of any portion thereof, in her lifetime.

June 21.—*Sir J. P. Wilde*: I am satisfied that the two papers executed by the

deceased are testamentary. It is clear that over a large portion of the property disposed of in these papers, the deceased had a disposing power, but it is unnecessary for me to decide what property passes under them, for Mrs. Edwards is next of kin as well as residuary legatee; and in that joint character I can make a general grant to her of administration, with the two papers annexed, as together containing the will of the deceased.

In the Goods of Ann Durrant Harris, Widow (deceased). June 14, 1864.—Will.—Revocation.—Cutting Codicil.—H. duly executed a Will, appointing executors, on six sheets, by sign-[486]-ing her name at the end of each of the first five sheets, and at the foot of the Will on the sixth sheet. The testimonium clause stated that she had so executed the Will. H. afterwards executed a codicil, which was written at the back of the last sheet of the Will, containing an appointment of executors. H. subsequently cut off her signatures at the end of each of the first five sheets, and drew her pen through her signature at the foot of the Will on sheet six. There was satisfactory evidence that she intended to revoke the Will but not the codicil.—Held, that H. having cut off a portion of the Will, which, though not in fact, was treated by her as a material part of it, had done an act of revocation sufficient to satisfy sec. 20 of 1 Vict. c. 26.—Probate granted of the codicil alone.

[S. C. 33 L. J. (P.) 181; 10 Jur. (N. S.) 684; 11 L. T. 276.]

Ann Durrant Harris, widow, formerly of Winchester Place, Southwark, but late of Upper Montague Street, Russell Square, died on the 10th of September, 1863, having duly executed a will, dated the 2nd of April, 1839, and a codicil, dated the 19th of November, 1844. By the will she disposed of £500 in legacies, divided her plate and furniture amongst her children, and gave one-fourth of the residue to her daughter, Sarah Rew Roberts, and the remainder to be divided between her four sons. She appointed as executors her son John Quincey Harris, Joseph Quincey, Durrant Quincey, and John Rew, but expressed a wish that only the three last should act in carrying out the trusts of her late husband's will, of which she was sole executrix. By the codicil she gave all her furniture to the daughter, Mrs. Roberts, and revoked the appointment of the executors, John Quincey Harris, Joseph Quincey, and Durrant Quincey, but appointed the two last, together with her son-in-law, Philip Roberts. The will concluded as follows:—"In witness whereof I, the said Ann Durrant Harris, have to each sheet of this my last will and testament, which is containd in six sheets of paper, set and subscribed my hand, this 2nd day of April, 1839." It was proved that the deceased had executed her will in the way stated in this clause, but on her [487] death it was found that the signatures had been cut off the first five sheets of the will (without any word or letter of the contents of the will having been injured), and a pen drawn through the name at the end, and the following words in the handwriting of the deceased added:—"Cancelled, A. D. H, 15th December, 1857." The codicil was written on the last sheet of the will, and a portion of it covered the back of the paper on which the deceased had signed her name to the will. Mrs. Roberts in her affidavit stated that her mother was seriously ill in the latter part of the year 1857, from an affection of the heart; that she (Mrs. Roberts) having been informed that her mother's will, as it stood, if carried out, would seriously affect her brother's interest, took an opportunity, when her mother was sufficiently well, to mention and to explain the matter to her; that her mother at once agreed it would be advisable to cancel the will. She was then propped up in bed, and at her mother's request the deponent took the will from the drawers in the bedroom, and gave it to her mother; that her mother then, in her presence, cut off the signatures at the bottom of the five first sheets, and also drew the pen through her signature at the bottom of the will on the sixth sheet thereof, and wrote the words, initials, and figures thereunder, as they now appear. The deponent subsequently told her mother that the cancellation of the will in the mode adopted would not affect the codicil; and her mother remarked that she was glad that the codicil might stand. At her mother's request the deponent afterwards wrapped up the will and codicil in a piece of paper, and replaced them in the drawer.

Dr. Middleton moved the Court to decree probate of the codicil alone to the surviving executors therein named, Durrant Quincey and Philip Roberts. The testatrix, by cutting off her signatures on the first five sheets, had destroyed the

entirety of the will (*Williams* v. *Tyley*, 1 Johns. 530, 5 Jur. **[488]** N. S. 35; *Price* v. *Powell*, 3 Hurl. and Norm. 341); and she had so done, with an intention to revoke the will, and to preserve the codicil.

*Sir J. P. Wilde*: I am of opinion in this case, that probate should be granted of the codicil alone. The testatrix, having executed her will, by signing her name at the foot of each sheet, cut off the signatures on the first five sheets, and cancelled her own signature at the end on the last sheet, writing underneath that she had cancelled the will on a certain day. There can be no doubt that she did this act animo cancellandi, and it is also clear that she injured and partly destroyed the will itself. When the Court therefore has arrived so far as this, that there has been a certain act done with an intention to revoke, I ought not to strain the statute to render that act void. In *Price* v. *Powell*, the Court of Exchequer guarded itself against being supposed to lay down a general rule. Neither will I do so; but I think I ought to adopt the act of the testatrix as an act of revocation, and in so doing I shall follow the authority of the cases cited. The circumstances in *Price* v. *Powell*, which was decided under the Wills Act, are not identical with the present; but the Court there held, that as the testator had torn off the seal, which he had treated as a material part of his will, the will was destroyed in its entirety. In this case the portion of the will destroyed was not such as was necessary by law to its existence, but in the last sentence of her will the testatrix refers to those signatures as giving validity to the will, and I shall therefore hold that the will was destroyed in its entirety, and that I can only decree probate of the codicil.

**[489]** IN THE GOODS OF ANDERSON (deceased). June 28, 1864.—Administration. —Next of Kin and Widow.—The Court will, on sufficient cause shewn by the next of kin, on motion, exercise its discretionary power and grant administration to such next of kin in preference to the widow.

[S. C. 33 L. J. (P.) 149; 11 L. T. 21. Followed, *In the Goods of Stevens*, [1898] P. 126.]

William Anderson died in the hospital at Quebec, on the 18th of October, 1862, without child or parent, and intestate. He was a mariner, and his sole personal property was a sum of £89, 2s. 8d., held by the Board of Trade, London, being the amount of wages due to him, and the proceeds of the sale of his personal effects. On the 9th of January, 1864, letters of administration of his personal estate were granted by the principal registry of Her Majesty's Court of Probate to Charles Anderson, as the natural and lawful brother and only next of kin of the said deceased, who was therein described as a bachelor. It appeared, however, that the deceased had been married to a woman whose Christian name was Charlotte, that they resided together in the parish of St. Thomas-in-the-East, in the island of Jamaica, and that in the year 1846 his said wife, when he was confined to his bed by illness, sold off his household furniture, and carried away his wearing apparel, and went to Bath in the same parish, and there committed adultery, and from that time the deceased had no communication with her. He left Jamaica in the year 1851, and went to sea as a mariner. His wife also afterwards left the island, and nothing had been heard of her since, and on that account the said Charles Anderson and her other acquaintances believed that she was dead. The said Charles Anderson inadvertently swore to the oath forwarded from England to enable him to obtain the aforesaid letters of administration, not observing that his brother was therein described as a bachelor. If the said Charlotte Anderson had died in the deceased's lifetime, the said Charles Anderson was **[490]** the only person entitled to his personal estate and effects, but if she had survived the deceased he was equally entitled with her to the deceased's property.

Dr. Wambey moved the Court to revoke the letters of administration granted to Charles Anderson on the 9th of January, 1864, and to grant to him fresh letters of administration. The grant of administration to the widow of an intestate is discretionary, and the next of kin may be preferred to her for sufficient cause. Thus the widow has been passed by on the grounds of lunacy (*In the Goods of Williams*, 3 Hagg. 217), and on the ground of her misconduct in eloping from her husband and cohabiting with other men during his lifetime. (*Fleming late Worsley* v. *Pelham*, 3 Hagg. 217, n.) The misconduct of the widow in this case is sufficient ground for passing her by if she is still living.

*Sir J. P. Wilde*: In the former of those cases, the Court said, "It has been always held that the widow upon good cause may be set aside." I think there is good cause

for setting aside the widow in this case. The only difficulty I felt was, whether I ought to do so upon motion, but that case is an authority for my doing so. Letters of administration will therefore be granted to deceased's brother, but there must be justifying security.

IN THE GOODS OF SARAH ROSSER (deceased). June 28, 1864.—Renunciation and Consent.—Power of Attorney.—Where the party entitled to the grant, being resident out of England, had by a power of attorney specially authorized his brother to execute for him an instrument of renunciation and consent, the Court acted on a renunciation and consent so executed.

[S. C. 33 L. J. (P.) 155; 10 L. T. 695; 12 W. R. 1014.]

**[491]** Sarah Rosser died in the city of Bristol in June, 1850, intestate, without child, leaving William Rosser, her lawful husband, now resident in the county of S. in Pennsylvania. The deceased was entitled at the time of her death to reversionary interest under her father's will, to come into possession on the death of her mother, which took place in October, 1858. A question had been raised on the construction of the will as to her right to this property, but an arrangement had been come to between the husband and Robert Newstead Osborne, the deceased's brother, by which the husband was to receive a sum from a brother in lieu of his claim, and was to consent to the brother taking out administration to her estate. William Rosser had accordingly executed a power of attorney whereby, after reciting that he had not intermeddled in her estate, that he was resident out of England, and that he was desirous that letters of administration of the personal estate of the deceased should be granted to the said Robert Newstead Osborne, he appointed James Rosser, of L. in the county of Glamorgan, "his attorney to execute any instrument for the purpose of renouncing on the part and behalf of the said William Rosser all right and title to the letters of administration of the personal estate and effects of the said Sarah Rosser, deceased, and of consenting to a grant of letters of administration of the estate and effects of the said deceased being made to the said Robert Newstead Osborne, and also to sign and execute on behalf of the said William Rosser any other document required to obtain or perfect the grant of such letters of administration to the said Robert Newstead Osborne as aforesaid."

There was filed a certificate by J. S., a justice of the peace in the county of S. in Pennsylvania, of an acknowledgment before him by William Rosser, of the power of attorney; also a certificate by C. F., prothonotary of the Court of C. P. of the said county of S., that J. S. was an acting justice of the peace of the said county, and that his signature to the said **[492]** certificate was genuine, and a certificate of the British consul for Pennsylvania of the genuineness of C. F.'s signature to the second certificate, and of his being prothonotary of the Court of C. P.

Dr. Spinks moved for a grant of administration of the effects of the deceased to pass to Robert Newstead Osborne, on the renunciation and consent of her husband, executed under the aforesaid power of attorney. It was not the practice of the registry to accept a renunciation and consent made by a person acting under a power of an attorney from the person entitled to the grant.

*Sir J. P. Wilde*: The usual practice of the registry has been to require renunciations to be under the hand of the party entitled to the grant. In this case the party desirous of renouncing has, by a power of attorney, authorized his brother to renounce for him. Had the power of attorney been framed in general terms, the Court might have felt a difficulty in departing from the practice. But the terms of the power are so specific that I think the Court may safely accept a renunciation and consent executed by the brother.

**[493]** JEFFREYS *v.* JEFFREYS AND SMITH. April 19, 1864.—Husband's Petition.—Separation from Wife without reasonable excuse.—31st sect. Divorce Act.—The husband is bound to give the wife the security and comfort of his home and society so far as his position and business will admit, and if the Court is satisfied that the husband has failed in this duty it will, in the exercise of its discretion, refuse to dissolve the marriage by reason of the wife's adultery.

[S. C. 33 L. J. (Mat.) 84; 10 Jur. (N. S.) 572; 10 L. T. 309; 12 W. R. 809.]

This was the husband's petition for dissolution of marriage. No appearance was given. The petitioner's case was conducted by Dr. Spinks.

*The Judge Ordinary* expressed himself dissatisfied with the circumstances in which the husband separated from the wife; the petition was adjourned and the petitioner examined. The facts are sufficiently stated in the judgment. Cur. adv. vult.

*The Judge Ordinary*: This case was heard before the **[494]** Court without a jury, and the adultery proved. But, as the petitioner appeared to have left his wife for some time previous, the Court naturally required an explanation of his conduct, and for that purpose availed itself of the powers granted by sect. 43 of the Act, to examine the petitioner himself.

It appeared on his statement that he was a butler in the service of a lady who was often away from London, and for a long time resident at Brighton. That he was, however, able to visit his wife frequently, and on many occasions to pass the night at his lodgings. In this way they cohabited together from 1844 to about the year 1854, when he left her altogether, but continued to provide for her support. About four years ago, according to his account, but much longer according to a statement by the wife, he discontinued this provision. From February 1853 to the end of 1854 the petitioner and his wife lived in a house in Carlisle Street, and the co-respondent Smith, a bricklayer, lodged in the same house with them. About the end of 1854, or early in 1855, the petitioner gave up this house, and upon his wife's removal to another house, Smith followed or accompanied her. It was this circumstance, according to the petitioner's statement, which first made him suspect any impropriety between them. And though it is not easy upon the evidence to assign any exact time to the first act of adultery, the subsequent conduct of the parties leads to the belief that his suspicions were well founded. But the petitioner had deserted his wife some time before. The petitioner's aunt, who was called on his behalf, said: "I have been in Carlisle Street before he left her. He did so considerably over a year before she left that place;" an event which, according to the same witness, occurred at the end of 1854 or spring of 1855.

The question then arises, whether at that time the petitioner had good cause for thus withdrawing himself from his wife's society, and thus exposing her to temptation, against which his presence and protection might have been a safe-**[495]**-guard. He could state no reason himself except a suspicion of her chastity, which, as I have already said, did not arise till long afterwards. The other witness could only speak to some acts of familiarity which were not communicated to the petitioner, and (what is much more material) to which they could assign no date, showing them to be previous to the husband's desertion. Some letters, written by the petitioner, were also put in to show his conduct and motives; but though they contained expressions of disapprobation of his wife's conduct in other respects Smith was not mentioned, nor was adultery so much as pointed at. I am compelled to conclude that the wife's intimacy with Smith was not the true ground of the petitioner's withdrawal, and I am unable, from the evidence, to draw the inference that such intimacy really then existed.

This state of things is fatal to the petitioner's prayer for relief from this Court. If chastity be the duty of the wife, protection is no less that of the husband. The wife has a right to the comfort and support of the husband's society, the security of his home and name, and the first protection of his presence, so far as his position and avocations will admit. Whoever falls short in this regard, if not the author of his own misfortune, is not wholly blameless in the issue; and though he may not have justified his wife, he has so far compromised himself as to forfeit his claim for a divorce.

**[496]** (Before the Full Court.—*The Judge Ordinary, Channell, B.*, and *Keating, J.*)

CODRINGTON *v.* CODRINGTON AND ANDERSON. April 28, 1864.—Access to Children pending Suit.—Discretion of the Court.—Guides thereof.—On an application for access to children pending suit on behalf of the mother, the Court will require to be satisfied that the motive is natural love and affection for the children, and that the applicant has no indirect object in view; as to which, lapse of time in making the application may be material. The Court will also consider the convenience of all parties in the circumstances, and how the children would probably be affected if the order were made.

[S. C. 10 L. T. 387.]

In this case Mr. Inderwick, on behalf of the respondent, had moved the Judge Ordinary to make an order for Mrs. Codrington to have access to her children. The motion was founded on the following affidavits:—

Affidavit of Helen Jane Codrington, the respondent, sworn the 11th of April, 1864.

"I was on the 9th day of April, 1849, lawfully married to Henry John Codrington, a Vice-Admiral in Her Majesty's Navy, the above-named petitioner, at the British embassy at Florence. I lived and cohabited with my said husband at divers places, and amongst others at Malta, at Eaton Square, and at Wilton Place, both in the county of Middlesex, and there have been issue of my said marriage and cohabitation two children, to wit, Ann Jane Codrington, born on the 7th day of February, 1852, and Ellen Codrington, born on the 16th day of February, 1853. I have always had the entire care and nurture of the said Ann Jane and Ellen Codrington and have personally superintended their maintenance and education from their birth until the 5th day of November last, when they were removed as hereinafter **[497]** mentioned. On the 5th day of November last, while the said Ann Jane and Ellen Codrington were walking with Mrs. Lawless, their governess, they were forcibly taken from the said Mrs. Lawless, without my knowledge or consent, by the Rev. Joshua Rowley Watson and his wife, Emily Watson, for the alleged purpose of my said children meeting their father at the house of his cousin, Miss Bethell, 43 Upper Grosvenor Street. I received no notice or intimation, either from the said Henry John Codrington or from any person on his behalf, that the said Ann Jane and Ellen Codrington would be so removed from me as aforesaid, and I have never since the said 5th day of November last seen the said Ann Jane and Ellen Codrington, or either of them. I was, on the 14th day of November last, served with the citation and copy of petition in this suit, wherein my said husband charges me with having committed adultery with Colonel David Anderson, the above-named co-respondent, and with other persons. I caused an appearance to be duly entered on my behalf on the 24th day of November last, and on the 20th day of January last I also caused my answer to the said petition to be filed, denying that I had committed adultery as set forth in the said petition, and issue has been, as I am informed and verily believe, joined in my said answer and the suit set down for hearing. I am informed, and verily believe, that on or about the 20th day of November last, and since the institution of this suit, the said Henry John Codrington removed the said Ann Jane and Ellen Codrington out of England, and beyond the jurisdiction of this honourable Court, but where the said Ann Jane and Ellen Codrington now are, or in whose custody they now are, I am informed, and verily believe, that they are under the control of the said Henry John Codrington. I have on several occasions applied through my solicitors, Messrs. Few and Co., to the said Henry John Codrington, through Mr. Bird, his so-**[498]**-licitor in this suit, for permission to see and have access to my said children, Ann Jane and Ellen Codrington, but have been informed by the said Mr. H. P. Bird, and believe it to be the fact, that the said Henry John Codrington will not sanction the same. I have on several occasions, but not since the said 2nd day of April instant, received letters from my said children Ann Jane and Ellen Codrington. The said letters were written in very affectionate language, and in the first of such letters they expressed a wish that I should be with them, but the said letters contained no address, or any other information as to where or in whose custody my said children were, and I have no means of communicating with my said children, or of learning their address. I am desirous that my said children Ann Jane and Ellen Codrington may be re-delivered into my custody, therein to remain until further order of this honourable Court, or that I may be ordered to have access to my said children, Ann Jane and Ellen Codrington, on the 29th day of April instant, and three times in every succeeding week until the final decree or other determination of this suit, at my residence, No. 9 Cadogan Place, aforesaid, or at some other convenient place within the jurisdiction of this honourable Court, without the interference or presence of any person or persons, or that I may have access to my said children at such other times, and subject to such regulations, as to this honourable Court may seem just and proper."

Affidavit of Messrs. Few's clerk:—

"I have the management of the proceedings in this suit on behalf of the respondent. On or about the 21st day of March, 1864, the said Messrs. Few did write and send to Mr. Bird, the solicitor for the petitioner in this suit, a letter, of which the following is a true copy:—

"'March, 1864.

"'*Codrington* v. *Codrington*.

"'Sir,—The knowledge of the existence of this suit being **[499]** no longer restricted to the parties themselves, we have Mrs. Codrington's directions to take steps for

obtaining access to her children, who were removed from her charge during a short absence from home on the morning of the 5th of November, by the Rev. Mr. Watson and Mrs. Watson his wife, without the slightest notice to her, and who have been since removed by the Admiral from England to Gibraltar, where we understand they still are. Our former application for the children having been made in November last, we deem it expedient to repeat the application to you before giving notice for a motion to the foregoing effect, and we have therefore allowed the motion-day of the 22nd instant to go by, in the hope that the Admiral may agree to send for the children at once, and may authorize you to arrange with us for an immediate compliance with their mother's earnest wishes. We beg to hear from you in reply in the course of the ensuing week, as, in the event of your client refusing Mrs. Codrington's application, we shall have no alternative but to give notice of a motion in court for the ordinary access by that lady to her children.—We are, Sir, your obedient servants,

"'FEW AND CO.'

"That no reply has been received by the said Messrs. Few and Co. from the said Mr. Bird to the said letter."

Mr. Karslake, Q.C., and Dr. Spinks, contrà. They relied on the following affidavit:—

"I, Robert Cork, of 58 Lincoln's Inn Fields, in the county of Middlesex, managing clerk to Henry Peale Bird, of the same, solicitor for the above-named petitioner, make oath and say as follows:—On the same day, or the day after the removal of Ann Jane and Ellen Codrington, the two children of the petitioner and respondent, from 82 Eccleston Square, the residence of the petitioner, I personally informed the respondent the said children were in the country **[500]** with their father, the petitioner, and would continue so to remain, whereupon she informed me she had been advised she could insist upon having the custody of them, but would be content if I would, from time to time, remit to the children communications from her to them, and from them to her in reply, urging that, as the petitioner could first read her letters to the children before delivering them, and could also first read the children's replies to respondent, the petitioner could not object. To this proposition I at once consented, and accordingly, from time to time, remitted respondent's letters to the children, and the children's replies to the respondent. On the 20th day of November last the petitioner, for the purpose of preventing any annoyance to himself or children from the respondent, left England with the said two children, and proceeded to Gibraltar on a visit to his brother, General Sir William Codrington, Kt., the Governor of Gibraltar; and the said petitioner and his said two children have been from that time, and now are, resident at Gibraltar. I have been informed by the petitioner, and verily believe, that from the time of the removal of the said children from Eccleston Square, they have continued to remain and are now under the same roof with him, under and subject to his own personal superintendence and guidance. The day following the petitioner's leaving England I apprised the respondent thereof, and that he and the children were going to Gibraltar, to remain for some time the guests of Sir William Codrington. The petitioner and also the respondent has informed me that the respondent had communicated with the petitioner by post to Gibraltar, and also in like manner had from time to time communicated with the children and received from them replies thereto, and that respondent had also sent by steamer to Gibraltar various articles for the children. I have been informed, and verily believe, that the respondent has recently been wrongly informed that the petitioner was in England, and **[501]** that in consequence of such information respondent proceeded to Hampton Court, the residence of Lady Bourchier, petitioner's sister, and also to Windsor, the residence of Miss Maria Codrington, another sister of the petitioner, and that not being able to meet with the petitioner, respondent expressed her intention of going to Dawlish, near Exeter, the residence of the Rev. Joshua and Mrs. Watson, the persons mentioned in the fourth paragraph of respondent's affidavit in this matter, sworn the 11th of April instant, for the like purpose, and I have subsequently been informed and believe, that in consequence of the said Joshua and Mrs. Watson being temporarily absent from Dawlish, that a solicitor at that place has been instructed by Messrs. Few, the respondent's solicitors, to procure the address of the said Joshua and Mrs. Watson. The said Henry Peale Bird, petitioner's solicitor, on the 27th March last, left England for Gibraltar, for the purpose of consulting with the said petitioner in this matter, and he has not returned to England."

*The Judge Ordinary*: I think in these circumstances the discretion of the Court ought to be exercised in favour of the husband. The children were taken possession of by him about the time the suit was commenced. If Mrs. Codrington had applied to this Court as soon as she appeared in this suit, the children might have been detained in this country by an order of the Court; failing that, she would have been in a different position if she had come to the Court as soon as she knew they were moved out of the country: they are now at Gibraltar with their father, and she has been contented for some months with the sort of arrangement which is spoken of in Mr. Cork's affidavit. Substantially, I am now asked to order Admiral Codrington to bring or send the children to this country, and that I do not think I ought to do.

An appeal from the refusal of the Judge Ordinary was **[502]** heard before the full Court on the same materials as were before the Judge Ordinary on the 29th of April.

The Queen's Advocate (Sir R. J. Phillimore) and Mr. Inderwick, for the appeal, tendered further affidavits in reply to that of Mr. Cork, which the Court refused to read.

Mr. Karslake, Q.C., and Dr. Spinks, contrà.

*Channell, B.*: This is an appeal against a decision of the Judge Ordinary, by which he refused to make an order in favour of Mrs. Codrington for the custody of, or, in the alternative, for access to her children. I quite agree that the Court has power to make an order for access only, and that the decision of the Judge Ordinary in such a matter may be properly reviewed by the full Court, but that must be on the same evidence as was before the Court below when it came to the decision appealed from. I do not deny either that the Court will act on the presumption of innocence, and will, as a general rule, give the wife access to the children pending suit. I assume no impropriety on the part of the wife; but on the day or day after that on which the children were taken out of her custody, she had an interview with Mr. Cork, and made the sort of agreement with him, that is described in his affidavit. I do not stop to consider what the position of the wife might be, when somewhat of a fraudulent possession of the children has been obtained by the father. It is true her consent to the separation was at first on the supposition that the children were to be in England. Upon the 21st of November, she knew that they were gone to Gibraltar, and she continued to act on the former arrangement. The affidavits in support of the motion would, if unanswered, found a case for order for access; but I think they are answered by Mr. Cork's affidavit, and considering that Mrs. Codrington delayed making any application from the 21st of November until the 11th of April, I think the Judge Ordinary exercised a sound discretion in refusing to make any order.

**[503]** *Keating, J.*: I think the Judge Ordinary was right. Mrs. Codrington had full notice that the children were removed to Gibraltar, and she continued to act on the arrangement for corresponding with them up to the present month. The Queen's Advocate seemed to argue on the assumption of a vested right in the mother, which lapse of time could not affect. I quite agree that, in dealing with these applications pending suit, the Court should be careful not to make any order, nor to say anything tending to prejudice the main question.

*The Judge Ordinary*: I think the right of the wife to access to her children has been argued to exist in a much stronger degree than it really does. The word itself is not to be found in the 35th section of the Divorce Act, and the interpretation put upon the section in the case of *Thompson* v. *Thompson and Sturmfells* (2 Swab. & Tris. 402) must not be strained. The Court is to make such order "as it may deem just and proper." The obvious intention of the Legislature was to gratify the natural affection of both parties for the children. The convenience of both parties must be considered, and when the Court sees reason to believe that access to the children would be productive of injury to them, or where the Court thinks that the application is not bonâ fide, it ought to refuse it.

ELLAYTT *v.* ELLAYTT, TAYLOR, AND HALSE. March 9 and 10, April 13, and May 3, 1864.—Inconsistent Verdict.—Connivance and Damages.—New Trial.—Costs.—An inconsistent verdict is not necessarily a ground for a new trial. It would be so if it prevented the Court from ascertaining the substantial opinion of the jury. —**[504]** Where the jury found adultery, connivance on behalf of the petitioner, and assessed damages against the co-respondent at £50, the Court refused to

grant a rule nisi for a new trial, holding that there could be no doubt of the substantial meaning of the jury in their verdict of connivance, and that it was sufficiently founded on the evidence. The Court further—Held, that the co-respondent was entitled to be dismissed from the suit, and made no order as to costs between the petitioner and such co-respondent.—The wife having established a good defence in law to her husband's petition, will be entitled to have her costs taxed against him, though she may have omitted to take the precaution of having a sum of money paid into Court, or security given to meet her costs of the hearing. [S. C. 33 L. J. (Mat.) 137; 11 L. T. 44; 10 Jur. (N. S.) 1035. Referred to, *Gilroy* v. *Gilroy*, [1914] P. 128.]

This was the husband's petition for dissolution of marriage. The petitioner claimed damages from both co-respondents.

The co-respondent Taylor did not appear. The respondent and the co-respondent Halse filed answers denying the charge of adultery, and pleading condonation, connivance, and that the petitioner was accessory to the adultery; also charging him with desertion, wilful separation without reasonable excuse, unreasonable delay, and adultery.

The issues joined on these pleas were tried before the Judge Ordinary, by a common jury, on the 9th and 10th of March, 1864. The jury found that the respondent had been guilty of adultery with both co-respondents, and assessed the damages against Taylor at £10, and against Halse at £50. They also found that the petitioner had connived at, and had been accessory to, the respondent's adultery. They found that there had been a separation by mutual consent; but said that they had not made up their minds whether or not there was reasonable excuse for such separation.

*The Judge Ordinary* said, he should not press the jury for a verdict upon the issue of wilful separation without reasonable excuse, as that was a question for the Court, and took time to consider what decree ought to be pronounced.

**[505]** On the 19th of April,

Mr. Sleigh (Mr. F. H. Lewis with him) moved the Court to dismiss the co-respondent Halse from the suit, with costs. The position of a co-respondent against whom damages are claimed, is analogous to that of a defendant in the abolished action for crim. con. The consent of a husband to his wife's infidelity was a bar to such an action (*Duberley* v. *Gunning*, 4 T. R. 661). The jury having found connivance, Halse is entitled to be dismissed from the suit, and with costs. It may be a question whether he has any right to ask the Court to dismiss the petition under sect. 30 of 20 & 21 Vict. c. 86.

Dr. Swabey and Mr. Starling were for the respondent.

Mr. Serjeant Ballantine, and Mr. Clare, for the petitioner, opposed the motion, and also moved for a new trial, on the grounds, first, that the verdict upon the issue of connivance was against the evidence; secondly, that the verdict was inconsistent, the jury having given substantial damages to the petitioner, whom they also found to have been guilty of connivance. The natural inference, from the inconsistency of the verdict, is, that the jury could not have understood the meaning of the term "connivance." (They cited *Allen* v. *Allen and D'Arcy*, 2 Swab. & Tris. 107; *Marris* v. *Marris and Burke*, 2 Swab. & Tris. 530; *Sugg* v. *Sugg and Moore*, 31 L. J. (N. S.), 41 Pr. M. & A.; *Rogers* v. *Rogers*, 3 Hagg. 57; *Moorsom* v. *Moorsom*, ib. 96; *Stone* v. *Stone*, 1 Rob. 99; *Phillips* v. *Phillips*, ib. 156.)

*The Judge Ordinary*: I think that there ought to be no rule for a new trial. The jury have found a verdict, which is certainly not strictly consistent. Such an occurrence is not uncommon, and it often happens that the inconsistency of the verdict is such that the Court cannot see clearly what was the substantial opinion of the jury; the inconsistency being such as to obscure the whole decision of the jury. In such a case, **[506]** the only remedy is to submit the case to another jury. It does not, however, follow as a necessary consequence, because the finding of a jury is inconsistent, that their substantial opinion cannot be ascertained.

In this case, notwithstanding the inconsistency of the verdict, I can see no difficulty in coming to the conclusion that the jury thoroughly understood the meaning of the term "connivance," and did intend to find that the petitioner had connived at his wife's adultery. It is true that they follow up that verdict by assessing substantial damages against the co-respondents; but that assessment does not, to my mind, raise

any difficulty in ascertaining their opinion, as it may be accounted for by the view that juries naturally take of damages in such cases. They consider them not merely as a compensation to the husband for the injury done to him, but also as a means of punishing the adulterer.

Upon the question, whether the verdict upon the issue of connivance was against evidence, his Lordship stated the substance of the evidence, and declined to grant a rule.

With respect to the motion on behalf of the co-respondent Halse, that he be dismissed from the suit, the 30th section of 20 & 21 Vict. c. 85, enacts: "In case the Court, on evidence in relation to any such petition, shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has, during the marriage, been accessory to or conniving at the adultery of the other party to the marriage, . . . then and in any one of the said cases the Court shall dismiss the said petition." It seems to me that, being satisfied that the petitioner has connived at his wife's adultery, I am bound by that section to dismiss the petition, whether I am asked to do so by the co-respondent or by the respondent.

I am also of opinion that the co-respondent Halse is entitled to be dismissed from the suit, on the ground that, as the plea of connivance would have been a bar to an action for crim. con., it is a defence to claim for damages.

**[507]** Mr. Sleigh and Dr. Swabey applied for an order as to costs.

*The Judge Ordinary* reserved the question of costs, and ordered the formal dismissal of the petition to be suspended.

May 3.—Mr. F. H. Lewis, for the co-respondent Halse, moved the Court to condemn the petitioner in costs. In *Seddon* v. *Seddon and Doyle*, 2 Swab. & Tris. 640, where the petition was dismissed on the ground that the petitioner had been guilty of adultery, and of misconduct conducing to the adultery, Sir C. Cresswell, though he did not condemn the co-respondent in costs, refused to give him his costs. In that case, however, the petition was dismissed under the 31st section for conduct which was not an absolute bar to the suit, but merely a discretionary bar. The Court might in its discretion have granted a decree, and therefore it could not be said that the petitioner had no right to institute the suit. That may have been the reason for not condemning him in the co-respondent's costs. In this case the connivance of the petitioner is an absolute bar to the suit. He wantonly instituted a suit against the co-respondent, in which he could not possibly succeed if connivance was set up, and he ought therefore to pay the co-respondent's costs. In *Allen* v. *Allen and D'Arcy*, 2 Swab. & Tris. 107, where the petition was dismissed on the ground of connivance, it was dismissed with costs.

*The Judge Ordinary*: In that case the Court could not have intended to give the co-respondent his costs. He did not appear.

Dr. Swabey (Mr. Starling with him) for the respondent, asked for costs. A wife, when successful in a matrimonial suit, is entitled to all her costs. (He cited *Allen* v. *Allen and D'Arcy*; *Sopwith* v. *Sopwith*, 2 Swab. & Tris. 105.)

**[508]** Mr. Clare for the petitioner: The co-respondent having been found guilty of adultery, he is not entitled to his costs, although the petition has been dismissed on account of the husband's misconduct.

*The Judge Ordinary*: I think there is no pretence for condemning the petitioner in the costs of the co-respondent. The petitioner clearly proved the co-respondent's adultery, and the jury awarded him £50 damages, but they also found that the petitioner had connived at the adultery. The Court dismissed the petition under 30th section of 20 & 21 Vict. c. 85, and Halse was therefore dismissed from the suit. He now asks that, although the adultery charged against him was proved, the petitioner should be condemned in the costs of proving it. The case of *Allen* v. *Allen and D'Arcy* is no authority for so unreasonable an application, for it appears that there the co-respondent was not even served with the citation. Each case must depend on its own merits. There may be many cases in which it would be right to condemn the petitioner in costs, but this is not one of them.

As to the wife's costs, there is no doubt as to the principle upon which they are to be dealt with. In the Ecclesiastical Court a sum of money, sufficient to carry the wife through the suit, used to be paid to her proctor before the hearing. When this Court was established, and trial on oral evidence was substituted for trial on written evidence, a new system was inaugurated as nearly as possible conformable to that of

the Ecclesiastical Court. An order was made that a registrar should estimate the costs of the trial as nearly as he could, and the husband, whether petitioner or respondent, was ordered to deposit in the registry, or give security to the satisfaction of the registrar for that amount, and to the extent of that sum the wife, although she fails in the suit, is entitled to her taxed costs of the hearing. Moreover, she has always been entitled, when she succeeds in a suit, to be placed in the **[509]** position of any other successful suitor and to receive her costs. That principle was explained by the late Judge Ordinary in *Sopwith* v. *Sopwith, Starkey* v. *Starkey and Irwin*, and many other cases. In this case the wife succeeded in establishing the defence of connivance, and the petition was dismissed, and she is therefore entitled to all her costs. The petition will be dismissed when those costs are paid. The registrar tells me that it is the practice not to dismiss the petition until that has been done.

Petition dismissed; petitioner to pay respondent's costs. As between petitioner and co-respondents, no order as to costs.

ROGERS, OTHERWISE BRISCOE (FALSELY CALLED HALMSHAW) *v.* HALMSHAW. June 30, 1864.—Dissolution of Marriage.—Second Marriage de facto.—Decree of Nullity.—20 & 21 Vict. c. 85, ss. 56, 57.—Where a final decree of dissolution of marriage was made on the 1st of June, 1860, and the respondent and co-respondent (the petitioner being still alive) went through a ceremony of marriage on the 20th of November, 1860, no appeal having been made to the House of Lords, which was prorogued on the 28th of August, 1860, and did not meet again for dispatch of business till the 5th of February, 1861:—The Court pronounced a decree of nullity of the marriage of the 20th of November, 1860.

[S. C. 33 L. J. (Mat.) 141; 11 L. T. 21.]

This was a suit of nullity of marriage. The petition was as follows:—

1. That on the 28th of November, 1850, your petitioner, being then Sarah Tomlin Briscoe, spinster, was lawfully married to John Crane Rogers, at St. George's Church, Doncaster, in the county of York.

**[510]** 2. That on the 1st of June, 1860, a final decree, dissolving your petitioner's said marriage with the said John Crane Rogers, was pronounced by Her Majesty's Court for Divorce and Matrimonial Causes.

3. That no appeal against the said decree was at any time presented to the House of Lords.

4. That at the expiration of three months after the pronouncing of the said decree Parliament was not then sitting, and that after the expiration of the said three months Parliament did not meet again until the 5th of February, 1861.

5. That on the 20th of November, 1860, and before the time by 20 & 21 Vict. c. 85, s. 56, limited for appealing against such decree dissolving your petitioner's said marriage had expired, your petitioner, by the name of Sarah Tomlin Briscoe, spinster, was in fact, though unlawfully, married to George Frederick Halmshaw, at the parish church of St. George's, Bloomsbury, in the county of Middlesex.

6. That on the said 20th of November, 1860, when the said ceremony of marriage was performed between your petitioner and the said George Frederick Halmshaw, the said John Crane Rogers was still living.

Your petitioner, therefore, humbly prays that this honourable Court will be pleased to declare that the marriage in fact, but illegally, celebrated on the said 20th of November, 1860, between your petitioner and the said George Frederick Halmshaw, is null and void, and that your petitioner is free from all bond of marriage with the said George Frederick Halmshaw, etc., and that your petitioner may have such further and other relief in the premises as shall to this honourable Court seem meet, etc.

Personal service of the citation and a copy of the petition had been dispensed with.

The respondent did not appear.

The petition now came on for hearing before the Judge Ordinary.

**[511]** The evidence in support of the petition was as follows:—Certificates of the first and second marriages, and an office copy of the proceedings in the suit *Rogers* v. *Rogers and Halmshaw*, were put in. An officer from the House of Lords produced the original journals of the House, shewing that Parliament was prorogued on the 28th of August, 1860, and that it did not again meet for the dispatch of business until the 5th of February, 1861. There was also evidence that the minutes of the proceedings in the suit *Rogers* v. *Rogers and Halmshaw* had been searched, and that no appeal had

been presented against the final decree made on the 1st of June, 1860; that the petitioner's first husband (Rogers) was alive at the date of the second marriage; and the petitioner proved that she was the person who had married Rogers and Halmshaw, and was the respondent in the suit *Rogers* v. *Rogers and Halmshaw*.

Dr. Deane, Q.C., and Dr. Spinks, for the petitioner, cited the 20 & 21 Vict. c. 85, ss. 56, 57; and *Chichester* v. *Mure* (*falsely called Chichester*), 3 Swab. & Trist. 223.

*The Judge Ordinary* pronounced the marriage of November, 1860, to be null and void.

TATHAM *v.* TATHAM AND NUTT. June 9, 1864.—Petition for Dissolution.—Evidence.—20 & 21 Vict. c. 85, s. 43.—Under certain circumstances, the Court will exercise the power given it by the 43rd section of the Divorce Act, by calling the petitioner and examining him on oath as to some of the facts necessary to establish his petition.

[S. C. 33 L. J. (Mat.) 140; 10 L. T. 725.]

**[512]** This was the husband's petition for dissolution of marriage by reason of his wife's adultery with the co-respondent. No appearance had been entered either for respondent or co-respondent.

The adultery was alleged in the petition as follows:—"That in the months of July, August, and September, 1863, the said Emma Louis Tatham, on several occasions, committed adultery with Horace Nutt, at the petitioner's residence aforesaid, and so continued to commit adultery with him up to and on the 14th day of September."

Dr. Twiss, Q.C., and Dr. Swabey, conducted the petitioner's case. Counsel, in opening the case, said that statements were permissible to the Court which might be improper before a jury; the Court would only act on what was legally proved before it. That an important part of this case was within the knowledge of the husband only. That on the morning of the 14th of September he woke early and found that his wife had left the bed. After waiting a time he went in search of her, and ultimately found her in or on the bed of the co-respondent, who was his assistant, and slept in a room on the ground-floor (the petitioner was a medical practitioner): that a scuffle ensued in which Mrs. Tatham was struck by her husband. The co-respondent left the house the same day, and Mrs. Tatham in the afternoon.

The evidence of the servants in the house proved that a disturbance had taken place on the morning in question; that Nutt had gone off at once, and Mrs. Tatham later in the day; but none of them had seen Mrs. Tatham in Nutt's bedroom. The mother of the petitioner and the brother of the respondent proved certain admissions made by the respondent as to adultery having taken place between Nutt and herself on several occasions before the 14th of September, though she denied its having taken place on that morning.

At the end of the evidence in support of the petitioner's case,

**[513]** *The Judge Ordinary* said: It seems hard that the Court should be deprived of the best evidence which the nature of the case admits. I understand that it has been the practice of the Court not to examine the petitioner, or to allow him to be examined to prove his own petition; and I do not think that his counsel have any right to make him a witness. But as to the power of the Court so to do, the words of 20 & 21 Vict. c. 85, s. 43, are very wide:—"The Court may, if it shall think fit, order the attendance of the petitioner, and may examine him or her, or permit him or her to be examined or cross-examined on oath on the hearing of any petition; but no such petitioner shall be bound to answer any question tending to shew that he or she has been guilty of adultery." As I am clearly of opinion that this section gives the Court the power, I shall examine the petitioner in the present case, guarding myself against laying down any general rule as to what may be proper to be done in other cases, and especially in cases in which the respondent or co-respondent appear.

The petitioner was then sworn and examined by the Court. He proved the statement made by counsel in opening.

*The Judge Ordinary*: The missing link in the case is now supplied, and I pronounce a decree nisi.

[Note.—It seems a sound reason for being very sparing of the exercise of this power, that, as the law of evidence now stands, it is impossible for the respondent or co-respondent to be heard in contradiction to such evidence.]

**[514]** COCK *v.* COCK. June 15 and 28, 1864.—Wife's Petition.—Desertion.—A separation, which was never acted upon, either as to the husband and wife living apart, or as to certain stipulations about money matters contained in it, does not deprive the husband's subsequently leaving the wife against her will of the character of desertion.

[S. C. 33 L. J. (Mat.) 157; 10 Jur. (N. S.) 806; 10 L. T. 726.]

This was a petition for dissolution of marriage by a wife on the ground of adultery, coupled with desertion. The respondent did not appear. The cause was tried before the Judge Ordinary on the 15th of June.

The Queen's Advocate and Mr. Arthur Wilson for the petitioner.

The marriage was in April 1838, and the cohabitation was at Plymouth, where the husband had carried on business as a grocer and draper. In 1856 he deserted his wife and went to live with another woman in Plymouth, and in 1858 he went to America. A deed of separation was put in evidence, executed in January 1856, some months previous to the desertion. It was proved that there had been cohabitation subsequent to the date of the deed. Cur. adv. vult.

*The Judge Ordinary*: In this case the petitioner proved to the satisfaction of the Court, that her husband had deserted her in the summer of 1856. He left this country for America some months afterwards, since which time she has never seen him. It was also proved that about the same time he also cohabited with another woman as his wife.

The case stood over that I might consider the effect of a separation deed entered into by the husband and wife in January 1856, some months before he left his wife. It is **[515]** clear that any separation between husband and wife, which is the result of mutual agreement, cannot constitute the "desertion" which the statute has made a ground of divorce. But in this case the parties continued to cohabit for some months after the deed was executed, and though the husband had covenanted not to interfere with the wife, but to allow her to live separate and apart from him, she had never availed herself of that permission. On the contrary, when he actually left her, it was against her strongly expressed wish. Furthermore, the deed contained an assignment of property and stock-in-trade and goodwill of his business to trustees, who were to carry on the business, make a certain allowance to the wife, and pay over a sum of £500 to the husband. These provisions were never acted upon, the trustees did nothing under the deed, and no money was paid to either husband or wife. Lastly, the deed contained a clause to the effect, that if the stipulated £500 was not paid to the husband the whole deed was to be void.

Considering these provisions in connection with the conduct of the parties, it seems more than probable that the wife's account of it was correct, and that its real object was to defeat the husband's creditors, and save something from his insolvency, which overtook him shortly afterwards. Be this as it may, the Court cannot, contrary to the manifest fact, consider the bare existence of this deed as a proof that these parties separated by mutual consent. The separation was the act of the husband alone, and the wife is entitled to the relief she prays.

**[516]** BASING *v.* BASING. June 21 and 28, 1864.—Wife's Petition for Dissolution.—Desertion.—Where the husband has been guilty of adultery and desertion for two years and upwards, an offer to return to cohabitation can be no bar to the wife's petition on the ground of adultery and desertion, for she is under no obligation to condone the adultery.

[S. C. 33 L. J. (Mat.) 150; 10 Jur. (N. S.) 806; 10 L. T. 756.]

This was a petition by a wife for dissolution, on the ground of adultery, coupled with desertion. The respondent did not appear. The cause came on for hearing before the Judge Ordinary on the 23rd of June.

Dr. Spinks conducted the petitioner's case.

Evidence was given of marriage in July, 1851, and of cohabitation in different parts of London until September, 1853, when the respondent went to Australia, leaving the petitioner in London. He had been guilty of adultery in Australia. The evidence as to desertion is stated in the judgment. Cur. adv. vult.

June 28.—*The Judge Ordinary*: In this case the evidence showed that the respondent had left his wife and this country for Australia some years ago, under a promise that he would send for her to join him. He ceased to correspond with her in 1857, and from that time until 1862 she did not hear of him, or know where he was. He

forwarded her no money at any time after he left this country. In 1862, after having for some time carried on an adulterous intercourse with a servant living at a place called Separation, near Ballarat, in Australia, he wrote his wife a letter, in which he confessed the wrong he had done her, promised amendment, and begged forgiveness, but he made no distinct offer to provide her with a home. She rejected his overture, and filed this petition for a divorce, **[517]** on the ground of desertion coupled with adultery. The only question in the case was, whether this letter, if it amounted to an offer to renew cohabitation with his wife, could be any bar to her right to a divorce on the above ground. I am of opinion that it was not. The petitioner was not bound to condone her husband's adultery, and take him back. The necessary period of desertion was complete before the letter was written. Supposing that it were in any case necessary under the statute to show that the desertion continued up to the filing of this petition, such necessity could not apply to a case in which the husband had in the meantime created a bar to his wife's return by the commission of adultery.

M——— (falsely called H———) *v.* H———. June 25 and 29 and July 12, 1864.—Woman's Petition for Nullity.—Traverse of alleged Frigidity.—Evidence.—Practice.—M. petitioned for a decree of nullity of marriage by reason of the alleged frigidity, etc., of H., the man, owing to which the alleged marriage had not been consummated. H. traversed the alleged frigidity, etc. At the hearing H. gave evidence that the non-consummation was caused by the pain felt and distress expressed by M. when he attempted to have connection. The evidence was objected to on the ground that such cause of non-consummation should have been alleged in the answer, but the Court admitted the evidence, saying, that evidence in reply might be called, if the Court should think that the petitioner was taken by surprise.—The marriage took place in December, 1860, and the parties cohabited for nearly three years. The medical certificate stated the virginity of the woman and the apparent potency of the man. The woman gave evidence of ineffectual attempts on the part of the man, and denied any unwillingness on her part. The man gave evidence as above suggested.—**[518]** The Court held, that it could not presume impotency, under such circumstances, with a cohabitation short of three years. That if the presumption arose it was rebutted by the man's account of the cause of non-consummation, to which, along with other circumstances in evidence, the Court gave faith, and refused the decree of nullity, but suspended any positive decree on the expressed hope that the woman would return to cohabitation.

[S. C. 11 L. T. 317; 13 W. R. 108. Referred to, *Scott* v. *Scott*, [1912] P. 281; [1913] A. C. 435.]

This was the woman's petition for a decree of nullity by reason of the alleged impotence of the man.

The petition, dated the 21st of October, 1863, stated, first, the fact of marriage, on the 11th of December, 1860, the petitioner then being about twenty-four years of age, and the respondent twenty-six; secondly, that from the said 11th of December, 1860, the petitioner lived with the said H. at, etc., but that the said H. was at such time, and had ever since continued, wholly unable to consummate his said marriage by reason of the malformation of his parts of generation, and that such malformation is incurable by art or skill; thirdly, that the said H. was at the time of his said marriage, and had ever since continued, wholly unable to consummate the said marriage by reason of the frigidity and impotence of his parts of generation, and that such frigidity and impotence of his parts of generation are wholly incurable by art or skill.

The respondent's answer alleged, first, a lawful marriage on the 11th of December, 1860; secondly, denied that at the time of or since the said marriage, he, the respondent, by reason of the malformation of his parts of generation, had been unable to consummate the said marriage as stated in the second paragraph of the said petition; thirdly, denied (mutatis mutandis) as to the frigidity or impotence.

The reports of the medical examiners were as follows:—

"Feb. 25, 1864.

"We, the undersigned, have this day carefully examined the parts and organs of generation of M———, and we certify that there is no natural defect or malformation which would **[519]** prevent the due performance of matrimonial intercourse, and that there is a perfect hymen, and the said M——— is a virgin.

"Arthur Farre,
"Fred. C. Skey."

"We, the undersigned, have this day carefully examined the parts and organs of generation of H———, and we certify that there is no malformation nor defect of these parts, and that there is no appearance indicating a want of virile power.

"ARTHUR FARRE,
"FRED. C. SKEY."

The case was heard before the Court itself.

Dr. Spinks and Mr. Searle for the petitioner.

Dr. Deane, Q.C., and Dr. Middleton for the respondent.

The petitioner, in her evidence, denied that the marriage had been consummated, or that the non-consummation was owing to any refusal or apprehension of pain on her part. Besides other witnesses, Dr. Farre was called on behalf of the petitioner.

He was cross-examined as to the process of dilation being in some cases necessary to enable consummation to take place. It appeared that in the spring of 1863 the respondent had a severe attack of smallpox, which laid him up for many weeks, during which time the petitioner was most assiduous in her attention to him. The immediate cause of the breaking up of their home was, that his farming business was unsuccessful, and a sale of stock and furniture, etc., became necessary.

Dr. Deane, in opening the respondent's case, said, that the non-consummation was due to the fear expressed and resistance made and pain felt by the petitioner when connection was attempted, and that the respondent had desisted in consequence.

**[520]** Dr. Spinks objected, that on the pleadings, which merely traversed the frigidity, etc., such evidence would be inadmissible. But the Court overruled the objection, and said that if, in the course of the case, it should be of opinion that the petitioner was taken by surprise by such a line of defence, the hearing might be adjourned for evidence to rebut.

Dr. Deane contended, that the rule of triennial cohabitation had only been broken in upon when the man had either refused to submit to inspection, or had, howsoever, admitted his inability to consummate.

The respondent was then sworn, and deposed to the effect stated by his counsel.

Mr. Skey was then called, and stated in substance:—I know Mr. H——— as a patient. I and Dr. Farre examined him under an order of this Court. Previously he had consulted me professionally as to non-consummation of the marriage. I examined him carefully about two months before the examination with Dr. Farre. I examined his loins, thighs, etc. Vigorous and healthy in all respects, to all appearance. Organs of generation perfectly healthy—rather more than usually vigorous in dimensions and appearance. I also examined Mrs H———. Found her a perfect virgin. Cases of dilation are comparatively rare in the practice of any one man. I heard Dr. Farre's evidence as to the process being followed by birth of children. I have known instances in my own practice; in two cases after several years' cohabitation, and in three or four others after two or three months.

Cross-examined: I agree with Dr. Farre in saying that in this lady's case there was nothing requiring the process of dilation. I think there was more than ordinary development in the man's organs.

In answer to the Court: Consummation of marriage might have been attended with more than usual pain on the part of the wife.

**[521]** Certain evidence in reply was called to contradict particular statements made by H——— in his evidence.

Cur. adv. vult.

*The Judge Ordinary*: In this suit the Court is asked to pronounce the marriage of the parties null and void on account of the incurable impotence of the husband.

The undoubted facts are, that the marriage has not been consummated; that the lady is a virgin, and without defect; that the husband has no visible defect either—on the contrary, has every outward sign of perfect health and vigour; and that the parties had cohabited two years and ten months, during by far the greater part of which they have occupied the same bed. No proof is given of the husband's impotence; but the Court is asked to infer it from the fact of the wife being still a virgin, together with her statements that he often attempted consummation, but without effect. There was nothing in these statements to throw light upon the cause of his failure. On the other hand, the husband swore that he had desisted from enforcing his marital rights by reason of the marked repugnance of the wife. He spoke of the pain and distress she evinced on all attempts of the kind, saying that she turned cold with dread

on his approaching her, and sometimes quitted his bed. And he asserted that the non-consummation of the marriage was due only to consideration for her, and forbearance on his part. All this she denied.

It becomes the duty of the Court to weigh these conflicting statements, and having formed a belief on the facts, to apply the rules of law. But I may premise that the Court is bound for obvious reasons, before declaring a marriage void, to see its way with tolerable certainty, and proceed with a measured and jealous caution. Now, what is the rule of law? Where a visible defect of an incurable nature announces the incapacity of man or woman, the Court acts upon it without regard to the length of cohabitation (*Greenstreet* v. *Cumyns*, **[522]** 2 Phil. 10); and the like has been done when the marriage, after a cohabitation of sufficient length to overcome any temporary impedients, has clearly not been consummated, and when by the admissions or acts of the party charged, his refusal to submit to inspection, or other independent circumstances, the Court is satisfied "beyond a doubt" (I quote from 2 Rob. 618) of the incurable impotence alleged. Such were the two cases in 2 Rob. pp. 618-625. But, subject to these exceptions, there is a well-known and valuable rule adopted of old time for the guidance of the Court, that impotence shall be presumed after three years of ineffectual cohabitation, and shall not be presumed before. The rule ought therefore to be applied.

But if it were otherwise, and the Court were permitted to presume the respondent's impotence, although the three years' cohabitation have not elapsed, still such presumption must be open to rebuttal by positive and satisfactory evidence that the result is due to other causes, and in my opinion there is such evidence in this case, for I give credence to the respondent's account. It is a strong fact in favour of his truth, that although the matter was known to his wife's mother within three months of the marriage, no complaint, no expostulation was heard from the lady herself, or, what might be more natural, from either of her parents. It is also a strong circumstance that, so little were the parents inclined to impute blame to the respondent, or to question the marriage, they were parties to a proposition for the respondent to leave this country with the petitioner as his wife, to try his fortunes in Australia. The evidence of Mr. Skey, the surgeon, who spoke of the unusual suffering likely to result from the consummation of the marriage, shews the husband's account to be not improbable.

But more cogent still is the conduct of the parties just before this suit was commenced: as soon as the respondent became insolvent the parents took charge of their daughter. **[523]** It was then they first charged the respondent with not being really their son-in-law. He was not allowed to see his wife alone, and under their influence she refused to go away with her husband, although, up to this time, and indeed until within a few days of the petition being filed, her letters and actions displayed no lack of the affection which had ever subsisted between them. There has, therefore, been no opportunity afforded to consummate this marriage since the charge of impotence was first made.

Under these circumstances the Court is not prepared to accede to the prayer of the petitioner, and proposes to suspend its decree altogether for the present. This will spare the petitioner much if, after a renewed cohabitation, and all reasonable conduct on her part, she should still be in a position to complain that the marriage has not been consummated. But it may be that she will desire to question the decision in a Court of Appeal; and if so, I am prepared to pronounce a final decree in favour of the respondent. A like decree must be pronounced if she refuses to return to her husband forthwith.

PRICHARD *v.* PRICHARD. July 12, 1864.—Husband's suit for Judicial Separation.—Cruelty.—Alimony.—Though the physical effects of the wife's violence may not generally be so serious to the personal safety of the husband as the effects of his violence towards her, yet the moral result of the wife's violence to all the proper relations of married life is so serious, that the Court will interfere, and not drive the husband to the necessity of meeting force by force.—In such cases the Court will expect some provision to be made for the maintenance of the wife; overruling *White* v. *White*, 1 Swab. & Tris. 591; and *Dart* v. *Dart*, 3 Swab. & Tris. 209.

[S. C. nomine *Pickard* v. *Pickard*, 32 L. J. (Mat.) 158; 10 Jur. (N. S.) 830; 10 L. T. 789; 13 W. R. 188. Discussed, *Russell* v. *Russell*, [1897] A. C. 395.]

**[524]** This was the husband's suit for judicial separation by reason of the wife's cruelty. There was no answer to the petition. The nature of the facts are sufficiently shewn in the judgment.

Dr. Spinks conducted the petitioner's case. Cur. adv. vult.

*The Judge Ordinary* gave the following judgment:—The facts of this case disclosed great violence on the part of the wife, and great forbearance on the part of the husband. The husband seeks the protection of the Court. And I reserved the case that I might consider the extent of this violence, its probable effect on his health and safety, and the degree to which his right to relief depended on such considerations.

The cohabitation of the parties has been very long; and there is a large family, many of them now grown up. The great and unrestrained violence of the wife, her irritability on all, even the slightest occasions, her bursts of unprovoked ill-temper, and the abuse she habitually heaped on her husband, were fully proved. But she went further. She ventured from time to time to lift her hand against him. She added personal outrage to the degradation of foul language. Emboldened by a policy of passive resistance which during the last fifteen years he had adopted from religious motives, she sought to rule his conduct by threats of personal attack; and finally she thrust herself before him on the steps of a public chapel, the service of which he was attending against her will; assailed him with abuse and blows, and as the sole refuge from an unseemly struggle, drove him with ignominy home. The excitement caused by this unwomanly deed, and perhaps still more the nervous shock sustained by him in the necessary effort of self-restraint, induced a fit and much mental and bodily suffering.

On review of this evidence I am not sure that I ought to draw the conclusion that the safety of the husband is im-**[525]**-perilled. I do not believe that his wife ever intended or is likely to do him serious harm by personal violence. But violence by the husband and similar conduct in the wife hardly deserves to be considered in the same identical light. Repeated bodily injury inflicted by the stronger party portends little safety to the weaker. There is nothing to restrain a man in such encounters but himself. Where the woman is the assailant it is otherwise, and many a man may submit to the outrage of a blow, who would defend himself from real injury if imminent. But if the physical effects of violence by the wife are less, the moral results are immeasurably greater. How is it possible that submission, which is the wife's lot in marriage, can be maintained by the husband if she become his assailant? The mutually dependent duties of the marriage state suffer a hopeless confusion in such an inversion of parts. Indignity and loss of self-respect undermine the position of the husband, and release the wife from all moral control. Cohabitation on the terms of the marriage contract ceases to be longer possible. But worse than all, the man is incited to the retaliation of force, perhaps driven to violence in self-defence. And if holding its hand this Court refuse to relieve him from the perils of provocation, what security is there for the safety of the wife herself?

These considerations satisfy me that the petitioner ought to be judicially separated from his wife; and I am prepared to pronounce a decree to that effect. But some provision must be made for her; and the decree must provide for that, if it has not been already done.

Dr. Spinks stated that it had been held that this Court on such a decree had no power to make any order for alimony, or to annex any such condition to the decree for judicial separation.

*The Judge Ordinary*: I am aware of the cases to which **[526]** you allude, but I think, if there is no precedent, I ought to make one.

ROOKER *v.* ROOKER AND NEWTON. November 24, 1863.—Dissolution of Marriage.—Evidence.—Foreign Marriage.—Identity.—A marriage proved by evidence that the parties had cohabited as man and wife, and that, by the law of the country where the marriage was contracted, such cohabitation constituted a valid marriage.—Identity proved by circumstantial evidence.

[S. C. 33 L. J. (Mat.) 42; 9 Jur. (N. S.) 1329; 12 W. R. 807.]

This was a petition by the husband for a dissolution of his marriage. No appearance was entered by the respondent. An answer was filed by the co-respondent, traversing the charge of adultery. The cause was heard before the Judge Ordinary on the 18th of November.

Dr. Deane, Q.C., and Mr. Thrupp for the petitioner.

Mr. A. S. Hill for the co-respondent. Cur. adv. vult.

*The Judge Ordinary*: This was a suit promoted by the Rev. William Yates Rooker, praying for a dissolution of his marriage on the ground of his wife's adultery. The adultery was satisfactorily proved at the trial, and the case stood over, that the Court might consider whether sufficient evidence was given of the marriage.

Upon careful consideration of the evidence, I am of opinion that the marriage was sufficiently proved. It appeared from the statement of the petitioner's brother, James Rooker, that in 1842 the petitioner was resident in America, and that in [527] 1843 he came back to this country with a lady whom he introduced as his wife, and who is undoubtedly the respondent in this suit. The history of this lady, from the time of her so coming to this country in 1843, is very clearly proved by the evidence, which proves her name to be "Sarah Massenburgh Rooker," and which brings home to her the act of adultery, upon which the suit is founded. It is also very clearly proved by the affidavit of Mr. Mason that, in the year 1842, the law in the State of Virginia did not require any religious ceremony for the celebration of a valid marriage, and that the "mere cohabitation of a man and woman who proclaim themselves, and are received in society as man and wife, constituted in the eye of the law a valid marriage." Further, that in 1842 there was "no law in Virginia requiring any registry or record to be kept of a marriage," though he believed the law has been since altered. He then states, that owing to the war now being carried on in Virginia, the record of any religious ceremony of marriage, which might have taken place, cannot be obtained. He goes on to state that William Yates Rooker was many years ago, and, as he believed, in 1842, rector of Christchurch, Winchester, Virginia, and that for five years he and Sarah Massenburgh Rooker resided together as man and wife in the parsonage, and were received and acknowledged as such by himself and his family and his whole congregation.

A marriage is thus proved, and the only remaining question is one of identification. Now, identification is a question of fact, to be proved, like any other conclusion of fact, either by direct or circumstantial evidence. It was urged by the co-respondent's counsel that a direct oath to the identity of the respondent was necessary. But to hold the rule thus stringently, and to require the direct oath of a witness, would be to add nothing in many cases to the cogency of the proof, while it might add much to the difficulties attending its production. All human testimony is of uncertain stability, and [528] the direct oath of a witness is quite as capable of leading the Court astray by mistake or design as a number of independent facts pointing to one and the same conclusion.

What, then, is the evidence in this case? The identity of the petitioner as a clergyman, who was rector of Christchurch, Winchester, in 1842, is made out by the testimony of his brother, who says he did occupy that position. The identity of the respondent, who came over here as his wife in 1843 with the lady whom Mrs. Mason described as living with him as his wife at Winchester in 1842, is made out plainly, if not simply, for Mr. James Rooker says that his brother went back with his wife in 1843 to Winchester, Virginia, and after some time removed to Kentucky. This accords with Mr. Mason's testimony, who speaks of the couple as living together five years at Winchester. James Rooker stated, further, that it was in May, 1843, that he first saw Mrs. Rooker; that she had sent him a letter previously (which he had destroyed), in which she said that she had become his brother's wife, and was very anxious to be introduced to the family; that this letter was dated from Winchester, and arrived here in October, 1842, and that it was in the same writing as more letters produced at the trial, and proved to be that of the respondent: that she also sent him a newspaper (since destroyed) containing the announcement of her marriage; that she added in her letter that she was in the family-way, and could not come over till the next year to this country to see her husband's relatives. These circumstances convince the Court that the person who visited this country in 1843 as the respondent's wife was the same person of whom Mrs. Mason speaks under the same name of Sarah Massenburgh Rooker and whom he describes as the wife of the petitioner, residing at Winchester, Virginia, in 1842. I therefore pronounce a decree nisi.

Decree nisi.

**[529]** NOKES *v.* NOKES. December 8, 1863.—Alimony.—Net Income from Trade. —Income from Houses.—Deduction.—Fuller Answer.—It is not sufficient to specify the amount of net annual income derived from trade in an answer to a petition for alimony. The gross annual income, and the deductions, must be specified.—It is also necessary to specify the gross rental of houses from which income is derived, and to give particulars of the charges and outgoings, in respect of which deduction is claimed.

[S. C. 33 L. J. (Mat.) 24; 12 W. R. 443.]

The wife, in her petition for alimony, pendente lite, alleged that the husband had for many years carried on the business of a bootmaker at, etc., and from such business derived the net annual income of £200; that he was possessed of a freehold estate at King's Lynn, yielding a net annual rent to him of £50; that he was possessed of stock in trade in his said business and ready money to the value of £700.

The husband, in his answer, alleged,—"1. My net annual income derivable from my said business, after payment of workmen and assistants' wages, cost of gas, and renewal of plant and tools, is £130, less income tax. 3. My estate in Lynn consists of a few perches of land and several houses in High Street, Purfleet Street, and Coburg Street; the gross rent of the houses in High Street and Purfleet Street is £84, 19s., the interest on the mortgage thereof £45, the landlord's taxes are £8, 14s., and the cost of repairs and loss on empty houses exceeds £20 per annum; leaving a net income from the houses in High Street and Purfleet Street of £10. The rent of the houses in Coburg Street is £24, but the whole of that amount is absorbed in interest on the mortgage thereof, rates, taxes, and repairs. The rent of the land is £4, making together a net rental income from my estates of £14, and no more. The houses in High Street and Purfleet Street are old houses, and the income from all house pro-**[530]**-perty in King's Lynn is very precarious. 4. To the best of my judgment I value my stock in trade at £450."

Mr. Douglas Brown moved for an order for a further and fuller answer. The objection to the first paragraph was, that it did not state the amount of the gross income, and the deductions which the husband claimed to make from it. The objection to the third paragraph was, that it did not state the gross rental of each of the houses, and the amount of the mortgages and outgoings in respect of which deduction was claimed. The fourth paragraph ought to contain a fuller statement as to the value of the stock in trade. *Crampton* v. *Crampton*, 32 L. J., P. M. & A. 142.

Dr. Spinks, contrà.

*The Judge Ordinary*: The answer must be amended by stating in the first paragraph the amount of the gross income derived from the business, and specifying the deductions. He must also state, in the third paragraph, the gross rental of the several houses, and give particulars of the mortgage and of the outgoings, which he claims to deduct from the rent. I think the answer is sufficient as to the stock in trade.

BOWEN *v.* BOWEN AND EVANS (The Queen's Proctor intervening). February 23, 1864.—Decree Nisi.—Time for Entering Appearance and Filing Affidavits in Opposition.—Queen's Proctor.—Costs.—23 & 24 Vict. c. 144, s. 7.—Any person, and the Queen's Proctor as one of the public, may enter **[531]** an appearance and file affidavits in opposition to a decree nisi being made absolute, at any time before it is made absolute.—Where the Queen's Proctor does not intervene in his official capacity, but appears as one of the public, the Court has no authority to award him his costs.

[S. C. 33 L. J. (Mat.) 129; 13 W. R. 109.]

This was a petition by a husband for a dissolution of marriage. No appearance by respondent or co-respondent.

On November the 13th, 1863, a decree nisi was pronounced in the usual form, declaring that the marriage "be dissolved unless sufficient cause be shewn to the Court why this decree should not be made absolute within three months from the making hereof." On the 17th of February, 1864, the usual affidavits were filed, stating that three months had elapsed from the date of the decree nisi, that no appearance had been entered by any person in opposition to the decree, and that the Queen's Proctor had not obtained leave to intervene. On the 19th of February,

without obtaining leave to intervene, the Queen's Proctor entered an appearance, and filed affidavits to the effect that the petitioner had been guilty of adultery.

Dr. Spinks, on behalf of the petitioner, now moved the Court to make the decree absolute. The question is whether the Court has power to refuse to make a decree nisi absolute upon the Queen's Proctor entering an appearance and filing affidavits in opposition to the decree after the expiration of three months from the pronouncing of the decree nisi, no person having during that period taken any steps in opposition to the decree, and the Queen's Proctor not having obtained leave from the Court to intervene. If the decree had been obtained by fraud, the Court would have the power, possessed by every Court, of rescinding the decree. But in the absence of fraud, and none is suggested, my position is that under the circumstances his right to a decree absolute has accrued to the petitioner, and that the Court has now no right to receive the affidavits, or to pay attention to the appearance en-[532]-tered. The question turns upon the construction of 23 & 24 Vict. c. 144, s. 7. That section is divisible into two distinct branches: the first enables any person to shew cause against a decree being made absolute; the second empowers the Queen's Proctor in his official capacity to intervene by leave of the Court. There are, as was said by Sir C. Cresswell, in *Boulton* v. *Boulton and Page*, 2 Swab. & Tris. 551 and 628, two courses open to the Queen's Proctor. He can either intervene by leave of the Court, or come in as one of the public, under the first branch, and shew cause against the decree; but he cannot do both. Here he has not obtained the leave of the Court to intervene, but he has entered an appearance and has filed affidavits in opposition to the decree, the course which, under the 17th and 18th of Further Rules, must be taken by any person wishing to shew cause against a decree being made absolute. The Queen's Proctor therefore in this case is proceeding under the first branch of the section as one of the public; and he is therefore in no better position than any one of the public. It is only during a certain period that one of the public is at liberty to shew cause, the words of the Act being "and during that period any person shall be at liberty, etc., to shew cause." The only period mentioned in the preceding words is, "such time not less than three months from the pronouncing thereof (i.e. the decree nisi) as the Court shall by general or special order from time to time direct." No period has been fixed by any general order, for as to that the rules framed under the 7th section are silent: but the decree itself limits the time for shewing cause to three months. Three months therefore is the "period" referred to. In this case the three months expired on the 13th of February, and on the 14th the petitioner had an indefeasible right to the decree absolute, so far as concerns the first branch of the 7th section. The appearance entered and affidavits filed by the Queen's Proctor are therefore nullities, and the decree should be made absolute. If, however, the Court en-[533]-tertains any doubt as to its power to make the decree absolute, I ask it, as the question is one of much importance, not to decide it now, but to direct that it be argued before the Full Court; for if it is now decided against the petitioner, inasmuch as the Court is sitting as the Full Court, he can only appeal to the House of Lords, and this it is practically impossible for a poor man to do.

Mr. Searle for the Queen's Proctor.

Dr. Spinks objected that he had no right to appear.

*The Judge Ordinary*: He is going to appear, in order that he may argue that he has a right to appear. It is all one question.

Mr. Searle: If the statute had directed that at the expiration of three months from the pronouncing thereof a decree nisi should, ipso facto, become absolute, there would have been some weight in the argument for the petitioner. But a decree can only be made absolute by the act of the Court. It is a fallacy to assume that the "period" mentioned in the statute is three months from the date of the decree nisi. It is the interval between the pronouncing of the decree and its being made absolute.

*The Judge Ordinary*: The language of the second branch of the section seems to me to be a conclusive answer to Dr. Spinks's argument. Under that section "at any time before the decree is made absolute any person may give information to Her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or expedient." Now, a decree may not be made absolute until some time after the expiration of the three months from the date of the [534] decree nisi. It would be futile to give

information to the Queen's Proctor after that period had elapsed, if the petitioner had already an absolute right to the decree.

Mr. Searle: That would be so if the words "may thereupon take such steps as the Attorney-General may deem necessary or expedient" would enable the Queen's Proctor, under the direction of the Attorney-General, to shew cause under the first branch against the decree as one of the public, and they are capable of that construction. *Boulton* v. *Boulton and Page* is a distinct authority that the Court may refuse to make the decree absolute. In that case, the facts of which were somewhat like the present, after the expiration of three months from the pronouncing of a decree nisi, the Court was moved upon the usual affidavit to make the decree absolute. On behalf of the respondent and co-respondent, and founded upon affidavits sworn by them, an application was made to the Court to postpone making the decree absolute, on the ground that a trick had been practised upon the Court, and that the petitioner had been guilty of bigamy. The Court refused to make the decree absolute, and directed that the Queen's Proctor should be informed that the affidavits had been filed. It was contended that the respondent and co-respondent had no right to shew cause against the decree being made absolute. Sir C. Cresswell said: "The decree cannot be made absolute without the act of the Court. I shall certainly not make it absolute until the matter has been cleared up." Ultimately the petition was dismissed. That decision is a conclusive answer to the argument that a petitioner, at the expiration of three months from the date of a decree nisi, has an indefeasible right to a decree absolute, if there has been no appearance in opposition to the decree, and the Queen's Proctor has not obtained leave to intervene. It shews that the Court, if it has reason to suspect that there are circumstances in the case which demand inquiry, will refuse to make **[535]** a decree absolute until they are cleared up. The intention of the Legislature seems clearly to have been to empower any person, and especially the Queen's Proctor, to intervene at any time before a decree nisi is made absolute. If the terms of the decree are inconsistent with the provisions of the Act of Parliament, the latter must prevail.

Dr. Spinks, in reply: Under the second branch of the 7th section the Queen's Proctor, undoubtedly, may in his official capacity intervene at any time before the decree is made absolute, even though three months from the date of the decree have expired; but the leave of the Court is a condition precedent to such intervention, and that he has not applied for. The argument on the other side simply comes to this:—the Queen's Proctor might, by adopting a certain course, have opposed the decree after the expiration of the three months. The answer to that argument is, that he has not taken that course, but has proceeded under the first branch of the section.

*The Judge Ordinary*: I suppose the Queen's Proctor intends, under the direction of the Attorney-General, to apply for leave to intervene.

Mr. Searle: The Queen's Proctor is acting under the direction of the Attorney-General.

*The Judge Ordinary*: I suppose he intends to ask for leave to intervene. The Court would not act merely upon these affidavits without further inquiry.

Dr. Spinks: The affidavits shew that there has been laches on the part of the Queen's Proctor in not coming sooner to the Court. They were dated on the 5th of February, and were filed on the 19th. The Queen's Proctor is not entitled to any **[536]** more favour than a party to the suit. If the Court refuses to make the decree absolute, I ask that the petitioner may have leave to answer the affidavits filed by the Queen's Proctor, and that the whole matter may be argued before the Full Court.

*The Judge Ordinary*: I am clearly of opinion that the hands of the Court are not tied in the way Dr. Spinks has contended. The construction he puts upon the statute is, in my opinion, contrary to the letter of the Act and to the obvious intention of the Legislature, which was, that up to the last moment an opportunity should be given to every person, and especially to the Queen's Proctor, of preventing a decree nisi for dissolution of marriage being made absolute if there were grounds for rescinding it. I am, therefore, clearly of opinion that I cannot now make the decree absolute.

With respect to the other part of the application, I do not propose to give any directions at present as to the mode in which this question is to be brought to an issue. It may be that the Queen's Proctor, acting under the direction of the Attorney-General, will ask for leave to intervene, and have certain issues tried.

Therefore I cannot anticipate the course that may be taken hereafter; but this I may say, that if the Queen's Proctor does not within a reasonable time take some definite course, and the petitioner again brings the matter before the Court, I shall then know how to deal with it. Meanwhile I cannot confine him to any particular course, because it is a question for the discretion of the Attorney-General, whether the Queen's Proctor should apply for leave to intervene in the suit in order that he may prove his case.

May 3.—The Attorney-General (Mr. Hannen with him) moved that the petition might be dismissed. The affidavits establish that the petitioner has been living in adultery with one Sarah Hughes, and that he has had a child by her since the decree **[537]** nisi was pronounced. The House of Lords has decided in *Latour* v. *Latour and the Queen's Proctor* (House of Lords Cases), that the Court has no power to give the Queen's Proctor his costs, unless collusion is proved. As there is no proof of that, I do not ask for costs.

Dr. Spinks, for the petitioner, said that he could not resist the motion.

*The Judge Ordinary*: The decree nisi must be rescinded and the petition dismissed. The Queen's Proctor has not intervened under the latter branch of the 7th section of the 23 & 24 Vict. c. 144, on the ground of collusion, but is shewing cause against the decree under the first branch; there will, therefore, be no order as to costs.

Petition dismissed. No order as to costs.

CHILD *v.* CHILD. March 22, 1864.—Practice.—Dissolution.—Time for entering an Appearance.—An appearance may be entered in a matrimonial suit at any time within twenty-one days of the service of the citation.

[S. C. 33 L. J. (Mat.) 156; 12 W. R. 992.)

This was a petition for dissolution of marriage. More than eight days had elapsed since the service of the citation, and no appearance had been entered.

Mr. Searle, for the petitioner, moved for directions as to the mode of trial.

*The Judge Ordinary*: The motion is premature, as **[538]** twenty-one days have not elapsed since the service of the citation and petition.

Mr. Searle: There is no time fixed in the rules for entering an appearance. The 14th rule is that an answer is to be filed within twenty-one days of the service of the citation; but the form of the citation is, "that within eight days of the service of this on you, inclusive of the day of such service, you do appear in our said Court," etc.

*The Judge Ordinary*: It is the practice to allow twenty-one days from the service of the citation for entering an appearance.

Motion rejected.

CARSTAIRS *v.* CARSTAIRS, DICKENSON AND OTHERS. March 11 and June 14, 1864.—Co-respondent.—Not Guilty of Adultery.—Petitioner not Condemned in Costs.—Property of Wife found Guilty of Adultery.—Settlement.—Sect. 45 of Divorce Act.—Petitioner's Costs.—Where the co-respondent has acted with imprudence with a person whom he knew to be a married woman, the Court will leave him to pay his own costs.—Where the respondent (the wife) became entitled in possession to £500 after the decree nisi, but before the decree absolute was pronounced, and was proved to have been guilty of very gross misconduct, and to have put the petitioner to heavy expense by opposing his petition, the Court declined to order a settlement of any portion of the fund on the petitioner in satisfaction of part of the costs incurred, as the wife had no other means of subsistence. If the sum had been larger in amount, a settlement would have been ordered to be made under sect. 45 of the Divorce Act.

[S. C. 33 L. J. (Mat.) 170; 10 L. T. 696; 12 W. R. 1015. Referred to, *Millar* v. *Millar*, 1869, L. R. 2 P. & D. 15.]

This was an application on the part of the petitioner, under **[539]** the 45th section of the Divorce Act, for the settlement on him of a portion of his wife's property.

In this case the Court, on the 11th of March, 1864, pronounced a decree nisi on the ground of the respondent's adultery with Dickenson, one of the co-respondents, and condemned him in costs.

The jury, by their verdict, found that the two other co-respondents, Billson and Biggs, had not been guilty of the adultery charged; whereupon,—

Dr. Swabey, for Billson, and Mr. Bridges, for Biggs, applied for the petitioner to be condemned in the costs incurred by them respectively.

Dr. Tristram, contrà.

*The Judge Ordinary*: I do not think I ought to make the petitioner pay the costs of either of these co-respondents. They both knew that the respondent was a married woman. Neither of them appears to have been on friendly terms with or to have visited her husband; and yet, according to the evidence, Billson was seen as late as between nine and ten o'clock one night walking about with the respondent in Malling Wood, under circumstances which would not unnaturally excite suspicion, and Biggs was also seen one night, in the dark, standing with her at a stile in a field under circumstances also suspicious. There was not sufficient evidence to establish adultery against either of them, yet their imprudence has been such, that I shall leave them to pay their own costs.

On the 12th of April, 1864, the respondent, by the death of her father, became entitled in possession, under her grandfather's will, to property of the value of from £450 to £500. By the affidavit of the petitioner, it appeared that the co-respondent Dickenson had absconded, and was without means **[540]** to pay the costs; that the respondent's costs already paid by the petitioner amounted to £105, 16s. 6d.; that his own costs would amount to from £350 to £400, and that during the last year of his cohabitation with his wife, she had, without reasonable ground, incurred debts, which he had paid, to the amount of £100. The petitioner, who was a commercial traveller, had been obliged to borrow £500 to meet these expenses.

Dr. Tristram moved the Court to direct a settlement to be made on the petitioner out of the property to which the respondent was now entitled in possession, in satisfaction of a portion of the costs incurred by him in the suit. The wife ought to provide for her costs out of the fund. He also asked the Court to make her contribute £200 towards the costs she had put her husband to by her vexatious opposition to his petition.

*The Judge Ordinary*: Is the wife entitled to any other property besides the property you ask me to settle?

Dr. Tristram: No

Mr. Serjeant Tindal Atkinson, contrà.

*The Judge Ordinary*: I very well recollect the circumstances of this case. It is one in which, from the facts proved at the trial, the husband is entitled to the sympathy of the Court; and if the property to which the respondent is now entitled were larger in amount, or if it were shewn that she had other means of subsistence, I should have made an order in favour of the husband. But it was the rule of the House of Lords not to pass a Bill for divorce until the husband had made some provision for the wife. I don't think, therefore, I ought to deprive the respondent of any portion of this fund, which is all she will have to live upon.

Motion rejected.

**[541]** SQUIRES *v.* SQUIRES. June 29, 1864.—Cruelty.—Pleading.—Evidence.—A petition alleged that the respondent had, by neglecting the petitioner, by violently pushing her, by striking her with his fist, by depriving her of food, and otherwise, treated her with great cruelty. There was no appearance.—The Court refused to admit evidence under this allegation, in support of the charge of cruelty, that the respondent had infected the petitioner with venereal disease.

[S. C. 33 L. J. (Mat.) 172; 10 Jur. (N. S.) 756; 12 W. R. 1028.]

This was a petition by a wife for a dissolution of marriage on the ground of adultery coupled with cruelty. The respondent had not appeared. The cause came on for trial before the Judge Ordinary without a jury.

Dr. Spinks for the petitioner.

The only charge of cruelty in the petition was contained in the 4th paragraph, which was as follows:—"4th. That on divers occasions, during the said seven weeks of their cohabitation, the said Charles Squires, by neglecting her, by violently pushing her, by striking her with his fist, by depriving her of food, and otherwise, treated your petitioner with great cruelty."

Dr. Spinks put some questions to one of the witnesses examined in support of the petition, for the purpose of proving that the respondent had infected the petitioner with the venereal disease.

*The Judge Ordinary*: There is no charge in the petition of cruelty of that nature.

Dr. Spinks: The evidence is admissible under the general **[542]** charge, "and otherwise treated your petitioner with great cruelty." If the respondent had appeared and asked for particulars of that charge, they would have been ordered, and then evidence of this act of cruelty would not have been admitted unless it had been specified in the particulars; but no particulars having been asked for, the Court ought not to exclude the evidence. The object of inserting a general charge is to enable the party to give evidence of acts not specified in the petition.

*The Judge Ordinary*: I quite agree that words such as these are inserted in petitions for the purpose of allowing a certain flexibility in the admission of evidence as to small details which cannot be expected to be found in the petition, and cannot reasonably be supposed to have been present to the mind of the person who drew the petition at the time when it was prepared. But this is a plain and distinct act of cruelty, which must have been known to the petitioner when the petition was drawn. If this was admissible, any evidence would be admissible under a general charge. I reject the evidence.

The evidence as to other acts of cruelty was sufficient, and a decree nisi was pronounced.

WELLS *v.* WELLS AND HUDSON. June 28 and July 5, 1864.—Wife Guilty of Adultery.—Alimony pendente lite.—Verdict.—Decree nisi.—Alimony pendente lite ceases when the wife's adultery is conclusively proved: that is, on the pronouncing of the decree nisi in cases heard **[543]** before the Court itself, or in cases tried before a jury, when the time has elapsed for moving for a new trial before the Court; and if that is refused by the Court, when the further time for appealing from such refusal has elapsed.

[S. C. 33 L. J. (Mat.) 151; 10 Jur. (N. S.) 755; 10 L. T. 696. Distinguished, *Dunn* v. *Dunn*, 1888, 13 P. D. 91. Referred to, *Bass* v. *Bass*, [1915] P. 19.]

In this case, on the 16th of March, 1864, a decree nisi for dissolution of marriage, on the ground of the wife's adultery, had been pronounced. Alimony pendente lite had been paid up to the 12th of March.

June 28.—Dr. Tristram moved for an attachment against the husband for non-payment of alimony pendente lite since the 12th of March. The question is whether alimony pendente lite ceases to be payable after a decree nisi has been pronounced. He submitted that it continued until the decree is made absolute, for until then there is a lis pendens. In *Latham* v. *Latham and Gethin*, 2 Swab. and Tris. 298, Sir C. Cresswell certainly held that it ceased when the decree nisi was pronounced, upon the ground that such decree as between the parties was final, but it would seem from what he said in *Laxton* v. *Laxton*, 30 L. J. 208, that he afterwards doubted the correctness of that decision. If alimony pendente lite ceases when the decree nisi is pronounced, the wife may be left for a long time destitute, as the Court has no power, until it is made absolute, to make any provision for her.

[Mr. G. H. Cooper, amicus curiæ, referred to *Nicholson* v. *Nicholson and Ratcliffe*, 3 Swab. & Tris. 214. In that case, after a verdict finding a wife guilty of adultery, a decree nisi was pronounced. A new trial was subsequently granted, and Sir C. Cresswell said that no fresh application for alimony pendente lite was necessary, but that it would continue to be payable.]

The Queen's Advocate (Sir R. J. Phillimore) and Dr. Spinks, contrà: There is no precedent or principle upon which it can be **[544]** held that after a decree nisi has been pronounced on the ground of the wife's adultery, alimony pendente lite continues to be payable. *Latham* v. *Latham* is a distinct authority to the contrary, and is not inconsistent with *Nicholson* v. *Nicholson*, for there the effect of granting a new trial was to rescind the decree nisi and put the parties in the same position as if no decree had been made. The suit therefore continued, and whilst it continued it was reasonable that alimony pendente lite should be payable. [*The Judge Ordinary*: It is difficult to reconcile that case with *Latham* v. *Latham*, for if alimony pendente lite had ceased to be payable on the decree nisi being pronounced, how could it revive without a fresh order for its payment? Sir C. Cresswell, however, held that no fresh order was necessary.] Upon principle, when a wife has been pronounced guilty of adultery, her right to be maintained by her husband, and therefore to alimony pendente lite, ceases. In *Holt* v. *Holt*, a husband, who had obtained a sentence of

divorce à mensâ et thoro on the ground of his wife's adultery, petitioned for a dissolution of his marriage. Sir C. Cresswell held that the wife was not entitled to alimony pendente lite, upon the ground that after the sentence of the Ecclesiastical Court her husband could no longer be compelled to support her. In the Ecclesiastical Court, alimony pendente lite continued to be payable after appeal and until final sentence was pronounced, the effect of the appeal being to put the sentence in abeyance.

Dr. Tristram, in reply: In *Stoate* v. *Stoate*, 30 L. J. 108, a wife had had permanent alimony allotted in a suit by her for judicial separation. The husband afterwards obtained a decree nisi for dissolution of the marriage on the ground of her adultery. Sir C. Cresswell refused to discharge the order for the payment of permanent alimony, and ordered the motion to stand over until the decree nisi should be made absolute or be reversed. In *D'Oyley* v. *D'Oyley and Baldri*, 29 L. J. **[545]** 163, alimony pendente lite was allotted after a verdict finding the wife guilty of adultery.

*The Judge Ordinary*: The cases referred to do not seem consistent, and I must take time to consider the matter: the title of the husband to relief is a different thing from the ascertainment of the wife's guilt. In cases tried by a jury, I should say that the question as to the fact of adultery is closed not when the jury have found a verdict, but when the time for moving for a new trial has elapsed

Cur. adv. vult.

July 5.—*The Judge Ordinary*: This case has raised for final settlement a point of practice which gave rise to several decisions by my most able predecessor. These decisions were hardly uniform or satisfactory to his own mind; and had the question been presented to him in all its bearings as a general one, it would no doubt have received a full and satisfactory solution before now.

When it comes to be seriously considered, I think it is manifest that the difficulties which have been urged in argument are entirely based on conclusions too closely drawn from the name of the thing. "Alimony pendente lite" is the allowance to the wife which the Court enforces from the husband during the time that their respective rights are in contest in the Court. But it does not necessarily follow, that such allowances should in all cases continue so long as any portion of what is technically called the suit is pending. For it is a principle in this and other courts, that so soon as a wife shall have been false to her marriage vow, she loses the right she had to her husband's support. Keeping this principle in view, it would be nothing less than making the name of the thing paramount to its substance, if the Court were to hold that after adultery proved the alimony must still be paid because the "lis" continued "pendens." I am therefore of opinion that, although other undecided matters in controversy may **[546]** keep the suit alive, the right to alimony perishes on the final conclusion of the wife's guilt.

When the cause is tried before the Court itself, that final conclusion will have been reached when the Court declares its judgment on the facts, for in this Court such judgment is final. And if an appeal carries the case forward, it also carries it into another court competent to allot alimony if it pleases.

On the other hand, when the cause is tried by a jury, the verdict is not final, it is capable of review in this Court, and may be set aside; in such case, therefore, alimony ought to continue until the time for moving for a new trial has passed, and when such motion has been made and failed in the first instance, until the further time for bringing it under the cognisance of the Full Court has also elapsed. But such alimony can only be allowed, if paid or enforced, while the question of a new trial is still open. So that if, as in the present case, no motion for a new trial has been made, the wife cannot afterwards seek its enforcement at a time when the verdict against her has become final. If the practice at common law of suspending judgment until the time of questioning the verdict had elapsed had been followed in this Court, the final determination of the wife's guilt would be coincident with the decree nisi; but some convenience to the parties is achieved by the contrary practice in this Court, and I do not propose to alter that practice.

I will only add, that the conclusions at which I have arrived will make it desirable to reconsider the rule which allows a month to the defeated party to move the Court to set the verdict aside, although the time allowed at common law is but four days; and when further rules are framed for the Divorce Court, I think provision may be made for an amendment in this respect.

**[547]** WILLIAMS *v.* WILLIAMS. July 26, 1864.—Suit by Wife.—Desertion.—The facts which constitute desertion, as ground for a decree, vary with the circumstances and mode of life of the married persons. So long as a husband treats his wife as a wife, by maintaining such degree and manner of intercourse as might naturally be expected from a husband of his calling and means, he cannot be said to have deserted her.

This was the wife's petition for dissolution on the ground of adultery and desertion. As to the latter point, it appeared that the petitioner and respondent were both in domestic service, and the nature of the intercourse which was maintained between them is sufficiently shewn in the judgment

The petition was unopposed.

Dr. Spinks conducted the petitioner's case.

Cur. adv. vult. as to the sufficiency of proof of desertion.

*The Judge Ordinary* gave the following judgment:—The question in this case is whether the respondent has been guilty of "desertion of his wife without reasonable excuse for two years or upwards."

It is not easy to define "desertion." To desert is to forsake or abandon. But what degree or extent of withdrawal from his wife's society constitutes a forsaking or abandonment of her? This is easily answered in some cases, not so easily in others, for the degree of intercourse which married persons are able to maintain with each other is various. It depends on their walk in life, and is not a little at the mercy of external circumstances. The position of some, and indeed the large majority, admits of that intimate cohabitation which completely fulfils the ends of matrimony. Short of that, all **[548]** degrees of matrimonial intercourse present themselves in the world. To some it is given to meet only at intervals, though of frequent recurrence. It is the lot of others to be separated for years, or to meet only under great restrictions. The fetters imposed by the professions of the Army and Navy, the requirements of commercial enterprise, and the call to foreign lands which so frequently attends all branches of industrial life, make these restrictions often inevitable. But perhaps on no class do they fall so heavily as on those who devote themselves to domestic service for the means of life. And yet matrimony is made for all; and matrimonial intercourse must accommodate itself to the weightier considerations of material life.

From these considerations it is obvious that the test of finding a home for the wife and living with her, is not universally applicable in pronouncing "desertion" by the husband; nor does any other criterion suitable to all cases present itself to the mind of the Court. To neglect opportunities of consorting with a wife is not necessarily to desert her. Indifference, want of proper solicitude, illiberality, denial of reasonable means, and even faithlessness, are not desertion. Desertion seems pointed at a breaking off, more or less completely, of the intercourse which previously existed. Is the husband, then, bound to avail himself of all means at his disposal for increasing the intimacy of this intercourse, on the peril of being pronounced guilty of desertion? Or, on the other hand, is he free from that peril so long as he maintains any intercourse at all? These are the two extremes. The former proposition is easily solved in the negative. It may be doubted whether the latter ought not to be answered in the affirmative. But thus far, at least, the Court may go, and it is enough for the decision of this case: so long as the husband treats his wife as a wife by maintaining such degree and manner of intercourse as might naturally be expected from a husband of his calling and means, he cannot be said to have **[549]** deserted her. And this I think the respondent did. He had before marriage adopted the calling of domestic service. Within a few months after marriage, his small stock of money being exhausted, his wife also went into service. In 1849, five years after the marriage, they set up a business in Mount Street. But it failed, and after two or three years we find them both recurring to domestic service for a livelihood. From that time to the present the wife has been continuously in service, and the husband from time to time the same, having no other occupation. For the last ten or eleven years the wife has been in one and the same situation, and during all that time up to July last the husband has been in the habit of visiting her from time to time. When the family with whom she resides are in London, his habit has been to come to the house perhaps once or twice a week, and for the last three, perhaps four, years he has met her regularly (when in London) every Sunday at the house of a mutual friend. Now this is the species of intercourse which might be expected between persons in the position of

domestic servants. And to call it desertion, would be in some cases to render the duties of matrimony impossible to persons of that class.

It has been urged that the petitioner's earnings were sufficient to enable them to start in business again, and that she offered so to apply them, but surely the husband was not bound to accept that offer. Nor has the Court the means of investigating the motives of his refusal. He might well hesitate to embark again in business after their former failure, and the home which his wife wished him to provide could only have been maintained by success. It is therefore impossible to refer his rejection of this overture to a determination not to cohabit with his wife. It is also urged that since the autumn of 1861 he is proved to have cohabited with another woman. If this had withdrawn him from his wife's society, it would have constituted a case of "adultery coupled with desertion." But the contrary is the case, and the evidence **[550]** shews that he continued to visit his wife as frequently as before.

The Court is therefore bound to declare that the respondent is not proved to have deserted his wife without reasonable cause; but as the adultery is clearly proved against him, the petitioner is entitled to a decree for a judicial separation.

M——— (falsely called B———) *v.* B———. July 2 and 26, 1864.—Petition for nullity.—Impotence.—Lapse of Time and Indirect Motives.—M. married B. in August, 1853, and slept in the same bed with him for about two years, when, at his request, she occupied a separate room, but lived in his house till June, 1863, when she left it, and in the early part of the present year petitioned for a decree of nullity, by reason of B.'s impotence. The medical evidence shewed her to be a virgin. B. did not submit himself to inspection; but the Court held that the lapse of time, coupled with indirect motives in bringing the suit (mentioned in the judgment), disentitled the petitioner to the relief sought.

[Referred to, *Scott* v. *Scott*, [1912] P. 281.]

This was the woman's petition for a declaration of nullity of marriage by reason of the man's impotency.

The respondent had not appeared nor submitted himself to medical inspection.

Dr. Deane, Q.C., and Dr. Spinks conducted the petitioner's case.

The medical certificate as to the petitioner's condition was as follows:—

"London, May 10, 1864.

"We, the undersigned, testify that we have this day in-**[551]**-spected the parts of generation of M. A. M. (otherwise B.), and we find that there is no malformation nor impediment on her part to prevent the consummation of the marriage; that there is a hymen, and that we believe the said M. (otherwise B.) to be a virgin.

"(Signed) ARTHUR FARRE,
"ROBERT GREENHALGH."

The evidence of the petitioner was, by order of the Court, given on affidavit to the following effect:—

"The marriage took place on the 18th of August, in the year 1853, the petitioner being about twenty-nine years of age, the respondent two or three years older. On the night of the said 18th day of August, 1853, the said R. B. made an attempt to consummate the said marriage by carnal copulation, but was altogether unable to do so, and after making such attempt, he said in a distressed and desponding tone, 'M. A., I think our marriage cannot be consummated to-night; there are certain feelings and passions which people ought to have when they are married, which I confess I have not,' or words to that effect, and he immediately added, apparently in great sorrow, 'My whole life shall be devoted to you, and if you wish, I will submit to the examination of a medical man.' But this I did not like the idea of, and therefore did not press him to do so, not at all understanding the matter myself, and hoping and feeling assured that in the course of time all would come right. He also at the same time, as expressive of his sorrow for my position, said several times, 'Poor M. A., I am very sorry for you,' or words to a similar effect. From the day of the marriage till the 2nd of June, 1863, when I finally left his house, I continued to live with the said R. B., and during the first two years, or thereabouts, I regularly slept with him, and have always been willing and anxious to receive his conjugal embraces, but notwithstanding such my desire, since the said 18th of August, 1853, the said R. B. has never **[552]** made any attempt, or exhibited any inclination, or shewn any disposition

to consummate the marriage; but, on the contrary, has exhibited coldness and indifference towards me, and that the same has never been in any way consummated. About two years after our marriage, the said R. B. expressed a wish that we should occupy separate sleeping apartments, alleging as a reason that I kept him awake by my loud snoring and other similar excuses. I was desirous of continuing to sleep, or at all events to occupy the same room with him, if only for the sake of appearances; but he persisted in his desire of occupying separate rooms, and we have since done so even when visiting at the houses of my brother-in-law, which were the only places we have visited. Instead of the said R. B. devoting his whole life to me, as promised by him, he has for the most part behaved with the greatest coldness and indifference, and has given his time and bestowed his attention upon any friends of his that might be staying with us in preference to me; but this, his unkind and unnatural treatment, I have borne with, and have not left him out of consideration for his character and position as a clergyman, until he latterly, contrary to my expressed wish, introduced into the house a servant boy we had in the garden, and had him in the drawing-room with him during a great portion of his evenings, and, indeed, spent most of his time with him, alleging, on my remonstrating with him, that he was giving him instruction with a view to his being some day a Scripture reader, when, feeling acutely his conduct towards me, and the indignity thus cast upon me, he refusing to put the boy out of the house again into his proper place in the garden, and feeling also the great wrong he had done me in marrying me at all, I could not remain any longer with him, and accordingly on the 2nd day of June, 1863, I separated from him. Upon leaving I went to the house of my brother-in-law, the said R. H., and have continued to reside there ever since; but in the month **[553]** of February last, on the occasion of my paying a visit of a week or so at the house of a friend residing close to Nottingham, I heard that divers reports were circulated relative to my leaving, to the effect that it was owing to my violent temper, and that I was mad and not fit to live in the house, and other things of a similarly annoying nature, which reports were very distressing to me, knowing them to be altogether untrue; and I thereupon consulted with my friends as to the course I should adopt, and was strongly advised by them to take legal advice, and to endeavour, if possible, to obtain a dissolution of my marriage, whereupon I consulted my solicitor, Mr. Butlin, of Nottingham, who suggested that before anything was done, the opinion of counsel should be taken as to whether the circumstances of my case would warrant my petitioning this Honourable Court for a decree to dissolve my marriage, and I instructed him to take such opinion. Whereupon he laid my case before counsel for his opinion, which was favourable to my petitioning for a declaration of nullity of marriage, and I say that until I read that opinion, I was not aware that the circumstances entitled me to such a decree."

Dr. Farre being called as a witness, said that the expression of belief in the certificate was his mode of stating his opinion, about which he had no doubt in the present instance.

*The Judge Ordinary* then called counsel's attention to the latter part of the petitioner's affidavit, which suggested other reasons than a mere feeling of the injury sustained by reason of the man's impotency, and to the lapse of time since the remedy accrued, adding, that it could not listen to the suggestion that the petitioner was ignorant of the remedy. Would counsel leave the case as it was, or had they further evidence to offer? Some of the circumstances in *H.* v. *C.* (1 Swab. & Trist. 605, affirmed on appeal to the House of Lords) **[554]** are different. The impotency was not so conclusively proved. There had been no application for a monition on the respondent to submit to inspection, and the parties had been separated for a much longer time before the suit was brought.

Dr. Deane: Delay has not generally been pressed against the woman as against the man in such cases. *H*——— v. *C*——— is the only case, as far as we know, in which the delay was held to disentitle a woman to the remedy; indeed, if the Court is satisfied that the marriage is really null and void—a mere ceremony—it is not easy to see how it can go into such considerations, though no doubt such was the course taken in *H*——— v. *C*———.

The brother-in-law of the petitioner, at whose house she had been staying, was then called.—He said that the petitioner came to his house in June, 1863, to live there; that he was aware of the reasons she had for leaving her husband when she came, but she did not ask his advice as to her course of conduct till the early part of

this year; that the petitioner's father and mother had both been dead for more than five years or thereabouts.

In answer to the Court.—I first knew of this matter about the year 1860, soon after my own marriage, from my wife. Mr. B. never came to my house to see his wife after she came there in 1863. I was on good terms with Mr. B. till she came to my house, then I rather took her part. She complained that this boy supplanted her almost in every way. Early this year reports were spread about the neighbourhood that she was mad, and that her husband could not live with her. On her own account and that of my family, I thought it advisable that these proceedings should be taken. I should say that the petitioner and respondent had been on terms of coldness, but not on uncourteous terms, before the question about this boy. No medical man attended the petitioner **[555]** after she came to my house. She was in good health, and has remained so. She is about forty.

Cur. adv. vult.

*The Judge Ordinary* gave the following judgment: This is a suit of nullity of marriage, promoted by the wife on the ground of the husband's impotence.

It has been decided in cases of this sort that the Court will not grant relief, unless the petitioner seeks that relief with a certain promptitude, and under the real pressure of the grievance upon which the suit is founded, to the exclusion of any collateral object. It is unnecessary to enumerate the decisions in which these principles are found; they prevailed in the Ecclesiastical Court, have been acted upon by this Court, and were directly affirmed by the appellate tribunal in the late case of *Castleden* v. *Castleden*, 9 House of Lords Cases 186. The Court is therefore bound by them, and it only remains to consider how far this case falls within them.

The marriage took place on the 28th of August, 1853, and the parties lived together from that time continuously until the summer of 1863. During this ten years no complaint was made and no step taken, but at the end of that period the petitioner left her husband's house in consequence of a disagreement between them in reference to a servant boy who had been employed in the garden, and whom the respondent insisted upon bringing into the house and instructing. The petitioner complained that he spent too much time with this boy, but the remonstrance being disregarded, she left the house on the 2nd of June, 1863, and proceeded to that of her brother-in-law. This gentleman was called as a witness, and stated that she did not on her arrival complain of the grievance on which this suit is founded, and of which he had been aware as long ago as 1860, but only of the respondent's conduct in reference to the servant boy. He further stated that at that time no advice was asked or offered as to **[556]** proceeding in this Court, nor was the matter suggested or considered between them. So far from this, both the petitioner herself and the witness agreed that the suit was not thought of until the month of February or March in this year, and then only by reason of reports which were circulated that the petitioner had been obliged to leave her home because she was mad. "It was to silence these reports," said the witness, "that I recommended this suit."

This state of facts, in my opinion, brings the case within the dictum of Lord Campbell, in the House of Lords: "According to the Cases, lapse of time, coupled with an indirect motive, is considered of itself an absolute bar" (9 H. of L. Cas. 191). I feel therefore constrained to dismiss this petition.

**[557]** HANCOCK *v.* LIGHTFOOT. July 14, 1864. — Administration de bonis non.—Grant to one of two Administrators to represent a Trust Estate.—D. H., executor and universal legatee of J. H., died, having proved the Will, intestate. Administration of her effects was granted to her three children, one of whom had since died, and the other, E. L., was in Australia. A representation to J. H. was required for the purpose of surrendering a term of a certain property, of which he had been a trustee.—The Court, on E. L. being cited and not appearing, granted administration to F. H. (her co-administrator) of the effects of J. H. with his Will annexed.

[S. C. 33 L. J. (P.) 174; 10 Jur. (N. S.) 758.]

John Hancock died, leaving a will, dated the 19th of September, 1843, wherein he named his wife, Deborah Hancock, sole executrix and universal legatee.

On January 20, 1844, probate was granted by the Prerogative Court of Canterbury to Deborah Hancock as executrix, who died, in May, 1845, intestate.

On the 12th of August, 1845, letters of administration of her effects were granted to her three children, Mrs. E. Lightfoot (wife of C. Lightfoot), Miss F. Hancock, and William **[558]** Hancock (since deceased). Mrs. Lightfoot was now permanently settled in Australia. All the property in which the deceased John Hancock was beneficially interested had been administered; but at the time of his death, as trustee for a Mrs. Randall and her children, he was entitled to certain leasehold property, situate at Devonport, held for a term of years determinable upon lives, and perpetually renewable. A renewal of the lease had become necessary, and in order to obtain it the surrender of the existing term by the personal representative of John Hancock was requisite.

On the 26th of May, 1862, after the death of W. Hancock, a citation was extracted by Miss F. Hancock, calling upon her sister, Mrs. Lightfoot, to enter an appearance, and to accept or refuse letters of administration, with the will annexed, of the unadministered effects of the deceased John Hancock, or to shew cause why such letters of administration should not be granted to her, F. Hancock, alone. An abstract of this citation had been advertised in three London newspapers, but no appearance had been entered by or on behalf of Mrs. Lightfoot.

Dr. Spinks moved the Court to decree that letters of administration, with the will annexed, of the unadministered effects of the said John Hancock should be granted to Miss Hancock.

[*Sir J. P. Wilde*: When a joint administration is granted to two persons, they together make but one administrator. Can one of them act without the other? Would not the proper course be for Miss Hancock to renounce, and then that administration should be granted to the *cestui que* trust?]

Dr. Spinks: In a case cited in Coote's "Probate Practice" (4th edit.), p. 80, *In the Goods of Crook*, Sir John Dodson decreed that letters of administration should be granted to one of three administrators without notice being given to the **[559]** others, one of them being lunatic, and the other resident abroad.

*Sir J. P. Wilde*: Upon that authority, I think administration may be granted in the form in which it is asked, namely, to Miss Hancock alone.

Motion granted.

IN THE GOODS OF WILLIAM ALLEN (deceased). November 3, 1864.—Administration.—Grant to Party without Interest.—Grant per saltum refused.—A. died in 1831, an infant, leaving his father, B., the only person entitled to his estate. B. died, leaving a Will, in which he named his wife, C., and D., executors, and C. universal legatee. B.'s Will had never been proved. C. died, leaving a Will, in which she named executors, and all her children, excepting E., residuary legatees. D. renounced probate of B.'s Will, and the executors and residuary legatees of C. renounced their right to administer to A.'s estate and consented to the administration going to E.—The Court held it could not make the grant to E. unless he first represented B.

[S. C. 33 L. J. (P.) 1; 13 W. R. 106.]

William Allen died on the 1st of December, 1831, an infant, leaving Charles Allen, his father, him surviving. Charles Allen died on the 11th of April, 1839, without having taken out administration to the said William Allen, leaving a will, of which he appointed his wife, Elizabeth Allen, and C. Smith, executors, and his said wife universal legatee. This will had never been proved. Elizabeth Allen died in 1862, leaving a will appointing executors, and bequeathing her residuary estate amongst all her children, with the exception of her eldest son, **[560]** C. H. Allen. C. Smith had renounced his right to probate of the will of Charles Allen; and the executors of the will of Mrs. Elizabeth Allen, and all her younger children as residuary legatees, had filed renunciations of their right to administer to the estate of William Allen, and consents to administration of her estate being granted to their eldest brother, C. H. Allen.

Dr. Tristram moved for administration of the effects of William Allen to be granted to C. H. Allen. It was true that C. H. Allen took no interest in the estate of his brother, William Allen; but all the parties who took an interest in it having renounced, and consented to the grant going to him, his want of interest was no objection (*In the Goods of George Johnson*, 2 Swab. & Trist. 595).

*Sir J. P. Wilde*: He should represent his father, Charles Allen, before he can ask for a grant.

Dr. Tristram: He is not in a position to represent him. The executors, and after them the residuary legatees, of Mrs. Elizabeth Allen, would be proper parties to represent Charles Allen. They have not done so, and have not renounced their right to do so, and he cannot compel them. They are willing to allow him to represent William Allen.

*Sir J. P. Wilde*: I cannot make the grant to C. H. Allen per saltum. If he is not entitled to, or cannot entitle himself to represent Charles Allen, he cannot take the grant to the deceased.

**[561]** IN THE GOODS OF ELIZA SMITH (deceased). November 3, 1864.—Will.—Bequest of Residue.—Construction.—A testatrix, by her Codicil, bequeathed to A. "her wardrobe, trinkets, and other things."—Held, upon the construction of the Will and Codicil, that this bequest did not pass the residue.

Eliza Smith, spinster, died on the 30th of September, 1864, having duly executed a will, dated July 16, 1864, and a codicil, dated August 1, 1864. The will, so far as is material, was as follows:

"This is to certify that I, Elizabeth Smith, on this 16th day of July, 1864, bequeath to John Townsend Smith, of 12 Down Street, Piccadilly, the sum of £50 Bank Stock in the new £3 per cents., out of which sum my funeral expenses are to be paid; also, to Mrs. David Smith the jet shawl-pin; also, to my cousin, Mary Warner Smith, a brooch—'The descent from the cross'—and pearl ring . . . . and to Eliza Catherine Smith everything else, viz. my gold watch, dressing-case, clothes, trinkets, as a token of gratitude to her for her unwearied kindness and sympathy shewn to me during my long illness."

The codicil was as follows:—"Circumstances having taken a turn, the money remains to John as before; my wardrobe, trinkets, and other things, to my aunt. In the event of her decease before mine, then all my effects to her two daughters, Eliza Catherine Smith and Mary Warner Smith."

Dr. Spinks moved for letters of administration, with the will and codicil annexed, to Mrs. C. Smith, the aunt of the testatrix named in the codicil, as residuary legatee.

*Sir J. P. Wilde*: A residuary bequest ought to shew an **[562]** intention to bequeath all the personal property to which the testator may be entitled, which has not been already disposed of by the will. From the way in which the testatrix in the will and codicil has used similar expressions, viz. "everything else and all my effects," I cannot come to the conclusion that by the bequest of "other things" she intended to pass the residue. I cannot grant the motion.

IN THE GOODS OF THOMAS TOOMY (deceased). November 8, 1864.—Will.—Delivery of Fund in Testator's Life.—Payment of Debt out of Fund.—Executor according to Tenor.—A direction to a person to pay debts or funeral expenses, not out of the general estate, but out of a particular fund, will not constitute him executor, according to the tenor.—Semble, when a testator, in his lifetime, hands over to a person a sum of money, and directs him (out of it) to pay the expenses consequent on his sickness, and, in case of death, his funeral expenses, such money does not pass under the Will.

[S. C. 34 L. J. (P.) 3; 13 W. R. 106. Applied, *In the Goods of Love*, 1881, 7 L. R. Ir. 178.]

Thomas Toomy, on the 18th of July, 1864, made his will in the following words:—

"Memorandum, July 18, 1864.

"I have this day handed over to my friend, Mr. William Winn, a one hundred pound draft, and nine pounds in gold—in all one hundred and nine pounds—being all I possess, either real or personal property. Being sick and in some danger of death, I will and devise that the said Mr. Winn do take control of the said sum, pay all expenses consequent on my sickness, and in case of death, funeral expenses; after which the residue, if any, be handed to the Very Rev. Canon **[563]** Browne, Catholic Church of St. Ann's, Leeds, to be used at his discretion for the benefit of my relations.

"Testator, THOMAS TOOMY.

"Signed by the testator and two witnesses, in the presence of each other, this date, July 18, 1864.

"Witnesses { WILLIAM MACHIN, LEWIS M. SHORE."

The testator died on the 20th of July.

William Winn, in pursuance of the above direction, paid the debts incurred by the testator's illness and his funeral expenses.

Dr. Wambey moved for a grant of probate to William Winn as executor according to the tenor. Although the testator handed over the money to Winn in his lifetime, he must have intended that he should not make the payments out of it until after his death, and must have considered it as remaining his own money until his death.

*Sir J. P. Wilde*: The grant cannot be made. First, I very much doubt whether, as the whole of the property mentioned in the memorandum was dealt with and handed over to Winn by the deceased in his lifetime, it can be said to pass under this paper. Secondly, according to the practice of the Court, a direction to a person to pay debts or funeral expenses, not out of the general estate, but only out of a particular fund, does not constitute him an executor according to the tenor (*In the Goods of Giles Davis*, 3 Curt. 748). The mere fact of the testator's saying that the sum of money out of which the debts and funeral expenses were to be paid was all the property he possessed, is not sufficient to make it a payment out of the general estate; for it might turn out that he was entitled to other property, at the time unknown to him or in reversion.

Motion rejected.

**[564]** DOWNWARD *v.* DICKINSON AND OTHERS. IN THE GOODS OF JOSEPH CHUNE (deceased). November 8, 1864.—Administration with Will annexed.—Grant to Assignee in Bankruptcy of Residuary Legatee.—Grant to Assignee in Bankruptcy of a Creditor.—A. died leaving a Will, whereof he appointed B executor and residuary legatee. B. proved the Will, and afterwards became bankrupt, and subsequently died intestate, leaving part of the estate of A. unadministered. At the time of his bankruptcy B. was a creditor of A.—The Court granted administration, with the Will annexed, of the unadministered estate of A. to the assignee in bankruptcy of B. in the character of assignee of a residuary legatee.—Semble, that the assignee would also have been entitled to the grant as assignee in bankruptcy of a creditor of A.

[S. C. 34 L. J. (P.) 4; 10 Jur. (N. S.) 1084; 11 L. T. 641.]

Joseph Chune, late of Coalbrookdale, in the county of Salop, died on the 20th of December, 1857, having made a will, and thereby appointed his brother George Chune and T. M. Luckock executors and residuary legatees in trust, and the said George Chune and his sister Alice Chune residuary legatees. Probate of the will was granted in February, 1860, by the district registrar at Shrewsbury, to the said George Chune, power being reserved to the other executor. Mr. Luckock had since renounced probate and letters of administration with the will annexed, and Alice Chune had renounced letters of administration de bonis non with the will annexed. George Chune died on the 1st of October, 1863, a widower and intestate, leaving seven children, together the only persons entitled in distribution to his personal estate and effects. No letters of administration of such effects had been granted. George Chune was, on the 14th of March, 1862, adjudicated a bankrupt, and George Downward, the plaintiff, was appointed assignee of his estate on behalf of his creditors.

**[565]** A suit had been instituted in Chancery for the administration of Joseph Chune's estate, and, from accounts taken therein, it appeared that the balance of £248, 3s. 4d. was due from the estate of Joseph Chune to George Chune, as executor. Before the chief clerk's certificate had been given, George Chune died. A citation had been issued at the instance of the said George Downward, calling upon the children of George Chune to accept or refuse letters of administration, with the will annexed, of the unadministered estate and effects of Joseph Chune, or shew cause why the same should not be granted to the said George Downward. The citation had been duly served, but no appearance had been entered.

Dr. Wambey moved the Court to decree letters of administration, with the will annexed, of the unadministered effects of the deceased Joseph Chune, to be granted to the said George Downward, as a creditor of the estate of the deceased. The question is, whether a grant can be made without first getting a representation to George Chune. Such a representation is unnecessary. If A. dies a widower and intestate, and leaving B. his only child, and B. dies a widower and intestate, leaving C. his only child, C. must represent B. before he can get administration to A., for this reason, that the property of B. does not vest in C. until B.'s death. Here the property

of George Chune upon his bankruptcy vested in the plaintiff, and his title is in no way dependent upon George Chune's death; indeed, during his lifetime he might, as standing in the shoes of a creditor of the deceased, have obtained the grant now prayed. A representation to George Chune is therefore unnecessary. (Cooke's "Probate Practice," pp. 46, 84; see also *Drewe* v. *Long and Others*, 1 Ecc. & Adm. 391.) The plaintiff has been advised by equity counsel that he has a lien on Joseph Chune's assets for any balance which may be found due to George Chune as executor of Joseph Chune's **[566]** will, or to the plaintiff as assignee of George Chune, and that such right of lien carries with it a right to repayment, and that such rights have precedence and priority over the rights of any other creditor of Joseph Chune, or of any legatee under his will. Cur. adv. vult.

*Sir J. P. Wilde*: This was an application for a grant of administration, with the will annexed, of the unadministered effects of Joseph Chune to George Downward as a creditor of the estate of the deceased. Joseph Chune made a will, appointing his brother George Chune an executor and residuary legatee. Upon the death of Joseph Chune, George Chune proved the will, and afterward became bankrupt, and George Downward was appointed his assignee. At the time of his bankruptcy George Chune was undoubtedly a creditor of the deceased; he has since died, and the present application is made by his assignee in bankruptcy. The application was made in the first instance to the registrars in the long vacation, and they referred the matter to the Court. It appears to be the well-founded practice of the Court not to grant administration to the assignee of a creditor. In *Baynes* v. *Harrison*, Deane R. 15, Sir J. Dodson says:—"It would be a dangerous practice to decree administration of an intestate estate to persons who had brought up a debt after the death of the deceased." Such reasoning is not applicable to the case of the assignee of a creditor where he is assignee in bankruptcy. It is not necessary, however, to consider the difference between the two cases, because George Chune was not only a creditor of the deceased, but also residuary legatee under his will, and in that latter character his assignee is clearly entitled to the grant.

**[567]** MOORE *v.* WHITEHOUSE. November 4 and 29, 1864.—Will.—Probate of Copy.—Proof.—Where a person, who has himself destroyed a testamentary paper after the death of the alleged testator, asks for probate of the substance thereof, as contained in a copy or otherwise, the Court will expect the fullest and most satisfactory proof of all the facts necessary to be established.

[S. C. 34 L. J. (P.) 31; 11 L. T. 458.]

In this case the plaintiff asked for probate of the will of a Mrs. Whitehouse, as contained in an alleged copy thereof, the original having been destroyed under the following circumstances:—The deceased died a widow in the year 1862. By the will in question, bearing date the 30th of January, 1861, Clara Whitehouse, a daughter of the deceased, was made sole executrix and universal legatee. Thomas James Moore, who afterwards married Clara Whitehouse, deposed to having drawn the will at the desire of the deceased, and to its having been duly executed. It was in his possession after the deceased's death, when dissatisfaction was expressed by his brother-in-law and others of the family at the mode in which the property had been left, in consequence of which Moore divided the property as under an intestacy and destroyed the will, having first made a copy thereof.

Circumstances made it advisable to have a personal representative of Mrs. Whitehouse, and the present suit was instituted. The evidence of one of the attesting witnesses fell short of due execution.

Dr. Spinks for the plaintiff. Cur. adv. vult.

November 29.—*Sir J. P. Wilde* gave the following judgment:—The proof of a will which has been destroyed is at all times a matter to be approached by the Court with jealousy and mistrust. It is **[568]** doubly so in this case; for the will in question was made by Thomas James Moore, who was then engaged to be married to Clara Whitehouse, the universal legatee under it. This Thomas James Moore became also one of the witnesses to the will, and was the person who, three months after the death, himself destroyed the will after procuring what he alleges to be a a copy of it to be taken.

Before such a paper can receive the sanction of the Court, the last trace of reasonable doubt or suspicion must be dispelled by trustworthy evidence. The evidence in

this case falls far short of that end. Mary Butler, the only disinterested witness, and who attested the will, distinctly declares that Mrs. Moore asked her to sign a paper; that she did not say what it was; that Mrs. Moore fetched it downstairs, and laid it on a table, and asked her to sign it; that she did so, and that nothing was done before she signed it. If this account is true, there was no due execution of a will according to the statute. Nor does the account of Clara Whitehouse (now Mrs. Moore), who was present, cure the defect. Further, the proof that the paper propounded is a copy of that of which the witnesses are speaking rests on the evidence of the same Thomas Moore.

The Court cannot, after such evidence, pronounce for a paper not in existence, which is to be supported, if at all, by the oath of the sole party interested, and who himself destroyed the original.

ROBSON *v.* ROBSON. December 6, 1864.—Plaintiff and Defendant.—Security for Costs.—Mode of Trial.—The plaintiff applied for administration to B. on presumption of death: **[569]** the defendant appeared in answer to a citation advertised in newspapers, and alleged that he was B.—The Court refused to make any order on the defendant to give security for costs.—Semble, the general rule at common law, that the defendant should not give costs, might not apply in all cases in the Court of Probate where the nominal position of plaintiff or defendant depends on the mode in which the cause commenced.—The Court refused an application on behalf of defendant to order the issue to be tried by a jury, the plaintiff objecting thereto.

[S. C. 34 L. J. (P.) 6; 10 Jur. (N. S.) 1243; 11 L. T. 459.]

This suit was instituted for the purpose of obtaining administration of the estate of George Robson, late of H.M.S. "Vindictive," who was alleged not to have been heard of by his family since 1843, and, therefore, was supposed to be dead. In the month of July, 1864, the Court, upon an ex parte application made by Cecilia S. Robson, the plaintiff, granted administration to her as an executrix named in the will of James Robson, the father of the said George Robson, who died in 1857. Before the grant under seal was issued from the registry a caveat was entered on behalf of George Robson, the defendant, and on the caveat being warned, an appearance was entered on his behalf as the George Robson alleged to be deceased. A declaration had been filed by the plaintiff, alleging that the said George Robson had died, in or about the year 1843, a bachelor and intestate, to which the defendant pleaded that he did not die in or about the year 1843, or at any other time.

Dr. Spinks moved for directions as to the mode of trial, and also that the defendant be ordered to give security for the costs of the cause, and in default thereof that all contentious business should be stayed. This was a very singular case; there were several circumstances which appeared in the affidavits filed in the previous motion, which shew that the defendant is not the man he alleges himself to be; he was in Australia and had authorised solicitors to appear for him, **[570]** and being without the jurisdiction of the Court ought to give security for costs. This was a matter within the discretion of the Court, and there was not the same distinction in this Court between plaintiff and defendant as in Courts of Common Law. The defendant was only nominally defendant, practically he was the plaintiff. The defendant's plea, moreover, should have gone on to allege that he, the defendant, was the George Robson named in the declaration.

Dr. Tristram, contrà: To compel the defendant to give security for costs would be to defeat the object for which the citations were issued and advertised, in cases where application was made for administration of the estates of persons who had not been heard of for some years. In almost every case the person cited, if alive, would be abroad, and it would be a great injustice to him if he were not allowed to come forward and establish the fact of his being alive, and so to secure his right to the property without his giving security for costs. By reason of his inability to give such security he might lose his own money. The circumstances referred to in the affidavits go to the very matter in issue between the parties, and cannot affect this question now raised. Moreover, the defendant here is not only nominally but practically the defendant.

*Sir J. P. Wilde*: This is a very peculiar case. The plaintiff asks for administration to George Robson said to be dead. The defendant comes here, invited by the citation

advertised in the newspapers, and says that the George Robson, of whose estate administration is sought, is not deceased and that he himself is the very man. The plaintiff denies this, and says you must give me security for my costs, or, if you cannot, then an end shall be put to the contentious proceedings. It would be a very great injustice to say that the defendant shall not be allowed to establish his claim unless he can find secu-**[571]**-rity for costs; for if he is not able to find security and is the right man, he may thereby be deprived of his property. On the other hand, very great inconvenience may be worked to parties who claim administration in these cases, if any one may start up without any title or claim, and put them to the expense of a suit to establish their claim. There is inconvenience both ways, but it seems to me that I cannot call upon this man to give security for costs. In this suit the plaintiff is really the plaintiff, as she is seeking to obtain a sum of money, which she cannot obtain without the assistance of the Court, and the defendant is really the defendant, as he is brought into the Court by the citation issued by her. The rule, therefore, of the Common Law Courts, that the defendant, when residing out of the jurisdiction of the Court, shall not be required to give security for costs, is applicable to and ought to govern this case. There is no application on the present motion for ordering the plea to be amended, but I think it ought to be amended by stating that the defendant is the George Robson named in the declaration.

Dr. Tristram, on behalf of the defendant, asked that the issue should be tried by a jury.

Dr. Spinks, contrà.

*Sir J. P. Wilde*: I do not think that this is a case in which, as one of the parties does not wish for it, the Court ought to order a trial by jury; it must be tried by the Court itself.

**[572]** THOMAS DIXON AND WILLIAM DICKENSON *v.* JOHN ALLINSON AND MARY HIS WIFE. IN THE ESTATE OF ANN WILSON, WIFE OF WILLIAM STITT WILSON (deceased). November 29 and December 5, 1864.—Will and Codicil propounded.—Persons proper to be cited.—The plaintiffs propounded the Will and Codicil of Ann Wilson, under the latter of which her husband, who had survived her but a short time, took an interest.—The Court allowed a citation to issue to the official liquidators of the East of England Bank, creditors of the husband, to see the Codicil proved.

Ann Wilson died at sea on the 3rd of June, 1864, having during coverture, by virtue of certain powers, made her last will, bearing date the 19th of October, 1863, and therein appointed her husband, William Stitt Wilson, and the present plaintiffs, executors. On the 30th of May, 1864, the deceased executed a paper, purporting to be a codicil to her said will, whereby she bequeathed certain railway shares and stock in railway companies to her said husband. William Stitt Wilson died on the 12th of June, 1864, having made his will, and thereby appointed Dixon and Dickenson, the present plaintiffs, executors, and residuary legatees, of which will probate had been granted to Dixon alone. Since Wilson's death, proceedings had been instituted in the Court of Chancery, by the East of England Bank, on behalf of itself and all other creditors of William Stitt Wilson, against the plaintiffs, as his executors, for administration of his real and personal estate, which proceedings were still pending. An order had been made by the Court of Chancery for winding-up the said East of England Bank, and James Boatwright Gibbons and Jacob Henry Tillet had been appointed official liquidators.

A caveat had been entered by the defendants against the **[573]** proof of the will and codicil of Ann Wilson; hence the present suit.

And the Court was now moved by Dr. Spinks, on behalf of the plaintiffs, for leave to cite Gibbons and Tillett, as representing Wilson's creditors, who were interested in the codicil of Ann Wilson, under which Wilson's estate would be benefited, to see proceedings to the present suit.

Dr. Wambey, on behalf of the defendants, made no opposition.

Cur. adv. vult.

December 6.—*Sir J. P. Wilde*: In this case the plaintiffs propound the will and codicil of Ann Wilson, wife of William Stitt Wilson, who survived his wife, but is since dead. The executors of the will of the deceased are also executors of the will of the husband. There are certain persons representing the East of England Bank

as creditors of the husband; these are official liquidators of the bank; the question is, what interest have they in the matter? They are creditors of the husband, and, as such, interested in supporting the codicil propounded, by which the husband's estate would be benefited; thus, though somewhat circuitously, they have a real and substantial interest. In *Kipping and Barlow* v. *Ash*, 1 Rob. 270, Sir H. Jenner Fust considered that the bare possibility of an interest was sufficient to enable a person to oppose a testamentary instrument. In the present case I think it is quite proper to cite the official liquidators.

**[574]** IN THE GOODS OF JOSEPH ALLISON (deceased). November 29 and December 20, 1864.—Property in England and Scotland.—21 & 22 Vict. c. 56.—*Goods of Muir*, 1 Swab. & Trist. 294, overruled.—Under 21 & 22 Vict. c. 56, it is not necessary that the memorandum of English domicil should be in or on the probate at the time it is issued, and where, by a bonâ fide mistake, the probate was taken for property in England only, and it afterwards turned out that there were certain railway shares in Scotland, the Court allowed a supplemental affidavit to be filed, and ordered the memorandum of English domicil to be written on the probate.

In this case the deceased died domiciled in England. For the purposes of probate duty the property was sworn under £90,000. When the residuary accounts were rendered, and a schedule of property annexed, it appeared that there were shares in Scotch railway companies to the value of between £2000 and £3000; and the Inland Revenue insisted on a Scotch probate or a confirmation of the English probate in respect of these shares.

By 21 & 22 Vict. c. 56, sec. 14, it is enacted that "When any probate or letters of administration to be granted by the Court of Probate in England to the executor or administrator of a person who shall be therein, or by any note or memorandum written thereon signed by the proper officer, stated to have died domiciled in England, shall be produced in the Commissary Court of the county of Edinburgh, and a copy thereof deposited with the commissary clerk of the said court, the commissary clerk shall indorse or write on the back or face of such grant, a certificate in the form, as near as may be, of the schedule (F) hereunto annexed; and such probate or letters of administration being duly stamped shall be of the like force and effect, and have the same operation in Scotland as if a confirmation had been granted by the said Court."

**[575]** Mr. Searle now moved the Court to direct the memorandum of English domicil to be added to the probate. *In the Goods of James Muir*, 1 Swab. & Trist. 294, Sir C. Cresswell held that such a memorandum must be affixed at the time the probate is granted; but it is submitted that the words of the section are not imperative, and the rule may cause great inconvenience; indeed, it is not clear what meaning can be given to the words "note or memorandum written thereon," unless what is now asked can be done. Cur. adv. vult.

December 20.—*Sir J. P. Wilde*: In this case application has been made to the Court that the proper officer may be allowed to make a note or memorandum on the probate, stating the testator to have been domiciled in England. This has become necessary in consequence of a bonâ fide mistake as to certain shares which now turn out to be "personal estate in Scotland," a mistake which, if not rectified, will deprive the applicant of the benefit intended to be conferred by the statute 21 & 22 Vict. c. 56. The obvious intention of the statute was, that for the purpose of duty, English and Scotch personal estate should be calculated together as one entire sum. But before the commissary in Scotland would be justified in taking the necessary steps to give effect to this probate as a Scotch confirmation, it is requisite that the officer of this Court should have stated in the probate, or "by a note or memorandum indorsed thereon," that the testator died domiciled in England. The question raised is, whether this can be done after the probate has once been granted. The words "indorsed thereon," in sect. 14, would seem to have been introduced for this and no other purpose, for if the fact is to be stated when the grant issues there is no conceivable reason for not stating it "therein." It is, however, to be observed, that neither in this section nor in any other is any direct power conferred on this Court in the matter. The section is ad-**[576]**-dressed directly to the commissary in Scotland, and the power and duties of this Court are spoken of inferentially only. This inference ought, I think, to be drawn with sufficient latitude to achieve the obvious

purposes of the legislature. And although the rest of the Act, in speaking of the affidavit as to domicil, has not expressly provided any machinery for the rectification of a mistake such as has occurred in this case, I feel justified in permitting, nay, bound to permit, a supplemental affidavit to be filed, and the proper note on the probate to be made.

PURDEY AND OTHERS *v.* FIELD AND ANOTHER AND HATCH (intervening). March 1 and 18, 1864.—Practice.—Citation of Heir-at-law.—Appointment of Receiver of real Estate.—20 & 21 Vict. c. 77, s. 71.—Before a receiver of real estate will be appointed by the Court, under the 20 & 21 Vict. c. 77, s. 71, it is necessary that it should appear on affidavit, that the heir-at-law, or devisee, or other person having or pretending interest in the real estate, has been cited under the 61st section.

[S. C. 33 L. J. (P.) 73; 12 W. R. 1088.]

James Purdey, deceased, by a will and codicil, both dated the 29th of October, 1863, and both affecting real as well as personal estate, appointed J. Purdey, W. Trinder, and W. Williamson, executors. Trinder and Williamson propounded the will and codicil; Purdey propounded the will and not the codicil; and the intervener, Martha Hatch, propounded the codicil and not the will. Leave had been obtained by the plaintiffs, Trinder and Williamson, under the 61st section of the 20 & 21 Vict. c. 77, to cite J. Purdey, the other plaintiff, who was the deceased's heir-at-law, to see proceedings in that capacity.

**[577]** Dr. Wambey, for J. Purdey, moved, under the 71st section of 20 & 21 Vict. c. 77, that G. and J. Rutherford, solicitors, or one of them, might be appointed receivers of the real and leasehold estate of the deceased pendente lite.

Mr. Searle, for Trinder and Williamson: The application is premature, because no affidavit has been filed, shewing that J. Purdey has been cited as heir-at-law. If he has not been so cited, the suit will not affect the real estate of the testator, and, consequently, no receiver can be appointed.

Dr. Wambey: I am instructed that J. Purdey has been cited as heir-at-law.

*Sir J. P. Wilde*: I must have an affidavit of the fact before I can appoint a receiver.

Dr. Deane, Q.C., for Mrs. Hatch, contended that Trinder and Williamson were the proper persons to nominate the receiver.

*Sir J. P. Wilde*: I shall not now make any order. When an affidavit has been filed, shewing that Purdey has been cited as heir-at-law, the motion may be renewed, if it is thought to be necessary. But as the case will probably be heard in the course of next term, it is worthy of consideration whether there is any necessity for the appointment.

March 8.—Dr. Wambey renewed the motion upon affidavits that J. Purdey had been cited as heir-at-law, and that the rents had fallen due at Christmas, 1863, and that other rents would be due at Lady Day, 1864, and that it was necessary that the rents should be collected, to pay taxes and other outgoings.

**[578]** IN THE GOODS OF MARY ANN KILLICK (deceased). November 3, 1864.—Will.—Execution.—Attestation in Presence of Testator.—A codicil was signed by a deceased, who was ill in bed in one room, and attested by two witnesses in an opposite room, but who did not see the deceased make or acknowledge, her signature, or have any conversation with her respecting it. The deceased, the doors of both the rooms being open, might by raising herself in bed have seen the witnesses sign; but there was no evidence that she did do so.—Held, to be a bad execution, on the ground (1) that the deceased did not make or acknowledge her signature in the presence of the witnesses, and (2) that they did not attest in her presence.

[S. C. 34 L. J. (P.) 2; 10 Jur. (N. S.) 1083.]

The deceased, Mary Ann Killick, died on the 27th July, 1864, having made a will dated the 24th of January, 1863, by which she appointed B. Beanland sole executor. Subsequently, in the month of February or March, 1864, she signed a paper as a codicil without an attestation clause, but which was signed by H. Kendall and R. Kendall as witnesses.

This paper was signed under the following circumstances. In the month of

February or March, 1864, the witnesses were at the house of Mrs. Jackson, with whom the testatrix resided. She was then confined to her bed in a room on the first floor, the door of which opened to a landing, and was directly opposite to the door of a sitting-room, in which the witnesses were. Mrs. Jackson told them there was a codicil for them to sign. She then went into the bedroom, and shortly afterwards returned with the codicil, which had been already signed by the testatrix, and placed it on a table near the door of the sitting-room. The witnesses then signed it in the presence of each other. The doors of both rooms were open, and the testatrix, from the position of her bed, might by raising herself and inclining her head in the direction of the door, have seen the witnesses sign; but they neither saw her nor heard her voice. The testatrix did not sign the codicil, **[579]** nor acknowledge her signature in the presence of the witnesses, nor had they any conversation with her respecting the codicil.

The parties interested had been cited, but had not appeared.

Dr. Wambey, to obtain the opinion of the Court, moved for probate of the codicil. He apprehended the Court would reject the motion, on two grounds; first, that the testatrix neither signed nor acknowledged her signature in the presence of the attesting witnesses: secondly, the attesting witnesses did not sign in the presence of the testatrix. For aught they knew, the testatrix might have been asleep, insane, or dead, when they signed. He cited *Shires* v. *Glascock*, 2 Salk. 687; *Davy* v. *Smith*, 3 ibid. 395. *Casson* v. *Dade*, 1 Bro. C. C. 99; *Newton* v. *Clarke*, 2 Curt. 320; and *Tribe* v. *Tribe*, 1 Robert. 775.

*Sir J. P. Wilde*: Cases of this description are often very difficult to determine. The Court has every desire to give a reasonable latitude to the exigencies of the statute, which require the execution of the instrument to be of a peculiar character, but it must be borne in mind that as much injustice may be done by pronouncing in favour of a will which has been improperly executed, as against a will which has been properly executed. There is a natural tendency in the mind of the Court to uphold a testamentary document, when it is clear that it was signed by the deceased with the intention of giving it validity; but it cannot uphold it in the face of facts negativing a compliance with the statute. The first question here is, whether the witnesses saw the deceased sign or acknowledge her signature to this document in the presence of each other. On this point the evidence is point-blank that they did not see her sign it, for it was signed by her in one room before they were aware of its existence. They were told that there was a paper requiring their signature, but they **[580]** had no conversation with her respecting it, and did not see her acknowledge it.

It is unnecessary to go further; but to my mind it is equally plain that the document was not signed by the witnesses in the presence of the deceased. Great latitude ought to be given to the meaning of the word "presence" used in the 9th section of the Wills Act, and I am not disposed to draw a fine distinction between one room and two rooms opening into one another; but I think such an act as this cannot be said to be done by one person in the presence of another, unless at the time each is aware of the other's presence. That was not the case here. Apparently the deceased knew nothing about the witnesses being in the other room. I pronounce against the codicil.

VINNICOMBE *v.* BUTLER AND ANOTHER. November, 4, 1864.—Will.—Execution. Evidence of Attesting Witnesses.—Presumption when the Memory is imperfect. —Where a Will appears to be duly executed, and there is a complete attestation clause, the presumption omnia rite esse acta applies, and is not rebutted by the defective memory of the attesting witness. Where the attestation clause is incomplete, the presumption also applies, but with less force.—The attestation clause to a Will was informal, and the memory of the attesting witness was defective; but it was proved that the Will was signed by the deceased, and that the witness had been in the room with him for the purpose of attesting it.—The presumption omnia rite esse acta was held to prevail, and the Court pronounced for the Will.

[S. C. 34 L. J. (P.) 18; 10 Jur. (N. S.) 1109; 13 W. R. 392. Referred to, *In the Goods of Peverett*, [1902] P. 205.]

Ann Boosey, wife of John Boosey, died on the 10th of April, 1862, leaving two testamentary papers, one dated the **[581]** 10th of April 1857, the other without date,

which were propounded by the plaintiffs as together containing her last will and testament. The defendants pleaded that the paper-writings propounded were not duly executed. The only question was as to the execution of the paper-writing of the 10th of April, 1857. It appeared to be made in execution of a power; it was without any attestation clause, and it concluded as follows:—

"Signed and sealed this 10th day of April, 1857. "ANN BOOSEY.

"Witness this my hand, JOHN HILLS.

"Witness this my hand (L. S.), ANN HILLS.

"Witness this my hand, SARAH POCOCK.

"Witness this my hand, GEORGE HILLS."

The cause was heard by Sir J. P. Wilde, without a jury.

The attesting witnesses were examined, and three of them, John Hills, Ann Hills, and George Hills, remembered nothing about the matter. Sarah Pocock, the other attesting witness, deposed that, on the 10th of April, 1857, she was asked by the testatrix to sign her will; that the testatrix signed the document in her presence and in that of John Hills, and that she, Sarah Pocock, and John Hills, signed it in the presence of the testatrix, John Hills signing before she (Sarah Pocock) signed. She was not sure whether the testatrix signed before or after, but she thought it was after.

Dr. Middleton and Mr. Joseph Sharpe for the plaintiffs. The presumption omnia rite esse acta was not rebutted by the failure of the memory of the attesting witnesses. *Burgoyne* v. *Showler*, 1 Rob. 5; *Gwillim* v. *Gwillim*, ante, 200.

Dr. Spinks for the defendant. The presumption omnia rite esse acta does not arise because, from the appearance of the paper and the evidence, it is to be inferred that the testatrix did not know the requirements of the Wills Act.

**[582]** *Sir J. P. Wilde*: I agree with Dr. Spinks, that questions of this kind depend upon a number of circumstances peculiar to the case in which they arise, and that the presumption omnia rite esse acta applies, with more or less force, according to the circumstances of each case. When there is a regular attestation clause, with the names of two witnesses appended thereto, leading to the conclusion that the will was executed by a person who knew the requirements of the Wills Act, the principle applies directly, and it may be presumed that the will was duly executed, and the mere failure of memory of the witnesses will go for nothing. But where there is an informal attestation clause, such as in the present case, which leads to the conclusion that the testatrix did not know the requirements of the Wills Act, the presumption will not apply with the same force. In every case of this kind the Court should be influenced by a strong desire that the intention of the testator be not frustrated by the lapse of time and failure of the memory of the witnesses. The requirements of the statute are very precise, and when the Court has to deal with witnesses who are not lawyers and men of business or persons who from their position in life have acquired the habit of jotting down in their minds the precise order of events, it should be very cautious indeed in pronouncing against a will where the signature of the testator is amply proved, and it is also proved that the persons who put their names as witnesses went for the express purpose of signing the paper as a will. Bearing this principle in mind, look at the evidence and see how far it is made out affirmatively that the will was properly executed. Sarah Pocock swears distinctly to her signing her name, and also to John Hills signing his name. She says, "John Hills signed, and he signed before me," and his name appears on the paper before hers. John Hills is present, and he signed before her, and as she saw him sign, they were both present when she signed. John Hills says, "My memory is a perfect blank, except that I saw **[583]** Sarah Pocock sign." Therefore two attesting witnesses present at the same time each saw each other sign. John Hills says, "I cannot recollect whether I saw the testatrix sign." Sarah Pocock says, "I saw Mrs. Boosey put her name to the will, and I also think that she put it there after I had signed my name. I am quite sure I saw her put her name, but I cannot be sure whether it was before or after I had signed. Mrs. Boosey said it was her will before we signed." Taking these statements together, they lead very reasonably to the conclusion that she did sign the will in the presence of Sarah Pocock and John Hills. It seems to me, therefore, that both papers are entitled to probate.

Dr. Spinks asked for the costs of all parties out of the estate. The litigation arose from the act of the testatrix.

*Sir J. P. Wilde*: I think all the costs should be paid out of the estate.

Probate granted. Costs of all parties out of the estate.

IN THE GOODS OF ELIZABETH MIDDLETON (deceased). November 8, 1864.—Mutilation of prior Will.—Dependent Relative Revocation.—The testatrix duly executed a Will in 1855, and in 1862 she signed another Will, being a copy of the former one, with the exception of bequests to a niece, but which was not duly attested. In 1864 she cut out the names of the attesting witnesses to the earlier Will, in the presence of a fellow-servant. Both documents were retained in her possession until her death.—Held, that the doctrine of dependent relative revocation applied, and that the Will of 1855 was entitled to probate.

[S. C. 34 L. J. (P.) 16; 10 Jur. (N. S.) 1109; 11 L. T. 684.]

The deceased, Elizabeth Middleton, died on the 16th of **[584]** June, 1864. She duly executed a will, dated the 26th of April, 1855, by which she bequeathed to her niece, A. Sanders, £5 and one fourth of her wearing apparel, and appointed the Rev. W. Clarke, and Miss F. Clarke executors.

Subsequently she wished to exclude her niece from taking any benefit under her will, and, having had the will recopied (omitting the legacies to the niece), she, on the 23rd of January, 1863, signed the will so recopied in the presence of two witnesses, one of whom, being unable to write, did not sign or make her mark on the will, but her fellow-witness signed her name for her by her request in the presence of the deceased. About a fortnight before her death the deceased, in the presence of one of her fellow-servants, without making any remark, took the will of 1855 out of a tin box in which she kept her papers, and, having cut out the greater part of the names of the attesting witnesses, directed her fellow-servant to burn the piece of paper so cut out, which she did. The deceased retained both wills in her custody until her death.

Dr. Spinks moved for probate of the will dated the 26th of April, 1855. The execution of the will of the 23rd of January, 1862, is defective, as it was essential to its due execution, that both the witnesses should have signed it. The reasonable presumption is, that the earlier will was mutilated by the deceased under the impression that it was revoked by the later one, but the latter one being invalid the doctrine of dependent relative revocation applies, and probate should be granted to the earlier one. If the mutilation of the earlier will had been contemporaneous with the execution of the later one, or there had been a declaration by the deceased contemporaneous with the mutilation, to the effect that she considered the later will to be valid, there could be no doubt as to the application of the doctrine. The lapse of time between the execution of the later will and the destruction of the earlier one did not take the case out of the rule.

**[585]** *Sir J. P. Wilde*: Upon a review of all the facts, I am satisfied that the deceased, by cutting out the signatures of the attesting witnesses to the earlier will, only intended to revoke it on the assumption that the later will had been duly executed. The case therefore falls within the principle of dependent relative revocation frequently acted on in this Court, and explained in *Ex parte the Earl of Ilchester*, 7 Ves. 279-372. Probate of the will of 1855 will therefore be granted.

IN THE GOODS OF HANNAH TUCKER (deceased). November 15, 1864.—Administration.—Jurisdiction.—Effects in France and not in England.—Practice of French Courts.—Where the deceased died in France, leaving personal estate there, but none in England, and it was alleged, that by the law of France her husband, from whom she had eloped, could not establish his claim to her property there without a grant from this Court—Held, that the Court had no jurisdiction to make a limited grant to enable him to substantiate his claim to the property in the Courts of France.

[S. C. 34 L. J. (P.) 29. Applied, *In the Goods of Lock*, 1875, 24 W. R. 281; *In the Goods of Butson*, 1882, 9 L. R. Ir. 21. Referred to, *In the Goods of Murray*, [1896] P. 71.]

The deceased, Hannah Tucker, died intestate in France in 1864, leaving William Tucker, her husband, her surviving, from whom she had eloped in 1854, and some personal estate in France, but none in England. By the law of France, the husband was unable to establish his claim to her property in France without a grant from this Court.

Dr. Spinks moved for a grant of administration to be made to William Tucker. As the deceased had left no property within the jurisdiction of this Court, it was

contrary to its practice to make a general grant of administration. He submitted, however, that the Court, under the circumstances, [586] might decree a grant to the husband, limited to the purpose of substantiating in the Courts of France his title to the property. *In the Goods of Charles Turner*, ante, 476, the deceased, if he had survived M. Turner, would have been entitled to a fund in Chancery. He had no other property. The Court being of opinion that this fund had never vested in him, declined to make a general grant, but decreed a grant of administration limited ad litem to enable the applicant to appear and substantiate proceedings in Chancery.

*Sir J. P. Wilde*: That case only decides, that, where it is doubtful whether a deceased was or was not entitled to personal property in this country, the Court would make a grant ad litem, in order that it might be ascertained whether he was or was not so entitled. In that case there was a possibility that the deceased had property in England, here she has none. It is not one of the functions of this Court to determine as an abstract question who is the proper representative of a deceased person, and if the Courts of France insist upon such a declaration they are very unreasonable. The foundation of the jurisdiction of this Court is, that there is personal property of the deceased to be distributed within its jurisdiction. In this case, the deceased had no property within this country, and the Court has therefore no jurisdiction. I reject the motion.

IN THE GOODS OF THOMAS ENGLISH (deceased). December 6, 1864.—Will.—Parol evidence that a document is testamentary.—The intention of the testator, that a duly executed paper-writing should operate as a Will, may be proved by parol evidence.

[S. C. 34 L. J. (P.) 5; 11 L. T. 612; 13 W. R. 503. Applied, *Robertson* v. *Smith*, 1870, L. R. 2 P. & D. 43. Referred to, *Godman* v. *Godman*, [1919] P. 231.]

Thomas English died on the 12th of March a bachelor, without any known relation.

[587] On the 10th of March, 1864, a document, in the following terms, was duly executed by him according to the provisions of 1 Vict. c. 26:—"I, Thomas English, tailor, give Dennis Newcombe, chandler, full authority to draw the amount of money, with interest, contained in my bank-book."

The usual citation had been extracted and advertised by the said Dennis Newcombe, who was a creditor of the deceased, and had been served on the Queen's Proctor, calling on the next of kin, if any, and all other persons in general, to accept or refuse letters of administration with the will annexed, or to shew cause why it should not be granted to him. No appearance had been entered to such citation.

Dr. Wambey moved for a grant of administration of the estate and effects of the deceased, with this paper-writing annexed, as being his last will and testament to Dennis Newcombe as a creditor. The testamentary character of a paper-writing can be proved by parol evidence: *The King's Proctor* v. *Daines*, 3 Hagg. 220; *Jones* v. *Nicolay*, 2 Rob. 292; *In the Goods of Marsden*, 1 Swab. & Trist. 542. It was proved by the affidavit of William Cooper, one of the attesting witnesses, that on the 10th of March, 1864, he was sent for by the deceased, who said that he wanted him to write out a paper to make the Newcombes all right, so that they could draw the money in the bank if anything should happen to him, and that he had given them the bank-book. The document was accordingly written by the witness from the dictation of the deceased, and was then duly executed. He understood at the time, and still believed, that the deceased intended the document to take effect as his will in case of his death. The only property of the deceased was a sum of £53, 9s. 2d. in the Halifax Mechanics' Institution Penny Savings-Bank.

*Sir J. P. Wilde*: The cases cited shew that, in order [588] to ascertain whether a paper-writing is of a testamentary character, the Court may admit parol evidence. The evidence satisfies me that the deceased intended the document to take effect as his will. It does not appear upon affidavit when the debt of Dennis Newcombe became due. When that omission has been supplied, letters of administration, with the will annexed, may be granted to Dennis Newcombe as a creditor.

Motion granted.

OWEN *v.* DAVIES. November 3, 1864.—Pleading.—Not the Will of the Deceased.—Practice.—November 3, 1864.—The plea that the Will propounded is not the Will of the deceased, is too vague and indefinite, and in future, therefore, will not be allowed to be pleaded.

[S. C. 33 L. J. (P.) 201; 13 W. R. 88.]

Dr. Spinks moved for directions as to the mode of trial. The defendant had pleaded several pleas; the first being that the will propounded was not the will of the deceased.

*Sir J. P. Wilde*: The plea that the will propounded is not the will of the deceased has become a very favourite plea, and it is time that the Court should take notice of it. If it means that the deceased did not intend the paper which he signed to operate as a will, but executed it as a sham for some collateral purpose, that meaning ought to be put in plainer language. If it means that he signed the will not knowing it to be his will, that should be stated, or if the plea has any other meaning, it ought to be precisely stated, in order that the Court may know the question that is to be tried. In its present form, it comprehends every plea which can be pleaded in opposition to a will. I shall in future not give directions **[589]** for the mode of trial of any case in which this plea has been pleaded, until it has been struck out. The plea must be struck out, with liberty to the defendant to apply for leave to add any further plea that may be applicable to the circumstances of the case.

IN THE GOODS OF ESTHER SMITH (deceased). December 13, 1864.—Probate.—Practice.—Probate in Fac-Simile.—Where a Will, on the face of it, had been executed in 1858 and subscribed by two legatees named in it as witnesses, and was re-executed in 1860 and attested by different witnesses, and after the death of the testatrix was found with the first attestation clause and the names of the witnesses to it cancelled, but there was no evidence to shew the date of the cancellation, the Court refused to exclude the part cancelled from probate, and directed the probate to go in fac-simile.

[S. C. 34 L. J. (P.) 19; 10 Jur. (N. S.) 1243: 11 L. T. 684.]

The deceased, Esther Smith, died on July 30, 1863, leaving a will, which was duly executed on the 24th of March, 1858, concluding:—"And I do hereby declare this to be the last will and testament of me, Esther Smith.

"Signed and sealed in the presence of *me* by me *in the Esther Smith, this 24th day of March, 1858.*

"*Elizabeth Mary Smith.*

"*Helen Smith.*

"Signed and sealed by me, the testator, Esther Smith, in the presence of us,—

"BETTY HARLAND and

"ELLEN BARNES (her + mark)."

Ellen Barnes deposed that in the year 1860, the testatrix, **[590]** with whom she was then living as a servant, called her and Betty Harland into the parlour, and stated that she wished to put her affairs straight, and requested them to put their names as witnesses to her will, which was lying upon the table already signed. In the presence of the testatrix and of each other, Ellen Barnes then signed her name, and Betty Harland put her mark. There were certain alterations and interlineations in the will, respecting which the witnesses were unable to give any information, and there was also an unexecuted document, in the nature of a codicil, on the third page of the sheet of paper upon which the will was written. When the will was found, after the death of the testatrix, so much of the first attestation clause as is printed in italics, and the names of the witnesses Elizabeth Mary Smith and Helen Smith, who were named legatees in the will, had been struck through with a pen, but there was no evidence to shew when or by whom this had been done.

Dr. Spinks moved the Court to decree probate of the will without the alterations and interlineations, and without the unexecuted addition on the third page. The only question is, whether the testatrix acknowledged her signature in the presence of Ellen Barnes and Betty Harland. Her request that they would put their names as witnesses to her will, her signature being already there, was a sufficient acknowledgment (*In the Goods of Warden*, 2 Curt. 334). It would be more convenient if probate were granted, omitting the first attestation clause and the names of the witnesses who subscribed the will in 1858: for no question could then be raised whether those witnesses had forfeited their legacies; although there is no proof, the reasonable

presumption is, that those names were struck through by the testatrix before the will was re-executed.

*Sir J. P. Wilde*: In the absence of evidence, I cannot **[591]** presume that the first attestation clause and the names of the witnesses written against it were struck through by the testatrix before the will was re-executed. They must, therefore, be included in the probate. The probate will be a fac-simile of the will, omitting the alterations and interlineations, and also the unexecuted addition on the third page.

**[592]** M——— (falsely called H———) *v.* H———. November 8, 1864.—Petition for Nullity.—Suspension of Decree.—Decree made on Subsequent Motion.—The woman petitioned for nullity by reason of the man's alleged impotency. The petition was opposed, and at the hearing, the Court, in the circumstances proved, suspended its decree; but now on affidavits to the effect that the woman had returned to cohabitation, and that the marriage remained unconsummated, made a decree of nullity, the respondent not appearing on the motion.

[S. C. 11 L. T. 317; 13 W. R. 108.]

This was an application to make a decree of nullity of marriage at the petition of the woman. The petition had been heard before the Judge Ordinary, in June last. There was no apparent incapacity on the part of the man; the cohabitation had lasted for rather less than three years; from these and other circumstances of the case, the Judge Ordinary suspended his decree, and suggested the policy of the petitioner returning to cohabitation with the respondent for a time (see ante, 520).

**[593]** Dr. Spinks (Mr. Searle with him) now moved the Court to make a decree of nullity on the affidavits of the petitioner, of Dr. Farre, of the petitioner's father, and of others, from which it appeared that after a good deal of correspondence between the petitioner and respondent, and apparent hesitation or reluctance on his part, the parties had slept together from the 2nd of September till the 7th of October, that the marriage had remained unconsummated, notwithstanding attempts on the part of the respondent to consummate it, and that, as far as was known, he had left England for Africa about the 10th of October.

No appearance on this motion was given for the respondent.

*The Judge Ordinary*: I think the petitioner has acted wisely, and I am satisfied that she is entitled to the decree of nullity which I now pronounce.

WELLS *v.* WELLS AND COTTAM. November 8 and 15, 1864.—Suit for Nullity.—De facto Husband and Wife Respondents.—Costs.—Sect. 51 of Divorce Act.—The petitioner, father of a de facto husband, sued for decree of nullity by reason of undue publication of banns. The de facto wife defended the suit, the issue in which was tried by a jury, who found a verdict against her, and the Court made a decree of nullity.—On motion to condemn the husband in the wife's costs, the Court held that the 51st section of the Divorce Act gave it power so to do, if the circumstances of the case warranted it; but that as the wife, by not going into the witness-box, had shewn that she had no reasonable ground of defence to lay before the jury, her costs were not made necessary by the conduct of the husband, and rejected the motion.

**[594]** This was a suit for a decree of nullity of marriage on the ground of undue publication of banns, brought by the father of the de facto husband, a minor (see earlier stages of the case, ante, 364).

The issue was ultimately tried by a jury and found in favour of the petitioner, and the Court made a decree of nullity.

November 8.—Dr. Wambey, on behalf of the respondent Cottam, now prayed to condemn the other respondent, the de facto husband, in her costs. It is true that the evidence shewed that the respondent Cottam was consenting to the undue publication of banns, but it also shewed that it was at the earnest solicitation of the man, who went through the form of marriage with her, that she did so; in such a case the woman is without means of defence, unless the de facto husband is liable. Apart from the particular facts of the case, it is a general principle that a de facto wife, a party to any suit in the Matrimonial Court, is entitled to have costs taxed against the de facto husband.

*The Judge Ordinary* having ascertained that the de facto husband had not notice

of the motion, directed that such notice should be given, and said that he should be ready to dispose of the application on a subsequent motion day.

November 15.—The Queen's Advocate (Sir R. J. Phillimore) now opposed the application on the part of the de facto husband. There is no precedent for condemning one of two co-defendants in the costs of the other.

By the Court: The words of the 51st section of the Divorce Act are very wide:—"The Court, on the hearing of any suit, proceeding, or petition under this Act, and the House of Lords, on the hearing of any appeal under this Act, may make such order as to costs as to such Court, or to such [595] House, respectively, may seem just; provided always that there shall be no appeal on the subject of costs only"; and under the 34th section the co-respondent has constantly in effect to pay the costs of the respondent.

The Queen's Advocate: At all events the de facto wife in this case had no real defence to the suit, as was proved by her not going into the box to contradict the evidence of the other respondent.

*The Judge Ordinary*: As to the principle relied on by Dr. Wambey, that the husband must always pay the wife's costs, I cannot think, on a review of the cases decided before and since the existence of this Court, that any such general rule exists where husband and wife are both respondents in the same suit. I think the effect of the 51st section of the Divorce Act is to give the Court power, after it has heard the case, and has before it the merits of all the parties to the suit, to throw the costs on either of the parties. If the necessity of this contested suit had been caused by the conduct of the man in inducing the woman, who may be taken to have been a good deal under his control, to act in this or that way as to the circumstances of the marriage, I should have been inclined to throw her costs upon him; but the costs of the defence in this case were not occasioned by his conduct; it was not necessary for her to defend the suit, if she had no facts to lay before the jury. At the trial she did not go into the witness-box to contradict or qualify the husband's statement; the defence was therefore unnecessary, and I shall make no order as to her costs.

[596] PORTER *v.* PORTER AND JAGGARD. November 8, 1864. — Pleading. — Omission of Name of Adulterer.—Amendment.—Practice.—A general allegation of adultery, not specifying person, place, or time, is bad, and will be struck out.

[S. C. 33 L. J. (Mat.) 207; 13 W. R. 108.]

This was a petition by a husband for dissolution of marriage. The petition, which was dated October, 1864, alleged, in the third paragraph, "That since the 8th day of October, 1846, the said Elizabeth Porter has on divers occasions committed adultery." In the fourth paragraph, "That from the month of April, 1864, and up to the present time, she, the said Elizabeth Porter, has been habitually visited at her residence at Chick, St. Osyth, in the county of Essex, by Benjamin Jaggard the younger, and that on divers of such occasions, and particularly on the night of the 31st day of August last, she there committed adultery with the said Benjamin Jaggard the younger."

Mr. Searle moved for an order to amend the petition by striking out the third paragraph, or by inserting in it particulars of the person with whom, the dates when, and the places where the acts of adultery therein referred to were committed. It is not a case for particulars, but for amendment; for unless the charges are stated in the petition with reasonable certainty as to person, place, and time, the respondent does not know how to frame her answer. To one charge she might plead condonation, to another connivance, and to another a mere traverse.

He cited *Windham* v. *Windham and Giuglini*, 32 L. J. P. M. & A. 89.

He also moved for further particulars of the charge of adultery in the fourth paragraph.

[597] Dr. Spinks for the petitioner: It is not a case for amendment, but for particulars. The respondent will not be prejudiced by taking that course, and it would be inconvenient to insert the name of an alleged adulterer in a petition against whom the petitioner might not have conclusive evidence, because if his name is inserted he must be made a co-respondent, 20 & 21 Vict. c. 85, s. 81. [*The Judge Ordinary*: Then the name of the alleged adulterer is omitted for the purpose of evading the directions of the Act of Parliament.] The fourth paragraph sufficiently specifies the nature of the charge.

*The Judge Ordinary*: The third paragraph must either be struck out or amended

by inserting particulars. In its present form it violates the rule that a charge of adultery should be alleged with reasonable certainty. The fourth paragraph is sufficient without further particulars. The respondent may have fourteen days to file an answer after the petition has been amended as ordered.

BANCROFT *v.* BANCROFT AND RUMNEY. November 15, 1864.—Cross Suits for Judicial Separation and Dissolution.—Where there were cross suits, and the wife in her suit (which was for a judicial separation on the ground of cruelty), was by the verdict of the jury acquitted of the charges of adultery alleged in the husband's answer, the Court refused to allow this verdict to be pleaded in answer to the husband's petition for dissolution in which the same acts of adultery were charged.

[S. C. 34 L. J. (Mat.) 31.]

This was a suit for dissolution of marriage on the ground of the wife's adultery. There was a cross suit by the wife for **[598]** judicial separation, on the ground of cruelty, in which the husband had charged his wife with the same acts of adultery as those charged in his petition for dissolution.

The issues raised in the suit for judicial separation were tried before the Judge Ordinary, by a jury, in July, 1864, when the jury found that Mr. Bancroft had been guilty of cruelty, and that Mrs. Bancroft had not committed adultery.

At the trial Mrs. Bancroft was examined, and she denied that she had been guilty of adultery.

Dr. Spinks, on behalf of Mrs. Bancroft, moved for leave to plead the verdict of the jury in the suit for judicial separation in answer to the husband's petition for dissolution of marriage. A question once brought in issue and decided cannot be again controverted between the same parties.

Dr. Swabey, contrà: In this suit the evidence of the parties is not admissible. In the suit for judicial separation it was, and Mrs. Bancroft was called as a witness, and denied the adultery. The verdict in the former suit having been obtained partly on evidence inadmissible in this suit is not an estoppel. *Stoate* v. *Stoate*, 2 Swab. & Tris. 223; *Sopwith* v. *Sopwith*, 2 Swab. & Tris. 169.

Dr. Spinks, in reply: The admissibility of the evidence of the parties is a mere accident to the form of the suit, and has no bearing on the question. The same issue ought not to be tried twice between the same parties. In *Bremner* v. *Bremner and Brett* a similar order was made.

*The Judge Ordinary*: It seems to me that the law, by making the evidence of the parties admissible in one suit and not in the other, has virtually declared that in cases of this kind the issue as to the wife's adultery may be twice tried, the same issue being triable on different principles in the two **[599]** suits: by one species of evidence in the one, and by another in the other. The Court is bound to administer the law as it exists. Upon the authorities cited, I think that the suit for dissolution must go on to trial. I may remark, that in the Courts of Common Law a prior verdict cannot be set up in answer to an action founded on the same cause of action. It is only the judgment founded upon such a verdict which would be a bar. In suits in this court the decree would take the place of the judgment of a Court of Common Law.

Dr. Swabey: The costs of this application ought not to be taxed against the husband, as the question raised has been already decided.

*The Judge Ordinary*: I shall make no order as to costs.

RE MULOCK. July 19, 29, November 3, and December 13.—Contempt of Court.—Letter threatening a Suitor.—Punishment by Fine.—Costs of Application to the Court.—It is a contempt of Court to write a letter threatening, if a petition is not withdrawn, to issue a publication respecting the petitioner in a pending suit.—The Court imposed a fine of £300 on a person who had been guilty of a contempt of that nature, but the threat being withdrawn, it remitted the fine on payment of the costs of the application. Those costs not being paid, and the person guilty of the contempt having refused to pay them, the Court directed that the fine should be estreated.

[S. C. 33 L. J. (Mat.) 205; 10 Jur. (N. S.) 1188; 13 W. R. 278.]

July 19.—Mr. Serjeant Ballantine (Mr. Hannen with him) moved on affidavit for a rule nisi for an attachment against Mr. T. Mulock for contempt of Court. The

contempt consisted in having sent a threatening letter to Mrs. Chetwynd, the petitioner in [600] a suit pending in the Court for dissolution of marriage. He referred to *Shaw* v. *Shaw*, 2 Swab. & Trist. 517. The letter was in the following terms:

"Stafford, July 16, 1864.

"Madam,—I beg to acknowledge the receipt of your letter. I pity you from my heart. You are terribly deceived, and your crafty law advisers have fostered your deception. You seem unaware of the abyss opening before you However, I must act as befits a Christian man to whom an appeal has been made, and I now inform you that if, on or before Wednesday next, the 20th instant, your suit in the Court of Divorce be not withdrawn, I will on my own responsibility, apart from Mr. Chetwynd or anyone else, publish the full truth of the case, founded upon my own various communications with your own friends, and accompanied with a statement of facts concerning yourself from before your marriage up to the present time, borne out by irrefragable documents.—I am, Madam, your obedient servant,

"T. MULOCK.

"Mrs. Blanche Chetwynd."

*The Judge Ordinary*: The affidavit of Mrs. Chetwynd discloses an attempt by a third person to prevent her from laying her case before the Court by threats of bringing her into disgrace and disrepute. A rule nisi will therefore be granted.

July 26.—Mr. Mulock appeared in court, but declined to make a promise that he would not issue any publication respecting Mrs. Chetwynd.

*The Judge Ordinary* suspended his judgment in order to give Mr. Mulock an opportunity for reconsideration.

[601] Mr. Mulock again appeared in court, but still declined to give the required promise.

*The Judge Ordinary*: Then it only remains for the Court to pronounce judgment. [After reading the letter above set out, his Lordship continued.] From the pressure of this threat Mrs. Chetwynd seeks protection, and she claims the right to approach this court free from all restraint or intimidation. It is a right that belongs to all suitors. Mr. Mulock has appeared to shew cause against the imputation thus made against him. He did not deny the fact that he sent the letter, and, although he disclaims all desire to threaten the petitioner, he distinctly reiterated his intention to make the publication referred to. Mr. Mulock, therefore, in the face of the Court, practically adheres to the threat he has made. No one can doubt that the very offering of such a threat to a suitor in this Court, for such a purpose, is in itself, and quite independently of its subsequent fulfilment, a contempt of Court. In *Shaw* v. *Shaw*, 2 Swab. & Trist. 519, the late Sir Cresswell Cresswell so decided, if, indeed, authority were needed. I own I was surprised, that when the legal effect of what he had done was pointed out to Mr. Mulock, he did not express himself prepared at once to retrace his steps, and to cease from further interference with Mrs. Chetwynd's suit; and the more so, as it appeared from his own statement in court, that he had no interest whatever in the matter, and only a very recent acquaintance with Mr. Chetwynd. Had Mr. Mulock, under these circumstances, been content to give the Court an assurance that he would go no further in his endeavour to intimidate Mrs. Chetwynd, the Court might properly have taken no further notice of this most improper letter. All this I intimated to him the other day, and I gave him the opportunity of considering the matter, and consulting his friends. The result is that he still adheres to the determination expressed in his letter, and refuses all assurance that he will desist from [602] executing his menace. The Court has no alternative but to adjudge him guilty of a contempt, and to order him for the same to pay a fine of £300. The future is in Mr. Mulock's own hands. If he persists in the course which he says he has marked out for himself as a Christian, and by act or deed, by writing or publishing, makes any further attempt to stand between Mrs. Chetwynd and her free access to this Court, I wish him to understand that he will subject himself to further punishment by fine or imprisonment, or both. If, on the other hand, being satisfied that he is acting illegally, he should hold his hand and submit to the authority of the Court, I shall be prepared to attend to any application that he may make next term for the remission of this fine, and for that purpose I shall direct the officer of the Court not to estreat the fine until the fourth day of next term.

November 3.—Mr. Mulock appeared in person, and said that he had come to the

conclusion that he had been wrong, and had been really usurping the functions of judge, jury, and witnesses. He had not published, and would not publish, a syllable respecting the case.

*The Judge Ordinary* then directed that the fine should not be estreated.

November 14.—*The Judge Ordinary* said he had omitted to mention that in accordance with the usual practice, Mr. Mulock must pay the costs of the application against him. The fine would be remitted on payment of those costs.

December 13.—Mr. Mulock appeared in court, and stated that the costs had been taxed, and that he declined to pay them.

*The Judge Ordinary*: Mr. Mulock was brought before the Court for writing a letter for the purpose of intimidating **[603]** a suitor, and I held that he had been guilty of contempt. A fine was imposed, but I afterwards announced to him, that as he had withdrawn the threat contained in the letter, I would not order the fine to be estreated. I afterwards intimated that this course would be taken only on his paying to the other side the costs, which they necessarily incurred in coming to the Court for protection. Mr. Mulock has now intimated that he does not propose to follow the lenient course I left open to him, and that he refuses to reimburse the applicants in the necessary costs of their application. The consequence is that the fine must be estreated.

COOKE *v.* COOKE AND ALLEN. November 22, 1864.—Dismissal of Husband's Petition.—Wife's Costs.—Where the husband's petition is dismissed, and the wife's costs of the hearing exceed the sum secured or paid into the registry to meet them, the husband is liable to pay the balance.—Application for the balance should be made on summons, and not on motion.

[S. C. 34 L. J. (Mat.) 15.]

This was the husband's petition for dissolution of marriage. The respondent denied the adultery, and also charged the petitioner with wilful neglect and misconduct conducing to the adultery, and with separation without reasonable excuse.

The issues came on for trial on the 14th of May, before the Judge Ordinary and a jury.

The witnesses called for the petitioner declined to give evidence, unless their expenses were first paid; and as the petitioner's solicitor was not then able to tender such expenses, no evidence was offered. A verdict was accordingly taken for the respondent, and the petition was dismissed, with costs.

**[604]** The petitioner had given security for £55, to meet the respondent's costs of the hearing. These had since, on taxation, been found to amount to £71.

Dr. Swabey, on behalf of the respondent, now moved the Court to order that the petitioner should pay to the respondent £16, the difference between the taxed costs of the hearing and the sum for which security had been given. As the petition was dismissed, the respondent is entitled to all the costs of the hearing. He also asked for the costs of the motion.

*The Judge Ordinary*: The dismissal of the petition, with costs, entitled the wife to all the costs of the hearing, although they might exceed the sum for which security was given. A motion was, therefore, unnecessary, and I cannot allow the costs of it, but merely the costs of a summons.

ROLT *v.* ROLT. November 22, 1864.—Cross Suits.—Dissolution on Ground of Wife's Adultery.—Wife's Costs of her Suit.—Practice.—Where there were cross suits, and the marriage was dissolved on the ground of the wife's adultery, the Court held, that the husband was not liable for the costs of the wife in her suit, inasmuch as she had not taken the ordinary steps to get them taxed previous to the final determination that she had been guilty of adultery. The decree pronouncing her guilty of adultery should be pleaded to entitle the Court to take notice of it.

[S. C. 34 L. J. (Mat.) 51.]

This was a suit instituted by the wife, for restitution of conjugal rights.

Dr. Spinks, for the respondent, moved the Court to dismiss **[605]** the petition. It appeared upon affidavit that in a cross suit by the husband, for dissolution of marriage, a decree absolute had been pronounced, after a verdict finding the wife guilty of adultery.

Mr. C. Russell, for the petitioner, consented to the petition being dismissed, upon

payment of costs. [*The Judge Ordinary*: Is the petitioner, after she has been found guilty of adultery, entitled to costs?] It has not been proved in this suit that she has been guilty of adultery. She is therefore entitled to costs. I only ask for costs up to the time of the decree being made absolute. He referred to *Holt* v. *Holt and Fleming*, 28 Law J. Rep. (N. S.) P. & M. 12. [*The Judge Ordinary*: I think that, in strictness, it ought to have appeared in the suit that the petitioner had committed adultery.]

Dr. Spinks, contrà: The marriage having been dissolved on the ground of the petitioner's adultery, she is not entitled to costs. The parties are no longer husband and wife.

*The Judge Ordinary*: She only asks costs up to the date of the dissolution of the marriage; that is, costs incurred while she was a wife.

Dr. Spinks: If a wife does not apply for her costs before she is found guilty of adultery, she is not entitled to have them taxed. If the wife had applied for her costs before the verdict finding her guilty of adultery, she would have been entitled to them; but not having done so, she has by her laches foregone her right.

*The Judge Ordinary*: I think that I cannot dismiss the petition without the petitioner's consent. That is, however, a mere matter of form. With respect to costs, if it had ap-[606]-peared in this suit that the wife had been guilty of adultery, from the moment when that was finally determined, the wife not having previously taken the ordinary step to get her costs taxed, she would have lost all right to them. It seems to me, therefore, that she really is not entitled to costs.

Mr. C. Russell: I am not instructed to consent to the petition being dismissed, except upon payment of costs.

*The Judge Ordinary*: Then I will give the respondent leave to put on the record a plea that the petitioner has been pronounced guilty of adultery.

Dr. Spinks: The respondent will consent to pay £10 nomine expensarum, if the petitioner will allow the petition to be dismissed.

Mr. C. Russell consented.

*The Judge Ordinary*: Then I order the petition to be dismissed, on the respondent paying the petitioner £10 nomine expensarum.

MOORE *v.* MOORE. December 6, 1864.—Permanent alimony.—Income.—The wife applied for permanent alimony on a decree for judicial separation by reason of cruelty. The husband stated on affidavit that, since the petition for alimony pendente lite an answer had been filed, he had parted with his business (which was the principal source of income) for a yearly payment of £300 for seven years, and 5 per cent. on the value of warehouse, stock-in-trade, debts, etc. [607] The Court held, that, in allotting alimony, the £300 yearly must be taken as income, observing that, if the income really failed, the husband could apply for reduction of alimony.

[S. C. 34 L. J. (Mat.) 146; 11 L. T. 459.]

This was an application for permanent alimony. On the 1st of March, 1864, alimony pendente lite had been allotted at the rate of £90 yearly.

A decree for judicial separation by reason of the husband's cruelty was pronounced on the 11th of November, 1864.

Dr. Tristram moved the Court to decree permanent alimony on the same amount of income as was ascertained when the order for alimony pendente lite was made, which would give permanent alimony at the rate of £150 per annum.

Dr. Spinks, for the husband, contended that an affidavit made by him shewed that his income was not now so much as it had been when the alimony pendente lite was allotted. The material part of the affidavit for the present purpose was as follows:—"That since the date of the petition for alimony pendente lite, and answer thereto, I have entirely sold and disposed of my business, from which my income was derived, to Henry Johnson, and C. Bock Harrison, in a consideration for a yearly payment for seven years, from the 29th of September last of £300, and in further consideration of their paying me interest at the rate of 5 per cent. per annum on the value of the warehouse and office, furniture, fixtures, book-debts and accounts, and stock-in trade, estimated to be worth the sum of £3500, but subject to the deductions hereinafter referred to, and that a transfer of the said business, stock-in-trade, book-debts, and other effects has been made by deed, dated the said 29th of September,

1864, and possession of the said business, etc., has been given to the said firm of Harrison and Johnson, and I believe they intend to carry on the said business in copartnership."

**[608]** Counsel contended that the £300 for seven years ought to be treated as capital.

Dr. Tristram: The husband has his skill and industry, which may be employed in other business. If at the end of seven years his income is really diminished, he may apply to have the rate of alimony reduced. It was a gross case of cruelty.

*The Judge Ordinary*: I think, for the present purpose, I must consider the £300 yearly as so much income. If the income really fails, the husband can apply to reduce the alimony. The circumstances of the case were not such as to entitle the husband to any indulgence; he had acted with savage violence towards the petitioner, who was much injured in consequence. I order alimony at the rate of £150 yearly, payable quarterly to the petitioner herself.

(Before the *Judge Ordinary* and a Special Jury.)

STONE *v.* STONE AND APPLETON. December 9 and 15, 1864.—Issue between Husband and Wife.—No appearance by co-respondent.—Damages.—On an issue of adultery raised between husband and wife, to be tried by a jury, who have also to assess damages against a co-respondent who has not appeared, no evidence which is not admissible against the respondent can be given to shew that the co-respondent has been guilty of adultery; but evidence in aggravation of damages is admissible: —The jury found a verdict for the respondent, and assessed the damages at one farthing.

[S. C. 34 L. J. (Mat.) 33; 11 L. T. 515; 13 W. R. 414. Referred to, *Reg.* v. *Manning*, 1883, 12 Q. B. D. 244; *Myers* v. *Myers*, [1918] P. 262; *Butterworth* v. *Butterworth*, [1920] P. 134.]

This was the husband's petition for dissolution of marriage **[609]** by reason of his wife's alleged adultery with Mr. Appleton, against whom he claimed damages. The respondent had appeared and traversed the charge of adultery, the co-respondent had not appeared. The issue of adultery raised by the respondent and the assessment of damages were therefore before the jury.

The Queen's Advocate (Sir R. J. Phillimore), (Mr. H. C. Lopes with him) claimed to read, as against Appleton, a letter written by him to the petitioner; the jury would have to assess damages.

Mr. Coleridge, Q.C. (Dr. Spinks and Mr. Searle with him), for the respondent, objected. On the issue now before the jury we have nothing to do with Appleton. The petitioner may be entitled to a verdict and damages against him by default. It is like judgment by default as regards one in an action against two co-contractors.

*The Judge Ordinary*: I think, in such circumstances, the rule must be thus: any evidence simply tending to shew that Appleton had committed the act of adultery, such evidence not being admissible against Mrs. Stone, is not admissible on this issue; but you can make use of any evidence that tends to aggravate damages.

At the conclusion of the case the learned *Judge Ordinary* made the following remarks to the jury as to Appleton's position:—

The question of fact you have to decide is, whether Mrs. Stone is proved to have been guilty of adultery with Mr. Appleton; you will further have to assess damages against Mr. Appleton with reference to the adultery with which he was charged, but on which no issue was raised. These matters are brought before you in a certain connection, but they are distinct, and must be kept distinct as if they were **[610]** two separate causes tried by two separate juries. How to deal with Appleton I will tell you presently.

The jury found a verdict for the respondent, and, under the direction of the Judge Ordinary, assessed the damages against Mr. Appleton at one farthing.

(Before the *Judge Ordinary* and a Special Jury.)

BANCROFT *v.* BANCROFT AND RUMNEY. December 16, 1864.—Trial.—Surprise.—Adjournment.—Costs.—When the petitioner at the trial opened evidence, which was admissible on the record, but took the other parties by surprise, the Court adjourned the trial, and, as the adjournment was made necessary by the conduct of both parties, refused to make any order as to costs of such adjournment.—The jury were dismissed by consent of all parties.

[S. C. 11 L. T. 515; 13 W. R. 506.]

This was question of practice in the following circumstances: It was the husband's petition for a dissolution of marriage, dated the 16th of February, 1864. On the 15th of March, 1864, the *Judge Ordinary* made an order on the petitioner "to deliver within a week from this date further and better particulars of the dates and places when and where the respondent is, in the petition filed in this cause, alleged to have committed adultery with the co-respondent, or that he do within the like time file an affidavit that he cannot furnish such particulars, and I do further order that this said petition be amended by adding to the third paragraph thereof the words as hereinafter set forth." A similar order was obtained on behalf of the co-respondent.

By affidavit of the 17th of March, 1864, the petitioner gave **[611]** certain particulars of place, and further stated, "And I, lastly, say, that in consequence of the relationship and intimacy subsisting between the respondent and co-respondent, they have been during the period set forth in the petition constantly in each other's society, and that I am not in possession of evidence which enables me to give more precise dates or any further particulars of places in respect of the adulterous intercourse alleged in the said petition."

The petition ended with a general allegation of adultery between April, 1863, and February, 1864, at places unknown. The issues of adultery were ordered to be tried by a special jury. The record for the jury (see rule 22), after setting forth the specific allegations of adultery, concluded thus: "And did further allege that upon divers other occasions, between the month of April, 1863, and the present time (to wit, the 16th February, 1864, the date of the said petition), the said Elizabeth Bancroft committed adultery with the said William Rumney in divers places unknown to him, the petitioner."

The case came on for trial before the Judge Ordinary, by a special jury, on December 16.

Mr. Overend, Q.C., Mr. Coleridge, Q.C., and Dr. Swabey for the petitioner.

Mr. M. Chambers, Q.C., and Dr. Spinks for the respondent.

Serjt. Ballantine and Mr. Staveley Hill for the co-respondent.

Mr. Overend, in opening the petitioner's case, stated generally the evidence to be offered in support of the specific charges, and then stated evidence to shew that on two other occasions the respondent and co-respondent had gone together to houses of ill-fame.

**[612]** Counsel for respondent and co-respondent objected that this evidence took them by surprise, and that there was nothing in the charges in the petition which would admit it. They referred to the order for particulars and affidavit of petitioner before set out.

Counsel for the petitioner urged that his affidavit must be taken to have been true at the date it was made; since then evidence of fresh cases had been obtained; and that under the concluding paragraph of the record for the jury, which the respondent and co-respondent had allowed to stand without complaint, the evidence would be admissible.

*The Judge Ordinary*: The evidence is, no doubt, admissible on this record; but, as it takes the respondent and co-respondent by surprise, I think the case must be adjourned if their counsel wish it, unless counsel for the petitioner will give up the evidence opened on the general allegation.

This petitioner's counsel refused to do, and counsel for the other parties cla med an adjournment.

On the question of costs of the adjournment,

*The Judge Ordinary* said: As regards this adjournment, neither party is free from blame. The petitioner has obeyed the order of the Court made on him as he best could at the time, and the evidence suggested is, no doubt, admissible on this record; but when he became aware of this fresh evidence tending to establish a distinct charge of adultery, he ought to have given the other side notice. On the other hand the respondent and co-respondent have come to trial without having taken any objection to the record as settled for the jury. This they might have done at any time; the surprise is, therefore, partly owing to their neglect. I shall make no order as to costs.

Trial adjourned till jury sittings in next term. Jury dismissed by consent of all parties.

**[613]** (Before the *Judge Ordinary* in Chambers.)

POLLARD *v.* POLLARD AND HEMMING. December 20, 1864. Damages.—Petitioner and Co-Respondent.—Discovery and Inspection.—P. petitioned for dissolution of marriage and for assessment of damages. The Judge, on summons, at the instance of the co-respondent, ordered the petitioner to bring into the registry letters written by the respondent to him, or to file an affidavit that he had no such letters, or that they contained no such matters as suggested by the affidavits in support of the summons.

[S. C. 11 L. T. 749.]

This was the husband's petition for dissolution of marriage by reason of the adultery of the respondent and co-respondent. Damages in the sum of £5000 were claimed by the petitioner. The co-respondent had traversed the allegation of adultery.

The present application was a summons to shew cause why the petitioner should not bring into the registry all letters written by the respondent to the petitioner, from January 1856 to the present time, and why the co-respondent should not be at liberty to inspect the same and take copies thereof.

The following affidavit of the co-respondent was filed in support of the summons:—

"1. I am advised and believe that it is materially and essentially necessary that I should know, for the purpose of preparing for my defence in this suit, and that I should be able to prove at the trial thereof, at what places severally the respondent resided since her leaving the petitioner in India, and that I should know and be able to prove that the petitioner knew that she resided in the said several places or some of them.

"2. I am advised and believe that it is material and essentially necessary for me to know and be able to prove, for the like respective purposes, who the persons were with whom the respondent resided and associated, and desired to **[614]** reside and associate respectively during the same period, and that I should know and be able to prove that the petitioner knew of the respondent's residing and associating respectively, and desiring to reside and associate respectively with certain persons during the same period or some parts thereof.

"3. I have been credibly informed and believe that the said petitioner received several letters from the said respondent in the years 1855-6-7, and in the year 1861, and between that year and the commencement of this suit, whereby, if produced, the matters aforesaid, or some of them, material and necessary to enable me to prepare for my defence in this suit, will appear.

"4. I am unable to ascertain, and have no means of knowing, notwithstanding inquiries made by me, without an inspection of such letters, the dates or respective material contents thereof, or where they were written from respectively, or that the petitioner knew the said material facts therein appearing as aforesaid.

"5. If such letters be not produced to me, or to my solicitors, to inspect and take copies or extracts therefrom, as may be advised, I shall be unable duly and properly to instruct my solicitors, and they will be unable to prepare my defence in this suit so as to prevent a failure of justice therein.

"6. Application not for purpose of delay.

"7. Advised and believe have a good defence to this suit on the merits."

An affidavit of Mr. Meyrick, the co-respondent's solicitor, nearly to the same effect, was filed.

Dr. Swabey, on these affidavits, supported the summons. He referred to the order made in *Winscom* v. *Winscom and Plowden*, 3 Swab. & Trist. 383, note; to 14 & 15 Vict. c. 99, s. 6; C. L. P. A. 1854, s. 50; Day's C. L. P. Acts, p. 221, **[615]** et seq.; and to the fact that a heavy sum was claimed for damages.

Dr. Tristram, for the petitioner, contrà: This is going beyond *Winscom* v. *Winscom and Plowden*. There is no precedent for it.

*The Judge Ordinary*: Considering the powers given by the Common Law Procedure Acts, and the mode in which the common law courts are in the habit of carrying out those powers, I think this is a reasonable application. What passed between husband and wife may be given in evidence to aggravate damages; it is only reasonable that the co-respondent should have an opportunity, in a like way, of diminishing damages. I order the petitioner to bring the wife's letters into the registry, or to file an affidavit that he has none, or that they contain no such matters as suggested. If the letters are brought in I shall look at them, and then give the co-respondent leave to inspect them if I think it right that he should do so.

REPORTS of CASES DECIDED in the COURT of PROBATE and in the COURT for DIVORCE and MATRIMONIAL CAUSES. By M. C. MERTTINS SWABEY, D.C.L., Advocate in Doctors' Commons, and of Gray's Inn, Barrister-at-Law, and THOMAS HUTCHINSON TRISTRAM, D.C.L., Advocate in Doctors' Commons, and of the Inner Temple. With a Supplement by T. H. TRISTRAM, D.C.L. Volume IV. From Hilary Term 1865 to Trinity Term 1865, and Cases in Supplement from Hilary Term 1858 to Trinity Term 1863. London, 1871.

[1] IN THE GOODS OF WILLIAM JONES (deceased). January 17, 1865.—Codicil.—Signature "beside the end of the Will."—15 & 16 Vict. c. 24.—When the dispositive part of a Codicil, written on a half-sheet of notepaper, occupied nearly the whole paper, and the names of the attesting witnesses were subscribed at the bottom of the page, and the signature of the testator was written down the lower part of the edge of the paper,—The Court held it to be a valid execution within the 15 & 16 Vict. c. 24.

[S. C. 34 L. J. (P.) 41; 11 Jur. (N. S.) 118; 13 L. T. 210; 13 W. R. 414. Applied, *In the Goods of Wright*, 1865, p. 35, post; *In the Goods of Coombs*, 1866, L. R. 1 P. & D. 302; *In the Goods of Rice*, 1871, Ir. R. 5 Eq. 176; *Kevil* v. *Lynch*, 1873, Ir. R. 8 Eq. 247.]

William Jones, the deceased, left a duly executed will and a codicil, written on a half-sheet of notepaper, in the following form:—"October 15, 1864.—Codicil of William Jones.—I, William Jones, leave to Mary Jones, my sister, the sum of eight pounds, having forgot to mention her in my will, and the sum of eight pounds to Ann Jones, also my sister; also to Thomas Andrew, gardener, the sum of three [2] pounds; and to Thomas Lawrence, joiner, the sum of three pounds; and James Hough the sum of six pounds. "JAMES HOUGH. "THOMAS LAWRENCE."



It was deposed by James Hough that the testator signed his name at the side of the codicil in the presence of both of the attesting witnesses, who thereupon, in his presence, subscribed their names as witnesses.

January 10.—Dr. Spinks moved for probate of the will and codicil. The testator clearly intended by his signature to give effect to the document,—and it is virtually at the foot or end of it,—and comes within Lord St. Leonards' Act, 15 & 16 Vict. c.

24. The fact that the signature is written perpendicularly and not horizontally can make no difference. (*In the Goods of Sarah Kimpton*, 3 Swab. & Tris. 427.)

*Sir J. P. Wilde*: I think the signature comes within the spirit of Lord St. Leonards' Act, and is good. I will consider the question.

Cur. adv. vult.

January 17.—*Sir J. P. Wilde*: In this case probate is asked of a codicil, and the question is, whether it has been so executed as to satisfy the requirement of the statute in being "signed by the testator at the foot or end thereof." It is written on a half-sheet of notepaper, taking so much space that there is no room left at the bottom for a signature and attestation of witnesses together in the ordinary form. But it bears the signatures of both witnesses written at the bottom of the paper, and that of the testator written crossways along the lower edge of the side of the document. There is proof satisfactory to the Court that the testator intended the signature as the execution of the codicil, and made it in the presence of two witnesses, as required by law. The question is, whether the fact of execution, thus fully and duly made out **[3]** in other respects, is to be annulled by reason of the unusual position which the signature occupies. This the Court is most unwilling to do. Ut res magis valeat quam pereat is a safe and sound maxim. Within the limits of reasonable construction the Court is prepared to go all lengths to save a genuine act of execution from entanglement and defeat by formal requirements. Such is the spirit of the Amendment Act passed by Lord St. Leonards; and the words of that Act, construed in that spirit, are, I think, sufficient to enable me to support this codicil, for I think this signature is so placed beside or opposite the end of the codicil that it is apparent on the face of the codicil that the testator intended to give effect by such his signature to the writing signed as his codicil. And I decree probate of the codicil accordingly.

SMITH *v.* SMITH. January 21, 1865.—Costs.—Revocation of Administration.—Proof in Solemn Form.—After a next of kin had taken out administration, a Will was propounded by one of the residuary legatees. The Court pronounced for the Will, but allowed the costs of the next of kin in obtaining administration, and in putting the residuary legatee upon proof in solemn form, out of the estate, as the residuary legatee did not produce the Will until after administration had been taken out, and several months after the testator's death, although he was several times desired by the next of kin to produce it if it existed, and he gave no explanation of the delay.

[S. C. 34 L. J. (P.) 57; 11 Jur. (N. S.) 143; 13 W. R. 504.]

The deceased in this case was James Smith, of Penn, in Staffordshire, who died in December, 1863. He left him surviving the defendant, who was his brother and next of kin, and some nephews, of whom the plaintiff was one, and nieces. **[4]** After his death, the defendant inquired of the plaintiff orally, and also by letter, whether he had left a will, and asked him to produce it. The plaintiff stated that there was no will, and made no answer to the letters written to him on the subject by the defendant's solicitor on the 4th February, 1864, the 7th of March, 1864, and the 23rd of March, 1864. The last of these letters was as follows:—

"Nottingham, 23rd of March, 1864.

"Sir,—I am surprised that I have not yet heard from you in reply to my last. I have since entered a caveat at the Lichfield Registry, and unless you come to some terms at once with your uncle I shall take further proceedings.—I am, Sir, your obedient Servant, HARRY HOGG.

"Mr. Thos. Smith, West Bromwich."

No notice being taken of these letters, in May, 1864, administration of the estate and effects of James Smith was taken out by the defendant. Proceedings were then commenced by the defendant to obtain possession of some of the deceased's property detained by the plaintiff. The plaintiff thereupon produced a will of the 7th of June, 1853, whereby the deceased gave all his property to his wife, and, in the event of her predeceasing him, which event happened, to his nephews and nieces and a sister-in-law. He also produced an unexecuted testamentary paper, appointing himself universal legatee. He propounded the will of June, 1853, and prayed that the administration to the defendant might be revoked. The defendant pleaded that the will was not duly executed, but gave notice under the 41st of the rules and orders in respect of contentious business, that he only intended to cross-examine the witness

produced in support of the will. The cause was heard before Sir J. P. Wilde without a jury.

Dr. Spinks for the plaintiff.

[5] Mr. Searle for the defendant.

The attorney who had drawn the will and propounded it, and who was one of the attesting witnesses, was examined, and proved its due execution. He stated, in cross-examination, that the testator took possession of it after it was executed. He did not see it or hear anything more about it until some time subsequent to the testator's death, when the plaintiff applied to him.

Mr. Searle: The due execution is proved, but the defendant is entitled to costs out of the estate, both of taking out administration and of this suit. The plaintiff's conduct in not producing the will obliged the defendant to take the grant of administration, and no explanation having been given of the delay the defendant was justified, under the circumstances, in putting the plaintiff upon proof in solemn form.

Dr. Spinks: The defendant is not entitled to the costs of the suit because, when the will was produced, he might have applied to the attesting witnesses, and satisfied himself that it was duly executed, without putting the estate to the expense of propounding it.

*Sir J. P. Wilde*: The defendant is clearly entitled to the costs of taking out administration out of the estate. It was not unreasonable, considering the circumstances under which the will was produced, and the delay in producing it, of which the plaintiff has never offered any explanation, that the defendant should desire to have it proved in solemn form. He is entitled to have his costs of the suit out of the estate. I revoke the administration and pronounce for the will, and I order the defendant's costs, both of obtaining the administration and of this suit, to be paid out of the estate.

[6] SWEETLAND *v.* SWEETLAND. January 20 and 31, 1865.—Will.—Several Sheets of Paper.—Signature at Foot or End.—Deceased signed his name on five sheets of a testamentary paper, which consisted of six sheets; the names of the attesting witnesses appeared on each of the five sheets; on the sixth appeared a testimonium and attestation clause, and the names of the witnesses, but not the signature of the deceased; the writing at the end of the fifth sheet broke off in the middle of a sentence, which was continued on the sixth sheet.—The Court refused to grant probate of the five sheets as containing the last Will and testament of the deceased.

[S. C. 34 L. J. (P.) 42; 11 Jur. (N. S.) 182; 11 L. T. 749; 13 W. R. 504. Applied, *In the Goods of Dilkes*, 1874, L. R. 3 P. & D. 164; *Margary* v. *Robinson*, 1886, 12 P. D. 13; *Leonard* v. *Leonard*, [1902] P. 249. Distinguished, *Boyle* v. *Harris*, [1895] P. 163.]

The question raised in this case was whether an instrument propounded by the plaintiffs as the will of Charles Sweetland, dated the 2nd of July, 1864, was duly executed.

The instrument was written on six sheets of paper. The first five sheets contained a complete disposition of the deceased's property, and were respectively signed at the bottom by the deceased and two witnesses. The fifth sheet concluded in the middle of a sentence completed on the sixth, which last contained a provision for the remuneration of the trustees, and the usual revocatory clause, concluding thus,—"I do declare this to be my last will. In witness whereof, I have hereunto set my hand," etc. Then followed the attestation clause, with the deceased's initials in pencil (written by his attorney), and the signatures of the two attesting witnesses. It was proved in evidence that the deceased asked the witnesses to attest "his will"; that he had signed the first five sheets in their presence, and that they had signed them after him; that they also signed the sixth sheet in his presence, without observing that he had not signed it; that he had subsequently spoken of the instrument to his brother as his will, and had given it to him with directions to deposit it at his banker's.

[7] Mr. Cleasby, Q.C. (with him Mr. J. Kaye), for the plaintiffs, submitted that as the deceased intended the document to operate as his will, and the first five sheets contained a complete disposition of his property, probate might be granted to them, under 15 & 16 Vict. c. 24. The sixth sheet was really immaterial. (*In the Goods of*

*Standley*, 7 N. C. 69; *In the Goods of Chamney*, *ib.* 70; *In the Goods of Jones*, 1 N. C. 396; *In the Goods of Kimpton*, 3 Swab. & Tris. 427; *In the Goods of Woodley*, *ib.* 429.)

Mr. Searle (Mr. Talfourd Salter with him), for the defendants, consented to probate being granted.

Cur. adv. vult.

January 31.—*Sir J. P. Wilde*: In this very pecular case the testator did, I have no doubt, intend to execute in proper form a will drawn by his attorney, and consisting of six sheets. The question is whether he has done so. The first five sheets were signed at the bottom of each by the testator, and in the margin of each of them the two attesting witnesses have also signed their names. The fifth sheet breaks off in the middle of a sentence, which is continued on the sixth sheet, which last, after a clause relating to the remuneration of the trustees, and a clause revoking former wills, ends thus,—"I do declare this to be my last will. In witness whereof I have hereunto set my hand," etc. Then follows a full attestation clause, in which certain verbal alterations are identified, and then the testator's initials pencilled by the attorney for his signature. This signature by some extraordinary blunder was never made by the testator, though the attestation clause was properly signed by both the attesting witnesses.

Mr. Scott, one of the attesting witnesses, who was examined before me, stated that the testator called him and Mr. Bagot into the room to witness the execution of his will. That the testator sat down at a writing-table and signed sheet **[8]** after sheet; that when he got up Mr. Bagot sat down and signed sheet after sheet in the same manner; and that when Mr. Bagot got up, he (Mr. Scott) sat down and followed the signature of Mr. Bagot. He could give no account of the omission of the testator's name on the last page, which he did not notice at the time. It was also proved that the testator spoke of the paper as his will, and gave it to his brother so describing it, and desiring that it might be safely deposited.

It was contended in favour of the will that probate might be granted of the first five sheets, and the signature at the bottom of the fifth sheet treated as an execution of the will. It was argued that these sheets contained a perfect disposition of the testator's property, and the sixth sheet might be disregarded. The first difficulty is, quo animo did the testator sign the fifth sheet? Ordinarily such a signature would be, I think, "intended to guard against other sheets being interpolated." So said Sir John Dodson in *Ewen* v. *Franklin*, Deane's Eccl. Rep. 7. Certainly no one would, on the face of the will, conclude that it was intended as the final signature by which the testator's affirmation of the will was to be signified. Still it might be argued that, when the testator sat down, he intended to execute the whole will; and if he stopped at the fifth sheet, it was only because he thought it was the last, and so intended his signature there as an execution of the whole. This view might deserve weighty consideration; but there is, I think, a fatal defect behind. The statute imperatively demands that a will should be signed "at the foot or end thereof." It is impossible to deny that this gentleman has not signed at the foot or end of his will, but only at the foot of the fifth page of it, and at the end of no definite part of it, for the fifth page ends in the middle of a sentence. "At the foot or end thereof." To what has the word "thereof" reference? Clearly, I think, to the whole will—to the whole of that which the testator then intended to execute as his will. Here he doubtless intended to execute **[9]** the whole six pages, but he has not put his name at the end of them. If the signature at the end of the fifth page can be said to be at the end of the will, the same thing is true of the signatures at the foot of each previous page. The Court would not be justified in fixing upon a signature in the midst of what the testator intended as his will, and treating it as an execution of all that preceded it, and granting probate of so much of the will, to the disregard of the remainder. This in many cases might produce a testamentary result far from the testator's wishes; and though in this case it is said that no disposition of property is rejected, the principle is the same. No case cited in the argument has gone this length; and it does not, I think, become the Court, in a laudable anxiety to give effect to the document, to twist or distort the plain meaning of the statute by ingenious construction, and virtually break the law to mend the testator's blunder.

The Court therefore pronounces against the will.

Will pronounced against.

IN THE GOODS OF BODY (deceased). February 7, 1865.—Probate.—Draft of Destroyed Will.—The Court will not admit the draft of a will, which has been inadvertently destroyed, to probate on motion.

[S. C. 34 L. J. (P.) 55.]

Henry Body, late of East Dereham, Norfolk, labourer, died in July, 1864, leaving a duly-executed will. He also left another testamentary paper of a later date, which was not duly executed. After his death his wife inadvertently destroyed the will by burning it with some old papers, thinking it was of no value.

Mr. R. Pritchard moved the Court to decree that probate **[10]** of a draft of the will should be granted to a nephew of the deceased, the surviving executor named therein.

*Sir J. P. Wilde*: People are constantly destroying wills, and the very persons who have destroyed them afterwards ask for probate of them. This is not one case, but one out of a hundred. I wish I had power to punish a person who destroys a will, but I have not. This, however, I always have done and always will do, I will have the will propounded before I admit it to probate; I will give no assistance whatever to a person who has destroyed a will.

Motion rejected.

CROFT *v.* CROFT. February 7, 1865.—Will.—Attestation Clause.—Evidence of Attesting Witnesses.—Where the evidence of the attesting witnesses directly negatives due execution, such evidence not being rebutted either by direct or circumstantial evidence, and the veracity of the witnesses is unimpeached, the Court cannot, by reason of a formal attestation clause, and on the presumption omnia esse ritè acta, pronounce for the Will.

[S. C. 34 L. J. (P.) 44; 11 Jur. (N. S.) 183; 11 L. T. 781; 13 W. R. 526. Distinguished, *Wright* v. *Rogers*, 1869, L. R. 1 P. & D. 682. Referred to, *O'Meagher* v. *O'Meagher*, 1883, L. R. Ir. 117.]

The only issue in this case was that of due execution, and was tried by the Court itself. The widow of the deceased, his second wife, opposed the will. There was a formal attestation clause, and a letter of instructions how to execute the will from the solicitor who drew it, but the evidence of the attesting witnesses directly negatived due execution, and there was no evidence, either direct or circumstantial, to rebut their statements.

Dr. Spinks for the plaintiff.

**[11]** Dr. Wambey for the defendant. Cur. adv. vult.

*Sir J. P. Wilde* gave the following judgment:—In this case proof was offered to the Court of the execution of the will of Charles Cheesman Croft.

It appeared on the evidence that Mr. Croft desired to make a will in favour of the children of a former marriage; but he was not bold enough to allow his second wife to know it. He therefore procured a will to be drawn through his brother-in-law, and having one day procured his wife's absence from home, he set about the execution of it. He appears to have known nothing about the requisite formalities himself, but with the will there was handed him a letter of instructions from the attorney who drew it as to the proper method of execution.

The question is, whether any evidence has been given upon which the Court can find a footing for the conclusion that the will was, in fact, executed according to the requirements of the statute. Both attesting witnesses were called; each denied positively that the other was present when they signed, and denied as positively that they saw the testator sign, or that they saw his signature, or that he acknowledged any signature to them. One of them was only asked to put his name to a paper so doubled down that no writing at all was visible. The other was only asked to sign "his will." On the other side, the only fact relied upon was the formal attestation clause, drawn by the attorney, and the conclusions to be drawn from the further fact of the letter of directions as to execution.

It would be largely exceeding the scope of any previous case if the Court were to hold this will well executed. In *Owen* v. *Williams* I have read the notes of the late judge, and I find there was a considerable body of evidence on both sides, and the Court gave credit to that in favour of the execution, disbelieving the oath of the attesting witnesses. In *Lloyd and* **[12]** *Hart* v. *Roberts*, 12 Moo. P. C., the attesting witness admitted that, when he saw the paper lying on the table, it had the testator's

name and that of the other attesting witness written on it. It was also beyond doubt that both witnesses were present together, and that the testator asked the witness to sign under the signature of the other. In *Gwillim* v. *Gwillim*, 3 Sw. & Tr. 200, both witnesses were present together. The testator asked them to witness his will, and they did so. The only difficulty was, that they did not recollect seeing his signature, though they could not say it was not there. These cases will not carry the conclusion for which the plaintiff contends.

I cannot, by reason of the attestation clause (not written at the time, nor read by the witnesses), presume a due execution in the teeth of direct testimony to the contrary, unless satisfied aliunde that the witnesses were conspiring to defeat the will, and I must, therefore, pronounce against it.

Dr. Spinks: As the litigation was caused by the testator's act, and the plaintiff is a nude executor, and propounds the will on behalf of the testator's children, he should have his costs out of the estate.

*Sir J. P. Wilde*: The costs of both parties must come out of the estate, and the sureties to the administration bond must justify to the amount of the shares which the children of the deceased will take.

**[13]** IN THE GOODS OF THERESE HENRIETTE AIMÉE DESHAIS (deceased). IN THE GOODS OF THE COUNTESS DE VIGNY (deceased). February 28, 1865.—Foreign will.—Probate in Common Form.[1]—Probate in common form of a Will alleged to be valid by the law of a foreign country will be granted, on primâ facie proof that the foreign Court has adopted it as a valid testament; but the certificate of a notary public, referring to some act of a foreign Court, is not sufficient. The prayer for probate may also be supported on another ground, viz., on the affidavit of a skilled person as to the validity of such a paper by the law of the foreign country, and on an affidavit as to the domicil of the deceased. —Where a translation of a Will, originally written in English, has been proved in the Court of a foreign country, and probate is asked here on that ground, a retranslation of the translation is the proper document to produce in this Court: but if proof of the validity of the paper by the law of the foreign domicil is relied on, then the original, or a copy of the original, should be before the Court.

[S. C. 34 L. J. (P.) 58; 12 L. T. 54; 13 L. T. 246; 13 W. R. 616.]

This was a question arising on what purported to be an official copy of the will of the first-named deceased, a domiciled Frenchwoman.

The document brought into the registry for probate is, it is believed, correctly described in the following words. It appeared from the (alleged) copy of the will, with notarial certificate annexed, that the will was holographic, dated at St. Malo the 17th of July, 1861, and registered there on the 19th of November, 1864, (five days before the death,) the original of which was deposited for minute with M. Lemaire, notary, in conformity with the decree contained in the act of recognition of the said will drawn up by the president of the Civil Tribunal of First Instance of the district of St. Malo, on the 16th of the said month.

**[14]** The registrars objected to granting probate on the certificate of the notary, and referred to a minute to the following effect:—

"No copy will, verified under the hand of a foreign notary who has the custody of the foreign will, shall be entitled to probate in common form without some further proof of the validity of the original than is contained in such certificate."

Dr. Swabey now moved the Court to grant probate without any further proof.—It is understood that the practice of the Prerogative Court for years past has been to grant probate of foreign documents so authenticated; and this seems in accordance with the principle that where the will has been recognised by the court of the domicil of the deceased, the Probate Court of this country will make its grant accordingly in respect of personal property in this country (Williams's Executors, p. 327, 5th edit.). If the practice of the Prerogative Court is correctly stated, the registry is bound to follow it. The 20 & 21 Vict. c. 77, s. 29, enacts that "the practice of the Court of Probate shall, except where otherwise provided by this Act, or by the rules or orders

[1] For the validity of wills of British subjects made out of the United Kingdom, so far as due execution is concerned, see 24 & 25 Vict. c. 114.

to be from time to time made under this Act, be, so far as the circumstances of the case will admit, according to the present practice of the Prerogative Court."

*Sir J. P. Wilde*: The proof is not sufficient to entitle the Court to grant probate. To grant probate in common form of a foreign will, this Court will be satisfied with prima facie proof that some foreign Court has adopted the document as a valid testament, and this without any regard to the form in which such adoption is signified; it does not require that the form of approval should be the same as its own grant of probate. But here nothing is offered but the certificate of a notary public. That certificate refers to some act of recognition by a Court of civil jurisdiction; but the act of Court is **[15]** not before me in any shape in which I can give effect to it. The mere reference to it in the certificate of the notary is not enough; there must be an official copy of the act of recognition; or, if the prayer for probate is put upon another ground, an affidavit from some skilled person as to the validity of the paper by the law of France, and an affidavit of the domicil of the deceased.

As to the practice of the registry, I cannot find that any uniform practice can be said to have prevailed. In some recent cases, where probate had been granted on documents such as are now before the Court, it afterwards came to the knowledge of the registrars that the papers were considered invalid by the law of the domicil: hence the minute which stopped this grant in the registry.

The Countess de Vigny died in December, 1862, leaving a will in English, dated the 24th of July, 1841. This will was translated by an expert in the French language, and the original, with the translation, was deposited in the Civil Tribunal of First Instance of the Seine. By the will the testatrix appointed her husband, the Count de Vigny, sole executor and universal legatee. He had since died, leaving a will which has been proved by his executrix in England. The executrix applied in the registry for probate of the will of the Countess de Vigny, and produced the French translation with the usual notarial certificate, and a re-translation of the French translation into English. The application having been refused,

Dr. Spinks moved for probate of the will of the Countess de Vigny to the executrix of her husband. The same question arises as in the case of Deshais. A will proved in common form in this country would be recognized as valid in any **[16]** foreign country, notwithstanding that such a probate is not conclusive, but may be revoked. By the comity of nations, therefore, the Courts of this country should accept what is equivalent to probate in common form of a foreign will. It ought not to require more than the foreign country requires.

*Sir J. P. Wilde*: I quite agree with you, and if you can shew me any document that purports on the face of it to be equivalent to probate, any act of the foreign Court the language of which carries to my mind in any shape or form that the foreign Court has adopted the document as a will, that will be sufficient for me. A notarial certificate is really nothing, because a notary has to take a note of anything that any one chooses to bring him. But you are labouring unnecessarily, because you have an affidavit that the will is good according to the French law. You also require, however, an affidavit that the deceased was domiciled in France. You are asking for probate of a re-translation of the French translation of the English original, and not of the English original. If you rely on the affidavit you should ask for probate of a copy of the original.

Dr. Spinks: The application is in accordance with the established practice. The French translation has been admitted to probate in France, and probate is sought here not of the original but of the document proved in France. The rule must be the same whether the original is in the English or in the German or in the Russian language.

*Sir J. P. Wilde*: If you ask for probate of the document that was admitted to probate in France, your argument will apply; but you cannot have probate of that document, inasmuch as you have only a notarial certificate, which does not satisfy me that it was recognized as valid in France. You have, however, an affidavit of a French advocate that the will is good according to the law of France, and on that affidavit **[17]** you must ask for probate, not of the document, recognized by the French Court, but of the original will. You must, therefore, produce not a re-translation of the French translation, but a copy of the original. In this case the proof is not sufficient. I am clear that the Court has no power to grant probate of any foreign will unless it is primâ facie satisfied by some document or another that

such will has been recognized by the foreign Court, or unless it is proved to be a valid will according to the law of the place where the testator was domiciled. There is a good deal in the argument of Dr. Spinks that the re-translation and not the original should be admitted to probate if it is shewn that the translation was recognised by the foreign Court. But if the other alternative is chosen, and if probate is sought of the document, not as having been recognized by the foreign Court, but as being valid by the law of the foreign country, it would be monstrous to grant probate of the translation of a translation, when the original will is English and a copy of it might be brought before the Court.

Motion rejected.

DOMVILE AND OTHERS *v.* DOMVILE. February 28, 1865.—Citation against Heir-at-Law.—Suit commencing with Caveat.—Probate Act, s. 61.—Where a suit has been commenced with a caveat, and the defendant had filed no plea to the declaration propounding the will, a citation may issue against the heir-at-law, under the 61st section of the Probate Act.

[S. C. 34 L. J. (P.) 79. Referred to, *Peacock* v. *Lowe*, 1867, L. R. 1 P. & D. 311.]

The plaintiffs in this case were the executors of Miss Emily F. Domvile, who died on the 15th of August, 1864, possessed of considerable personal property, and also seised of real **[18]** estate situate at Putney, leaving a will dated the 5th of August, 1864, by which she devised her said real estate to her sister, now Madame de Bille, who, together with her brother William Charles Domvile and Sir T. E. Winnington, she appointed her executors.

The defendant Sir Charles Domvile, who was her heir-at-law, and with Madame de Bille and Lady Winnington (wife of Sir T. E. Winnington) her only next of kin, entered a caveat against the will being proved, which was warned by the plaintiffs on the 1st of November, 1864. The defendant appeared to the warning, and on the 21st of November, 1864, the plaintiffs delivered their declaration, to which the defendant had filed no plea.

On the 31st of January, 1865, the Court, on motion of the plaintiffs, gave leave for a citation to issue against the defendant as heir-at-law to see proceedings. A difficulty had since been raised in the registry on the ground that, as no plea had been filed, and no citation issued in respect of the personal estate, the will could "not be said to be in dispute," which it was said was a condition precedent in this case to issuing the citation. An affidavit was filed by Madame de Bille, that she and her co-plaintiffs were desirous of proving the will in solemn form, and had propounded it for that purpose, and that she was desirous also that the heir-at-law should be cited.

Dr. Tristram moved for leave for the citation to issue, and submitted that, under the 61st section of the Probate Act, it ought to issue. The words of the section are: "Where proceedings are taken under this Act for proving a will in solemn form, or where, in any other contentious cause or matter under this Act, the validity of a will is disputed, the heir-at-law and persons interested in the real estate affected by the will shall be cited to see proceedings in like manner as next of kin and other persons having interest in personal estate affected by the will should be cited," &c. It has been **[19]** suggested in the Registry that the words in the first sentence of the section, "where proceedings are taken," refer only to suits commenced by a citation; and that the words "where in any other contentious cause or matter" the validity of a will is disputed, include suits originating with a caveat, and that this suit having originated with a caveat, as no plea has been filed, the will could not be said to be in dispute so as to entitle the citation to issue. The effect, however, of the word "taken" in the first sentence ought not to be so limited in construction, and Sir C. Cresswell had so held in *Nicholls and Freeman* v. *Binns*, 1 Swab. & Trist. 21, which was a suit commenced, not by a citation, but, like the present one, by a caveat, and a citation was allowed to issue to cite the heir at law before any plea had been filed. The affidavit of Madame de Bille shewed that the plaintiffs were, in the words of the first sentence, taking proceedings for proving the will in solemn form.

*Sir J. P. Wilde*: Is there any opposition to your motion?

Dr. Tristram: No.

*Sir J. P. Wilde*: The citation may issue. I think the construction you have put upon the word "taken" is correct.

JONES *v.* WILLIAMS AND OTHERS. March 1, 1865.—Pleas.—Interveners.—Practice.—A party cited to see proceedings, who has appeared and opposes a testamentary paper, is not allowed to adopt the pleas of the defendant, but should file pleas on his own behalf.

[S. C. 34 L. J. (P.) 102; 11 Jur. (N. S.) 288.]

The plaintiff propounded the will and five codicils of Francis Williams, Esq., deceased. The defendant pleaded as to the five codicils undue execution and incapacity.

**[20]** Dr. Spinks, for one of the next of kin, who had been cited to see proceedings, and had appeared during the progress of the suit, moved that his party might have leave to adopt the plea of the defendant in opposition to the last codicil. The pleadings are completed, and the party cited not having pleaded would not be entitled to take part in the trial. There is no rule and no practice as to what steps should be taken by him to enable him to appear at the trial under such circumstances. I suggest that the most convenient course will be that a minute should be made that he shall be allowed to appear as a party at the trial, adopting the pleas of the defendant as to the last codicil.

Dr. Wambey, for the plaintiff, consented.

*Sir J. P. Wilde*: I am unwilling to create a new precedent of the kind suggested by Dr. Spinks, and to dispense with a plea substituting for it a minute of the Court. I think the party cited may plead like any other party. I give him leave to file a plea within a week.

IN THE GOODS OF GOOLD (deceased). March 14, 1865.—Administration Bond.—Excessive Penalty by Mistake.—Cancellation of Bond.—Where, under a misapprehension as to the value of the personal estate of an intestate, the penalty of an administration bond was too large, the Court, upon the execution of a fresh bond in a penalty proportioned to the actual value of the estate, ordered the original bond to be delivered out of the registry to be cancelled.

[S. C. 34 L. J. (P.) 105; 11 Jur. (N. S.) 288; 13 L. T. 193.]

George Goold, late of Shanghai, in China, deceased, died March 13, 1855, a widower, without child or parent, and intestate.

**[21]** In February, 1856, administration of his property was granted by the Prerogative Court of Canterbury to H. M. F. Goold, his brother, and one of his next of kin, who died in May, 1861, leaving part of the deceased's property unadministered. In June, 1861, on the citation and non-appearance of the other brothers and sisters, administration of the unadministered effects of George Goold was granted to Matilda Goold, the widow, relict, and sole executrix of the will of H. M. F. Goold. Mrs. Goold, in the affidavit to lead the administration, swore that the unadministered effects of the deceased did not amount in value to £2000. She paid the stamp-duty of £60, and, together with her sureties, executed a bond in the penalty of £4000, and this bond had been filed in the registry.

The reason why Mrs. Goold valued the unadministered estate at this amount was, that she believed, that at the time of his death, George Goold was entitled, under certain deeds of settlement and family arrangements, to one-twelfth part of a certain freehold estate: and such real estate was not sold until October, 1864, when it realized £30,000. She then discovered, that the deceased had, by an indenture dated the 31st of July, 1830, made between himself of the one part, and George Woodroffe (since deceased) of the other part, bargained, sold, and released all his right, title, and interest in the above estate to George Woodroffe, his heirs, executors, and assigns, for his and their own absolute use and benefit; consequently, the whole property left unadministered by the first administration did not amount in value to the sum of £20. On the 24th of February, 1865, the Commissioners of Inland Revenue, on a representation to them of the aforesaid facts being made, ordered that the £60, the amount of the duty paid on the letters of administration of the unadministered effects of the deceased, should be returned, and the stamp be cancelled. Mrs. Goold, with one surety, had entered into a new bond in the sum of £100.

**[22]** Dr. Deane, Q.C., moved the Court to order that the new bond should be substituted for the old one, and that the latter should be delivered out of the registry to Mrs. Goold to be cancelled.

*Sir J. P. Wilde*: As the Commissioners of Inland Revenue have investigated the

matter and have returned the duty, and as it appears from the affidavit of the administratrix that there is no such estate as was supposed, and that the whole matter has originated in a mistake, I think the bond for £4000 may be given out to be cancelled on the bond for £100 being brought into the registry.

WEST AND NICHOLL *v.* WEST. March 14, 1865.—Pleading.—Undue Influence.—Practice.—A plea alleging undue influence without naming any person by whom the undue influence has been exercised is bad and must be amended. But a plea alleging undue influence by A. B. and others, is a sufficient plea, though the other party would be entitled to particulars of the "others," on summons.

[S. C. 34 L. J. (P.) 146. Followed, *Jackson* v. *Hillas*, 1869, Ir. R. 4 Eq. 60.]

The plaintiffs propounded, as executors, the will and two codicils of the Dowager Countess of Amherst. The defendant pleaded, as to the second codicil, undue execution, that it was not the codicil of the deceased, and that it was procured by undue influence, but no person was named by whom the undue influence was alleged to have been exercised.

Mr. Searle moved to strike out the second plea, that the codicil was not the codicil of the deceased, and that the defendant might be ordered to specify by way of particulars the **[23]** persons by whose undue influence the codicil was alleged to have been procured.

*Sir J. P. Wilde*: The second plea must be struck out, the third plea must be amended by inserting the names of the persons by whose undue influence the codicil was procured.

Mr. Searle: We do not ask for the plea to be amended, we shall be satisfied with particulars in order to save delay.

*Sir J. P. Wilde*: It is not a case for particulars but for amendment; the plea is bad as it stands. If undue influence had been alleged to have been exercised by A. B. and others, the plea would be good, though the other party would be entitled to particulars of the "others" on summons.

BIRKS *v.* BIRKS. April 21, 1865.—Probate of Two Testamentary Papers.—Mistake.—Admissibility of Parol Evidence.—Testamentary Papers not inconsistent with each other.—The First not revoked by the Last.—A testator, having erased a clause in his Will after the execution, asked a friend to make a fresh copy of the Will, omitting the erased clause. The copy was made; but the person who made it by mistake omitted several other clauses. The copy was duly executed, and the omissions were not discovered until after the testator's death, both Wills having remained in his custody up to that time. The two Wills were not inconsistent with each other, and the latter contained no express clause of revocation. Probate was granted of both documents upon parol evidence of the circumstances under which they were drawn up and executed, as together containing the deceased's last Will and Testament.

[S. C. 34 L. J. (P.) 90; 13 L. T. 193; 13 W. R. 638.]

**[24]** The plaintiffs were the executors of Peter Birks, deceased, and the defendants were some of his next of kin.

Peter Birks, James Birks, and Mary Elizabeth Birks, spinster, the plaintiffs, alleged in their declaration, that Peter Birks, of Laughton-en-le-Morthen, in the parish of Laughton, in the county of York, gentleman, deceased, who there died on or about the 13th of May, 1864, made his last will and testament, bearing date the 19th of April, 1861, and now remaining in the Registry of this Court, marked A, and therein appointed the said Peter Birks, James Birks, and Mary Elizabeth Birks, executors. That the said will after having been reduced into writing, was signed at the foot or end thereof by the said testator, in the presence of two witnesses present at the same time, who subscribed the said will in the presence of the said testator, and that at the time of the execution of the said will the said testator was of the full age of twenty-one years, and of perfectly sound mind, memory, and understanding.

That, after the execution thereof, the said testator, having a mind and intention to revoke one specific devise therein contained, cancelled and erased the words: "I devise all those my two cottages adjoining each other, situate at Cordwell Green, in the parish of Laughton aforesaid, now in the respective occupations of George Fowler and Charles Jarvis, unto my housekeeper, Mary Dawson, to hold unto the said Mary

Dawson and her heirs." That the said testator, having the mind and intention effectually to revoke the said devise, and otherwise to confirm the said will, instructed Mr. John Acom, of Laughton-en-le-Morthen aforesaid, grocer, to recopy his said will, omitting only the aforesaid devise to the said Mary Dawson.

That the said John Acom, in copying the same, inadvertently, and by mistake, omitted divers other words and sentences besides those contained in the devise to the said Mary Dawson, to wit, first the word "in" between the words "be" [25] and "England," in the ninth line from the top of the first page of the said will; secondly, the words "But if the said Gerald Peter Tarleton shall die under the age of twenty-one years," between the words "years" and "either," in the twentieth and twenty-first lines from the top of the first page of the said will; and thirdly, the words "unto my said nephew, Peter Birks and his sister, my niece, Mary Elizabeth Birks, to hold unto them, my said nephew, Peter Birks, and his said sister, my niece, Mary Elizabeth Birks, and their heirs, in equal shares and proportions as tenants in common. I bequeath all the residue of my personal estate whatsoever and wheresoever," following the words "whatsoever and wheresoever," in the seventh line of the second page of the said will, and extending to the word "unto" in the eleventh line of the said second page of the said will.

That the said incorrect copy now remaining in the Registry of this Court, marked with the letter B, and bearing date the 4th day of July, 1862, was signed by the testator at the foot or end thereof, in the presence of two witnesses present at the same time, under the belief that the said paper B was an exact copy of the said paper A, save and except the omission of the devise to the said Mary Dawson; that the said two witnesses whose names appear upon the said paper B, subscribed the same in the presence of the said testator, and at the time of the execution of the said will marked B, the said testator was of perfectly sound mind, memory, and understanding; and that the said papers A and B, without the said devise to the said Mary Dawson, together contain the last will and testament of the said testator.

Elizabeth Gordon (wife of William Robert Gordon), the said William Robert Gordon, Pamela Priscilla Dale (wife of Edward Samuel Dale), and the said Edward Samuel Dale, the defendants pleaded:—

That the paper writings A and B, without the devise to Mary Dawson, propounded by the plaintiffs, as together con-[26]-taining the last will and testament of Peter Birks, late of Laughton-en-le-Morthen, in the county of York, gentleman, deceased, are not, and do not together contain the last will of the said deceased.

That the said paper-writing marked A was and is revoked by the said paper-writing marked B.

Replication.—As to the first plea the plaintiffs join issue.

As to the second plea, they deny that the paper-writing marked A was or is revoked by the paper-writing marked B, and they take issue thereon.

The cause came on for trial before Sir J. P. Wilde without a jury.

The Queen's Advocate and Dr. Spinks for the plaintiffs.

Dr. Wambey for the defendants.

The due execution of paper A, the first will, was proved, and that the papers A and B both remained in the deceased's custody up to the time of his death.

William Wasteneys, a schoolmaster, who formerly lived near the deceased, said: Sometime after the execution of the first will the deceased told me that his housekeeper, Mary Dawson, was going to leave him and get married, and he did not think it would be right that she should have his cottages. He fetched the will into the room, and said, "I will let you see me cross it out." He then crossed out the devise to Mary Dawson. He asked me to copy out the will again, leaving out the paragraph with the devise to his housekeeper. I objected to do so, and recommended him to go to a solicitor. I saw nothing more of the will after that, and in the following December I left Laughton.

John Acom: I am a grocer at Laughton. In July, 1862, the testator sent for me, and I went to his house. He was very ill. He asked me to copy out a will for him, with the [27] exception of a few lines he had crossed out. He produced paper A to me. A few lines with the devise to Mary Dawson were crossed out. He asked me to make a fresh copy of the will, leaving out those lines. I agreed to do so, and took the will home to my house. He said he was afraid the will would not stand good unless a fresh copy was made. I copied out the will at my own house. I believed

that I had copied it out correctly. I took the copy (paper B) to his house with the first will. I told the deceased that I believed that I had copied it correctly to the best of my knowledge. He said nothing to me about making alterations in the copy. Neither of us read over the copy I had made. He was so shortsighted that he could not have found out the mistake. I did not know of the omissions I had made in the copy until the solicitor told me the day the deceased was buried. It was entirely my mistake, and I am very sorry for it.

The following is a copy of paper A. The words printed in italics are those which were omitted in paper B:—

"This is the last will and testament of me, Peter Birks, of Laughton-en-le Morthen, in the parish of Laughton, in the county of York, gentleman. I bequeath the following legacies, namely,—To each of my brothers, William Birks, of Manchester, hairdresser, £200. To my nephew, Alexander Birks, of Manchester, shopman, £200. To my nephews and nieces, children of my brother Simon Birks, who shall be *in* England at the time of my decease, £150, to be divided among them in equal shares and proportions. To my niece Sarah Ann, now the wife of Ephraim Webster, of Witney, in the county of Oxford, schoolmaster, £150. To my farm-servant David Bulmer, in consideration of his long service to me, £50. I bequeath to my executors, hereinafter named, the sum of £500, upon trust to pay the same to Gerald Peter Tarleton, son of my late niece Sarah, the wife of John Willington Tarleton, late of Solihull, in the county of Warwick, gentleman, deceased, when **[28]** he shall attain the age of twenty-one years. *But if the said Gerald Peter Tarleton shall die under the age of twenty-one years*, either in my lifetime or after my decease, then upon trust to pay the same sum of £500 to Anne Tarleton, Mary Paulina Tarleton, and Mary Margaret Tarleton, the daughters of my said late niece Sarah Tarleton, who have attained or shall attain the age of twenty-one years in equal shares and proportions. I devise all that my close of land situate on Laughton Common, in the parish of Laughton aforesaid, commonly called or known by the name of 'common field' (with the large shed thereon), containing about eight acres, now in my own occupation, to William Hollingworth, of Staveley, in the county of Derby, farmer (nephew of my late wife), to hold unto the said William Hollingworth and his heirs. I devise all my field of land situate at Brampton-en-le-Morthen, in the parish of Treeton, in the county of York, containing about five acres, now in the occupation of Thomas Skelton; and also all that my field of land situate at Brampton-en-le-Morthen aforesaid, commonly called or known by the name of the 'gated lands,' containing about two acres and twenty-two perches, now in my own occupation, unto my nephew Peter Birks, of Manchester, traveller, to hold unto my said nephew Peter Birks and his heirs. *I devise all those my two cottages adjoining each other situate at Cordwell Green, in the parish of Laughton aforesaid, now in the respective occupations of George Fowler and Charles Jarvis, unto my housekeeper, Mary Dawson, to hold unto the said Mary Dawson and her heirs.* I devise all that my small farm situate at Marsh Lane, in the parish of Eckington, in the county of Derby, containing about twenty acres, now in the occupation of George Spencer. And all my real estate whatsoever and wheresoever *unto my said nephew Peter Birks, and his sister, my niece, Mary Elizabeth Birks, to hold unto them, my said nephew Peter Birks and his said sister my niece,* **[29]** *Mary Elizabeth Birks, and their heirs, in equal shares and proportions, as tenants in common. I bequeath all the residue of my personal estate, whatsoever and wheresoever*, unto my said nephew Peter Birks, and his said sister, my niece, Mary Elizabeth Birks, in equal shares and proportions, as tenants in common, for their own respective use and benefit. I direct my executors to invest during the minority of the said Gerald Peter Tarleton the said sum of £500 bequeathed to them upon the trusts aforesaid, in the Three per Cent. Consols, and to receive the dividends thereof as they shall become due and be payable, and to pay the same to the guardians of the said Gerald Peter Tarleton, to be applied by them in the maintenance and education of the said Gerald Peter Tarleton. I devise all estates vested in me as trustee or mortgagee in any real or personal estates unto my said nephews Peter Birks and James Birks, their heirs, executors, administrators, and assigns, upon such trusts and subject to such equities as shall be subsisting concerning the same respectively at the time of my decease. I appoint my said nephews Peter Birks and James Birks, and my said niece Mary Elizabeth Birks executors of this my will. In witness whereof I have hereunto set my hand this 9th day of April, in the year of our Lord 1861.

"PETER BIRKS."

A regular attestation clause followed.

Dr. Wambey: The second paper contains a fresh appointment of executors; it is a complete testamentary instrument, and it therefore revokes the first paper, although it does not contain an express clause of revocation.

The Queen's Advocate: Both papers are duly executed; there is no clause of revocation in the second, the residue amounting to about £3000, is undisposed of by the second, [30] and both are entitled to probate, as together containing the last will and testament of the deceased.

The following cases were cited:—*Plenty* v. *West*, 1 Rob. 264; *Stoddart* v. *Grant*, 1 Macq. 171; *Geaves* v *Price*, 3 Sw. & Tr. 71; *Cutto* v. *Gilbert*, 9 Moo. P. C. 146; *Henfrey* v. *Henfrey*, 4 Moo. P. C. 29.

*Sir J. P. Wilde*: The evidence in this case discloses that a blunder has been made, the effect of which is that certain portions of the intentions of the testator were not expressed in the paper which he last executed. Indeed, the mistake appears upon the face of the paper, and the language bears traces of the omissions. The question is, whether this blunder is one which it is within the power of the Court to set right, as the Court would, no doubt, desire to set it right if it has the power. I quite admit that it is beyond the power of the Court to interpolate anything in a will, or to supply an omission by parol evidence, for, by so doing, it would give the force of a testamentary act to parol evidence, contrary to the statute. If this case came within that rule it would be impossible for the Court to supplement the will by inserting the omissions; but it is not so. Besides the second paper B there is the original will A, from which it is copied, and which is duly executed. The question therefore arises whether the Court, on reading paper B, can come to the conclusion that paper A has been revoked. It is said that the words "This is the last will and testament" have sometimes been relied on as shewing that the testator intended all previous instruments to be revoked; but, independent of the language of the Privy Council on that point, it is obvious that a man might very well sign a paper in which that language is used without intending to revoke all previous instruments. It is also said that the appointment of executors constitutes a revocation of previous instruments. For my own part I repudiate the notion that there are any particular words, or any particular [31] forms of expression, on which one's finger can be put as an universal test of revocation. I hold that the Court is bound to look, as far as it is justified in looking, at all the circumstances attending the execution of the will. A question of great importance then arises in this case as to the extent to which parol evidence is available. It is conceded that it is not available to supply a mere omission; but it is undoubted law that parol evidence may be given to shew the circumstances under which a testamentary paper was executed, and probate of a will has been refused where it has been satisfactorily proved by parol evidence that the testator signed it, not intending it to operate as a will, but for some collateral object. Parol evidence being admissible to shew under what circumstances a will was executed, the Court may draw what light it can from that evidence. The evidence in this case shews that at the time when the will B was executed the testator thought he was executing a copy of the will A, which he had caused to be made for the purpose of removing what he thought was a defect in the will A, namely, the erasure of one of the clauses. Under these circumstances, it would be monstrous for the Court to come to the conclusion that the testator intended to revoke those portions of paper A which were omitted from paper B by accident. Looking at all the circumstances, and the total absence of any language in paper B tending to revoke paper A, I think that paper A is still alive as far as is not inconsistent with paper B. I therefore think that probate must be granted of both papers as together containing the last will of the deceased.

Dr. Wambey moved for costs out of the estate.

*Sir J. P. Wilde*: Certainly.

[32] CHARLES ADOLPHUS SLUMBERS (deceased). April 20 and 25, 1865.—Grant for the use of Next of Kin, Lunatic.—25 & 26 Vict. c. 86, s. 12.—An intestate, whose property was under £1000 in value, left no known relation except a sister who was of unsound mind, but had not been found so by inquisition, and who had no property of her own. The Court refused to grant administration under 20 & 21 Vict. c. 77, s. 73, for the use and benefit of the lunatic, to a stranger in blood, until the applicant should obtain an order from the Court of Chancery

under the 12th section of the Lunacy Regulation Act, 1862 (25 & 26 Vict. c. 86). rendering the property of the lunatic available for her maintenance and benefit.

[S. C. 34 L. J. (P.) 93; 11 Jur. (N. S.) 396; 12 L. T. 582; 13 W. R. 696.]

The deceased in this case died on the 23rd of December, 1864, intestate, without any known relation except a spinster sister, who was of unsound mind, but had not been so found by inquisition.

The deceased had for some years been clerk to Mr. Chabot, a newspaper agent. On the day of his death Mr. Chabot had called at his lodgings, and found thirty-eight sovereigns in a coat pocket. Shortly afterwards, on searching the lodgings, he found hidden in the cupboard several packets, containing in all 644 sovereigns. Mr. Chabot had taken possession of this money, and after paying thereout for mourning for the deceased's sister, had placed the balance in a bank. Mr. Chabot had also paid the rent for the deceased's lodgings, medical and other expenses during his last illness, and funeral expenses, and had advanced certain sums for the maintenance of deceased's sister, who was in great poverty.

Dr. Spinks moved, under the 73rd section of the Probate Act, for letters of administration of the personal estate of the deceased to be granted to Mr. Chabot for the use and benefit of Caroline Slumbers, the natural and lawful sister and only next of kin of the deceased.

**[33]** The Queen's Advocate, on behalf of the Queen's Proctor, who had received notice of the motion, consented to the grant being made, the securities to justify.

*Sir J. P. Wilde*: The registrar tells me that by a recent statute the Court of Chancery is enabled by a summary process in a case of this kind to appoint a person to take charge of the estate without taking out a commission of lunacy. The case had better stand till next week.

April 25.—*Sir J. P. Wilde*: In this case application was made for a grant of administration to a stranger in blood of the deceased for the use and benefit of his only known relation, a sister, who is said to be lunatic. As was stated at the time, there is an Act of Parliament under which application can be made to the Court of Chancery in a case of this kind. The 25 & 26 Vict. c. 86, s. 12, provides that, "where by the report of one of the Masters in Lunacy or of the Commissioners in Lunacy, or by affidavit or otherwise, it is established to the satisfaction of the Lord Chancellor, intrusted as aforesaid, that any person is of unsound mind and incapable of managing his affairs, and that his property does not exceed £1000 in value, or that the income thereof does not exceed £50 per annum, the Lord Chancellor, intrusted as aforesaid, may, without directing any inquiry under a commission of lunacy, make such order as he may consider expedient for the purpose of rendering the property of such person or the income thereof available for his maintenance or benefit, or for carrying on his trade or business. Provided nevertheless, that the alleged insane person shall have such personal notice of the application for such order as aforesaid as the Lord Chancellor shall by general order to be made as after mentioned direct." I think that an application ought to be made under that section. It is said that the applicant intends to avail himself of the statute, but **[34]** wishes to obtain administration in the first instance. I think he ought to go to the Lord Chancellor in the first instance; he will probably be entrusted with the care of the lunatic's estate; and if he then comes here I can make a grant of administration to him under the 73rd section of the Probate Act. I am told in the Registry that the practice under the statute has been such, and that several grants of administration have been made to persons who have complied with the 12th section of the above statute.

Dr. Spinks asked for costs of the present application out of the estate.

*Sir J. P. Wilde*: I will make no order as to costs. If Mr. Chabot gets administration, he will be able to take his costs out of the estate.

IN THE GOODS OF JAMES POWELL (deceased). May 2, 1865.—Execution of Will.—Testator's Signature.—Foot or End.—A testator wrote a Will on three sides of a sheet of notepaper. The attestation clause and names of the attesting witnesses were at the bottom of the second side; a dispositive clause was written on the third side, and all the letters of the testator's signature, excepting the two last, which extended over to the third side, were on the second side. Held, to be a good execution.

[S. C. 34 L. J. (P.) 107; 13 L. T. 195; 13 W. R. 696.]

The deceased in this case, James Powell, late of Exeter, surgeon, made a will, dated the 9th of February, 1864, written on the two first sides, and a portion of the third side, on a sheet of notepaper. At the bottom of the second side there was the attestation clause and the names of the attesting **[35]** witnesses. At the top of the third side were these words, which had been written, as deposed to by one of the attesting witnesses, before execution :—"I should wish, if there are any books in my possession at my death, that some of them might be selected, and, as a remembrance, presented to my friend the Rev. Robert Oliver, Dr. Sieveking, and Dr. Parkes, of Netley Hospital, Hants, respectively." The signature of the testator, James Powell, was at the foot of the second side, with the exception of the two last letters of the surname, which extended to the third side.

Mr. C. A. Turner moved for probate of the whole document, including the words at the top of the third side, as being substantially signed at the foot or end thereof.

*Sir J. P Wilde*: I have looked at the will in this case. Assuming the paper to have been spread open at the time of execution, the signature would have embraced the whole of the writing, which was written on the third as well as on the second side. If it was not spread open, then it might be said the signature would only refer to the second side. I think I am justified in holding that it embraces the whole of the writing, and grant probate accordingly.

IN THE GOODS OF WRIGHT (deceased). May 30 and June 6, 1865.—Will.—Position of Signature.—15 & 16 Vict. c. 24, s. 1.—A Will filled two pages of a sheet of notepaper, leaving no room on the second page for the signatures of the testator and attesting witnesses, which were written along the sides of the Will upon the third page.—Held, to be a due execution.

[S. C. 34 L. J. (P.) 104; 13 L. T. 195. Applied, *In the Goods of Coombs*, 1866, L. R. 1 P & D. 302.]

William Wright, late of King's Lynn, Norfolk, died on the **[36]** 6th of April, 1865, leaving a will dated the 8th of April, 1864. The will was written on the first and second pages of a sheet of notepaper, and finished at the end of the second page, having no room for the signature of the testator. The signatures of the testator and of two attesting witnesses were written along the side of the will on the third page. One of the attesting witnesses make an affidavit to the effect that the will had been duly signed and attested, and the only question was whether, considering the position of the testator's signature, it was duly executed.

May 30.—Mr. R. A. Pritchard moved the Court to decree probate of the will.

Cur. adv. vult.

June 6.—*Sir J. P. Wilde*, after stating the facts, said: I am of opinion that the execution is sufficient. I cannot distinguish the case from one which I decided last term, *In the Goods of Jones*. I think the signature of the testator is "so placed at, or after, or following, or under, or beside, or opposite to the end of the will," that it is "apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will."

IN THE GOODS OF GEORGE THORNE (deceased). June 13 and 20, 1865.—Will.—Conditional or General.—Actual Military Service.—11th section of Wills Act.—The words, "I request that in the event of my death while serving in this horrid climate, or any accident happening to me," held not to make a testamentary paper conditional on the event of death while in that climate.—A mere averment that deceased held such a rank in his regiment, was in such a place, and was in actual military service, at the date of writing the paper in question, is not necessarily enough to entitle such paper to be treated as a soldier's testament; but the affidavit **[37]** should contain a statement of the circumstances full enough to enable the Court to judge whether the case falls within the meaning attributed by previous cases to the 11th section of the Wills Act.

[S. C. 34 L. J. (P.) 131; 11 Jur. (N. S.) 569; 12 L. T. 639. Discussed, *In the Goods of Porter*, 1869, L. R. 2 P. & D. 22; *In the Goods of Spratt*, [1897] P. 32.]

The deceased in this case died in London on the 16th of September, 1864. He left behind him a paper-writing, the material parts of which were as follows :—

"Cape Coast Castle, Gold Coast, 2nd of November, 1863.

"Be this known to all concerned: I request that in the event of my death while

serving in this horrid climate, or any accident happening to me, I leave and bequeath to my beloved wife, Ambroisine Thorne, residing in the Island of St. Lucia, West Indies, or her heirs, the sum of £1521, 14s. 9d. sterling, being the amount lodged to my credit, etc. I have also to request that, should anything happen me, that this letter will be sufficient for the President, who may take an inventory of my effects, to act on behalf of my beloved wife for me, etc. I will feel truly obliged to the officer commanding the 4th W. I. Regt. if he will, at my decease, take the necessary steps to procure the highest pension for my beloved wife and child, or if my beloved should prefer the price of my commission as a captain, viz. £1800, which I am led to suppose can be obtained, particularly should I be killed in action, etc. I consider that every person should be prepared for the worst, and particularly in such a treacherous climate as this, which is considered one of the worst in the world, which has compelled me to write this letter.

"I now sign my name in the presence of

"GEO. THORNE, Capt. 4th W. I. Regt.

"Witness my signature,
"Joseph Gray,
"S. A. Surgeon."

The affidavit of James Lyon Thorne, brother of the deceased, stated, among other things, as follows:—

[38] "My said brother went to Cape Coast Castle, on the Gold Coast, Africa, on or about the 1st of July, 1863, in command of a detachment of the said regiment, and whilst stationed there made and executed his last will and testament beginning [the affidavit then described the above paper]. On the said 2nd day of November, 1863, the date of his aforesaid will, my said brother was in actual military service. In the month of July following he left Africa for England, invalided, and died at the Craven Hotel, Strand, on the 16th of September, 1864."

The affidavit also spoke to the whole of the paper-writing, with the exception of the witness's name and description, being in the hand of the deceased.

June 13.—On the above facts,

Dr. Swabey moved for letters of administration with the will annexed to be granted to the widow as the sole legatee. The first question is, whether the paper is contingent on the event of the writer's death having taken place "while serving in this horrid climate." It is submitted that the words which follow, "or any accident happening to me," are sufficient to give a general effect to the paper. The whole scope of the paper is testamentary, i.e., intending to dispose of property after death, and the words "or any accident," etc., may fairly mean "death happening to me elsewhere than in this horrid climate."

*Sir J. P. Wilde*: I have read this paper over very carefully, and I think it is not necessary to limit its operation to the event of death while on the Gold Coast. But I am not clear at present that the paper is entitled to be treated as a soldier's will under the 11th section of the Wills Act: "provided always and be it further enacted, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act." Since the case [39] of *Drummond* v. *Parish*, 3 Curt. 522, something more than a mere averment of the deceased having been in actual military service has been required, namely a statement of circumstances full enough to enable the Court to judge for itself whether the case comes within the interpretation put upon the section by the case of *Drummond* v. *Parish*.

June 20.—On June 20th Dr. Swabey renewed the motion on the following affidavit from the widow of deceased:

"In the month of June, 1863, I was living with my said husband at Jamaica, where he was serving as senior captain of his said regiment. Some time in the summer of that year disputes arose between Governor Pyne, in command of the English settlement on the Gold Coast, Africa, and the King of Ashantee, and military operations were commenced by Her Majesty's troops under the command of the said Governor Pyne against the King of Ashantee. My said husband was ordered with a detachment of his regiment to reinforce Her Majesty's troops on the Gold Coast, and left Jamaica on the 1st of July, 1863. On arriving on the Gold Coast my said husband joined the expedition formed to march into the interior as acting-major; and in contemplation of such march, as I verily believe, he made his will now in the

registry of this court, etc. At the date of such will my said husband was in actual military service against the King of Ashantee. My said husband returned to England and died on the 16th of September, 1864; and Her Majesty the Queen has allotted to me through the War Office a special pension in consideration of my husband's death as having occurred or been brought on through the aforesaid Ashantee expedition."

*Sir J. P. Wilde*: I think there is a sufficient statement of circumstances which bring the case within the principle laid down in *Drummond* v. *Parish*, and the grant may be made as prayed.

**[40]** IN THE GOODS OF NICKALLS (deceased). June 6, 1865.—Two Wills of the same Date.—Parol Evidence of Intention.—Probate of both Wills.—Three duly-executed testamentary papers bore the same date, two of which purported to dispose of the residue. It was proved by parol evidence that the first was intended to apply only to certain property in Canada, and that the two last were intended to apply only to certain property in England. The three papers were admitted to probate as together containing the testator's last will and testament.

[S. C. 34 L. J. (P.) 103; 13 W. R. 1047.]

John Lott Nickalls died in March, 1865, having duly executed three wills, each of them bearing date the 25th of October, 1864. They were all in his handwriting. The first, paper A, was as follows:—

"This is the last will and testament of me, John Lott Nickalls, of the parish of Orsett, in the county of Essex, England, that is to say after my decease I give and bequeath unto my cousin, Patteson Nickalls, of Bromley, in the county of Kent, the whole of my freehold property situate in the city of Kingston, in Upper Canada, together with my waterwork shares and gas stocks, on condition of his giving to each of his sisters, viz., Elizabeth Nickalls, Maria Rudge, and Hannah Nickalls, the sum of £20 a year, each for and during their natural lives. Should any calamity befall the property at any time, then one half of the income. These ladies shall be entitled to receive the same, and should the said Patteson Nickalls die before his children, then the said property to be equally divided amongst all his children, subject to the sums to be paid yearly to the above parties—Elizabeth Nickalls, Maria Rudge, and Hannah Nickalls—and I appoint Patteson Nickalls and his son Tom Nickalls, of Bromley, my executors to this my will, dated October 24, 1864."

The second, paper B, was as follows:—

**[41]** "This is the last will and testament of me, John Lott Nickalls, of the parish of Orsett, in the county of Essex, England. I give and bequeath to the following parties, viz.—To Mrs. Hardwidge, my sister-in-law, one hundred pounds; to my sister-in law, Mrs. Greenaway, three hundred pounds, and in the event of her death, to her daughter, Elizabeth Bunter; to Richard James, of Orsett Mill, the sum of three hundred pounds, and in the event of his death, to his two sons and his daughter, equally divided; to the sons of the late Thomas James, viz., Joseph James and Richard James, the sum of twenty-five pounds; to Charles E. James, the sum of one hundred pounds; John Frederick James, the sum of fifty pounds; and to Ruth Fortt, of Bath, the sum of four hundred pounds (that is to say), the interest of the same during her life, and, after her decease, to her children, James Fisk and Sarah Matchett; the residue I leave to Ruth Fortt and her children, after all my just debts are paid. I appoint Mr. Joseph James my executor, and Mr. Richard Bunter my executor, for which I give him £25."

This was attested by Richard Bunter and Stephen Hallow Bread.

Paper C was substantially the same as paper B, but the clause appointing executors was omitted. Affidavits of Patteson Nickalls, of Sarah Hardwidge, and of Elizabeth Greenaway, were filed, from which it appeared that the deceased was a widower without children; that Patteson Nickalls was one of the next-of-kin and one of the persons entitled in distribution; that the deceased was possessed of property in Canada and in England, and that he had frequently, previous to October 25, 1864, expressed his intention to leave his Canadian property to Patteson Nickalls and his English property to his wife's family.

Sarah Hardwidge, one of his attesting witnesses, stated in her affidavit that, on the 25th of October, 1864, the deceased, **[42]** before preparing the will marked A, said to her, "I shall make the American will first"; that she was present in the

sitting-room during a portion of the time in which he was preparing his wills; that the wills marked A and B were written out by him, and ready for signature before either of them was signed; that after they had been prepared the deceased said it would be necessary to have three witnesses for the Canadian will; that the paper marked A was duly signed and attested by the three witnesses, whose names appear upon it; that immediately after the execution of A, the deceased signed paper B, which he called his English will, which was duly attested; that she had read over both wills before either of them was executed, and that when Mr. Bunter was about to sign paper B, she said, "Nickalls, Mr. Bunter, being an executor, should not sign"; that deceased said, "Bunter, sign," and accordingly Bunter did sign; that she repeated that it was illegal, and the deceased said, "I will write it out again"; that he appeared somewhat tired and excited, and she suggested that he should defer it till the next day, that he said he should do it at once, and he proceeded to write it over again; and that paper C was accordingly written out by him, and duly signed and attested.

May 30.—Dr. Spinks, for the executors appointed by paper A, moved for probate of the three papers as together containing the last will and testament of the deceased.

Dr. Swabey, for the executors appointed by paper B, consented.

Cur. adv. vult.

*Sir J. P. Wilde*: I am of opinion that probate ought to be granted of all the three papers, as together constituting the last will of the deceased. The grant will be made to the four executors.

Probate granted.

**[43]** MASON *v.* THE NEXT OF KIN OF WILLIAM ROBINSON. IN THE GOODS OF WILLIAM ROBINSON (deceased). June 6, 1865.—Administration to Creditor.—Original Citation not forthcoming.—When the estate of the deceased, who died without any known relation, was barely sufficient to pay his liabilities, and a citation had been issued and served on behalf of a creditor upon the Queen's Proctor and by advertisement, but had been lost or destroyed by his solicitor's clerk, who had absconded for embezzlement, the Court dispensed with the rule requiring the citation to be returned into the Registry, and made the grant of administration to the creditor.

William Robinson, the deceased, died at an hotel, of which the plaintiff was proprietor, without any known relation, indebted to the plaintiff in the sum of £39, 10s. 4d. There was also a further sum due to the plaintiff for the expenses of his funeral. His debts altogether amounted to £140, his assets to £150. The usual citation had been issued and served on the Queen's Proctor, by the managing clerk of the plaintiff's solicitor, who had since absconded, having grossly neglected his employer's business, and embezzled a considerable amount of his money. No appearance had been entered to the citation, and the plaintiff was unable to proceed with the motion in consequence of the citation not having been filed by the managing clerk, who could not give any account of what had become of it. A copy of the citation was annexed to an affidavit.

Dr. Spinks moved to dispense with filing the citation in the Registry, and for the grant to go to the plaintiff as a creditor of the deceased.

*Sir J. P. Wilde*: I think the Court may in this case dispense with the rule requiring the citation to be returned into **[44]** the Registry before making the grant. It is necessary as a general rule that the citation should be returned into the Registry, in order to preserve a record of what has been done in each case. But here there is a reason for dispensing with the rule.

IN THE GOODS OF ELIZABETH NOSWORTHY (deceased). June 27, 1865.—Inconsistent Wills of same Date.—Execution by Mistake.—A testatrix duly executed two inconsistent Wills, bearing the same date, and written on different sides of the same sheet of paper. Evidence was admitted to shew that the deceased signed one of them only as her Will, and signed the other by mistake. The Court granted probate of the paper signed by the testatrix, with the intention that it should operate as her Will, and not of the other paper.

[S. C. 34 L. J. (P.) 145; 11 Jur. (N. S.) 570.]

In this case the deceased died on the 2nd of January, 1865, leaving two testamentary papers, A and B, written on different sides of the same sheet of paper, both

duly executed and both bearing the date of 6th of January, 1862. The first side of the sheet of paper (A) contained a lithographic form of will, with blank spaces for names and dates, and one of these blank spaces was filled up, in the handwriting of the testatrix, with the name of Maria Nosworthy, to whom testatrix, by this paper. left all her property, both real and personal, and whom she appointed executrix, The testimonium clause, which was filled up in the testatrix's handwriting, was as follows:—"I have set my hand the — day of January 6th one thousand eight hundred and 62," the word "January" and the figures being in writing and the other words lithographed. This paper contained a clause revoking all former or other wills and was duly signed and attested.

The second testamentary paper (B) was written on the **[45]** second side of the sheet, at the back of the lithographed form. It was in the testatrix's handwriting, and the beginning was apparently copied from the lithographed form. The paper read as follows:—"This is the last will and testament of Eliz. Nosworthy, of Powhill, Devon, made this — day of January 6th, 1862, in the year of our Lord eighteen hundred and 62. I hereby revoke all wills made by me heretofore. I appoint Maria Nosworthy, my niece, to be my executrix, and direct all my just debts and funeral expenses shall be paid as soon as conveniently may be after my decease." The will then proceeded to make a bequest of Elwell Cottage to Mrs. Alfred Medland, and to leave legacies of £25 to each of her nieces, Mary, Martha, and Agnes Nosworthy; of £20 each to her nephew Samuel Nosworthy and her niece Mrs. Dennington, and to divide her jewellery, plate, wardrobe, books and pictures between her nephew and her nieces. This will was also duly signed and attested by the same witnesses who had subscribed their names on the preceding side of the sheet of paper. The affidavit of Henrietta Sharland, one of the attesting witnesses, stated that the deceased had been for many years housekeeper to Mr. Thomas Melluish, with whom the deponent was intimately acquainted; that in January, 1862, the deponent was staying at Mr. Melluish's house, and the deceased asked her and Mr. Melluish to see her execute her will; that they went into deceased's sitting-room, and she produced from a drawer the sheet of paper containing the two testamentary papers in question; that she opened the sheet of paper, and holding it with the second and third pages wide open, said, "This is my will"; that she then placed it open on the table and signed her name at the end of the second side of the sheet, and the deponent and Mr. Melluish then subscribed their names in her presence; that the deceased, who was old and near-sighted, then asked the deponent to see whether there was any other place where she and the witnesses ought to sign; that the deponent then **[46]** turned to the first page of the sheet, and, after reading the lithographed attestation clause on that page, told the deceased that she and the witnesses must sign there also, and they did so; that the deceased did not make any further observation about either of the two wills, and that all the writing in both the papers had been written by the deceased previous to their execution.

Dr. Wambey moved for the two papers as together containing the wills of the deceased.

*Sir J. P. Wilde*: The deceased appears to have put her name to paper A under an impression that it was a form which it was necessary to go through in order to give validity to paper B. If that is so the signature to paper A would not be an execution, and paper B would be only the duly-executed paper. The parties may, if they please, propound paper A, and take the opinion of the Court or a jury, because the question is one of fact, namely, what was done at the time of execution.

Dr. Wambey: I will take probate of paper B alone.

IN THE GOODS OF COWARD (deceased). June 27, 1865.—Will.—Wife of convicted Felon.—The wife of a convicted felon is a feme sole as to the power of disposing by Will at least of property acquired after her husband's conviction.

[S. C. 11 Jur. (N. S.) 569; 34 L. J. (P.) 120; 13 L. T. 210.]

Sarah Coward, the wife of Fleming Coward, died on the 30th July, 1858, leaving a will, dated the 21st June, 1858, whereof she appointed Joseph Slee sole executor. She was the daughter of James McNeil, late of Maryport, who died **[47]** in April, 1846, leaving a will, whereby he devised a messuage in Maryport for his wife for life, and after her decease to his daughter, S. Coward; and bequeathed to his wife for life, afterwards to S. Coward and to his two other children, the whole of his household

furniture, plate, linen, and china; and bequeathed to his daughter S. Coward one-sixteenth share of and in the brig "Congress" of Maryport.

At the Carlisle Summer Assize of 1855 Fleming Coward was tried and convicted of an attempt to murder his wife's brother J. McNeil. Sentence of death was recorded against him, and he was transported for life, and is still living and undergoing his sentence. No transfer of the one-sixteenth share of the brig "Congress" was made to Fleming Coward or to Sarah Coward until after Fleming Coward's conviction; it was then transferred to Sarah Coward, and is now duly registered in her name as owner. Joseph Slee, the executor, being in Castlemaine, in the county of Talbot, Victoria, by power of attorney, dated the 14th of November, 1864, appointed J. McNeil his attorney for the purpose of obtaining administration with the will annexed of Sarah Coward. A statement of facts was submitted to the Queen's Proctor, who, by letter dated the 9th of May 1865, stated that he declined to interfere.

Dr. Spinks moved for a grant of administration with the will annexed of the personal estate and effects of Sarah Coward to J. McNeil, as the attorney of Joseph Slee, the sole executor therein named, for his use and benefit until such time as he should duly apply for and obtain probate of the said will. The question is, whether the will of a married woman, made whilst her husband is undergoing sentence for felony, is a valid will? The authorities shew that a married woman, after her husband is convicted and whilst he is undergoing his sentence, is a feme sole as to her testamentary capacity :—1 Jarm. on Wills, p. 35, 3rd edit.; 2 Bright on **[48]** Husband and Wife, p. 39; *Countess of Portland* v. *Prodger*, 6 Vern. 104; *Ex parte Franks*, 1 Moo & Sc. 1; and *In the Goods of Martin*, 2 Rob. 405.

*Sir J. P. Wilde*: The case of *Ex parte Franks* was very fully argued and well considered in the Court of Common Pleas, but unfortunately the Court did not give a detailed judgment, as it was a question sent from Chancery. On the authority of the cases you have cited, and especially of *Ex parte Franks*, I think that I am justified in holding that a woman whose husband is a convict is to be regarded as a feme sole, for the purpose, at any rate, of making a will. Administration with the will annexed may therefore issue as prayed.

Administration decreed.

CORDEUX *v.* TRASLER. July 18, 1865.—Administration.—Prior Petens.—Affidavits in Reply.—Practice.—Cæteris paribus, the male is preferred to the female, in a contest for a grant of administration; but the female, when with the consent of the male she is prior petens, is preferred to the male, who afterwards opposes her taking the grant.—The Court will allow affidavits in reply to be read at the hearing of a cause, if it thinks such affidavits are necessary.

[S. C. 34 L. J. (P.) 127; 11 Jur. (N. S.) 587.]

This was an administration suit. The intestate, George Trasler, late of Houghton, Northamptonshire, farmer, died at Houghton on the 12th of May, 1865, a bachelor, leaving Mary Cordeux, the plaintiff, his lawful niece, and George Trasler, the defendant, his lawful nephew, the only persons entitled in distribution to his estate. The value of the property was about £5000.

**[49]** On the 17th of May, Mrs Cordeux, with her husband's consent, applied to the District Registry of Northampton for a grant of administration, and was duly sworn, and executed the usual bond; but before the grant was issued a caveat was entered by the defendant. The plaintiff in her petition alleged that she was a fit and proper person to have the grant, being well educated and accustomed to business, and of independent means, and able and willing to give justifying security; that the defendant was an uneducated man, and was, and had been for many years, a private soldier, and was not accustomed to business, and was not a fit and proper person to have the grant.

The defendant's answer denied that he was uneducated or unaccustomed to business, or an unfit and improper person to have the grant, and alleged that he was the deceased's heir-at-law, that he had served for upwards of twenty years in Her Majesty's Fifteenth Regiment of Hussars, and was entitled to be discharged on a full pension; and that he was able and willing to give justifying security.

Affidavits were filed in support of the petition and the answer by both parties. The plaintiff's affidavits contained charges of misconduct against the defendant.

July 11.—Dr. Wambey, for the defendant, moved for leave to file affidavits in answer to the plaintiff's affidavits, as to the charges of misconduct. Those charges

are not contained in the pleadings, and the defendant has not had an opportunity of answering them. He referred to the 69th rule.

Dr. Spinks, for the plaintiff: The practice in the Ecclesiastical Courts was to object at the hearing to any material fact in the affidavits being read which was not stated in the pleadings.

*Sir J. P. Wilde*: It seems to be a very reasonable practice **[50]** that the Court at the hearing should determine what is material and what is immaterial in the affidavits, and should then call on the other side to answer only what is material. The Common Law Procedure Act authorized the Courts of Common Law in all cases to allow affidavits to be filed in reply, and those Courts adopted the practice of allowing the cause to come on for hearing, and then, if they thought necessary, allowing affidavits already prepared to be read in reply. The defendant may prepare affidavits in reply; and if I think it necessary, I will allow them to be read at the hearing.

July 18.—Dr. Spinks moved for a grant of administration to the plaintiff.

Dr. Wambey: The defendant has prepared affidavits in answer to the charges against his character.

*Sir J. P. Wilde*: As Dr. Spinks has not read those parts of his affidavits, and does rely on them, it is unnecessary to read the affidavits in answer to them.

Dr. Wambey moved that the grant might be made to the defendant, in accordance with the rule that the male is preferred to the female. He cited *Chittenden* v. *Knight*, 2 Lee 559, and *Iredale* v. *Ford*, 1 Swab. & Trist. 305.

*Sir J. P. Wilde*: In *Iredale* v. *Ford*, Sir C. Cresswell said: "There are several dicta in the books on the subject of the rules which guide the discretion of the Court in granting administration where the statute does not apply. Dr. Waddilove is right in stating that, cæteris paribus, males are preferred to females; but there is another principle relied on by Dr. Spinks, that the grant will follow the majority of interests, and will be made as desired by the majority of interests. I think this is a more stringent rule than the one giving a preference to **[51]** males over females." There is also another rule which sometimes guides the Court, and is mentioned in Coote's "Probate Practice," c. 8, s. 1, namely, that the grant will be made priori petenti. It is difficult to weigh with great exactitude the merits of the respective applicants for a grant, nor is it necessary to do so, because, provided the Court is satisfied that the person it selects is responsible, and is able and willing to give security, the object of the grant is achieved. It often happens that a contest for administration is caused by jealousy arising between persons nearly related to one another, rather than from fear of loss to the estate. In this case the defendant appears to have been on very friendly terms with Mr. Cordeux, and to have discussed the affairs of the deceased with him shortly after the death, and to have expressed a desire that Mr. Cordeux should wind up the affairs and manage everything, and all he wanted to know was, how much he would have. Therefore the plaintiff is not only prior petens, but she was so at first with the consent of the defendant. The Court will not disturb that arrangement without proof that the person to whom the grant is about to be made is an improper person to take it. The rule that the male is to be preferred to the female is sufficiently answered by the rule that the prior petens is to be preferred, and I decline to interfere. Mrs. Cordeux will therefore take the grant.

Dr. Spinks and Dr. Wambey moved that the costs of the plaintiff and of the defendant respectively might be paid out of the estate.

*Sir J. P. Wilde*: I think the costs of both parties may be paid out of the estate.

**[52]** ARGENT *v.* ARGENT. April 22 and July 26, 1865.—Marriage and Decree of Dissolution in Cape of Good Hope.—Second Marriage.—Right of Widow to Administration in England.—A., born in Ireland, resided at the Cape of Good Hope, in Her Majesty's Forty-Fifth Regiment of Foot, and afterwards in the Cape Mounted Rifles, from 1842 till 1862. In 1850 he married B., resident in the colony; in 1852 the Colonial Court decreed a dissolution of that marriage; in 1856 A. married C., B. still living. A. died in 1863 intestate; and, on a question as to the right to letters of administration raised between C. and the brother and next of kin of A.:—The Court held, that C. was entitled to administration as the widow of A.

[S. C. 34 L. J. (P.) 133; 11 Jur. (N. S.) 864; 12 L. T. 768.]

This was a question arising on a claim to the administration of the personal estate of Thomas Argent. Eleanor Argent, the plaintiff, by her declaration, alleged, that

Thomas Argent, late of Port Louis, Mauritius, deceased, died on or about the 4th of December, 1863, at Port Louis aforesaid, intestate, without child or parent, leaving the said Eleanor Argent his lawful widow and relict, and John Argent his natural and lawful brother (and certain sisters) his only next of kin.

John Argent, the defendant, by his pleas, (1) denied that the plaintiff was the lawful widow and relict; (2) alleged that on or about the 22nd of March, 1850, the said Thomas Argent, being then a Colour-Sergeant in Her Majesty's Forty-Fifth Regiment of Foot, was lawfully married to Amelia Argent, then Amelia Adams, spinster, at Graham's Town, Cape of Good Hope: that the said Amelia Argent, the lawful wife of the said Thomas Argent, died in or about the year 1860, and that the said Thomas Argent having never again married subsequently, died intestate and a widower.

The replication first took issue on defendant's pleas; and, **[53]** secondly, to the second plea, further replied, that the said marriage in the plea mentioned was, on or about the 6th of October, 1852, by proceedings duly taken in the Circuit Court holden in and for the division of Albany, Graham's Town, Cape of Good Hope, and having jurisdiction in that behalf, dissolved by decree or judgment of the said court; which said decree or judgment still remains in full force, etc., and thereupon the deceased Thomas Argent became and was lawfully divorced from the said Amelia Argent, who ceased to be the lawful wife of the said Thomas Argent; that subsequently to the said decree, and on or about the 11th of July 1856, the said Thomas Argent was lawfully married to the plaintiff, then Eleanor Pridmore, spinster, at Graham's Town, aforesaid, and the said plaintiff became and was the lawful wife of the said Thomas Argent, and continued such until his decease.

Rejoinder to the further replication alleged that the marriage of the said Thomas Argent with Amelia Argent was not dissolved as alleged; that by reason of the said Thomas Argent being a British subject and a domiciled Englishman on the 6th of October 1852, the Court aforesaid had not jurisdiction to dissolve the marriage; that the said decree has no force or effect in England; that the said Thomas Argent, by the law of England, did not become and was not lawfully divorced from the said Amelia Argent; that the said Thomas Argent was not lawfully married to the plaintiff on or about the 11th of July 1856, when the said Amelia Argent was still living.

Sur-rejoinder took issue on the rejoinder.

The following facts were agreed upon by the parties, and admitted by a previous order of the Court:—First, Thomas Argent was born in Ireland; secondly, Thomas Argent became and was resident in the colony of the Cape of Good Hope in or about the year 1842, being in Her Majesty's Forty-Fifth Regiment of Foot, and stationed there on duty; thirdly, Thomas **[54]** Argent continued to reside in the said colony on duty in the said regiment and in the Cape Mounted Rifles until the year 1862, with the exception of a short time when on leave of absence; fourthly, Amelia Argent, in the pleadings mentioned, was resident in the colony of the Cape of Good Hope during the years 1850 and 1852; fifthly, the decree of divorce in the plaintiff's replication mentioned, was made on the 6th of October 1852; sixthly, the plaintiff became and was resident in the colony of the Cape of Good Hope in or about the year 1854, and continued to reside therein until the year 1862.

On these pleadings and admitted facts, the case was heard by the Court itself on the 22nd of April.

Mr. W. Willis opened the pleadings.

The Queen's Advocate (Sir R. J. Phillimore): We claim administration for the plaintiff as widow. It is admitted that she married after a decree of divorce; it will be for the other side to shew why she cannot claim as widow.

Dr. Spinks, for defendant: If you claim as widow, you must shew that you are so.

*Sir J. P. Wilde*: On the pleadings the plaintiff alleges that she is the lawful widow, which the defendant denies; the affirmative of that issue is on the plaintiff, whose counsel must therefore begin.

The Queen's Advocate: In support of the invalidity of the decree of dissolution it will be said that the deceased was a soldier in Her Majesty's service, and never lost his domicil of origin. The first marriage took place at the Cape in March 1850; and *Simonin* v. *Mallac*, 2 Swab. & Tris. 67, shews that the jurisdiction of a Matrimonial Court is founded by reason of the contract having been entered into within **[55]** the local limits of the jurisdiction. The argument in *Lolly's* case, Russell & R. C. C. 237,

no longer applies now that dissolution of marriage is recognised by the law of this country. We admit that there may have been an English domicil for certain purposes, but contend that there was a sufficient residence to found the jurisdiction of the Colonial Court, which has by its constitution authority to give relief for breaches of the marriage contract.

Dr. Spinks, for the defendant: The principle of this question was very ably treated in No. 47 of the "Edinburgh Review," 112. That the deceased was an English subject is at the bottom of the whole question; the Court must take the law of this country as it was in 1852, when dissolution of marriage was unknown to it. The decree of the Colonial Court, must have been effectual or ineffectual for purposes in this country at the time it was made, and can acquire no validity by the subsequent change in our law. The Courts of this country have adopted the position of international law laid down in 1st Burge ("Commentaries on Colonial and Foreign Laws"), 681, namely that the status of marriage depends on the law of the domicil. *Warrender* v. *Warrender*, 2 Cl. & F.; Bishop on Marriage and Divorce, ss. 150, 714, 720, 721. In the present case the residence in the colony was a mere temporary sojourn, the deceased was liable to be sent away at any moment, and the actual length of residence is immaterial, his only forum for matrimonial relief was England. *Simonin* v. *Mallac* only determined that the effect of a contract entered into in this country and the status of persons consequent upon it, may be ascertained by the Courts of this country; but the question of altering the status never arose in that case. The jurisdiction of this Court was considered in *Bond* v. *Bond*, 2 Swab. & Tris. 93; *Brodie* v. *Brodie*, 2 Swab. & Tris. 259; *Ratcliffe* v. *Ratcliffe*, 1 Swab. & Tris. 467.

**[56]** *Sir J. P. Wilde*: To shew that this Court has jurisdiction would not shew negatively that no other Court has it.

Dr. Spinks: That, with submission, is one of my propositions. *Tollemache* v. *Tollemache*, 1 Swab. & Tris. 557; *McArthy* v. *De Caix*, 2 Russ. & My. 614.

*Sir J. P. Wilde*: What ought the Court to do if it were satisfied that the plaintiff is the deceased's widow by the law of the Cape of Good Hope, and in possession of a grant of administration made there?

An informal copy of the decree of divorce made at the Cape of Good Hope was put in de bene esse.

The Queen's Advocate, in reply, cited *Pitt v. Pitt*, 4 M'Q. H. of L. Reps. 5th part.

Cur. adv. vult.

Subsequently *Sir J. P. Wilde* suggested that, to enable the Court to dispose of all the points argued, it would be desirable that further admissions of fact should be made, but the sittings after Trinity Term drawing to an end without this having been done, the learned judge, on 26th July, gave the following judgment:

*Sir J. P. Wilde*: The facts in this case are not before the Court with such distinctness as to raise all the questions intended. But, as the suggestion of the Court that further admissions should be made has not been attended with much result, I must deal with the case as it stands, without further delay. And I shall decide it upon one short ground. It appears that the deceased was continuously resident at the Cape of Good Hope for many years preceding and up to the period of his death. While there, in the year 1850, he married Amelia Adams. This marriage was lawfully dissolved, according to the law of the place, in the year 1852, by reason of the **[57]** wife's adultery. In the year 1856 the deceased, still resident in the same place, contracted a second marriage with Eleanor Pridmore, the plaintiff, which was a valid marriage according to the law of that place. And the question is, whether this Court is to hold this last marriage to be invalid according to the law of England, upon the ground that the deceased was not domiciled at the Cape of Good Hope, but somewhere else, and that according to the law of that place, wherever it may be, the deceased had no capacity to contract the second marriage, because the first marriage, though legally dissolved at the Cape, and for a ground of divorce recognised and acted upon in England, namely, adultery, was still a valid and subsisting marriage unless dissolved by the Courts of the country of his domicil? This will indeed be carrying the principle that the law of domicil governs the relations of marriage and the remedies of divorce to its extreme length. For here we have a marriage good and binding at the place where it is celebrated, both parties capable of contracting it according to the law there, and the supposed incapacity now relied upon both created and removed there—all the parties being resident there and nowhere else during the whole time.

I do not propose to enter upon the much-vexed question, so ably and vigorously debated by the Scotch lawyers, whether the Courts of a country where the parties are substantially resident, though not domiciled, ought to be held in other countries to have the power of entertaining the question of divorce, at least to the extent of applying the same remedies for the same offences as the country of the domicil would have done. For, assuming this to be resolved in the negative, there is nothing admitted in this case from which the conclusion can be clearly drawn that the deceased had no domicil at the Cape, or that he was a domiciled Englishman. And, if these difficulties were removed, it would still remain to be shewn on clear authority not only that the divorce was invalid by the law of the domicil, but that the capacity to con-**[58]** tract the second marriage was a question to be referred to the law of the domicil, to the disregard of the lex loci, and to the annulling of a marriage contracted innocently and bonâ fide in reliance upon that law. Those who have considered these questions most will be the most ready to admit that an inflexible rule, which makes either the lex loci or the lex domicilii paramount in the regulation of matrimonial relations, will hardly meet the justice of particular cases. But I can conceive no state of the law likely to work more hardship and injustice than that which would permit some legal incapacity springing out of the law of his distant domicil to be at the service of a man who induces a woman to marry him in the country where they both live, for the annulling of such a marriage. And, upon the authorities as they now stand, I am not, I think, forced to any such conclusion. For these reasons the Court declines to pronounce the marriage of the plaintiff invalid, and decrees administration to her as the widow of the deceased.

BELLEW *v.* BELLEW AND OTHERS. July 11 and 18, 1865.—Suit pending.—Receiver in the Court of Chancery.—Administration pendente lite.—The practice of the Prerogative Court, and of the Probate Court hitherto, has been not to grant administration pending suit, unless by consent, or on proof that such a grant was necessary for the preservation of the property; but in future cases the Court will follow the practice of the Court of Chancery in appointing receivers, and will apoint an administrator pending suit where a bonâ fide suit is pending, irrespective of the property being in particular danger.

[S. C. 34 L. J. (P.) 125; 11 Jur. (N. S.) 588; 13 L. T. 247. Not applied, *Horrell* v. *Witts*, 1866, L. R. 1 P. & D. 104. Referred to, *In re Oakes*: *Oakes* v. *Porcheron*, [1917] 1 Ch. 232.]

The defendant Henry Bellew propounded, as sole executor, the will dated the 5th of August 1863, of Caroline Countess Bellew, late of Stockleigh House, North Gate, Regent's Park, **[59]** who died on the 24th of February 1863. The plaintiff is a sister and one of the next of kin of the deceased. Several nephews and nieces of the deceased, and parties entitled to distribution, had been cited to see proceedings, and had appeared. The deceased was possessed of no real estate.

Her personal property was estimated as follows:—

| | | | |
|---|---|---|---|
| Thirty-eight years' unexpired term in the lease of Stockleigh House and grounds, and furniture and pictures, etc., in the house | £4,424 | 16 | 6 |
| Cash in the house | 88 | 4 | 9 |
| Balance at Bankers' | 480 | 0 | 0 |
| Three per Cent. Consols | 18,662 | 8 | 6 |
| Three £100 East Indian Bonds | 300 | 0 | 0 |
| Three £100 Turkish Bonds | 300 | 0 | 0 |
| Stock and Shares in different companies | 391 | 0 | 0 |
| Reversion to an annuity, value unknown | | | |
| Amount unknown in the Dutch Funds | | | |
| | £24,646 | 9 | 9 |

The defendant had declared, propounding the will. The plaintiff and one of the parties cited had pleaded, traversing the due execution of the alleged will and the capacity of the testatrix.

On the 17th of June, 1865, the plaintiff and several of the parties cited to see proceedings filed their bill of complaint against the defendant, praying, amongst other things, that some proper person might be appointed by the Court of Chancery as receiver, pending the proceedings in the Court of Probate, to take possession of the

leasehold property of the deceased, and to collect, get in, and receive all her other personal estate and effects.

July 11.—Dr. Spinks moved the Court, on behalf the defendants, to decree administration pendente lite of the effects of the de-[60]-ceased to Henry Baldock Kingsford, on his giving security and filing inventory.

The defendant had filed an affidavit, stating that Mr. Kingsford was the senior partner of the firm of Kingsford and Garland, accountants, of St. Martin's Lane, and was a fit and proper person to be appointed administrator pendente lite, and was uninterested in the suit.

Mr. H. Bullar, for the plaintiff, opposed the motion. It is not alleged that the property is in any jeopardy, and it appears from the schedule in the defendant's affidavit that it is not of a nature to require the immediate appointment of an administrator. It would be therefore contrary to the practice of the Court to make such an appointment without the consent of all parties. (*Williams on Executors*, 433, 434 (5th edit.); *Godrich* v. *Jones*, 2 Curt. 453.)

Dr. Tristram, for some of the parties cited, supported the motion.

Mr. Searle, for others of the parties cited, opposed it. He referred to Dodd's Probate Practice, 456. Cur. adv. vult.

July 18.—*Sir J. P. Wilde*: an application was made last week for the appointment of an administrator pendente lite in this suit. The applicant's affidavit did not shew, and it was not pretended that it did shew, that the estate was in any jeopardy or peril; but it appeared that some of those who were opposing the appointment of an administrator had applied to the Court of Chancery to appoint a receiver. It was argued that it was not necessary in this Court to shew that the estate was in peril, but that it was competent to either party who desired to have the management of the estate confided to some indifferent person, to obtain a grant of administration pendente lite, without the [61] consent of the other side. Not only the text-books, but the cases cited against that argument, unquestionably established the proposition that in the Ecclesiastical Courts administration was never granted, unless with the consent of all parties, or unless a case of necessity was made out. Has the practice of this Court been different from that of the Ecclesiastical Courts? In one case since I had the honour of presiding here, I refused to grant administration pendente lite, on the ground that no necessity was made out for it. I have taken some pains to ascertain whether the same course was followed by my learned predecessor. A case has been found in the Registry where the property was more within the category of property in danger, than the property in this case, being money due in respect of freight, shares in railways and other companies, household furniture and cash. Although in that case there was quite as much or more than there is in this case to call for such a grant, and although an attempt was made with some success to shew that the person who then had possession of the estate could not be trusted, because he had been convicted of an offence against the custom laws, Sir C. Cresswell refused the application with costs. I take it therefore that it is plain that the practice of the Ecclesiastical Courts and of this Court has been only to grant administration pendente lite in cases where necessity for the grant is made out. That being so, the defendant was wrong in applying for administration pendente lite, and the parties who applied to the Court of Chancery for a receiver were right. It would be improper to depart in this case from the practice hitherto followed in this Court, and I therefore refuse to appoint an administrator pendente lite. I have taken some pains to ascertain whether the rule of the Court of Chancery with regard to the appointment of a receiver is wider than the rule of this Court with regard to the appointment of an administrator pendente lite, and I think that it is. The rule of the Court of Chancery appears to be, that wher-[62]-ever there is a bonâ fide suit pending, the Court will appoint a receiver quite irrespective of the condition of the estate, or of the person who has the actual possession of it, on the ground that while the suit is pending there is no one legally entitled to receive or to hold the assets, or to give discharges. I wish to give notice that I shall in future assimilate the practice of this Court to that of the Court of Chancery, and that I shall grant administration pendente lite wherever the Court of Chancery would appoint a receiver; for I do not think it right that a party suing in this Court should be put to the inconvenience of making an application to the Court of Chancery when it is in the power of this Court to assist him. I must refuse this application; but I think, under the circumstances, that none of the parties ought to be condemned in costs.

**[63]** CODRINGTON *v.* CODRINGTON AND ANDERSON. July, August, November, and December, 1864; January, February, 1865.—Order for Particulars.—Sufficiency.—Adjournment by Reason of Surprise.—Charges by Respondent against Petitioner not established.—Costs against Co-Respondent.—New Trial.—On summons for particulars of a charge of adultery, an order was made to give, at least ten days before the trial, particulars specifying dates and occasions, or the petitioner to be precluded from giving other than documentary evidence in support of certain charges of adultery. A statement, purporting to be particulars, was given, but with scarcely any specification of dates and occasions. At the trial evidence other than documentary was objected to, on the ground that the order for particulars had in substance not been complied with; but the Judge Ordinary held that the evidence was admissible, and that if the particulars were not sufficient, the proper course would have been to apply for further and better particulars.—Where an adjournment was granted on the ground of surprise, at the instance of the respondent, in respect of a charge of adultery with a person other than the co-respondent, it was granted on the understanding that the co-respondent should not be prejudiced as to costs by such adjournment.—The question of costs is in the discretion of the Court, in the circumstances of each case, and where the petitioner obtained a verdict **[64]** establishing—1st, the adultery of the respondent and co-respondent; 2nd, the adultery of the respondent with a person other than the co-respondent; and 3rd, the petitioner's innocence of charges brought against him by the respondent; the Judge Ordinary, in the circumstances of the case, refused to condemn the co-respondent in costs other than those occasioned by the issue of adultery raised by his answer and found against him.—On motion for new trial it was urged that the Jury had been unfairly affected, as against the co-respondent, by the production of a draft or duplicate of a letter in the handwriting of the respondent, and found in her custody, there being no proof that the original or duplicate had been sent to, or reached, the co-respondent.—The Judge Ordinary held that this ground for a new trial should have been founded on an affidavit from the co-respondent that he had not in fact received such original or duplicate.

[S. C. 34 L. J. (Mat.) 60; 11 Jur. (N. S.) 286; 13 W. R. 527.]

This was a petition for dissolution of marriage by reason of the adultery of the respondent and co-respondent. The co-respondent traversed the adultery; the answer of the respondent raised a further issue of conduct on the part of the petitioner conducing to the adultery. The fourth paragraph of the petition was as follows:—"That during the years 1859, 1860, 1861, and 1862, the said Helen Jane Codrington was habitually and frequently visited by David Anderson, the Colonel of Her Majesty's Second Regiment of Foot, at your petitioner's residence at Malta aforesaid, and that on divers of such occasions, which your petitioner is unable more particularly to set forth, the said Helen Jane Codrington committed adultery with the said David Anderson." There was also a charge of adultery with Lieutenant Mildmay, but he was not made a co-respondent. S. C. 3 Sw. & Tr. 368.

On the 16th of July, 1864, the following order was made on summons, at the instance of the co-respondent, for particulars:—"By order of this date it is ordered that unless the attorney for the petitioner do, not later than ten days before the trial of this cause, deliver to the attorney of the co-respondent particulars specifying the dates and occasions of the **[65]** adultery charged in the fourth paragraph of the petition filed in this cause, the petitioner will be precluded from offering at the trial of this cause, any evidence save documentary evidence, in support of the said fourth paragraph." It was stated on behalf of the petitioner that he was not then in possession of any evidence as to Malta, except certain diaries and other documents in the handwriting of the respondent.

On the 31st of May, 1864, the following statement was handed to the co-respondent's attorney:—

"The following are the particulars of the dates and occasions of the adultery charged in the fourth paragraph of the petition in this cause, delivered to the co-respondent pursuant to an order made in this cause, dated the 16th day of February, 1864. Petitioner abandons the charges of adultery against the respondent and co-respondent, for the years 1859 and 1860, as alleged in the fourth paragraph of the said petition, but alleges that during the year 1861, 1862, and down to and

inclusive of the 12th day of May, 1863 (upon which day the petitioner, respondent, and family, left Malta for England), the said co-respondent was the intimate friend and constant guest of the respondent, and that during the whole of that period he was in the habit of almost daily and nightly visiting the respondent at petitioner's house at Malta aforesaid, and accompanying her to and from balls, the opera-house, and other places at Valetta, and elsewhere at Malta, and meeting with her on her journey homewards from thence, and accompanying her to petitioner's house aforesaid, and afterwards remaining with her till a late hour in the night, often after petitioner had retired to rest, and without his knowledge or consent; and on divers such occasions, which the petitioner cannot more particularly specify, the respondent committed adultery with the said co-respondent in your petitioner's house at Malta, and in the cabin of the boat returning home across the water from Valetta; that on one occasion, late at night, [66] which the petitioner cannot specify by date, save that it was on a night when there was an illumination at Malta, the respondent and co-respondent committed adultery just aside the Victualling Yard gate."

The issues came on for trial before the Judge Ordinary, by a special jury, on the 29th July, 1864.

Mr. Bovill, Q.C., Mr. Serjeant Ballantine, and Dr. Spinks for the petitioner.

The Queen's Advocate (Sir R. J. Phillimore), Mr. Hawkins, Q.C., and Mr. Inderwick for the respondent.

Mr. Price, Q.C., and Dr. Swabey for the co-respondent.

The petitioner's case was proceeded with on the 30th of July, when the depositions of certain witnesses examined under commission at the instance of the petitioner, at Malta, were tendered by Mr. Bovill.

Mr. Price, on behalf of the co-respondent, objected to this evidence on the ground that the particulars of the 31st of May were not only an insufficient compliance with the order of the 16th of February, but amounted in fact to no compliance at all, no more specific dates being given in the so-called particulars than in the paragraph of the petition. The petitioner is therefore bound by the proviso in the order which confines him to documentary evidence on this part of the case.

*The Judge Ordinary*: If no particulars had been given that would have been so. You say the particulars are insufficient; if so, application should have been made in Chambers for further and better particulars. I am quite clear this evidence is admissible.

[67] Towards the end of sitting on the same 30th of July, a Mrs. Watson was called as a witness on behalf of the petitioner, and stated certain admissions and confessions of intercourse with Mr. Mildmay, made by the respondent to her, Mrs. Watson, when no other person was present, in terms and to an effect which Mrs. Watson said she had never uttered till she was in the witness-box.

At the sitting of the Court on the 1st of August, the respondent's counsel applied for an adjournment of the cause on the ground of surprise by Mrs. Watson's evidence.

Counsel for petitioner, contrà.

*The Judge Ordinary*: I think I must grant the adjournment which is asked; it is an evil and inconvenience in itself, but if the cause went on now, and a verdict was found against the respondent, I should be bound to grant a new trial on the ground of surprise, which would be a still greater evil.

The cause was thereupon adjourned till Michaelmas Term, all parties agreeing to leave any difficulty arising from casualties in the Jury to the decision of the Judge, and it being understood that the co-respondent was not to be prejudiced as to costs by the adjournment.

The hearing of the case was proceeded with on the 17th, 18th, 19th, and 23rd of November, on which last day the jury found a verdict for the petitioner on all issues, and the Judge Ordinary pronounced a decree nisi.

A certain letter in Mrs. Codrington's handwriting, and proved to have been found in her desk, dated 27th of October, 1863, 82, E. S., was put in evidence against her. It commenced, "What can I say to your letter?" it contained no name throughout, but it was suggested, and the internal evidence afforded by the letter, coupled with certain facts proved as to Colonel Anderson, shewed that it was addressed to [68] Colonel Anderson; but there was no proof that the document itself, or any copy or duplicate of it, had ever reached Colonel Anderson.

Mr. Bovill (Serjeant Ballantine and Dr. Spinks with him) for the petitioner, moved to condemn the co-respondent in costs.

Mr. Price (Dr. Swabey with him) for the co-respondent, contrà: The question of costs is entirely in the discretion of the Court, but in exercising that discretion the Court will consider the conduct of the petitioner as well as that of the co-respondent. Though the jury found that the petitioner had not been guilty of wilful neglect or misconduct conducing to the adultery, yet the evidence shewed great carelessness on his part. At all events, the co-respondent ought not to be condemned in the costs occasioned by the proof of adultery with Lieutenant Mildmay, and by the charges brought by the respondent against the petitioner.

Mr. Bovill and Dr. Spinks in support of the motion: The case comes within the ordinary rule as to costs, namely, that where the adultery is proved against the co-respondent, he must pay all the costs incurred in consequence of that adultery. The only exceptions yet allowed to that rule are—first, cases in which the co-respondent did not know that the respondent was a married woman; secondly, cases in which the co-respondent has already paid costs and damages in an action for crim. con. in a court of common law. It was held by the full Court, in *Badcock* v. *Badcock and Chamberlain*, 1 Swab. & Trist. 189, that remissness of the husband's conduct was no excuse for the co-respondent. It is an argument in mitigation when damages are claimed, but it is no answer to an application for costs. The jury negatived the charge that any conduct of the petitioner had conduced to the respondent's adultery. It was proved that she did not choose to adopt the mode of **[69]** life which her husband's official duties obliged him to adopt, and the co-respondent's conduct was without excuse. If the Court does not condemn co-respondents in the costs of countercharges contained in the answers of respondents, the result will be that in every case the co-respondent will set up his defence in the answer of the wife, and the husband will have to bear the costs.

*The Judge Ordinary*: I must say that in my opinion the argument in support of this motion has been put on too high a ground. It has been assumed that in all cases in which the co-respondent has been found guilty of adultery, he must as a matter of course be condemned in costs. That argument, if well founded, would deprive the Court of the discretion expressly vested in it by the statute. If this is the first case in which the Court has been asked to exercise that discretion, the reason perhaps is that it is the first case in which that discretion could reasonably be exercised. I think it by no means follows as a matter of course that because a co-respondent is found guilty he must pay the costs. In dealing with the question of costs, it is necessary carefully to consider the conduct of the husband and wife, as well as that of the co-respondent. I will bestow careful consideration on the conduct of each of the parties in this case. Cur. adv. vult.

Jan. 17.—The Queen's Advocate (Mr. Hawkins and Mr. Inderwick with him) for the respondent, moved for a rule nisi for a new trial.

Mr. Price (Dr. Swabey with him) moved for a similar rule on behalf of the co-respondent.

Upon counsel commenting upon the undue effect, as against the co-respondent, which had been given to the letter in Mrs. Codrington's handwriting referred to above,

**[70]** *The Judge Ordinary* asked whether Colonel Anderson had made an affidavit that the original of that letter had not reached him, and was answered in the negative.

The following judgment sufficiently shews the grounds on which the rule was moved, and disposes of the question of costs. Cur. adv. vult.

Feb. 14.—*The Judge Ordinary* gave the following judgment:—

In this case I feel bound to refuse a rule to shew cause why a new trial should not be had. That this costly, protracted, and painful investigation should be gone through a second time, would be a grievous hardship on the petitioner; and the reasons which should induce the Court to subject him to it had need be weighty and conclusive.

On the part of Mrs. Codrington it was urged that the verdict was against the weight of the evidence, and much reliance was placed on the fact that the jury must have given credit to Mrs. Watson, whereas they ought, after certain contradictions she received, to have done the contrary. But this was essentially a matter within their peculiar province, and I must respect their decision. It was further argued that I had misdirected the jury because I had not remarked upon certain parts of the evidence so forcibly as it was thought they had deserved. This is a new head of

misdirection, and one which if sustained as the ground of a new trial, would be likely to bring about a second trial in all cases of importance. For the weight to be given to the several facts and statements laid before a jury varies so much in the estimation of different minds, that anything like a common consent on the subject is not attainable.

On the part of Colonel Anderson it was argued that his identity as the man who drove with Mrs. Codrington to the Grosvenor Hotel was not established. But this man was taken up by Mrs. Codrington at the house where Colonel **[71]** Anderson was lodging; and Frank Strutt, the porter there, swore he saw Colonel Anderson get into a cab one evening about that time, and that there was a lady in the cab, whom he recognised as Mrs. Codrington. Again, it was urged that the copy of a letter purporting to be written by Mrs. Codrington to Colonel Anderson, which was necessarily laid before the jury as evidence against her, unduly and improperly biased the jury against him. Now if this letter was really sent to and received by him, he has no real ground of complaint that the jury should have drawn such conclusions as the letter warranted against him, as well as against her. Upon asking whether he had availed himself of the opportunity which the forms of the Court permitted, to make an affidavit that he never received that letter, I was told that he had made no such affidavit. And his counsel very properly from that moment argued the case on the supposition that he had received the letter. It would be of little avail to comment at length on the evidence by which the finding of the jury may be justified. It is enough that I can by no means say they were clearly wrong.

I have now to dispose of the question of costs. The 34th Section of the Divorce Act authorizes the Court in its discretion to cast the whole or any portion of the costs on the co-respondent. The discretion must bear on the special circumstances of each case, though in most cases those circumstances may present very uniform features.

But this is by no means an ordinary case. On the part of Colonel Anderson it was argued that the petitioner's conduct to his wife, though the jury found that it did not amount to such neglect as to bar his divorce, was yet by no means free from blame. It was urged that for years he had suffered, if not enforced, his wife to absent herself from his bed at night, and lead a separate life by day.

Further, that when they did go out together into society, the petitioner was in the habit of leaving his wife to come **[72]** home alone at night, and that she did so night after night, at a very late hour, in the company of Colonel Anderson, of all which the petitioner was aware.

It was also pointed out that James Tuck, the petitioner's valet, who spoke to many acts of gross familiarity with Lieutenant Mildmay, when asked why he had not mentioned what he had seen, replied "that he thought Admiral Codrington knew all about it," and "that he must have known it." And further, that evidence was not wanting to prove that the Admiral had withdrawn himself from his wife advisedly, saying that he did not want to have any more children.

It was also clear on the evidence that the intrigue with Lieutenant Mildmay preceded Mrs. Codrington's intimacy, if not her acquaintance, with Colonel Anderson.

The facts gave rise to much very able reasoning on Colonel Anderson's behalf, to the effect that the costs incurred by the petitioner in obtaining a divorce ought not to be borne by the co-respondent.

But to some portions of that reasoning as applied to the question of costs, various answers suggest themselves, and other portions depend on the degree to which the facts relied upon were credibly established in proof.

The Court is by no means prepared, therefore, to adopt it without qualification; and while it cannot on the one hand deny that the conduct of the petitioner has been such as to invite reasonable challenge, it cannot on the other hand go the length of absolving Colonel Anderson from the costs of proving against him the adultery which he has chosen to put in issue.

The Court therefore condemns him in those costs, but it will go no further. He will not have to bear the costs of Mrs. Codrington, nor the costs of the petitioner in proving the case against her in respect of Lieutenant Mildmay; nor the costs of the adjournment, which arose entirely on that branch of the case.

**[73]** (Before the *Judge Ordinary*, and, on appeal, before the Full Court—The *Judge Ordinary*, *Mellor*, *J.*, and *Pigott*, *B.*)

GARSTIN *v.* GARSTIN. January 19, 1865.—Absolute Appearance.—Plea to the Jurisdiction. — Party in Contempt. — Practice.—A respondent who appears absolutely thereby admits the jurisdiction of the Court, and cannot afterwards amend his appearance in order to plead to the jurisdiction.—The Court will not hear a party who is in contempt for any purpose except that of purging his contempt.

[S. C. 34 L. J. (Mat.) 45; 13 W. R. 508. Refered to, *Gordon* v. *Gordon*, [1904], P. 172.]

This was a petition by a wife for a judicial separation. The citation and a copy of the petition were served on the respondent in Jersey on the 18th of July, 1864, and on the 25th of July his solicitors entered an absolute appearance on his behalf.

November 3.—Dr. Tristram, for the respondent, moved for leave to amend the absolute appearance, by substituting for it an appearance under protest, in order to enable him to plead to the jurisdiction. Affidavits were filed in support of the motion, in order to shew that the respondent was domiciled in Jersey, and was not subject to the jurisdiction of this Court.

Mr. Thrupp opposed the motion, and cited *Donegal* v. *Donegal*, 3 Phil. 609; *Chichester* v. *Donegal*, 1 Add. 18; *Zycklinski* v. *Zycklinski*, 2 Swab. & Trist. 420; *Forster* v. *Forster and Berridge*, 3 Swab. & Trist. 144.

*The Judge Ordinary*: Sir C. Cresswell having, in *Forster* v. *Forster and Berridge*, refused to allow the respondent, who had appeared absolutely to amend her appearance, and enter an appearance under protest, I feel myself bound by his opinion, though I have some doubt upon the question. I shall therefore refuse the application.

Motion rejected.

**[74]** The respondent having given notice of appeal, the question came on for argument on the 10th of January, 1865, before the full Court.

Dr. Tristram for the appellant.

Mr. Thrupp for the wife. The appellant is in contempt, and therefore cannot be heard. After the suit commenced, the respondent took from the petitioner her youngest child, which was under the age of two years, and the Court ordered him to deliver it up to her. Upon his refusal to do so, the Court issued an attachment against him, whereupon he left England, taking the child with him. Until he has complied with the order of the Court, he can only be heard for the purpose of purging his contempt. He cited *Ricketts* v. *Mornington*, 7 Sim 200.

Dr. Tristram: If the Court has no jurisdiction to make the order, the respondent cannot be in contempt for not obeying it. He has, therefore, a right to raise the question of jurisdiction, notwithstanding his contempt. This being a suit for judicial separation, the Court is bound to follow the practice of the Ecclesiastical Courts, and those Courts were prevented from making any order in a suit while an appeal was pending, by an inhibition issued by the Court of Appeal. [*The Judge Ordinary*: An appeal from the Ecclesiastical Court would carry the case out of the Court below into the Court of Appeal. Here the appeal is to the same Court, the Court for Divorce and Matrimonial Causes.] When the Judge Ordinary hears a cause of judicial separation, he does not sit in the full Court. [*The Judge Ordinary*: All the acts of the Court are the acts of the Court for Divorce. There is but one Court, certain powers being wielded by the Judge Ordinary alone, and certain other powers being wielded by the Judge Ordinary with other members of the Court.]

Mr. Thrupp replied.

**[75]** *The Judge Ordinary*: I am of opinion that the course which the appellant proposes to take is not in any way conformable to the practice of the Court. The respondent has appeared absolutely, and unless that appearance is got rid of, he has subjected himself to the jurisdiction of the Court. After that appearance had been entered, certain orders were made for the purpose of compelling the respondent to give up the custody of his child, and he has chosen not to obey those orders. He has applied to have those orders rescinded, and it was intimated to him that if he was prepared to submit to the authority of the Court and bring back the child within its jurisdiction, his application should be heard. He now applies to the full Court to be allowed, as a matter of indulgence, to withdraw his appearance. I am of opinion that while

he sets the authority of the Court at defiance, he cannot be heard in support of that application. The appeal may stand over, and it will be heard as soon as the respondent has put himself in a position to have it heard.

Mellor, J., and Pigott, B., concurred.

Appeal stayed accordingly.

SHELDON *v.* SHELDON (The Queen's Proctor intervening). January 28, 1865.—Practice.—Dismissal of Petition.—No Evidence produced.—The Queen's Proctor intervened in a suit for dissolution in which the respondent did not appear, and alleged collusion and the petitioner's adultery. No evidence being tendered in support of the petition, when the case came on for hearing the Court dismissed the petition, without requiring evidence to be produced in support of the Queen's Proctor's plea.

[S. C. 34 L. J. (Mat.) 80; 13 W. R. 507.]

This was a wife's petition for dissolution of marriage, on the ground of adultery, coupled with cruelty.

**[76]** The respondent did not appear.

The Queen's Proctor had intervened, and traversed the petitioner's allegations of cruelty and adultery, and charged the petitioner with collusion and also with adultery with John Thomas Browne. Issue had been joined on these pleas, and the cause came on for hearing before the Judge Ordinary without a jury.

The Solicitor-General (Sir R. P. Collier) (Dr. Spinks with him) for the Queen's Proctor. He had no evidence in support of the charge of collusion, but had evidence which established the charge of adultery against the petitioner. If no evidence is tendered in support of the petition it will probably be unnecessary to produce it.

No one appeared on behalf of the petitioner.

*The Judge Ordinary*: The object of the Queen's Proctor's intervention is to prevent the petitioner from obtaining a decree if the allegations in the petition are proved. Unless evidence is produced upon which a decree can be founded, it is unnecessary to produce evidence in opposition to the decree. As no one appears on behalf of the petitioner to offer any evidence in support of the petition it must be dismissed.

Petition dismissed.

NARRACOTT *v.* NARRACOTT AND HESKETH. January 31, 1865.—Settlement of Damages.—Order.—Application for Amendment.—Where the Court, on pronouncing the decree nisi, had directed the damages to be invested, and the annual income arising from them to be paid to the respondent "dum casta vixerit," and the decree had been made absolute:—**[77]** Held, that it was too late afterwards to apply to the Court to amend the order by inserting in it, after the words "dum casta," the words "et sola."

[S. C. 34 L. J. (Mat.) 54; 11 L. T. 750; 13 W. R. 506. Followed, *Gladstone* v. *Gladstone*, 1876, 1 P. D. 442.]

In this case, the jury having found that the respondent had been guilty of adultery with the co-respondent, and having assessed the damages against him at £2500, the Judge Ordinary, on the 3rd of May, 1864, pronounced a decree nisi, condemned the co-respondent in the costs of the suit, and directed that such costs as should not be recovered from him should be defrayed out of the damages, and that the surplus thereof should be invested in the names of two trustees to be held by them in trust to pay the income arising therefrom to the respondent during her natural life, dum casta vixerit.

On the 3rd of November, 1864, the decree nisi was made absolute.

The Solicitor-General (Sir R. P. Collier) (Mr. Beresford with him) moved for the order to be amended by inserting after the words "dum casta" the words "et sola." A settlement had been prepared to carry out the order contained in the decree, and the respondent claimed to be entitled under the terms "dum casta vixerit" to a life-interest in the fund, even if she were to marry again. The co-respondent had already settled £160 a year on her. She would be entitled to a further income of between £200 and £300 a year on her mother's death, and the Court could never have intended her to enjoy the annuity in the event of her marrying again.

The Queen's Advocate and Mr. Pritchard for the respondent. The application comes too late. The order must be strictly followed.

*The Judge Ordinary*: I think I ought not to interfere. If at the time when the order was made the addition of the words "et sola" had been suggested, their insertion would **[78]** have been a proper subject for consideration, and I by no means say that I should not have directed them to be inserted. But it is now too late for me to alter the order.

Motion rejected.

[Note.—Compare the terms of the order in *Fisher* v. *Fisher*, 2 Swab. & Tris. 410, where the dissolution was obtained on the wife's petition.—Rep.]

HOLLAND *v.* HOLLAND. January 31, 1865.—Non-compliance with Order for Payment of Costs.—Inability of Husband to pay.—Attachment refused.—The Court refused to grant an attachment against a husband for non-payment of certain costs incurred on behalf of the wife in a suit instituted by her for judicial separation on the ground of his alleged cruelty, where, on his uncontradicted answer, it appeared that the husband had been compelled to separate from her several months before the institution of the suit in consequence of her drunkenness and violence, and had not the present means of complying with the order for payment.

[S. C. 34 L. J. (Mat.) 65; 11 L. T. 750; 13 W. R. 505.]

This was an application for an attachment against the respondent for non-compliance with an order of the Court, dated the 5th June, 1863, requiring him to pay the two sums of £12, 1s. 6d. and £5, 1s. 4d. to the petitioner's solicitor, being her taxed costs in this suit. The petition, which was for a judicial separation on the ground of cruelty, was filed by the wife on the 16th of March, 1863. The respondent filed an answer on the 16th of April, 1863, denying the cruelty charged, and alleging that since the year 1857 the petitioner had been a drunkard, had been very violent in her conduct towards him, and had frequently assaulted him and **[79]** wantonly destroyed his furniture; that she had been bound over to keep the peace towards him and had been committed to prison for assaulting him, and that by reason of her conduct he had been compelled to separate from her on the 22nd of April, 1862, and had since lived separate from her, allowing her 6s. a week towards her support.

To this answer no reply had been filed, and no further proceedings had been taken by the petitioner in the cause.

An affidavit of the respondent was also read in opposition to the application, by which it appeared that he was employed in a soda-water and ginger-beer manufactory, and that his wages and earnings in the winter averaged 25s. and in the summer 35s. per week; that he had two girls of the respective ages of ten and fourteen years at a boarding-school at the cost of 12s. per week; that he had allowed his wife since the institution of the suit 5s. per week, and that for his own lodging he paid 4s. 6d. per week; that out of the residue of his earnings he had barely sufficient to support himself, and that he gave his wife the greater part of his furniture when they separated, and that he had been unable to pay the costs since the order had been made, or he would willingly have paid them.

Mr. Vigors moved for an attachment.

Mr. Shaw, contrà: After reading the affidavit above referred to, he submitted that, as the result of putting in force the attachment against the respondent would be to deprive him of the means of supporting his children and wife, the order ought not to be made. He cited *Ward* v. *Ward*, 1 Swab. & Tris. 484; *Fitzgerald* v. *Fitzgerald*, 2 Lee, 263; and *Wise* v. *Wise and Wells*, Pritchard's Div. Prac. 267.

*The Judge Ordinary*: Does the petitioner desire to file an affidavit in answer to the one read?

**[80]** Mr. Vigors: No. The statements in it cannot be denied.

*The Judge Ordinary*: Upon this affidavit I must decline to grant an attachment.

Motion rejected.

HYDE *v.* HYDE. February 21, 1865.—Judicial Separation.—Permanent Alimony.—Order to secure by Deed rejected.—The order of the Ecclesiastical Court for permanent alimony was an order for payment of a certain part of the husband's actual income, the amount of which might be varied according to his change of means, and the nature of this order is not altered, as regards alimony on judicial separation, by the Divorce Act.—The Court refused to make an order on the

husband to execute a deed charging stock with a yearly sum equal to the amount of permanent alimony allotted.—The Court has more extensive powers of enforcing its decrees than the Ecclesiastical Court had.

[S. C. 34 L. J. (Mat.) 63; 12 L. T. 235; 13 W. R. 545.]

This was originally the wife's petition for judicial separation by reason of the husband's adultery. The decree was made in June, 1859, and in July, 1859, permanent alimony at the rate of £120 had been allotted, which was paid till 1863. In March, 1864, a writ of attachment was issued against the respondent, the return to which was non est inventus, and in June, 1864, a writ of sequestration issued against his property. The sequestrator had paid certain sums of money into the registry of the Court in obedience to this writ, and on the 14th of February, 1865, the writs were discharged by order of the Court upon payment of the arrears due, with interest and costs.

Mr. Pritchard now moved, on behalf of the petitioner, for **[81]** an order on the husband to execute a deed charging his life-interest in certain stock with the payment of the £120 yearly decreed as permanent alimony. It appears on affidavit that the respondent had sold certain stocks admitted by the answer to the petition for alimony to have been then in his possession. If nothing can be done to secure part of the property for the wife's alimony, it will be made away with. I admit the application is without precedent; but the 17th and 22nd sections of the Divorce Act, 20 & 21 Vict. c. 85, give the power.

Dr. Spinks and Mr. Everitt, contrà: The Ecclesiastical Court had no such power to enforce its decree for alimony. On comparing the case of *Pratt* v. *Bull*, 7 L. T. Rep. N. S. 378, S. C. 32 L. J. Ch. 144, with that of *Ex parte Holden*, 7 L. T. Rep. N. S. 791, it may be that the end sought for may be obtained elsewhere; but this Court has no power to make what is in fact a charging order. If this motion is rejected, it ought to be rejected with costs.

*The Judge Ordinary*: I by no means concede the proposition that this Court has no other power to enforce its orders than the powers which the Ecclesiastical Court had. The 52nd section of the Divorce Act clearly states that all decrees and orders of this Court shall be enforced and put in execution in the same or like manner as the orders of the High Court of Chancery. But I am of opinion that the nature of orders for alimony is in nowise intended to be altered, and that this Court was intended, in cases of alimony on judicial separation, to make orders of the same nature as those made by the Ecclesiastical Court. If the order of the Ecclesiastical Court had been to secure to the wife, as long as she lived, a yearly sum, irrespective of the husband's future fortunes, this Court might have contrived to give effect to such an order; but the order of the Ecclesiastical Court was, that the hus-**[82]**-band, having regard to his actual circumstances, should make his wife a certain allowance, which might be increased or diminished with the varying fortunes of the husband. An order charging the husband's property with the payment of a fixed sum by way of alimony would alter its character altogether, would affect the husband's property in a different way, and tie up his hands from engaging in business. Thus the question is not one of the power of this Court to enforce its orders, but rather of the nature of the order itself, which, I think, has been misapprehended. The motion must be refused; and I should have refused it with costs if the husband had acted differently with regard to the payment of the alimony as it became due.

ROGERS *v.* ROGERS. March 9, 1865.—Wife's Costs.—Unfounded Suit.—Deposit of Money in Registry.—In a suit by the wife for judicial separation, an application was made in chambers for the usual order for the payment by the respondent of the petitioner's taxed costs, incurred previous to the hearing, to her attorney. Affidavits were filed shewing that the petitioner had been living in open adultery for several years before the petition was filed, and up to the date of the petition. —The Court, having reason to believe that the suit was not instituted bonâ fide, but for the purpose of obtaining costs from the husband, refused to make the usual order for the payment of costs to the petitioner's attorney, but directed that they should be paid into the Registry to abide the event of the hearing.

[S. C. 34 L. J. (Mat.) 87; 12 L. T. 236; 13 W. R. 546. Not followed, *M'Dade* v. *M'Dade*, 1895, 30 Ir. L. T. 14.]

This was the wife's petition for judicial separation, on the ground of the husband's

adultery and cruelty. The husband, by his answer, denied these charges, and alleged adultery against the petitioner.

**[83]** The marriage took place in 1838, and the parties had not lived together since 1851.

A summons was taken out for the payment to the petitioner's attorney of the taxed costs of the suit up to the time of hearing. The application was opposed before the Judge Ordinary in chambers on the part of the respondent upon affidavit, shewing that the petitioner had lived in open adultery with different men from the time of the separation up to the time of filing the petition; that she was a notorious drunkard, and had been in the custody of the police for drunkenness and for assault.

It was contended that the petition ought never to have been presented; that the only object of presenting it was to obtain costs from the respondent, and that no order ought to be made for payment of the costs until the Court had heard the evidence in the case. The respondent was willing to deposit the amount in the Registry, to be disposed of as the Court should direct after the hearing. It was admitted that there was no precedent for refusing the order for which the petitioner applied. The Judge Ordinary adjourned the summons for a week, to give the petitioner an opportunity of answering the affidavits. On the 21st of February the adjourned summons was called on, and no affidavits being filed on behalf of the petitioner, and no one appearing for her, the Judge Ordinary ordered that the costs should be deposited in the Registry until further orders.

When the issue came on for trial before the Judge Ordinary, by a common jury, a witness was called on behalf of the petitioner, who failed to prove any of the allegations in the petition; but who proved, on cross-examination, that the petitioner had been guilty of adultery.

Mr. J. P. Campbell and Mr. J. Mew for the petitioner.

Dr. Swabey and Mr. Searle for the respondent.

**[84]** Mr. J. P. Campbell: I knew nothing of the case till our briefs were delivered. As we have no more witnesses, we cannot proceed further with it.

*The Judge Ordinary*: You have only done your duty. The case is a disgraceful one. It has been pending a long time, and has been postponed on a variety of pretences, and there is every indication that the filing the petition is an abuse of the process of the Court.

Verdict for respondent. Petition dismissed.

No order was made as to costs, as the order for the deposit of costs in the Registry had not been drawn up, and therefore no money had been deposited by the respondent.

BANCROFT *v.* BANCROFT. March 14, 1865.—Judicial Separation.—Cross-Suit for Dissolution.—Decree.—A judicial separation was decreed on a verdict establishing the husband's cruelty, though an issue on a cross-suit as to the wife's adultery was still pending.

[S. C. 34 L. J. (Mat.) 70; 12 L. T. 236; 13 W. R. 548.]

In a petition by a wife for a judicial separation on the ground of her husband's cruelty, to which he answered by a traverse and a charge of adultery, the petitioner obtained a verdict on both issues.

A petition by the husband for dissolution, in which the same adultery was in issue, was tried by a special jury before the Judge Ordinary, and the jury were discharged, being unable to agree on a verdict.

**[85]** Dr. Spinks moved for a decree of judicial separation on the verdict obtained by the wife on that suit.

Dr. Swabey: A charge of adultery against the wife is still pending, and if she is found guilty she will not be entitled to any relief from this Court. No decree, therefore, should be pronounced till that charge is decided.

Dr. Spinks: The effect of the verdict in the cross-suit, if against her, can be considered when it is delivered; but the verdict she obtained in her suit entitled her to a decree immediately it was found by the jury, without reference to the cross-suit.

Cur. adv. vult.

*The Judge Ordinary*: A motion was made last week for a decree in this case. The question is, whether the pendency of the suit by the husband is or is not a legitimate bar to the decree to which the wife would otherwise be entitled in her suit. After

consideration, I am of opinion that it is not. I think the Court would not be justified in holding its hand and refusing the wife a decree on the verdict she has obtained, unless by so doing it would prejudice the right of the husband to the relief to which he may be entitled in the event of his succeeding in his suit. His right would not be prejudiced by such a decree, for, notwithstanding that decree, the Court might hereafter pronounce a decree of dissolution in the suit instituted by him. The conclusion at which the jury have arrived in this suit entitles the wife to a decree of judicial separation, which I therefore make.

[86] F——— (falsely called D———) *v.* D———. February 6 and March 7, 1865.—Woman's Suit for Nullity.—Impotence.—Triennial Cohabitation.—Evidence.—When the Court is satisfied by other evidence, e.g., that of the petitioner herself, of the man's impotence, the rule of apparent virginity after cohabitation of three years does not apply. In the present case the man did not appear, and did not submit to the order for inspection; the medical evidence was not conclusive as to the woman's virginity, but the Court, on her evidence on affidavit, took it to be proved, first, that the marriage was never consummated; secondly, that this was owing to the impotence of the man; thirdly, that the physical appearance of the woman was to be accounted for otherwise than by consummation; and pronounced its decree of nullity of marriage.

[S. C. 34 L. J. (Mat.) 66; 11 L. J. (N. S.) 307; 12 L. T. 84; 13 W. R. 546.]

This was a petition by the woman for declaration of nullity of marriage by reason of the man's impotence. The case is of importance, as being the first which has ascertained the principle on which the Court no longer holds itself bound by the old rules of triennial cohabitation.

The respondent was personally served with the copy of the petition and citation, and with the order of the Court to submit to medical inspection, but he neither appeared nor obeyed the order as to inspection.

The marriage was celebrated on the 18th of April, 1861, the petitioner being then thirty-eight years of age, and the respondent twenty-six.

The report of Dr. Burrowes and Dr. Farre as to the condition of the petitioner was "that there was no malformation nor impediment on her part to prevent the act of generation, but we cannot determine whether she is a virgin."

By leave of the Court the evidence of the petitioner was given on affidavit to the following effect:—

"That on the afternoon of the marriage apartments were [87] engaged at a certain hotel, and then at respondent's desire, who stated that he wished to see the town, we walked about for nearly three hours, and returned to the hotel about eight p.m. During the remainder of the evening the respondent became and continued to be very dull and abstracted and silent, which he had not been previously, or at any former period of my acquaintance with him. That he shewed and expressed reluctance to retire to our bedroom, which adjoined, and consequently we were very late in going to bed, and when at length he followed me into the bedroom, and I was in bed, he dawdled for a long time about the room before he came into bed. When we were in bed together the respondent caressed me, but with a total absence of that warmth of manner which he had theretofore shewn towards me, and then expressed his desire that we should not have any sexual intercourse for three months or so, and alleged as his reason, that it would be better to defer it, because in case we should have any family at an early period, it might be said that there had been intimacy between us before our marriage, or to that effect; but the respondent afterwards, during that night, endeavoured to have sexual intercourse with me, but entirely failed in so doing, owing, as I believe, to his total want of power for that purpose. That on more than one occasion during the following day the respondent again endeavoured to consummate our marriage, but entirely without effect. That the respondent before coming into contact with me, used to excite himself by violently rubbing his private parts with his hand, and generally did so whenever he made any attempt during the time I lived with him. That we remained at the said hotel for a week, and another week or ten days in lodgings in the same town: the respondent made other useless attempts, and excused himself by saying he was not strong enough, but he should be better and stronger in the winter, although I believe the respondent was at that time in a very good state of health. [88] The respondent asked me not to tell my mother

that he had not had intercourse with me: he also asked me if I could love him as I did then if he could never do anything for me, or to that effect. . . . At times he tried to make me believe that he had the power to move in the way of consummating our marriage, if he would exercise it. We next went to my father's house in London, when, in consequence of an inquiry by my mother, who had observed that I was low-spirited, I told her that nothing in the way of consummation had taken place. Thence after a few days we went to respondent's house in the country, where he on several occasions renewed his attempts but failed, and on such failures would shed tears and become silent and depressed. Upon several occasions he tried to do with his hand what should have been done otherwise, but I used to feel afraid of him, when so trying to use his hand, and would get away from him. In August, 1861, my father and mother came to stay near us; my mother asked me how matters were going on. I answered that the marriage had never been consummated; I believe my mother mentioned the fact to respondent's mother, who suggested that it was owing to some fault or impediment on my part. I was much annoyed and distressed at this, knowing, as I did, that the real reason was the incapacity of the respondent. On my father and mother's return to London I went there by their desire for the purpose of being examined. I told the respondent that such was my intention, but he made no reply. I told the respondent's mother in his presence that there had been no marriage between us, and that I was going to London to be examined, and to undergo any operation that might be necessary to remove any impediment on my part, but the respondent remained silent. The respondent went with me to London, where he remained from the Saturday afternoon to the following Monday. An appointment had been made for Dr. Burrowes on the Monday morning. I was exa-[89]-mined by him, and he stated and certified in writing that there was no inability on my part. The respondent left the house when Dr. Burrowes came, and did not return for three or four hours. I remained in the country with the respondent till the month of February, 1862, with the exception of occasional visits. In February, 1862, I came alone on a visit to my parents for about five weeks, then returned to the respondent, and continued to live with him till the 2nd of September, 1862. On my return from London the respondent asked me to promise that I would not tell my mother, or divulge anything that passed between us in bed for the future. On the anniversary of my birthday in January, 1862, when in bed the respondent said: 'I hope you may be happier this time next year, for it is no happiness for you or pleasure to me to be going on as we now are," or to that effect: alluding, as I believe, to his repeated failures in attempting to consummate our marriage, and during our cohabitation he has several times said to me that I deserved a better husband than he could ever be to me. During the whole time of cohabitation useless attempts were repeated by the respondent. On the evening of the 1st September, 1862, the respondent and I were at his father's house, when, in consequence of some remarks and observations disparaging to me and my family, and eulogizing the respondent as a husband, made to me by respondent's mother in his presence, I expressed my determination to go on the following morning to my father, who was then staying out of London, and I was induced to do so not only by what then passed, but by the fact that at that time I felt myself very ill and unhappy in mind: that the respondent went with me home from his father's house that night, but did not, as I believe, utter a syllable to me on the way home or during the night. On the 2nd of September, 1862, I accordingly went alone to my father, without any objection or remonstrance on the part of the respondent, and I have never seen him since, [90] although I knew he was in London when I went there with my parents in November, 1862. After, when I so left the respondent, and for long afterwards, I was in a delicate state of health, caused by disappointment and unhappiness, and have been very reluctant to meet the exposure incident to adopting the procedings in this suit, which, however, by the advice of my family, I have now done."

The petitioner's case was conducted by Dr. Spinks and Mr. T. Jones.

The petitioner's father was examined, and his evidence corroborated the facts stated by her affidavit so far as the circumstances admitted, and he deposed strongly as to the miserable state she was in when she came to her parents in September, 1862. In answer to questions by the Court, he said:—

"She came of her own accord, saying that she could not remain any longer with him, from the treatment she had received. I did not press her as to the nature of

the ill-treatment. She said he was stingy, and gave her no money for housekeeping. I understood that she had some altercation with her husband's mother on the evening before she came away. She continued ill, and was attended by Dr. Burrowes. After a little time, I urged these proceedings as the only thing to be done to relieve her from the position she was in. I believe she has never seen her husband since September, 1862. He knew where she was, but did not correspond with her as far as I know, nor did he write to any member of her family as to her returning to live with him."

Dr. Burrowes gave evidence as to the examination of the petitioner in August, 1861, and under the order of the Court. In answer to questions by the Court, he said:—

"I could not state from that examination whether intercourse had or had not taken place. I only examined as to **[91]** her capacity. I should now say that the physical signs of virginity are not present to the extent they sometimes are; for aught that appeared, intercourse might have taken place. The outward signs of virginity may be destroyed otherwise than by intercourse."

In answer to questions by the counsel,—

"The petitioner has on two occasions made a statement in relation to that. I did not see the husband. It is consistent with medical experience that continued unsatisfied expectation of intercourse, when naturally expected as between husband and wife, would be hurtful to the health of the female."

Dr. Farre was also examined.

Dr. Spinks for the petitioner: Though the medical evidence of virginity is not conclusive, and the cohabitation has been short of three years, yet I submit, if the Court is satisfied of the impotence of the husband, the petitioner is entitled to the decree she prays. The old rule of the Ecclesiastical Court which, where there was no proof of the man's apparent impotence, required proof of virginity after three years' cohabitation, was adopted as the best and safest means of proof when the law of evidence was very different from what it now is. The Court has now the evidence of the parties themselves. In point of fact, the rule has not of late years been strictly upheld in the Ecclesiastical Court, and I submit that in the present state of the law of evidence it is altogether unnecessary: *Greenstreet* v. *Cumyns*, 2 Phill. 10; *A.* (falsely called *B.*) v. *B.* 1 Sp. Ecc. & Adm. 12; *G.* (falsely called *T.*) v. *T.* Ib. 389. In *Pollard* v. *Wybourn*, 1 Hagg. 729, the Court gave great weight to the man not appearing in the suit after personal service. Cur. adv. vult.

March 7.—*The Judge Ordinary* gave the following judgment:—This was a suit of nullity of marriage, promoted by the wife **[92]** on the ground of the impotency of the husband. The husband did not appear, and refused to submit to inspection.

The inspectors report with respect to the wife, that there are no certain signs of virginity, and that the physical appearances are consistent with the marriage having been consummated or not. The cohabitation was far within the triennial period. After about seventeen months the wife left her husband in broken health and returned to her father, apparently suffering in mind and body. The husband does not appear to have reclaimed her, or made any inquiries after her. At the time she thus left her home she had other causes of complaint besides that which she now proffers, namely, her husband's meanness with respect to money, and some insinuations against her father, which she alleged to have been made to her by the respondent's mother.

But the question as to the husband's capacity had arisen long before this; within four or five months after the marriage conversations had taken place between the petitioner and her parents, which had resulted in her coming to London to be examined by Dr. Burrowes, who then reported her condition to be the same as the inspectors report now. The respondent at that time declined not only inspection, but even conversation with Dr. Burrowes.

The remaining evidence in the case may be summed up in a few words. The wife has made a long affidavit, detailing the conduct of the husband to her during the cohabitation. If this affidavit is to be believed, it proves beyond doubt three things: first, that the marriage was never consummated; secondly, that this was owing to the impotency of the husband; and, thirdly, that the present physical appearances are to be accounted for otherwise than by consummation.

Before the law of evidence was altered by admitting both parties to tell their own tale, the matrimonial tribunal stood in a very different position from what it now

occupies in relation to cases of this delicate and critical character. **[93]** Except the answer upon oath of the accused party, the sole means of judgment were the outward and bodily signs revealed on medical inspection. This condition of things had at least one merit, if it had greater defects. Its merit lay in this, that it became very difficult for a woman to approach the Court, save with those cogent signs of virginity which constituted reliable proof that the marriage had really never been consummated. And this was surely a merit, for it saved the Court from possible imposition upon this fact, and limited the number of such suits to those rare cases in which, from some cause or other, no sexual intercourse had taken place.

On the other hand, it had the great defect of ofttimes leaving the fact of impotence, which is the very foundation of the suit, to such presumptions as might be gathered from the condition of the wife or the silence of the husband. But now both parties can speak on oath, explain what they cannot deny, dispel and rebut inferences, while they admit facts; and the Court judges in a broader and fuller light.

The Ecclesiastical Courts have gone quite far enough in cases of this kind, and I am by no means prepared to go farther. But, for the reason just stated, it is no answer to the petition in this case to say that, under the old system, it could not have succeeded. No one can help feeling that the single oath of the party interested, fortified by nothing stronger than the silence of the party charged, is treacherous ground for judicial decision; but no one can deny that, if this lady's story is true, her condition is one of grievous hardship. And to call for corroboration, where all corroboration is, from the nature of the subject, impossible, would be harder still.

I have no alternative, then, but to examine and adjudicate upon the petitioner's truth, or to close the door of the Court against her altogether, be her story never so true. I accept the former, and pronounce myself entirely satisfied that this **[94]** marriage has never been consummated, and that the respondent is incurably impotent.

There remains the rule as to triennial cohabitation; this rule only applies when the impotence is left to be presumed from continued non-consummation; for when the impotence is clearly proved aliunde, the Court has never resorted to it. The present case falls rather within the latter class; for, if I may rely upon the petitioner's oath, the impotence is beyond a doubt; and if I cannot rely upon her oath, I shall have no better ground for doing so by putting her to repeat the same story at the end of another eighteen months' cohabitation. The Court, therefore, pronounces the marriage void.

CARRYER *v.* CARRYER AND WATSON. January 10, 24, and 31, 1865. Husband's Petition.—Co-Respondent.—20 & 21 Vict. c. 85, s. 28.—The petitioner must make every person whom he charges in the petition with having committed adultery with his wife a co-respondent, unless he is excused from so doing by the Court on special grounds.—Query, whether the fact that the petitioner can only obtain evidence admissible against the respondent, but inadmissible against the alleged adulterer, would be such special ground?

[S. C. 34 L. J. (Mat.) 47; 11 Jur. (N. S.) 352; 13 L. T. 250; 13 W. R. 507. Discussed, *Jones* v. *Jones*, [1896] P. 165. Referred to, *Rayment* v. *Rayment*, [1910] P. 285; *Rush* v. *Rush*, [1920] P. 245.]

This was the husband's petition for dissolution of marriage.

The petition alleged that on divers occasions between the 1st of January, 1858, and the 1st September, 1864, and in September, 1864, the co-respondent Watson had committed adultery with the respondent. It also alleged that Charles Manning, at the date of the petition residing at Natal, in Africa, had, on divers occasions between the 7th of October, 1856, and August 1862, committed adultery with the respondent. Watson had been made a co-respondent, and had filed **[95]** an answer traversing the charge against him. A citation had not been served on Manning.

The Queen's Advocate (Sir R. J. Phillimore) and Dr. Deane, Q.C., on behalf of the co-respondent Watson, moved the Court to order that the petitioner should also make Manning a co-respondent. A husband petitioning for dissolution of marriage is bound, by sect. 28 of 20 & 21 Vict. c. 85, to make every man with whom his wife is alleged in the petition to have committed adultery, a co-respondent, unless the Court on special grounds excuses him from so doing. The fact that Manning is resident at Natal is no ground for excusing the petitioner from making him a co-respondent.

[*The Judge Ordinary*: What locus standi has a co-respondent to make such an application?] If Watson is proved guilty, the whole of the costs of the suit may fall upon him; whereas, if Manning were made a co-respondent and both were found guilty, Watson might be in a better position as to costs.

Mr. Mundell, contrà: It is not necessary to make more than one alleged adulterer a co-respondent: *Hunter* v. *Hunter*, 28 L. J. Prob. & Mat. 3. Watson has no locus standi to make this application. So far from sustaining any injury by Manning not being made a co-respondent, he will be advantaged, for he can then call him as a witness: *Codrington* v. *Codrington and Anderson*, 3 Sw. & Tr. 368. On the other hand, the petitioner may be injured. The only proof of adultery with Manning may be admissions of the respondent, which, although evidence against her, would not be evidence against him, and the petitioner, if Manning is cited and defends himself, may, for want of evidence against him, be condemned in his costs. At all events, Watson should have filed an affidavit that he is innocent of the charge, and that the application is not made for delay.

**[96]** *The Judge Ordinary*: I certainly was at one time under the impression, from *Hunter* v. *Hunter*, that Sir C. Cresswell was of opinion that it was not necessary that there should be more than one co-respondent, although the petition charged the wife with adultery with more than one man. I think, however, that the petitioner ought to make all the alleged adulterers co-respondents, unless there are special grounds for excusing him from so doing.

Mr. Mundell asked that the motion might stand over in order that affidavits might be filed by the petitioner shewing special grounds for excusing him from making Manning a co-respondent.

And leave was given accordingly.

January 24.—Mr. Mundell moved the Court to excuse the petitioner from making Manning a co-respondent. Watson has no right to oppose the application. In *Hook* v. *Hook*, 1 Sw. & Tr. 183, Sir C. Cresswell expressed a doubt whether the wife had a right to object to such an application; à fortiori a co-respondent has no such right. The petitioner has filed an affidavit from which it appears that in October, 1864, he intercepted certain letters and found diaries in the handwriting of the respondent for the years 1856, 1857, 1858, and 1859, detailing acts of adultery with a person sometimes in the diaries described as C. M., and sometimes as K., which persons, from internal evidence, it might be inferred were the same person, viz. Charles Manning, and that there was great risk of procuring any evidence which would be admissible against Manning. If he should be cited and appear, the petitioner may be unable to make out a case against him, and may have to pay the costs of his defence. He is willing at the trial, with respect to the charge of adultery with Manning, to rest his case upon the diaries and letters.

The Queen's Advocate and Mr. A. S. Hill contrà, contended **[97]** that the affidavits shewed no ground why Manning should not be made a co-respondent.

*The Judge Ordinary*: It certainly is a great hardship cast upon the petitioner, that if he has unquestionable evidence of adultery against his wife he must, by the terms of the Act, make the adulterer a co-respondent, for he may be placed in this position, that he may have evidence against his wife, but none whatever against the co-respondent. In such a case, if a man were made a co-respondent, and at the trial it should turn out that there was no evidence against him, he might be dismissed from the suit. Apply that to this case. If it may be taken as a datum that there is evidence against the wife, and none against Manning, if he were made a co-respondent, and the case were tried, he would be in a position to ask to be dismissed from the suit with costs. That would be a very inconsistent state of things. I am, however, clear that if the petitioner chooses to charge Manning with adultery, he is bound, unless by leave of the Court, to make him a co-respondent. The question is, whether a case has been made out to-day to dispense with that necessity in the exercise of the discretion of the Court. As to the special grounds, I should like the intercepted letters and the diaries to be brought into the Registry, that I may see them before deciding the question. Cur. adv. vult.

January 31.—*The Judge Ordinary* now said: This was an application on the part of a co-respondent that Manning, another person against whom adultery was alleged in the petition, should also be made a co-respondent. It was urged that under the 20 & 21 Vict. c. 85, s. 28, it is not necessary to make more than one co-respondent.

But the Court is of opinion that whenever adultery was alleged in a petition against any man, that man must be made a co-respondent. The application then took another form. The same section which im-**[98]**-poses the necessity of making the alleged adulterer a co-respondent gives the Court a discretion to dispense with that necessity, and it was urged that this was a proper case for the exercise of that discretion. The ground on which it was placed was, that Manning is now resident at Natal, and that the bulk of the evidence as to the adultery charged to have been committed with him is contained in the wife's journals, and in letters in her possession, which would not be evidence against him; and the argument went so far as to insist, that though there was evidence against the wife with regard to Manning, there was none upon which a jury could find a verdict against him. If that had been clearly made out, I am not disposed to say that the Court would not have relieved the petitioner from making him a co-respondent. On the other hand, I do not intend at once to decide that the Court would so act. It is rather difficult to ascertain with certainty what was the motive of the Legislature in requiring that the alleged adulterer should be made a co-respondent. There may have been several motives. First, it may have been intended that any man against whom adultery is charged should have a citation served on him, in order that he may, if he like, appear and defend his character. In that view of the case, this enactment would be intended for his benefit. Another motive may have been, that it would be desirable, on behalf of the public, who are interested in not having divorces lightly granted, that there should be a party to the suit who should be interested in disproving the charge of adultery quite independently of the petitioner's interest in the matter, and his right to get costs; so that the mere fact of want of evidence against the alleged adulterer might not in all cases be a sufficient reason for dispensing with a co-respondent. In this case, I am by no means satisfied that the petitioner could not get evidence against Manning; I therefore reject the application to relieve him from the necessity of making the alleged adulterer a co-respondent.

**[99]** LING *v.* LING AND CROKER. January 24, 1865.—Dissolution of Marriage.—Death of Petitioner.—Marriage Settlements.—22 & 23 Vict. c. 61.—The Court will make an order varying the trusts of a marriage settlement on the petition of the guardian of the children of the marriage after the death of the petitioner.

[S. C. 34 L. J. (Mat.) 52. Discussed, *Stanhope* v. *Stanhope*, 1886, 11 P. D. 103; *Thompson* v. *Thompson and Rodochinka*, [1896] P. 263.]

This was originally the husband's suit for dissolution, and on the 16th of June, 1858, a decree of dissolution of marriage on the ground of the respondent's adultery was pronounced. The petitioner, Captain Ling, who never remarried, died on the 28th of February, 1860, leaving two daughters of the ages of seven and five years respectively. By his will, which was proved in the Court of Probate on the 11th of May, 1860, he bequeathed the whole of his property to his said daughters; but, if neither of them should attain the age of twenty-one, or be married under that age, he bequeathed the same to James Bremridge, whom he appointed executor and guardian of his children.

Mrs. Ling, after the marriage had been dissolved, went to New Zealand with the co-respondent, and had since remarried there.

The case now came before the Court on a petition by the said James Bremridge for an order, under sect. 5 of the 22 & 23 Vict. c. 61, as to the application of certain settled property.

The petition, in addition to the facts above stated, alleged, that prior to the marriage, which took place at Calcutta in 1849, Captain Ling gave a bond to Sir J. H. Littler, the father of the respondent, and A. C. Bidwell, conditioned for the payment to them, as trustees of his marriage settlement, of 25,000 Company's Rupees (equivalent to about £2500) when and so soon as he should be in a condition to pay that amount, and that he also executed an indenture of settlement, by which **[100]** it was provided, that the said trustees should hold the said bond and the proceeds thereof, when paid off, in trust to invest the same in certain specified securities, and on further trust to permit the said Captain Ling to receive the annual income thereof during his life; and if the respondent should survive him, in trust to permit her to receive the same during her life, for the benefit of herself and the issue of the marriage; and after the death of the survivor, as to the principal, income, and accumulated proceeds thereof, in trust to pay and assign the same between and amongst all the children

of the marriage, in equal shares, the portions of daughters to be paid at the age of twenty-one years, or on marriage; or, if they had attained twenty-one or married before the decease of the surviving parent, then at the end of six months after such decease. . . . If there should be no child of the marriage, or if the children of the said marriage should all die before they acquired vested interests, the trustees were directed to pay and transfer the trust-funds absolutely to the survivor of the petitioner and respondent; that Sir J. H. Littler died on the 18th of February, 1856, and the said A. C. Bidwell is now the surviving trustee; that the amount secured by the bond was never paid during his life by Captain Ling; that after his death the surviving trustee filed a bill in Chancery for the administration of his estate, and established in that suit a claim for £2671, 19s. 8d. for principal and interest due on the bond; that the petitioner Bremridge, as executor, collected the estate of Captain Ling, and in pursuance of a decree of the Court of Chancery, in part discharge of the said claim of the trustee, transferred to him £1189, 15s. Reduced Three per Cent. Annuities, and paid to him in cash £92, 17s. 10d., being the whole of the assets which had come to the hands of the executor, after paying testamentary expenses and the costs of the administration suit; that no other assets were outstanding.

Leave had been given to serve this petition on the solicitor **[101]** who had acted in the suit on behalf of Mrs. Ling, the sufficiency of such service being reserved.

Mr. H. Matthews now, in accordance with the prayer of the petition, moved the Court to order:—1. That A. C. Bidwell, or other the trustee or trustees of the settlement for the time being, do stand possessed of the trust-funds, subject to such of the trusts, provisoes, and with such of the powers contained in the settlement as would be subsisting and operative and capable of execution if Mrs. Ling had died on the 16th of June, 1858 (the date of the decree), and with and subject to no other powers, trust, or provisoes. 2. That A. C. Bidwell, or other the trustee, etc., do pay to the petitioner, as guardian of the children, the interest, dividends, or other annual income arising from the prospective shares or share of the said children, or either of them, in any trust-funds under the said trusts, towards the maintenance and education of the said children, so long as they, or either of them, should remain unmarried and under the age of twenty-one years; and that he do pay to the petitioner, as executor of the said J. T. Ling, the said trust-funds in the event of both of the said children dying unmarried before attaining the age of twenty-one years.

Dr. Spinks, for A. C. Bidwell, the surviving trustee, consented to the order being made. The only question is whether the Court, under the 22 & 23 Vict. c. 61, has power to make the order after the death of the petitioner. In *Grant* v. *Grant*, 2 Swab. & Trist. 522, where the husband died after he had obtained a decree nisi, Sir C. Cresswell refused, on the motion of his executor, to make the decree absolute, in order that an application might be made under the above section on behalf of the children; the ground of that decision being, that the suit having abated by the petitioner's death, the Court had no power to make the decree absolute. Here, however, a final de-**[102]**-cree was pronounced in the lifetime of Captain Ling, and there seems to be no reason why the order should not be made.

Dr. Wambey, for Mrs. Ling, consented to the order being made.

*The Judge Ordinary*: I think, that under the 5th section of the 22 & 23 Vict. c. 61, the Court has power to alter the settlement for the benefit of the children, although the petitioner is dead. By that section the Court, after a final decree of dissolution of marriage, is empowered "to make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage, or of their respective parents, as to the Court shall seem fit." There is nothing in the section to shew that the application can only be made by a parent. As the order prayed will be for the benefit of the children, and it is in accordance with the practice of the Court, it may be made.

Dr. Spinks, for A. C. Bidwell, asked that he might be allowed to discharge himself of the trust by transferring the trust-fund to the Court of Chancery. If the Court make the order upon him, the Court of Chancery will decline to interfere.

*The Judge Ordinary*: I may make an order extinguishing the trust in favour of Mrs. Ling. The trustee will then only be liable for the performance of other trusts.

Application was then made on behalf of all parties for costs.

*The Judge Ordinary*: I think that the guardian is entitled to his costs of the application. I think Mrs. Ling is not entitled to costs. As to the costs of Mr. Bidwell, I shall **[103]**

make no order; if he is entitled to them, I think that he will get them from the Court of Chancery.

KNIGHT *v.* KNIGHT. June 20, 1865.—Cruelty.—Cruelty established by proof of habitually insulting conduct and violent temper, connected with an adulterous intercourse carried on by the husband, and leading to frequent quarrels, and occasionally to slight acts of violence, and causing mental and bodily suffering.

[S. C. 34 L. J. (Mat.) 112; 11 Jur. (N. S.) 568; 11 L. T. 252.]

This was the wife's petition on the ground of adultery coupled with cruelty. The respondent did not appear.

The cause was heard before the Judge Ordinary, without a jury, on the 14th of June.

Dr. Spinks and Mr. Pearce for the petitioner.

The marriage was in September, 1851, and the parties cohabited from that time until the beginning of 1865, at the house of the petitioner, York Gate, Regent's Park. In 1863 the respondent made the acquaintance of a girl named Margaret Phillips, who was employed in a shop in Regent Street, and from that time until the separation he carried on an adulterous intercourse with her. After he had formed this connection he treated his wife with unkindness; he boasted to her of his connection with Phillips. On one occasion he introduced Phillips to her, and wished that she should be invited to his house. They had frequent quarrels, all on the subject of his intimacy with Phillips; and in the course of some of them the petitioner said that the respondent had pushed her about and bruised her. On one of these altercations the petitioner broke a blood-vessel.

**[104]** Dr. Spinks: The question is, whether the cohabitation can be renewed with safety to the petitioner. The respondent has insulted her by repeatedly boasting of his adultery, and has refused to give up his paramour; and it is evident that he is a man of very violent temper, and if she returns to cohabitation and the quarrels are renewed, there is reason to apprehend danger from his violence. Cur. adv. vult.

*The Judge Ordinary*: It was proved beyond doubt that respondent had for more than a year before this suit maintained an adulterous intercourse with a young girl, for whom he had suffered himself to indulge a passionate attachment. For some time, by his unaccountable conduct, he tortured his wife by incessant suspicion of his fidelity. The outbreaks between them springing from this fertile source were frequent, and marked on his part with unrestrained violence of language and demeanour. On one occasion she broke a blood-vessel in the excitement thus caused. On another occasion he introduced his paramour to her, and tried to obtain a place for her at his table. Finally, on more than one occasion he laid violent hands on his wife and inflicted bruises and injuries, which were afterwards visible on her person. The amount of mental and bodily suffering thus induced, the lengthened period over which it lasted, the bold and open manner in which he finally avowed to his wife his passion for another woman, and his determination to indulge it, combined to give these acts of violence a still less excusable character. And the case is, I think, made out as one of adultery coupled with cruelty.

Decree nisi, with costs.

**[105]** DENT *v.* DENT. June 14, 1865.—Dissolution of Marriage.—Revival of Condoned Adultery by Subsequent Cruelty.—The word "condonation" has the same meaning in the Divorce Acts that it had in the Ecclesiastical Courts. Condoned adultery, therefore, may be so revived by subsequent cruelty as to found a sentence of dissolution.—The Court will, at the prayer of the petitioner, at the hearing make a decree of judicial separation instead of a decree nisi for dissolution, although the petition prays for dissolution, and facts are proved on which the dissolution might have been granted.

[S. C. 34 L. J. (Mat.) 118; 13 L. T. 252. Direction to jury not approved, *Collins* v. *Collins*, 1884, 9 A. C. 205. Followed, *Moore* v. *Moore*, [1892] P. 382. Referred to, *Moss* v. *Moss*, [1916] A. C. 158; *Cramp* v. *Cramp and Freeman*, [1920] P. 162.]

This was the wife's petition for a dissolution of marriage, on the ground of adultery coupled with cruelty. The respondent, in his answer, traversed those charges, and pleaded condonation as to the adultery. Issue was joined on these pleas, and the cause came on for trial before the Judge Ordinary by a common jury.

The Queen's advocate and Mr. Pritchard for the petitioner.

Mr. G. Browne for the respondent.

It was proved that the marriage took place on the 26th of June, 1850; that the parties afterwards cohabited at various places in the West of England, and latterly at Weston-super-Mare until September, 1864; that they had several children, the last of whom was born in July, 1863; that the respondent had committed an act of adultery in 1861, which was condoned by the petitioner; and that he had committed divers acts of cruelty, the date of the last act being immediately before the separation.

*The Judge Ordinary*, in summing up, gave the following [106] direction to the jury on the issue of condonation: It is said on the part of the husband, that the adultery committed by him was condoned or pardoned by the wife. It is very properly admitted by the Queen's Advocate that the adultery of the husband was condoned by the wife; and you will have no difficulty in finding that issue for the respondent. But then it is said, that although that adultery was condoned, the condonation was done away with by the subsequent misconduct of the husband. Now the rule of law is, that all condonation is conditional, and the condition is, in future you shall treat me as a husband ought to treat his wife; and if you hereafter break your matrimonial obligation, and are guilty of adultery or of cruelty, the condoned offence is revived. The question for you is, whether there was any subsequent cruelty by the respondent which did away with that pardoning or condonation. The pardoning having taken place in 1861, there is evidence that in 1864 the husband was guilty of cruelty. If you are satisfied of that fact, you will find that, although the wife did pardon the husband's adultery, there was subsequent cruelty committed by the husband which revived that adultery.

The jury found that the respondent had been guilty of adultery and cruelty; that the adultery had been condoned; and that he had been guilty of cruelty subsequent to that condonation.

Mr. G. Browne: The Court is bound, by the 30th section of the 20 & 21 Vict. c. 85, to dismiss the petition. The meaning of the statute is, that a marriage shall not be dissolved for any cause but adultery; and although condoned adultery may be revived by subsequent adultery, it cannot be revived for the purpose of founding a claim for dissolution by subsequent cruelty. The words of the statute are distinct, and if the adultery complained of has been condoned the petition must be dismissed. He cited *Goode* v. *Goode and Hamson*, 2 Sw. & Tr. 253. It is admitted that the doctrine [107] of revival is established by the cases in the Ecclesiastical Courts; but those cases are not applicable to suits for dissolution under the statute.

The Queen's Advocate: The meaning of condonation is conditional forgiveness (*Eldred* v. *Eldred*, 2 Curt. 385), and the same meaning is to be given to it in construing the statute as that which was given to it by the judges of the Ecclesiastical Courts: *Goode* v. *Goode and Hamson*. The condition upon which the husband's adultery was condoned having been broken, the effect of the condonation is taken away. If the Legislature had intended to use the word "condonation" in any other than the legal sense, if it had intended its meaning to be absolute forgiveness instead of conditional forgiveness, it would have expressed that intention. The doctrine of revival is as applicable to suits for dissolution as it was to suits for divorce à mensâ et thoro.

*The Judge Ordinary*: I am of opinion that the point which Mr. Browne has taken very clearly and ingeniously cannot avail him. He asks me to take the words of the statute as they stand, disregarding the meaning which I should think must be put upon them by any one who reads them, and to hold that when the adultery complained of has once been condoned, although it has been revived according to the ecclesiastical law by subsequent cruelty, the Court is bound to dismiss the petition. "Condonation" is a strictly technical word. It had its origin, and as far as I know its entire use, in the Ecclesiastical Courts, and it means "forgiveness with a condition." The statute says, that if the petitioner has condoned, that is, has conditionally forgiven, the adultery complained of, the petition shall be dismissed. The question is, whether the Legislature meant by those words that where the petitioner has conditionally forgiven the adultery complained of, her remedy should be barred, although [108] the condition of the forgiveness is afterwards broken. Such a construction seems unreasonable. It seems to me that if the condition on which the forgiveness is founded is broken, the effect of the forgiveness is taken away as if there had been no condonation at all. I think the statute means, not that the petitioner shall be barred of her

remedy if she has ever condoned, but that she shall be barred of her remedy if the condonation is still existing. If the statute is to be read in a way that will make sense of it, that must be its meaning. To read it otherwise one must suppose that the Legislature intended to give to the word "condonation" a meaning different to that given to it by the ecclesiastical law, which they were in part re-enacting, and one which would lead to great injustice. The petitioner is entitled to a decree nisi.

The Queen's Advocate: The petitioner instructs me to pray for a decree of judicial separation instead of a decree nisi.

Mr. G. Browne: The adultery and cruelty having been proved, the Court is bound to pronounce a decree of dissolution.

*The Judge Ordinary*: The Court always prefers to grant a decree of judicial separation rather than a decree of dissolution, and it certainly will not dissolve a marriage against the wish of the petitioner.

Judicial separation decreed.

CHETWYND *v.* CHETWYND. March 1, 1865.—Order for Payment of Wife's Costs of Hearing.—Bill of Exceptions pending.—After a wife has obtained a verdict, and a decree nisi has been pronounced, an order was made for the payment by the husband of her **[109]** surplus costs of the hearing beyond the sum deposited in the Registry, although a motion for a new trial and a bill of exceptions were pending.

[S. C. 34 L. J. (Mat.) 65; 13 W. R. 528.]

The issues in this suit by a wife for dissolution were tried before the Judge Ordinary by a special jury on the 20th of January 1865, and a verdict was pronounced for the petitioner, and a decree nisi pronounced.

On the 21st of February the Judge Ordinary made an order in chambers, for the payment by the respondent of the taxed costs of the petitioner, beyond the amount, £500, for which security had been given in the Registry before the hearing.

Mr. Bush Cooper moved for a rule to set aside the order made in chambers for the payment of surplus costs. The order is premature, as the surplus costs are dependent on the event of the suit (*Sopwith* v. *Sopwith*, 1 Sw. & Tr. 484); and although the verdict has been delivered and a decree nisi has been pronounced, notice has been given of a motion for a rule for a new trial, and there is also a bill of exceptions pending. If the respondent succeeds in setting aside the verdict, the surplus costs will not be payable. As long as the verdict is impeachable the order for surplus costs ought not to be made.

The Queen's Advocate, contrà.

*The Judge Ordinary*: I will postpone my judgment until the motion for a new trial has been made.

On the same day the motion for a rule nisi for a new trial was made and rejected.

Mr. Bush Cooper renewed his motion, and cited *Kaye* v. *Kaye*, 27 L. J. Rep. P. & M. 45; and *Dixon* v. *Dixon*, 28 L. J. Rep. P. & M. 96, to shew that the costs followed the **[110]** event, and that, when the petitioning wife was successful, it was unnecessary to make any order as to costs.

*The Judge Ordinary*: Those authorities are at variance with the daily practice of the Court. The 51st section enacts that "the Court, on the hearing of any suit, proceeding, or petition under this Act, may make such order as to costs as to such Court may seem just," and the ordinary course in making a decree in a suit by a wife is to go on to order that the respondent be condemned in costs.

Mr. Bush Cooper: The costs ought not to be paid until the bill of exceptions is decided.

*The Judge Ordinary*: I am of opinion that this application to vary the order as to costs must be refused. After the trial the Court made a decree nisi, and under the powers given to it by the 51st section condemned the respondent in the costs incurred and to be incurred by the petitioner, and directed them to be taxed. That decree was made on the 20th January, the day on which the verdict was delivered. Accordingly, under that order the costs were taxed, and on the 21st February the parties came before me, and I made an order that they should be paid by the respondent. It seems to me that the pendency of the bill of exceptions is no answer to that application. I therefore refuse to rescind the order, and I reject this motion with costs.

**[111]** CLARK *v.* CLARK, PERRIN, AND CUMINS. March 18 and 21, 1865.—Husband's Petition. — Wife's Answer. — Unfounded Charge. — Costs.—Where the wife's answer contains charges against the husband which at the trial appeared to have been made without any foundation, the whole of her costs will not be allowed to be taxed as against her husband.

[S. C. 34 L. J. (Mat.) 71; 12 L. T. 148; 13 W. R. 549.]

This was the husband's petition for dissolution of marriage by reason of the wife's adultery. She had answered, traversing the adultery, pleading condonation, connivance, and acts of cruelty from shortly after the marriage, at some length. She also counter-charged adultery.

The issues were tried before the Judge Ordinary, by a common jury, on the 18th of March.

Dr. Spinks and Mr. Searle for the petitioner.

Dr. Wambey and Mr. Pritchard for the respondent.

Mr. Inderwick for Perrin.

Mr. W. A. Holdsworth for Cumins.

The wife's adultery was clearly proved with Perrin. No evidence in support of her answer had been adduced. The husband had paid into the registry or given security for £75 to meet the wife's expenses of the trial.

Cur. adv. vult, as to costs.

March 21.—*The Judge Ordinary*: On the trial of this case I reserved the question of costs. A most improper, because entirely unfounded, defence had been set up by the wife, and detailed acts of cruelty set out in her answer, which she had **[112]** no evidence whatever to support. The practice which obtains in this Court, of making the husband pay the costs of the wife whether she succeeds in the suit or not, can only be justified by the supposed necessity of the thing. I say supposed, for I am by no means assured that the necessity is not rather theoretical than practical. But at any rate there can be no need for setting to the cost of the husband fictitious charges against him, and thus laying his purse at the mercy of his wife or her advisers. The amount thus heaped upon him makes his suit always costly and often impracticable. The wife in this suit has, by means of a fictitious defence, forced the petitioner to pay into court or secure £75 to defray her expenses, though she had been living in flagrant adultery, and had not a single witness on the trial on her own behalf. An efficient stop must be put to this practice, and the Court therefore pronounces the following order as to costs. The wife's costs must be taxed as if she had only traversed the adultery and gone to trial upon that issue alone; all costs of and occasioned by the rest of her answer being disallowed. From the costs thus taxed must be deducted any costs which the registrar shall find that the petitioner has reasonably incurred, in witnesses or otherwise, for the purpose of meeting the charges made against him in the answer; and the residue, if any, is to be paid to the respondent out of the £75. With respect to the case against the co-respondent Perrin, the Court condemns him in the costs of that case, and this will include, as usual, the costs which the petitioner has had to pay to the respondent in respect of that charge. With respect to the case against the co-respondent Cumins, he and the petitioner will each bear his own costs.

**[113]** SCOTT *v.* SCOTT. July 19, 1865.—Restitution of Conjugal Rights.—Nature of Defence.—Unless the respondent to a petition for restitution of conjugal rights can establish a legal defence to the petition, the petitioner will be entitled to a decree, and the Court has no discretion to inquire into the sincerity of the petitioner in bringing the suit.

[S. C. 34 L. J. (Mat.) 23; 12 L. T. 211.]

This was the husband's petition for restitution of conjugal rights.

The respondent had filed an answer, charging the petitioner with cruelty. The issue joined on this plea was tried before the late Judge Ordinary, by a special jury, who found a verdict for the petitioner.

An application for a rule nisi for a new trial was made to the Judge Ordinary, who refused a rule, and upon appeal to the full Court, this refusal was confirmed. A subsequent motion for a decree had been rejected, on the ground that the marriage had not been formally proved.

Affidavits having been filed proving the marriage of the parties,

Mr. Karslake, Q.C., (Mr. Shaw with him) now moved for a decree.

The Queen's Advocate (Sir R. J. Phillimore), on behalf of the respondent, asked the Court not to pronounce a decree. Although the respondent failed to establish the charge of cruelty, it appeared from the evidence that the real object of the petitioner in instituting the suit was not to obtain the society of his wife, but to obtain the custody of her person, and thereby to extort money from her and her mother. He referred to *Burroughs* v. *Burroughs*, 2 Swab. & Trist. 303.

Dr. Spinks on the same side:—It may be a question whe-**[114]**-ther, in suits for restitution, the Divorce Act having introduced a new matrimonial offence, viz. wilful separation without reasonable excuse, the old law is not thereby altered, for it has been held that there may be a reasonable cause of separation other than the causes which would formerly have been an answer to a suit of restitution. In this case, although the respondent failed to establish cruelty, and therefore was not entitled to a judicial separation, she did establish that there was cause for the separation. I admit that a plea framed upon that theory has been struck out on the ground that nothing can be pleaded in bar to a suit for restitution of conjugal rights, which would not be ground for a divorce à mensâ et thoro. [*The Judge Ordinary*: Assuming the allegation of cruelty to be untrue, what reasonable excuse had Mrs. Scott for refusing to return to her husband?] The whole circumstances of the married life as they appeared in evidence. The petitioner's object was to get money from his wife and her mother, not to obtain his wife's society.

Mr. Karslake in reply: The respondent only pleaded cruelty in bar. Having failed to establish that defence, she now makes a sort of equitable appeal to the discretion of the Court. There is no authority for the refusal of a decree upon any such ground. The defence she relied on having failed, she is bound to return to cohabitation.

*The Judge Ordinary*: I think I am bound to make the decree. No precedent for refusing it has been cited, and it would be very inconvenient if, after the respondent has, by her answer, raised an issue which has been found against her, the duty should be cast upon the Court of sifting the evidence for the purpose of ascertaining whether there is sufficient ground for refusing a decree. There is a broader ground upon which I found my decision. If the Court were to refuse to order the respondent to return to cohabitation, it ought, **[115]** according to the principles on which the Ecclesiastical Courts acted, to grant her a decree of judicial separation, and yet it is not contended that the petitioner in this has been guilty of any matrimonial offence which would be ground for a judicial separation. It may be that, as desertion is now a ground for judicial separation, it would also be an answer to a suit for restitution. The law has hitherto enforced the obligation of conjugal cohabitation on man and wife, unless one of them has been guilty of some definite offence known to the ecclesiastical law, such as cruelty or adultery. If I refuse this decree, I should throw the whole matter into doubt and difficulty, for no precise definition has been offered to the Court of a matrimonial offence which would be an answer to this suit. I therefore make a decree in the ordinary form.

Decree granted.

(Before *The Judge Ordinary*, in Chambers.)

L——— (FALSELY CALLED H———) *v.* H———. February 10 and 11 and March 21, 1865.—Woman's Petition for Nullity.—Inspector's Report.—Conflicting Evidence.—The woman cohabited with her husband from their marriage, in November, 1848, till July, 1862; she then occupied a separate bed for two or three weeks, and left his house in August, 1862, after disputes about other matters, and did not return to it. In May, 1864, she filed her petition for nullity, by reason of his impotence; he traversed this, and alleged consummation. The report of the inspectors pronounced her to be a virgin and apt, and stated that the man had no apparent imperfection. At the hearing the petitioner and respondent both gave evidence, and medical men, besides the inspectors, gave evidence on both sides. In the result the Court—Held, that the petitioner had failed to prove that the marriage had remained unconsummated by reason of the impotence of the man, and dismissed him from the suit.

**116]** This was a petition for a decree of nullity of marriage, brought by the woman. The petition, filed on the 7th of May, 1864, alleged a ceremony of marriage on the 7th of November, 1848, the man being then about thirty years of age, and the

woman about twenty-two years. That at the time of the said marriage the said H., by reason of the frigidity or impotence of his parts of generation, was, and has ever since continued, unable, to consummate the marriage by carnal copulation, notwithstanding that the said petitioner cohabited and constantly occupied the same bed with the said H. until the month of July, 1862, and resided with him in the same house till the 19th of August following, and the said petitioner was apt and willing to receive his conjugal embraces. That such frigidity and impotence of the said H. is incurable by art or skill.

The respondent's answer denied that at the time of the marriage, or at any time since, he had been from any cause unable to consummate the said marriage, and alleged that it had, in fact, been consummated by carnal copulation. Issue taken and joined by replication.

The report of the medical inspectors, Dr. Farre and Dr. Sewell, was in the following terms:—

"19th July, 1864.

"We, the undersigned, testify that we have this day examined the parts and organs of generation of L., otherwise H., and we find that she is a virgin, that there is a hymen, and that there is no impediment on her part to prevent the consummation of marriage."

"19th July, 1864.

"We, the undersigned, testify that we have this day examined the parts and organs of generation of H., and we find that there is no malformation, nor any appearance indicating a want of capacity of performing the act of generation."

**[117]** The case was heard by the Judge Ordinary in chambers (on consent of both parties), on the 10th and 11th of February.

The Queen's Advocate (Sir R. J. Phillimore), Dr. Spinks, and Mr. Searle for the petitioner.

Dr. Deane, Mr. Serjeant Ballantine, and Dr. Swabey for the respondent.

The Queen's Advocate opened the petitioner's case.

The substance of the oral evidence given by the witnesses called on either side was as follows:—

Mr. Soden, on behalf of the petitioner:—

"I practice as a surgeon. I first knew Mrs. L., petitioner's mother, in March, 1864. Mrs. L. and the petitioner called on me; at their request I examined the petitioner, the result of which was, that I had no difficulty in concluding that it was a case of perfect virginity. I asked certain questions of the petitioner, and received answers. I saw her once again and examined her more fully than the first time. I remained of the same opinion. From my medical experience I think it would be injurious to the petitioner if she returned to cohabitation."

On cross-examination:—

"The signs from which I came to the above conclusion were the extreme smallness of the orifice of the vagina, so small that it would not admit my little finger without constriction; a well-defined hymen; prominent well-defined rugæ of membrane lining the vagina; a total absence of all posterior dilation, which must be present where ordinary intercourse has frequently taken place. By posterior I mean the back portion of the orifice. By hymen I mean a fold of membrane half closing a natural orifice: it varies very much in form, sometimes circular with a hole in centre; it is more generally **[118]** semilunar. In some instances it is hard and difficult of rupture; occasionally it is very much relaxed. The rugæ are consistent with a certain amount of intercourse. They would only be totally obliterated by childbirth. Their marked prominence is a matter of importance after many years of married life. In some cases, of what I suppose you refer to as relaxed hymen, a foreign body might pass beyond it without rupturing it, but only where there is an unusual dilation of the vagina above it. Application of astringents would not, I think, reduce such dilation. I do not recognize any such state of relaxation except as a natural formation of the parts. To some extent the condition of contraction and relaxation of the muscle round the orifice would vary according to the nervous condition of the parts; it is a sphincter muscle. In the present instance I should imagine pregnancy could not have occurred."

On re-examination:—

"I saw none of these peculiar conditions in the petitioner's case. On the contrary, as I have stated before, the orifice was very small. Excessive menstruation is not

uncommon soon after marriage. It is sometimes doubtful whether a case is one of excessive menstruation or of miscarriage."

Dr. Farre, on behalf of the petitioner, confirmed the inspector's report as above given. On cross-examination:—

"In such cases I judge a good deal by the hymen. It consists of the last fold of the membrane that lines the passage to the womb. The aperture is generally circular. The semilunar form is not so common. The membrane is very rarely indeed so small as to be scarcely perceptible. What takes place in connection is more generally a wearing out or obliteration than actual rupture. The discharge of blood in connection depends on the general state of those parts, not of the hymen in particular. There are cases of hymen continuing after penetration, where the parts of the man are small. I have attended a woman in labour where the hymen was not **[119]** ruptured. As to whether a miscarriage has occurred to the present petitioner, that must depend on the question of impregnation without penetration beyond the hymen. At all events it must have been in a very early stage of pregnancy. Astringent injections do act on the vagina. The parts of a young woman (I mean a woman not past menstruation) who has ceased to cohabit do commonly become smaller."

On re-examination:—

"The hymen may not be fully dilated, and in such a case it might be restored; but after complete dilation I have never known it entirely restored. Impregnation may take place without penetration of the parts within the hymen. Menstruation is commonly, soon after marriage, mistaken for miscarriage."

Dr. Sewell, on behalf of the petitioner, confirmed his report as above given, but was not cross-examined.

Mrs. L., mother of the petitioner, on behalf of the petitioner: Her evidence did not give any other facts than those spoken to by the petitioner herself afterwards; but on questions being put in cross-examination as to the circumstances of the family before the petitioner left the respondent's house in 1862.

The Queen's Advocate objected to such an inquiry as irrelevant to the only issue in the case.

*The Judge Ordinary*: Though the consummation or non-consummation of the marriage, owing to certain causes, may be the only issue, yet in the course of the investigation it is impossible to exclude anything that tends to throw a light on the credibility of the whole case set up. Now the motives of the parties may throw great light upon that. Take an extreme case: suppose it to be alleged on the other side that the whole of this proceeding was for a collateral purpose, and that evidence were tendered of a conversation between the **[120]** petitioner and some other person which went to shew that she wished to separate from her husband on some ground wholly distinct from that which forms the subject of the suit, surely that would throw light on the question. The weight of such evidence is another matter; but I am clear that it is admissible, and if I have reason to think that you are taken by surprise I will adjourn the case.

Mrs. L.'s cross-examination was then resumed.

Petitioner produced on her own behalf:—

I lived with the respondent from our marriage in 1848 till August 1862. On the first night we slept together attempts at connection were made. I have been told what consummation means; there was no consummation that night. Attempts were still continued; his person partially entered my person. I am sure there was no erection of his person, nor penetration of mine. I never complained to any one: how could I tell? My father did not like my marriage. I had not the least idea at the time of marriage what takes place between man and wife. I thought things were very strange; I can scarcely say I had doubts. The respondent always made excuses of some kind; he very often spoke of a kick he had had, that was when these attempts were made; sometimes said he was fatigued, or worried, or not well. I hardly knew whether this referred to present weakness or to the fact of my having no children. I went to my mother in the autumn of 1862. I first knew from her that I had not been treated as women are by their husbands. My mother was talking of the respondent's unkindness and keeping things back from me which I wanted; she said some people said I might go back and live with him. I said he had never really loved me. She asked what I meant? I said I thought he had never cared for me as men do care for their wives. She pressed me to tell her more. I said I believed it must have been

because of the kick which he so often spoke of. After he sent me [121] away my mind dwelt much upon the manner in which he had treated me. I saw a short account of Miss Balfe's case in the "Standard"; I had spoken to my mother before that time; I spoke to her afterwards; I brooded over it and could not rest. I saw Mr. Soden; he asked me a great many questions. I had been thinking of bringing this suit before, but had not made up my mind till I saw Mr. Soden.

On cross-examination: There was never at any time marks of blood on bed linen or clothes after these attempts. I was hurt by the attempts; they were always painful. I suffered next day. Impossible for me to explain what caused the pain; I should say the pain was external; I think never internal; it was caused by these long attempts, I suppose.

By the Court: What do you mean by long?

A quarter of an hour or twenty minutes.

I cannot say what pressure caused the pain; the continued pressure of a soft substance caused the pain. Soon after marriage I consulted Dr. Everett; I had had a fall, my mother suspected a miscarriage; Dr. Everett treated me for that. After that I saw Dr. Black, occasionally, for several years. I do not remember that I stated to him that I had two if not three miscarriages. I do not recollect Dr. Black suggesting that I should sleep apart from my husband at any time; I consulted him for general weakness; I mentioned pain from the time of marriage in certain parts; on and off I consulted all the doctors as to that. I cannot swear that Dr. Black did not make some suggestions about separate beds. I did not mention to Dr. Black any doubts as to the marriage having been consummated. I saw Dr. Gream once at his own house. External applications and lotions were ordered from the first. Mr. Soden was the first person who examined me. Dr. Nicholls suggested an examination of my person to my mother, but not to me.

[122] The petitioner was then cross-examined at length as to the general terms on which she had lived with her husband, and as to the circumstances which had occurred in the spring and summer of 1862 before she left and her conduct since.

Various letters of hers were put in evidence, and the history of the parties, deduced from this part of the petitioner's cross-examination, and from her letters and other evidence in the case, may be shortly taken as follows:—

The respondent was a solicitor in a country town. Petitioner and respondent lived on the best terms as man and wife for years after their marriage. Her father and mother lived in the neighbourhood, and she was in the constant habit of seeing her mother. About 1860 the petitioner and respondent became intimate with a Dr. and Mrs. N——— living near them. After a time the respondent objected to the petitioner keeping up the intimacy, in which she persisted. In the early part of 1862 the petitioner's father died, whereupon the income of certain moneys secured by her marriage settlement came into possession. A few weeks after the father's death a brother died intestate, and a share of his money came to the petitioner. The petitioner and respondent both wished to have spent this money, or part of it, but it turned out that there was a clause in the settlement securing after-acquired property. This led to some disputes, and the petitioner considered that her father's memory was unjustly attacked by the respondent. To use her own words on this point: "We occupied separate rooms for a few weeks before I left the house in August, because he spoke of my dear father in such a manner that I determined I would never be in the same room with him again. I made up my mind at that moment, two or three weeks before I left."

In August, 1862, there was a talk of the petitioner going to an uncle at Folkestone, The respondent wished to go with her: the petitioner objected, and determined to go, as far as London at least, with Dr. and Mrs. N———. The respondent [123] wrote a note forbidding her going with the N———s; but, according to the petitioner's view, afterwards gave a tacit consent. She went. The respondent denied that he had ever varied from the note he had written to her, and which was in evidence. He refused to receive her again without some explanation. Attempts continuing for many months were made by friends and relations to bring about a reconciliation. Letters of hers written during this period were put in evidence; they referred in various terms to the grounds of misunderstanding above hinted at, but contained no allusion to the complaint now brought forward.

She said on cross-examination: "I have resisted all attempts at reconciliation."

Dr. Deane opened the respondent's case, and the Court adjourned.

February 11.—The respondent, produced on his own behalf, gave his statement of the dispute about the settlement and the intimacy with the N———s, and proceeded as follows:—

The petitioner never charged me as unfit for the duties of a husband; at the time of marriage I had connection—penetrated her person. There was never any disability. It is not true that there was no erection, or that I was in the habit of lying upon her for fifteen or twenty minutes together. She told me she had had a miscarriage, a month or two after our marriage, in consequence of a fall. Dr. Everett attended her. I received a letter from Dr. Black; I told my wife what Dr. Black wished, that we should sleep together less frequently. I had an accident when I was seventeen, a kick in the testicles; I was ill for a day or two, and there was an end of it. I may have mentioned it to my wife; never gave it as an excuse for not having connection.

On cross-examination:—

To the best of my belief I had full and complete connection with my wife every year on many occasions.

**[124]** In answer to the Judge Ordinary:—

My wife was delicate when she married; she always suffered from weakness. After she consulted N———, I was aware of her using a lotion; I think she had done so when under Dr. Everett's treatment. I was not conscious of my wife being formed differently from other women. As to Dr. Black's letter, I talked to my wife about less sexual connection. I do not recollect what she said; but nothing came of it.

Dr. Everett, on behalf of the respondent:—

I was called on to attend Mrs. H. soon after her marriage. I was told that she was suffering from miscarriage caused by a fall down some steps. I treated her accordingly. There were the usual signs of miscarriage—pain and discharge.

On cross-examination:—

Excessive menstruation may be mistaken for miscarriage; but excessive menstruation would not be caused by slipping down stairs, and it would be likely to recur. Uterine inflammation would only be caused by mechanical violence acting on the womb; ineffectual attempts at intercourse would not occasion it. It is possible or probable that sleeping in the same bed without connection—unsatisfied excitement—might cause uterine inflammation.

The following answers of the witness were given partly on re-examination and partly to further questions put by the Queen's Advocate and the Judge Ordinary:—

A full state of the vessels of the womb caused by unsatisfied excitement might be continuous. I was never consulted by the petitioner for congestion of the womb. The discharge I saw was sanguineous; there were the symptoms of miscarriage. I have heard the petitioner's account of the attempts at intercourse by her husband; they would not, I think, injure the womb. What I actually saw was not menstrual fluid. I did not see an ovum, which is the only infallible sign of miscarriage; but unless all the discharges are kept it **[125]** might, especially at so early a period, escape notice. The petitioner afterwards consulted me for leucorrhœa. I probably ordered astringent lotions or injections. I do not think any astringent application would restore the condition of the hymen so that, on inspection, it might appear that connection had not taken place. I make the same answer, assuming that the hymen had not been ruptured, but only distended. I heard Dr. Farre's evidence. I think that the existence of a hymen does not indicate with certainty that no penetration had taken place. It is possible that the formation of the parts might admit of penetration without destroying the hymen. According to the evidence given yesterday, of the formation of Mrs. H.'s person, I should think the present is a case of imperfect penetration. I do not think any permanent contraction of the parts of the vagina, other than the hymen, could be effected by artificial means. I think it possible that, after full and perfect connection for fourteen years, the hymen might remain. I never met with such a case in my own practice.

Dr. Black, produced on behalf of respondent:—

The first time the petitioner consulted me was in September, 1852. I have referred to my notes. She was suffering from neuralgic pain, and from general derangement of digestive and uterine organs. I saw her alone. I did not then know her husband. In giving the history of her case she told me that her health was rather better since than before marriage, and that she had had three miscarriages. I asked her as to

habits of menstruation. It was scanty, and attended with pain. She also had leuchorrhœa. Both these symptoms existed before marriage. I gathered from what she said, that she and her husband were much attached to each other, and had frequent intercourse. I saw her, off and on, from September, 1852, till May, 1859. I concluded more than ordinary sexual intercourse—partly from her, partly from her husband. On reflection, I do not think I formed that conclusion indepen-**[126]**-dently of what the husband said; certainly nothing from her to lead me to suppose that intercourse had not taken place. She seemed a person of intelligence and great reserve. I proposed an examination of her person, which she declined. I should think existence of hymen is consistent with perfect penetration. There might be a general relaxation of the surrounding parts.

On cross-examination:—

The hymen may be so relaxed that a foreign body may be introduced, and that part recover its position. The fact of impregnation shews perfect connection. I know of no recorded case where, after full and frequent intercourse for fourteen years, the hymen has been found intact.

On re-examination:—

From the petitioner's account of what took place in bed with her husband, impregnation would be impossible.

In answer to the Judge Ordinary:—

I never attended her for excessive menstrual discharge.

Dr. Gream, on behalf of the respondent:—

I have known cases of virginity, by which I mean non-rupture of the hymen, after marriage, from two or three different causes (I do not think that the hymen is always a test of virginity); a rigid hymen may be carried up into the vagina without rupturing or permanently dilating it. A man might suppose he had had perfect connection. Supposing such a state of facts early in matrimonial intercourse, the hymen would be more likely to relax and give way. There is a thin hymen which dilates with great facility; I have no doubt connection might take place with a man of perfect power without destroying such a hymen; the man's parts might pass beyond it. From the petitioner's evidence I should think that complete penetration had not taken place; but that, from obstruction in the female rather than from weakness in the man. No impregnation could take place without erection; at least without a semi-erection; but that **[127]** would not have caused pain. I should expect to find the parts of a man shrivelled where complete impotence exists at twenty-five years of age. I have not myself met with any case of impotence where the man's parts were apparently perfect, but such cases may exist. If a man were impotent for sixteen or seventeen years together, I should expect to find signs of it, but impotence may exist without.

On cross-examination:—

I think that complete penetration could not take place without enlarging the posterior parts of the vagina.

In answer to the Judge Ordinary:—

I think that a husband might go on for years imagining he had had connection, and yet the wife have perfect hymen (I have known such a case after eight or nine years' cohabitation), so that neither man nor woman might be aware that the act of generation had not been perfectly performed. In the case of a large vagina and very relaxed hymen, intercourse might go on for years without rupturing the hymen. But in the case of such a person as the petitioner is described in the evidence, I do not think perfect penetration could take place. According to Mr. Soden's description, the vagina in the petitioner's case is unusually small.

Mr. Serjt. Ballantine summed up the respondent's case, and

The Queen's Advocate replied. Cur. adv. vult.

March 21.—*The Judge Ordinary* gave the following judgment:—In all cases of this class there are two distinct questions. First, whether the marriage has in fact been consummated: and if not, then whether this has arisen from the impotency of the party charged. It devolves upon the petitioner to establish both these propositions to the reasonable satisfaction of the Court. The media of proof are threefold:—medical inspection of the parties; medical testimony as to the conclusions to be **[128]** drawn therefrom; and finally, the examination upon oath of both parties as witnesses. The Court has in this instance a full body of evidence from all these

sources, and is now prepared to state the result of it after a careful review. But in doing so I do not propose to myself, save so far as need be, to enter into details which are of so personal and delicate a nature that they may be fitly excluded from the pages of a public judgment. I am satisfied, then, that this marriage has never been consummated in the complete sense of that term; but I am by no means assured that there is any impotency on the part of the husband. I consider the actual state of things to be partly due to causes in which the petitioner has her share; and I believe that both parties did in this case what Dr. Gream informed the Court he had known to happen in others, namely, live happily together for years under the impression that the marriage had been fully consummated, when in fact it had not. These conclusions, drawn from the evidence of the medical men, and supported by portions of the petitioner's own testimony, particularly that in which she referred to bodily pain, receive strong confirmation from the general facts of the case. These people lived together in perfect happiness and contentment from January, 1848, till February, 1862, a period of fourteen years, the petitioner's mother living near her and seeing her almost daily; and yet no complaint was made, no inquiry set on foot, no failure or defect in the husband was imputed. Soon after marriage the petitioner had a violent fall on her back: this brought on what her mother considered a miscarriage; attempts are now made to explain this incident by referring it to excessive menstruation. But two or three efficient answers are given to this suggestion: the fact that it supervened upon a fall; that it did not recur; and finally, that the appearance, though not conclusive, for the only infallible test was absent, pointed to miscarriage and not menstruation. It appeared further, on the petitioner consulting Dr. Black respecting her general **[129]** health some years since, she told him she had had three miscarriages, and the result of several conversations which he held at various times with the husband and the wife was, that he actually recommended abstinence from sexual intercourse for a time and separate beds. Finally, the separation and rupture between the parties had no reference to the matters now in controversy, and were not the offspring of distress either mental or bodily caused by the husband's supposed defects; nay more, such distress, which to a greater or less degree is an invariable feature in these cases, does not appear to have had any existence for the lady; she was not conscious of a wish unfulfilled or a desire repressed. If she had been, the delay would have barred her suit; that she was not, is a cogent support to the conclusions I have above set forth. The respondent must be dismissed from the suit.

PHILLIPS *v.* PHILLIPS AND MEDLYN. April 25, 1865.—Examination of Petitioner's Witnesses de bene esse.—Alimony pendente lite.—On the last day of the sittings the Judge Ordinary allowed the petitioner's witnesses to be examined, though the case was not in the list for the day, on the understanding that, if the respondent and co-respondent intimated their intention to defend the suit, the case should be reheard. The evidence proved adultery. On a subsequent application for alimony pendente lite, the Judge Ordinary held that the respondent could not be prejudiced by the evidence so taken; notice meantime having been given that the respondent and co-respondent intended to defend.

[S. C. 34 L. J. (Mat.) 107.]

This was the husband's petition for the dissolution of his marriage, the respondent and co-respondent had both answered, traversing the charge of adultery, and making counter charges, and the cause was set down for trial by the Court without a **[130]** jury, at the sittings in and after Hilary Term, 1865. On the 16th of February, the last day appointed for the trial of causes without juries at these sittings, the Judge Ordinary allowed the evidence of the witnesses in support of the petition to be taken, in order to save the petitioner the expense of bringing them up again from Cornwall, although the case was not in that day's list of causes, and no notice had been given to the respondent or co-respondent that it was to be brought on; but on the understanding that the case would be re-tried if the respondent or co-respondent wished to defend the suit. The evidence of the witnesses proved the charge of adultery. Notice was afterwards given that the respondent and co-respondent intended to defend the suit, and it was again set down for trial. On the 25th of April, before it had come on for trial, Dr. Wambey, for the respondent, moved for an allotment of alimony pendente lite.

Dr. Spinks: If the petitioner's witnesses have spoken truth the respondent is

guilty of adultery, and is not entitled to alimony: the question ought to be postponed till after the hearing.

*The Judge Ordinary*: I cannot treat what passed in February as a hearing of the cause. I acceded to the petitioner's application to take the examination of his witnesses to save him expense, upon the express understanding that if the respondent or co-respondent desired to defend the suit, the witnesses should be brought up again and the case re-tried. I cannot look at what then took place as any step in the cause. I cannot, because I may have reason to believe, from a collateral proceeding, not a step in the cause, that the respondent has been guilty of adultery, refuse to allot the alimony. Nor can I suspend the decree for alimony till after the hearing. I cannot say that I will decline to hear the respondent's petition for alimony until I have ascertained **[131]** whether she has been guilty of adultery. I allot alimony pendente lite at the rate of £48 a year.

FORSTER *v.* FORSTER AND BERRIDGE. February 7, April 20, and May 9, 1865.—Application of Damages.—Agreement between Petitioner and Co-Respondent.—After an order made for application of damages the Court will not sanction any agreement between the petitioner and co-respondent, whereby the latter would be relieved from any part of what was due from him; but where, after such an order, the petitioner was put to further expense by appeals and other litigation, the Court varied the original order so as to allow the petitioner to take a larger share of the damages, on the ground that the main intent of the original order had been to reimburse the petitioner the whole expense to which he had been put.

[S. C. 34 L. J. (Mat.) 88; 12 L. T. 504; 11 Jur. (N. S.) 512.]

In this case, after a decree absolute for dissolution of marriage, the following order was made in June, 1863, as to the disposal of a sum of £5000 assessed by the jury as damages against the co-respondent:—

"The Judge Ordinary having taken time to deliberate, directed that the sum of £5000, being the damages assessed in this cause, be paid to the petitioner's solicitor, to be by him applied in the following manner:—That £1000 be paid to the petitioner for his own use; that an annuity for £120 a year be bought in the names of two trustees on the life of the respondent, and that such annuity be paid by the trustees to the respondent so long as she shall lead a moral and respectable life; but should the respondent not lead a respectable and moral life, then that her interest in the annuity should be forfeited, and that the trustees should pay such annuity to the two daughters of the marriage, in equal portions, or to the survivor of them; and that the residue **[132]** of the said sum should be invested in the purchase of equal annuities for the use of the two daughters of the marriage on their own lives; and that a deed should be prepared and settled by one of the conveyancing counsel of the Court of Chancery, whereby this order should be effectually carried out through the intervention of trustees, and anticipation of the annuities should be prevented."

Application had been made to the Queen's Bench for a prohibition, and appeals had been presented to the full Court and to the House of Lords by the respondent, the co-respondent, and an intervener.

An agreement had since been come to by the petitioner and the co-respondent that the litigation should cease, and the appeals be withdrawn; that the co-respondent should pay to the petitioner £2700, which it was supposed would cover the costs of the petitioner in the whole litigation; that the co-respondent should also secure an annuity of £120 to the respondent while she lived respectably, and that the petitioner should release the co-respondent from the claim for £5000 damages and costs.

February 7.—Mr. Lawrence, on behalf of the respondent, moved that the order of June, 1863, might be carried into effect. The respondent is no party to the agreement between the petitioner and co-respondent, and is therefore not bound by it.

Mr. Lumley Smith, for the petitioner, and Dr. Tristram, for the co-respondent, argued that the agreement was a proper one, and that the respondent had no right to object to it.

*The Judge Ordinary*: The agreement may be a very proper and prudent one as between the parties who have entered into it, and this Court would not interpose any difficulty in the way of carrying it into effect if it were satisfied that the respondent and the children of the marriage would **[133]** not be injuriously affected by it. But

no agreement between the petitioner and the co-respondent ought to deprive the children of the benefit conferred upon them by the order of the Court. The case may stand over that the parties may come to some arrangement as to the interests of the respondent and the children. If they cannot come to such an arrangement the order of the Court must be enforced.

April 20.—Mr. Lawrence renewed the motion, no further arrangement having been come to. The respondent is, no doubt, not injured by the agreement made between the petitioner and the co-respondent, but by it her two daughters, who, by the order of the Court, would be entitled to annuities out of the damages, are deprived of that benefit.

Mr. Coleridge, Q.C., and Dr. Tristram for the co-respondent: The agreement ought not now to be disturbed, as the co-respondent, upon the faith that it would be carried into effect, has abandoned his appeal, and has paid a considerable sum of money.

Mr. Lumley Smith for the petitioner: The petitioner has not derived any pecuniary advantage from the compromise; he consented to it as the best way of putting an end to the litigation, and is willing to carry it out if the Court will sanction it.

*The Judge Ordinary*: The question is a difficult one. On the one hand the interests of the children must be protected; on the other, the co-respondent has parted with a considerable sum of money on the faith of his agreement with the petitioner. I must take time to consider the matter.

Cur. adv. vult.

May 9.—*The Judge Ordinary* gave the following judgment: After considering this matter, I am of opinion that the original **[134]** order of the Court, made on the 23rd of June, 1863, must be in substance complied with. It appears that the costs between party and party of the petitioner in the suit in this Court were taxed at £977, 18s., and the damages assessed at £5000. The co-respondent's whole liability amounted, therefore, to £5977, 18s. The Court cannot now with justice relieve him from the payment of any portion of this sum. It is true that he has made an agreement with the petitioner which, if it could be adopted in place of the order of the Court, would have that effect. But the petitioner has no right to deal with the damages beyond the sum of £1000, which was awarded to him. This agreement was beneficial both to the petitioner and the co-respondent, but not to the respondent or the children, both of whom were interested in the full payment of the damages. The respondent, who was no party to the agreement, claims the enforcement of the order, and is entitled to it. But regard ought, I think, to be had to the amount already paid by the co-respondent to the petitioner. The order will, therefore, stand thus: that the £2700 already paid be deducted from the total of £5977, 18s., and that the co-respondent do pay the residue, viz., £3277, 18s., to the petitioner's solicitor within a month, to be applied to the purposes and in the manner in the original order of the 23rd of June 1863 set forth, in all respects, save and except the payment of the £1000 thereout to the petitioner, whose claim upon that sum is already satisfied. I am aware that in thus treating the case I am allowing a larger portion of the damages to go to the petitioner than was originally ordered, and consequently a smaller portion to the two daughters of the marriage; but I consider that the leading intention of the Court was to reimburse the petitioner fully for all the expenses he incurred, and if the costs to which he was afterwards subjected by appeal in the House of Lords had been an existing burden at the time the order was made the Court would have relieved him from them before devoting the surplus of the damages to any other object.

**[135]** SWATMAN *v.* SWATMAN. May 4 and 16, 1865.—Wife's Petition.—Cruelty.—Where the evidence of actual violence used by the husband towards the wife is not sufficient of itself to warrant a decree on the ground of cruelty, the Court will take into consideration his general conduct towards her, and, if this is of a character tending to degrade the wife and subjecting her to a course of annoyance and indignity injurious to her health, will feel itself at liberty to pronounce the cruelty proved.

This was the wife's petition for dissolution of marriage, on the grounds of the husband's adultery and cruelty.

Dr. Spinks conducted the petitioner's case.

The adultery was clearly proved, but the Court took time to consider whether a case of cruelty was established; the circumstances are sufficiently referred to in the judgment. Cur. adv. vult.

May 16.—*The Judge Ordinary* gave the following judgment:—

On consideration of the evidence given by the petitioner I feel justified in granting her the relief she prays.

The evidence of actual violence on the husband's part was not of a sufficiently aggravated character, standing by itself, though distinctly proved, to warrant the charge of cruelty. But, taken with the rest of his conduct, that charge is, I think, substantiated. The petitioner has been during the latter part of her married life subjected to a continued course of ill-treatment and degradation such as no lady is bound to bear.

Daily intoxication, with late hours at night. Women of the town brought home to his own door, and on more than one occasion introduced into his bed. Adultery committed with his female servants under his own roof, while his wife was then confined, and familiarity with them even in his **[136]** wife's presence. These and the like indignities made up a burden which the petitioner's health was unable to bear, and under which she could not be expected to discharge the duties of married life. She quitted her home at length, after a futile trial of promised amendment, and as her husband's adultery was plainly proved, I pronounce a decree nisi for the dissolution of marriage, with costs.

ENTICKNAP *v.* RICE (falsely called ENTICKNAP). May 30, 1865.—Suit for Nullity by reason of previous Marriage.—Decree for Confrontation.—The Court will follow the practice of the Ecclesiastical Court in making a decree of confrontation in fit cases.

[S. C. 34 L. J. (Mat.) 110; 12 L. T. 211.]

This was a petition by a man for a decree of nullity of marriage, on the ground that the woman had been married previous to her marriage with the petitioner, and that at the time when that marriage was celebrated her first husband was alive. The respondent had appeared and traversed the allegations in the petition.

Dr. Spinks, for the petitioner, moved for a decree of confrontation in accordance with the practice of the Ecclesiastical Court.

Dr. Wambey for the respondent: I cannot resist the motion.

*The Judge Ordinary*: I am bound to follow the practice of the Ecclesiastical Court. The process appears to me to be a very useful one. I grant a decree of confrontation.

**[137]** (Before the Full Court—*The Judge Ordinary, Bramwell, B.*, and *Mellor, J.*, and before *The Judge Ordinary.*)

ROWLEY *v.* ROWLEY. April 27 and May 30, 1865.—Form of Decision of Judge Ordinary.—Appeal to the House of Lords.—By 20 & 21 Vict. c. 85, s. 56, and 23 & 24 Vict. c. 144, s. 3, an appeal lies from the Judge Ordinary, discharging the functions of the full Court by deciding on any petition for dissolution, to the House of Lords: and where the Judge Ordinary had, in substance, disposed of an important question in a suit for dissolution by refusing to give directions for the mode of trial of certain issues, from which refusal no appeal would lie to the House of Lords, the full Court, on appeal, varied the order so as to enable the party aggrieved to appeal to the House of Lords.—Where, on a petition for dissolution of marriage by a wife, the only facts which in the opinion of the Court the petitioner is at liberty to prove would be ground for a decree of judicial separation only, and the petitioner refuses to amend the petition by praying for judicial separation, the petition must be dismissed.

[S. C. 11 Jur. (N. S.) 562; 12 L. T. 505.]

This was originally the wife's petition for dissolution of marriage by reason of the husband's adultery and cruelty, in which, under the circumstances detailed, 3 Sw. & Tr. 338, the Judge Ordinary refused to give directions for the trial of the issues raised, concluding his judgment with the following sentence:—"The result is that the Court declines to further Mrs. Rowley's suit by giving any directions for the mode of trial, and on proper application will entertain the question whether the husband is not entitled to be dismissed from the suit."

From the order embodying that refusal the present appeal was brought.

Dr. Twiss, Q.C., and Dr. Tristram, for the appellant, **[138]** urged that, independently of the importance of the question raised by the pleadings, the form in which the decision of the Judge Ordinary had been given, namely, by refusing to give directions for the trial of the issues raised, had virtually deprived the petitioner of the appeal to the House of Lords. By 20 & 21 Vict. c. 85, s. 56, "Either party, dissatisfied with the decision of the full Court on any petition for the dissolution of a marriage, may, within three months after the pronouncing thereof, appeal therefrom to the House of Lords," etc. By the 23 & 24 Vict. c. 144, the Judge Ordinary had authority given to him to exercise all the powers theretofore vested in the full Court; and by section 3, "Where there is a right of appeal to the House of Lords from the decision of the full Court, there shall be the like right of appeal to the said House from the decision of the Judge Ordinary alone, or with any other Judge under the Act." The interlocutory order complained of is not "a decision on any petition for the dissolution of a marriage." If, on the husband's application, the petition had been dismissed, the appeal would have been to the House of Lords.

Without hearing Dr. Deane, Q.C. (Dr. Swabey with him), for the respondent,

The Court intimated that the right of appeal to the House of Lords ought not to be interfered with: and

*The Judge Ordinary* said: When I made the order on the motion for directions as to mode of trial, I expected that the husband would have applied to dismiss the petition. As things now stand, we make the following order:—The husband may apply on any motion day during the term to dismiss the petition; from my decision on that motion an appeal will lie to the House of Lords; if he does not so apply, the present appellant to be at liberty to move the Court for **[139]** directions as to mode of trial of the issue of adultery subsequent to the 12th of March, 1861.

On the 30th of May Dr. Swabey moved the Court, in accordance with the suggestion made by the full Court, to dismiss the petition.

*The Judge Ordinary* asked Dr. Tristram, who appeared for Mrs. Rowley the petitioner, whether she wished to amend the prayer of the petition by asking for a judicial separation, instead of a dissolution of marriage?

Dr. Tristram stated that Mrs. Rowley refused to do this, and stood on her right to reopen the whole matter, and on proof thereof to obtain a decree of dissolution.

Cur. adv. vult.

*The Judge Ordinary* gave the following judgment: If the petitioner in this case had desired a decree of judicial separation, in place of a dissolution of her marriage, it would have been right to give her the opportunity of proving the adultery with which she has charged her husband: but on making her the offer to amend the petition for that purpose, she declined the indulgence, and intimated that she was prepared to take her stand on the petition in its present form, and contest her right in the Court of Appeal to maintain the charge of cruelty as well as that of adultery, and so entitle herself to a divorce. Now, as the cruelty and adultery must concur to entitle her to the only form of relief which she is willing to ask, and as I am of opinion that she cannot, for the reasons I formerly expressed, be permitted to sustain the charge of cruelty in proof, it follows that her petition must be dismissed. In arriving at this conclusion I have endeavoured to give full weight to the ingenious argument by which the doctrine of condonation was pressed into her service; but I retain the conviction that it has no place in the **[140]** discussion, for there had been no forgiveness between these parties, and no return to cohabitation as the result of it. So far from it, the bargain they made, and which is now argued to carry within it the character and incidents of condonation, was nothing more than the cession of a doubtful remedy, and nothing less than a contract for perpetual disunion. The petition is dismissed.

PROCTOR *v.* PROCTOR, AND SMITH AND PITMAN. May 30, 1865.—Petition for Dissolution.—Wilful Separation.—Discretion of Court.—The petitioner, son of a clergyman, and having taken his degree at Cambridge, married a woman who had been living as a prostitute in Cambridge, on the 13th of June, 1863. Nothing in the nature of continuous cohabitation took place. In October, 1863, the petitioner's father became aware of the fact, and in December, 1863, a deed of separation, under which the respondent was to receive £1 a week, was

executed. The adultery proved took place in the early part of 1864. The petitioner was dependent on his father.—The Court held that the separation, if wilful, was not without reasonable excuse, and made a decree nisi.

[S. C. 34 L. J. (Mat.) 99; 11 Jur. (N. S.) 531; 12 L. T. 505; 13 W. R. 963.]

This was the husband's petition for dissolution of marriage by reason of the respondent's adultery.

No appearance by respondent or co-respondent.

Mr. Manisty, Q.C., and Dr. Spinks conducted the petitioner's case, and

It was proved that the marriage took place in London on the 13th of June, 1863, at St. Pancras, the petitioner being then about twenty-four years old, and having just taken his degree at Cambridge; the respondent had led the life of a **[141]** prostitute at Cambridge for several years before the marriage, after which she went back to Cambridge.

In October, 1863, the petitioner's father, who was a clergyman, discovered the marriage, and in December, 1863, a deed of separation was executed by which an allowance of £1 a week was secured to her.

The adultery proved took place on several occasions in the early part of 1864.

The Rev. William Proctor, the father, said:

I was not aware of his marriage till October, 1863. At the time of the marriage he was entirely dependent on me; he had no fixed allowance, but I paid his expenses, and he held some scholarships: on the whole his income might be £150 a year. He had no regular allowance in October, 1863. I paid the £1 a week under the deed.

In answer to the Court:

A friend told me of the marriage, and then I consulted my solicitors. My son came home on the 14th of June, and was with me till October, 1863. So far as I know he has never seen his wife since the marriage. I took the matter up entirely—the petitioner was entirely in my hands, but was aware and consented to what I did.

Counsel for the petitioner referred to the case of *Beavan* v. *Beavan*, 2 Sw. & Tr. 652; and

*The Judge Ordinary* observed that, in the present case, there was no cohabitation at all between the parties, and that he must take time to consider.

Cur. adv. vult.

May 30.—*The Judge Ordinary*: The 31st section of the Divorce Act imposes a difficult and serious responsibility on the Court. If the petitioner shall have been guilty in the opinion of the Court of wilful separation from his wife (or certain other wrongs), "without reasonable excuse," the Court is not to be bound to grant him a decree dissolving the **[142]** marriage. The language here used is of great latitude. An opinion has first to be formed as to what, in the particular case, may constitute "reasonable excuse," and then a sort of discretion to be exercised in granting or withholding a decree. The subject could not well have been otherwise treated. The shape or form that the petitioner's misconduct in married life may take, its degree, the length of its duration, its incidents of mitigation or aggravation, its causes and effects—all these have or may have a bearing on the petitioner's just claim to relief, and yet are capable of such infinite variety and intensity, that they escape distinct expression, and refuse to be fixed in a positive and detailed enactment. The duty of weighing these matters has, therefore, been cast upon the Court, and when the cases arising under this section have been sufficiently numerous to unfold any rules of general application, the Court may be enabled to guide itself and others within more narrow limits, by further definition. But until then, the same reasons which have served to make the Legislature express itself with latitude ought to make the Court cautious in restricting itself by precedent. One main end of the Legislature in these provisions was this—that a wife should not first be the object of neglect and ill-treatment, and then the victim of the husband's own wrong. Now, in this case, there certainly was an entire separation after the marriage, but it was acquiesced in by the wife at first temporarily, and soon afterwards by a regular deed of separation, with a weekly allowance. Further, the petitioner, though he had just taken his degree at Cambridge, was without means of any sort, and entirely under the control of his father, through whom the separation was effected, and by whom the allowance was paid. Was this such a wilful separation, without reasonable excuse, as should induce the Court to hold its hands and refuse a decree? I think not. The wife led the life of a common prostitute, both before and after the marriage; she never called upon or

de-[143]-sired her husband to live with her, and she has not raised her voice here in complaint or resistance. The mere fact of the separation being the mutual act of both parties may not in all possible cases be enough to constitute "reasonable excuse," though it may go a long way towards it. But the peculiar position in which this young man was placed under his father and his want of means hardly left him an alternative: and the separation, if it can be considered wilful, may with good reason be excused.

Decree nisi for dissolution.

PALMER *v.* PALMER. June 6, 1865.—Decree Nisi, Motion to make Absolute.—Queen's Proctor's Intervention.—The Court will refuse to make a decree nisi absolute, after the expiration of three months from the time when it was pronounced, in order to enable the Queen's Proctor to make inquiries, and to lay a case before the Attorney-General for his directions, upon an affidavit being filed by the Queen's Proctor, to the effect that he has received information of material facts, and that he intends to take the directions of the Attorney-General.

[S. C. 34 L. J. (Mat.) 110.]

This was the wife's petition for dissolution of marriage. The respondent had not appeared, and a decree nisi had been pronounced on the ground of his incestuous adultery.

Dr. Spinks moved for a decree absolute, on the usual affidavits.

Mr. Searle, for the Queen's Proctor, moved that the decree might be suspended. Certain information had been received by the Queen's Proctor as to material facts, and he is making inquiries into the truth of that information, with the view of laying it before the Attorney-General for his directions. It is understood that the other side consent.

**[144]** Dr. Spinks: I am not instructed to consent; I claim the right to have the decree made absolute.

*The Judge Ordinary*: As the petitioner does not consent the Queen's Proctor must file an affidavit that he is making inquiries into the truth of the information he has received, and that he intends to take the direction of the Attorney-General upon the result of those inquiries within a reasonable time. On such an affidavit being filed the decree will be suspended.

BROWN *v.* BROWN. June 13, 1865.—Alimony.—Order for Payment to Wife or her Solicitor.—Practice.—An order for the payment of alimony to wife's solicitor will not be made without a written authority from her.

[S. C. 34 L. J. (Mat.) 102.]

In this case the Court allotted alimony pendente lite (Dr. Deane, Q.C., appearing for the wife, and Dr. Spinks for the husband).

Dr. Deane asked that the alimony should by the order be made payable to the wife or her solicitor.

*The Judge Ordinary*: If the order is required in the usual form, namely, for the payment of the money to the wife or her attorney, there should be brought into the Registry a written authority from the wife authorizing her attorney to receive it. In future no order will be made in that form without such an authority. Upon that authority being brought into the Registry, the order will be made.

**[145]** HARDING *v.* HARDING AND LANCE (the Queen's Proctor intervening). May 10 11, 12, 13, and July 4, 1864.—Dissolution of Marriage.—Decree nisi.—Intervention.—Charge of Collusion.—Admissibility of Petitioner's Evidence.—H. petitioned for dissolution of marriage; the respondent answered, and made counter-charges; some evidence in support of those charges was offered at the trial, but a verdict was found for the petitioner on all issues, and a decree nisi made. The Queen's Proctor intervened, and alleged the same charges of adultery as had been in issue on the respondent's answer, and collusion:—The Court held that the intervener was not bound to prove the collusion before he went into the question of the adultery.—The petitioner is not a competent witness in a proceeding by an intervener shewing cause against a decree nisi, nor will the Court examine him under the 43rd section of the 20 & 21 Vict. c. 85, in support of his own petition.

This was a petition by James Harding for a dissolution of marriage, on the ground

of his wife's adultery. The respondent had filed an answer, denying the charge of adultery, and making divers counter-charges of adultery against the petitioner.

The cause was tried before the Judge Ordinary at the sittings after Michaelmas Term, 1863. After the petitioner's case had been proved, some witnesses were examined in support of one of the counter-charges, but they failed to establish it, and no evidence was called in support of the other counter-charges, and the respondent's counsel declined to contest the case any further. A verdict was accordingly found for the petitioner on all the issues, and a decree nisi was pronounced. Before the decree was made absolute, the Queen's Proctor entered an appearance under the 7th section of the 23 & 24 Vict. c. 144, to shew cause against the decree being made absolute, and filed affidavits shewing that **[146]** the petitioner had been guilty of adultery. Affidavits in reply had been filed on behalf of the petitioner, and the Judge Ordinary had made an order, under the 21st of the Further Rules of 1860, that the controverted questions of fact raised by those affidavits should be tried by a special jury. The issues were, whether the petitioner had been guilty of collusion, whether he had suppressed material facts, and whether he had been guilty of adultery; the charges of adultery being the same as those contained in the respondent's answer. These issues now came on for trial.

The Solicitor-General and Mr. Hannen for the Queen's Proctor.

The Queen's Advocate and Dr. Spinks for the petitioner.

After the Solicitor-General had opened the case, and before the witnesses were examined,

The Queen's Advocate objected to any evidence being received in support of the charge of adultery until the charge of collusion had been proved. The charges of adultery made by the Queen's Proctor were identical with those made by the respondent, and no material facts are alleged which were not brought before the Court by the respondent's answer at the last trial. Before those charges can be re-tried it is necessary to shew that they were not fairly inquired into at the last trial, in consequence of collusion between the petitioner and the respondent.

*The Judge Ordinary*: The objection is wholly untenable. If the construction of the Act contended for by the Queen's Advocate is correct, the course of a petitioner and a respondent intending to collude would be easy. They would have nothing to do but to put all the charges that could be alleged **[147]** against the petitioner on the record, and to give no evidence in support of them. It appears that at the last trial some evidence was given in support of one of these charges of adultery, but no evidence was offered in support of the two other charges. To say that the Act precludes the Court from inquiring into those charges would be to reduce it to an absurdity. It would be a very short-sighted construction to hold that to make a charge is the same thing as to bring a fact before the Court. The charge is one thing, the fact is another. Some of the facts of which evidence is now to be given have never been before the Court.

Evidence was then given in support of the three charges of adultery alleged by the Queen's Proctor. Some evidence was also given in support of the charge of collusion.

The Queen's Advocate, after opening the petitioner's case, called the petitioner as a witness.

The Solicitor-General objected.

The Queen's Advocate: This is a proceeding of an anomalous character to inform the conscience of the Court whether collusion has been practised on it. It is not "a suit or proceeding instituted in consequence of adultery," it is a proceeding instituted on the ground of collusion. In *Marris* v. *Marris and Burke and the Queen's Proctor*, 2 Swab. & Trist. 530, the petitioner was examined by the Attorney-General. *Gray* v. *Gray*, 2 Swab. & Trist. 554, seems to be against me, but the question does not appear to have been argued, and I ask the Court to reconsider it. The Court has power to examine the petitioner under the 43rd section, *Tatham* v. *Tatham and Nutt*, 3 Swab. & Trist. 511. The petitioner is able to give the best evidence on the question, and **[148]** his evidence ought not to be excluded, for an affidavit of the respondent is before the Court.

*The Judge Ordinary*: I believe my opinion on this subject is perfectly well known. I entertain the strongest opinion that the parties to a suit ought to be competent witnesses, and what is said about the hardship of excluding them, a hardship which

is equally felt on both sides, has my entire concurrence. But I must look to the language of the statute. There can be no doubt, after all that has passed in this Court, that if this proceeding is a proceeding in a suit instituted in consequence of adultery, it falls within the express words of the statute, and the evidence of the parties is excluded. Therefore, the only question I have to ask myself is, whether this is a proceeding in a suit instituted in consequence of adultery. I have no doubt that it is. The state of things is this. The petitioner filed his petition. The respondent pleaded to it. The case was tried, a verdict was delivered, and a decree nisi granted; and before the decree was made absolute the Queen's Proctor intervened, as one of the public, under sect. 7 of 23 & 24 Vict. c. 144, and alleged that material facts had not been brought before the Court, and that there had been collusion, and on those grounds shewed cause—against what?—against the decree being made absolute. Until the decree is made absolute the original suit is pending. There can be no doubt that an inquiry, the sole object of which is to ascertain what should be the result of the suit, is an inquiry in the suit. In passing, I may notice the suggestion made by the Queen's Advocate, that the wife's affidavit has been admitted. The wife may have made an affidavit for the purpose of informing the Court, but it is not in evidence before the jury, and it is wrong, therefore, to say that the wife has been allowed to give evidence. Then I am asked to exercise the discretionary power given me by the 43rd section. No doubt I could examine the petitioner under that section, but I have, with very **[149]** rare exceptions and on special grounds, uniformly refused to exercise that power where the other party has appeared in the suit, and cannot be called to contradict the petitioner's evidence, except when the petitioner has been examined adversely, as was the case in *Marris* v. *Marris and Burke*. There the Queen's Proctor charged connivance, and said, "If the Court will let me examine the petitioner, I will prove connivance out of his own mouth." That mode of proceeding used to be adopted in the House of Lords, but it has never happened that where both parties have appeared the petitioner has been allowed to be examined under that section for the purpose of proving his own case. I, therefore, decline to exercise the discretion given me by that section in favour of the petitioner.

The petitioner's evidence was accordingly rejected.

The Queen's Advocate, in his address to the jury, contended that the question of collusion ought to be left to them before the question of adultery, and that if they found there was no collusion, they ought not to be called upon for a verdict on the issue of adultery.

*The Judge Ordinary*: I shall take the opinion of the jury upon both these questions.

Both issues were accordingly left to the jury, who found that the petitioner had been guilty of two of the charges of adultery, but that he had not been guilty of collusion.

July 4, 1865.—The Solicitor-General (Mr. Hannen with him), for the Queen's Proctor, moved that the petition might be dismissed.

Dr. Spinks, for the petitioner, moved that the decree nisi might be made absolute on the following grounds:—first, that the intervention was after the expiration of three months from **[150]** the date of the decree nisi;* secondly, that the intervener, not having proved collusion, was not entitled to give evidence in support of charges against the petitioner which the respondent had made in her answer and had failed to establish, and upon which the petitioner had obtained a verdict.

The Solicitor-General and Mr. Hannen, contrà.

*The Judge Ordinary*: I am of opinion that the petition must be dismissed. The questions raised on behalf of the petitioner turn upon the meaning of the 7th section of the 23 & 24 Vict. c. 144. That section establishes an entirely new system for the granting of decrees in cases of dissolution. It enacts that every decree shall in the first instance be a decree nisi, and it then goes on to provide for a very peculiar and anomalous state of things, namely, for the intervention before the decree is made absolute, not only of a public officer, but also of any one of Her Majesty's subjects, for the purpose of raising the question whether the petitioner has been guilty of adultery, or of any other misconduct which disentitles him to the relief he seeks. The words are, "and during that period any person shall be at liberty, in such manner as the Court shall by general or special order in that behalf from time to time direct,

* On this point, see *Bowen* v. *Bowen and Evans*, 3 Sw. & Tr. 530.

to shew cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not brought before the Court." In this case the Queen's Proctor shewed cause by reason of material facts not having been brought before the Court up to the time when he introduced them to its notice. But it is argued that the meaning of these words is to be limited, and that "material facts" are to be read as "material charges." The suggestion is, that the power of intervention given to any **[151]** one of the public is to be confined to matters which have not been pleaded by any of the parties to the suit. I think that the Court ought not so to alter the words "material facts" upon any speculation as to the intention of the Legislature using them. But even if the Court were entitled to alter the words in the manner suggested, I own that I am utterly at a loss to see that in making such an alteration it would be giving effect to the intention of the Legislature. The very fact that the Legislature provided for the intervention of third persons, and of the public officer, shews that it entertained some distrust of the opposite parties to the suit, and doubted whether a respondent or co-respondent would be able or willing to bring to light all the facts which ought to be laid before the Court. It seems to me that I should be robbing this enactment of that which gives effect and life to it if I were to hold that from the moment when the respondent has put a certain charge into an answer (although she may have given no evidence in support of it), the right of one of the public to intervene and prove the truth of that charge is taken away. I cannot put that construction on the statute. The charge of adultery having been brought home to the petitioner, I rescind the decree nisi and dismiss the petition.

CHETWYND *v.* CHETWYND. July 18, 1865.—Petition for Custody of Children.—22 & 23 Vict. c. 61, s. 4.—Intervention.—When a petition for the custody of children after a final decree of dissolution is before the Court, persons, other than the parents, may intervene and bring before the Court such facts as in their opinion the interests of the children may require. The form of such intervention will be by petition, and the interveners act at their own risk as to costs.

[S. C. 34 L. J. (Mat.) 130; 11 Jur. (N. S.) 958; 13 L. T. 197; 14 W. R. 184.]

This was the wife's petition for dissolution of marriage on **[152]** the ground of her husband's adultery and cruelty. A decree absolute for the dissolution of the marriage was pronounced on the 2nd of May last. The petitioner had since filed a petition for an order as to the custody, maintenance, and education of the children of the marriage, and an answer had been filed by the respondent.

Mr. Stavely Hill, on behalf of Sir George Chetwynd and Lady Hanmer, the uncle and aunt and also the godfather and godmother of the two children of the marriage, moved that they might have leave to intervene and plead upon the question of the custody, maintenance, and education of the children. The children are minors, and in the absence of their parents, the persons who wished to intervene are their natural guardians. The 35th section of the 20 & 21 Vict. c. 85, coupled with the 4th section of the 22 & 23 Vict. c. 61, gives the Court the power to make what orders it thinks proper with respect to the custody of the children, and some one should be allowed to represent the children, if necessary, before any such order is made. It is the practice of the Court of Chancery to allow any person to appear on behalf of the children: Daniell's Chancery Practice, cap. on Guardians; *Sturtin* v. *Bartholomew*, 6 Beav. 143; *Sale* v. *Sale*, 1 Beav. 586. [*The Judge Ordinary*: The two sections on which you rely seem to indicate that there are cases in which it is proper that proceedings should be taken in Chancery.]

Mr. Hill: If the Court will not allow us to intervene, we must apply to the Court of Chancery.

The Queen's Advocate, for the petitioner, opposed the motion. The question is one of pure principle. No person has a right to be heard upon the petition, except one of the parties to the suit. There is no necessity for such intervention, and it would lead to grave inconveniences; for a **[153]** guilty respondent might put forward third persons to attempt to deprive the petitioner of the custody of the children. There is no analogy between the jurisdiction of this Court and that of the Court of Chancery with regard to children; the power of this Court to make orders respecting them is merely incidental to the suit. *Grant* v. *Grant and Others*, 2 Swab. & Trist. 522, although not a direct authority on the question, seems to shew that, in the

opinion of the late Judge Ordinary, an intervention for this purpose could not be allowed.

Mr. Hill in reply: The power of the Court is not incidental to the suit, because it can make the order after the suit is at an end.

*The Judge Ordinary*: The question that has been raised for the first time under these two sections is, whether the application which they obviously contemplated was to be made to the Court for an order as to the custody, maintenance, and education of the children of the marriage, must necessarily be made by the parties to the suit or one of them; or whether the Court is at liberty, in order to carry out the intention of the Legislature, to allow third persons to come forward and make it. Now the sections are most general in their terms. If they had been intended only to enable the Court to decide between the rival claims of the parties to the possession of their children, which all parents covet, it is clear that the parties alone ought to be heard on that question; but I think they have a far wider scope. It was the obvious intention of the Legislature that the Court should have the power to make such orders as it might think necessary for the benefit of the children themselves; and it could not properly exercise that most useful power if it were to decline altogether to hear what third persons had to say on the matter. It might be that a worthless father and mother having been divorced, both of them might marry again, and neither of them might be **[154]** willing to have the care of the children. It would be a great misfortune if this Court were to abdicate the power given to it by those sections by holding that no third person could intervene for the benefit of the children. I think, therefore, it ought to hold that when any third person shews sufficient cause to justify his intervention, he ought to be allowed to intervene. Without intimating any opinion upon the question whether the intervention is likely to be successful, or whether the intervener will have to pay the costs caused by the intervention, it is enough to say that I think a third party ought in proper cases to be allowed to intervene, and bring before the Court the facts on which he relies in support of his intervention. There is now before the Court a petition by the wife for the custody of the children and an answer of the husband. I think the intervention ought to be in the form of a petition. The intervener must file a petition within ten days. The most convenient course will be to bring the case on by motion, when the pleadings and the affidavits have been filed.

ELLIS *v.* ELLIS AND SMITH. June 8, 1865.—Adultery of Wife.—Condonation.—Before the Court can come to the conclusion of condonation by the husband, it must be satisfied that the husband continued to live with his wife with full knowledge of the acts of adultery alleged to be condoned.—Where, to an action for maintenance, the husband had alleged the wife's adultery, but failed to prove it, and afterwards lived with her, the Court refused to come to the conclusion of condonation.

[S. C. 34 L. J. (Mat.) 100; 11 Jur. (N. S.) 610; 13 L. T. 211; 13 W. R. 964. Referred to *Cramp* v. *Cramp and Freeman*, [1920] P. 162.]

This was the husband's petition for dissolution of a marriage on the ground of his wife's adultery. The respondent and the co-respondent pleaded a denial of the charge, condonation, and other pleas. Issue was joined on these pleas, and the **[155]** cause was tried before the Judge Ordinary, without a jury, on the 7th and 8th June.

Dr. Spinks for the petitioner.

Mr. Temple, Q.C., and Mr. Searle for the respondent.

Mr. Littler for the co-respondent.

The petitioner was an engineer employed on a railway at Birkenhead; he married the respondent in 1848, and in the latter part of 1859 and in 1860, whilst they were living at Birkenhead, she was in ill-health, and was attended by the co-respondent, a surgeon at Liverpool. The adultery was alleged to have been committed in November and December, 1859, and the early part of January, 1860, while the respondent was lodging at the house of Mrs. Caley, at Liverpool, and in the latter part of January, 1860, and during the month of February, 1860, whilst she was lodging at the house of Mrs. Evans, at Liverpool. Mrs. Evans was the principal witness in support of the charge of adultery. The petitioner and the respondent had continued to live together from February, 1860, until the summer of 1861, when he separated from her, and she went to live with her sister, Mrs. Naylor. In November, 1861, Mr. Naylor brought an

action against him in the County Court for her maintenance, and he set up the defence that she had been guilty of adultery with Mr. Smith, and examined witnesses in support of the charge, but failed to establish it. Mrs. Evans, however, was not examined at the trial. After the trial a meeting took place, at which the petitioner, the respondent, Mr. and Mrs. Naylor, and a man named Colvin, were present, when the charge of adultery against the respondent was talked over, and the petitioner said that he did not believe that she was guilty. He spoke of Mrs. Evans's accusation against her, but said he thought it was made out of spite and he did not believe it. A reconcilia-**[156]**-tion was effected, and they lived together for several weeks. In the middle of December, 1861, she left him, in consequence, as she alleged, of his ill-usage, and he was subsequently taken before the magistrates on two occasions, on the charge of deserting her. He again set up the defence of her adultery, but was ordered to contribute to her support. He then made her an allowance of 8s. a week, and in February, 1863, he filed this petition.

Mr. Temple as to condonation. There was a long cohabitation after the last act of adultery charged, and all the evidence by which the charge was supported was known to the petitioner in November, 1861, and with that knowledge he returned to cohabitation with the respondent. Either he had reason to know that the evidence was false, and did not believe it, or, believing it to be true, he condoned his wife's offence. The adultery has not been proved, but if it has been proved, it has also been proved that there was condonation.

Dr. Spinks: When the petitioner returned to cohabitation, he did not believe that his wife was guilty, although some of the evidence against her was, no doubt, known to him. If he did not believe her to be guilty, he could not have condoned. He has since become convinced that she was guilty, and if the adultery is proved, he is entitled to a decree notwithstanding the cohabitation in November and December, 1861.

*The Judge Ordinary* in giving judgment said, that the evidence of Mrs. Evans was sufficiently corroborated to induce the Court to give credit to it, and he was satisfied that adultery had been committed by the respondent. After going through the evidence on this point he proceeded:—It is said, however, that there has been condonation, and there is a good deal in the evidence as to this part of the case which requires **[157]** to be narrowly looked into. Now, the essence of condonation is forgiveness. In order to establish condonation, it is not enough to prove that the husband took his wife back after certain facts had come to his knowledge, after certain intelligence had been communicated to him tending to prove her adultery; it is necessary to prove that the husband took his wife back with the intention of forgiving her, believing her to be guilty. If the evidence leads the Court to the conclusion that the husband did not thoroughly believe that his wife had been guilty, and therefore did not forgive her when he took her back, condonation is not established. It is very difficult to trace the movements of the petitioner's mind as first one and then another piece of evidence as to his wife's conduct was communicated to him. On the one hand it is said, that at the time of the trial in the County Court, in November, 1861, he knew all that was to be said against his wife. On the other hand it is said, that although he knew in general terms that Mrs. Evans charged his wife with adultery, he did not know all the evidence which has now been produced; that he did not know the facts spoken to by Mrs. Caley and by her daughter, which have led the Court to the conclusion that adultery was committed. The evidence, as far as I can trace it, points to that conclusion. On the Saturday after the trial in the County Court, Ellis told Mrs. Naylor that Mrs. Evans could prove his wife's adultery, and Mrs. Naylor says that they dissuaded him from parting with his wife, and she and Colvin persuaded him that no adultery had been committed. Both Mrs. Naylor and Colvin agree that he said he did not believe that adultery had been committed, and he thought that Mrs. Evans had made the charge against her out of spite. The evidence of condonation falls short in that respect. In a case of this kind, the Court ought to see its way very clearly to the fact of condonation before it comes to that conclusion. I am not satisfied that when the husband and wife lived together in November and December, 1861, he believed that she had committed **[158]** adultery, and that he took her back intending to forgive her. The result is, that I pronounce a decree nisi, with costs against the co-respondent.

RAWLINS *v.* RAWLINS. June 27, 1865.—Dissolution of Marriage.—Annuity to Wife. —20 & 21 Vict. c. 85, s. 32.—Under the above section, the Court can order an annuity to be secured to the wife only on making the decree; the order, therefore, would be permanent and incapable of being varied to meet the varying fortunes of the husband.—Where the husband's income was professional, and the wife was entitled to a sum of money in reversion, which was imminent, the Court refused to make any order under the section.—The Court ought also to consider the conduct of the parties.

[S. C. 34 L. J. (Mat.) 147; 13 L. T. 212.]

This was originally the wife's petition for dissolution of marriage by reason of the husband's cruelty and adultery. There was issue of the marriage.

On the 15th of February, 1865, a decree nisi for dissolution of the marriage was made.

On the 27th of June the Court was moved by Dr. Deane, Q.C. (Mr. T. J. Clark with him), to make the decree absolute, and to order the husband to secure some annual sum of money to the petitioner.

The 20 & 21 Vict. c. 85, s. 32, enacts that,

"The Court may, if it shall think fit, on any such decree order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune, if any, to the ability of the husband, and the conduct of the parties, it shall deem reasonable, etc."

**[159]** Affidavits were filed by both parties, but the respondent did not appear by counsel on this motion.

The respondent's income was small, and from his profession of attorney only. The petitioner had no present income, but was entitled to a reversionary interest on the death of an aged mother.

*The Judge Ordinary*: I have great difficulty in dealing with this case. [The learned Judge read the section above cited.] Under this section the Court has not the power of providing for the case of the varying fortunes of the husband; the order can be made only on the decree for dissolution, and is, therefore, of a permanent character. As to the facts of the case, first, the husband's income is professional, and therefore liable to variations; secondly, the wife is entitled to a considerable sum in reversion, which is imminent. By the terms of the section the Court should consider the conduct of the parties. On the whole I think no order should be made in this case.

Decree absolute.

MANTON *v.* MANTON AND STEVENS. July 11, 1865.—Dissolution of Marriage.—Unfounded Claim for Damages.—Costs.—Where damages were claimed from a co-respondent, and it appeared that the respondent was leading an abandoned life when the co-respondent made her acquaintance, and there was evidence raising a strong suspicion that the petitioner must have been aware of that fact:—Held, that the co-respondent ought not to be condemned in costs, on the ground that the claim for damages was, under the circumstances, improper.

[S. C. 34 L. J. (Mat.) 121; 11 Jur. (N. S.) 863.]

This was a petition by a husband for a dissolution of mar-**[160]**-riage, and claiming damages from the co-respondent. The respondent and co-respondent had filed answers denying the adultery. The issues came on for trial on the 7th of July, before the Judge Ordinary, by a common jury.

Mr. Serjeant Tozer and Dr. Spinks for the petitioner.

Mr. Searle for the respondent.

The Queen's Advocate and Dr. Tristram for the co-respondent.

The marriage took place in 1854. In April, 1864, the petitioner, who was a schoolmaster at Notting Hill, traced the respondent to a brothel, with the co-respondent, who was the landlord of a tavern near the petitioner's residence. The adultery was clearly proved; and after some evidence (which is stated in the judgment) had been given on behalf of the co-respondent, shewing that the respondent had been leading an abandoned life, the claim for damages was withdrawn. The jury found a verdict for the petitioner, and a decree nisi was pronounced.

Mr. Serjeant Tozer moved that the co-respondent might be condemned in costs.

Dr. Tristram, contrà. Cur. adv. vult.

*The Judge Ordinary*: This was a very peculiar case. The petitioner married in 1854, and lived for several years with his wife. It appeared from the evidence that as early as 1861, or the beginning of 1862, the wife began to lead an abandoned life, and it was proved that she had committed adultery with three other men besides the co-respondent. It was also proved that she was to some extent addicted to **[161]** drinking. There was evidence, but it was no doubt slight, that previous to the marriage her character had been immoral, and that the petitioner had been in the habit of having connection with her; and there was evidence, but still weaker, that before the marriage she had had connection with the petitioner's brother. Her intercourse with the co-respondent must have commenced about the beginning of 1862; and about the same time, or rather earlier, she had, if the witness Badger can be believed, commenced an adulterous intercourse with Badger. In the course of 1863 she took furnished lodgings in another part of the town, under the name of Leslie, and there carried on an adulterous intercourse with another man. It also appeared that the man Badger used to be very often (he said every night) at the husband's house, carrying on the most open adultery, almost under the husband's eye. The Court was a little surprised at another part of the evidence, tending to shew that she was in the habit of going out at night alone, when her husband was at home, and not returning until a late hour. All these circumstances gave the case a very peculiar aspect. Then comes the question whether, considering all these circumstances, and some others I am about to mention, there is any ground for condemning the co-respondent in costs. It appeared to be doubtful whether the co-respondent knew that the respondent was a married woman. I suspect, although it was not very plainly made out, that he did know it. I cannot, however, shut my eyes to the circumstance that the petitioner, desiring to get rid of such a wife as this, thought fit to make a claim against the co-respondent for damages. In consequence of that claim the co-respondent has been obliged, at a great expense to himself, to bring witnesses and engage counsel for the purpose of exposing the respondent's real character, and resisting the claim. The real contest between the petitioner and the co-respondent was as to the character of the respondent; and in that contest the co-respondent has been successful. I think I should not be doing justice if I **[162]** were to condemn the co-respondent in costs, and I shall make no order whatever as to costs.

ROWE *v.* ROWE. June 13 and 20, 1865.—Judicial Separation.—Withdrawal of Wife from Bed.—To the wife's petition for judicial separation, on the ground of the husband's cruelty and adultery, an allegation on his part that the wife had wilfully withdrawn herself from his bed, and refused him conjugal rights, is no answer.

[S. C. 34 L. J. (Mat.) 111; 11 Jur. (N. S.) 568; 12 L. T. 639; 13 W. R. 1048.]

This was the wife's petition for judicial separation. The petition alleged a marriage in 1843, cruelty and adultery from November, 1862, till the filing of the petition.

The respondent by his answer traversed the cruelty, alleged condonation as to the cruelty, traversed the adultery, alleged condonation as to the adultery, and pleaded, fifthly, that on "divers occasions since the marriage between the respondent and the said Sarah Rowe, and particularly from the month of February, 1864, until the filing of the petition, the said Sarah Rowe, without any reasonable cause, and notwithstanding the repeated remonstrance of the respondent, withdrew herself from the bed of the respondent, and refused to render him conjugal rights."

Dr. Spinks moved to amend the answer by striking out the fifth paragraph. The matter alleged in that paragraph is no answer to a suit for judicial separation on the ground either of adultery or cruelty; and it is not pleaded as a provocation of the cruelty alleged in the petition.

Mr. Searle: This objection is not taken on demurrer, but is an application to the discretion of the Court to amend an answer. I submit that the fact alleged is material for the **[163]** Court to consider in determining whether the petitioner is entitled to the relief she prays. Without saying that any decided case shows that such matter has been held to be a plea in bar, the judges of the Ecclesiastical Courts have admitted evidence of such conduct, and have given it their consideration in granting or refusing a decree. *Forster* v. *Forster*, 1 Consist. 154; *Clowes* v. *Clowes*, 4 N. C. 12; Bishop on Marriage and Divorce, Sect. 397. Cur. adv. vult.

*The Judge Ordinary* gave the following judgment:—The respondent in this case has put in an answer denying the cruelty and adultery charged, and pleading condonation. The answer has no further allegation but the following. (The learned Judge read the paragraph above set out); and the question is whether such allegation should be allowed to remain. There is no doubt, after the case of *Orme* v. *Orme*, 2 Add. 382, that although this Court enforces conjugal cohabitation, it does not pretend to enforce marital intercourse. The reasons why it does not embark in such an attempt are sufficiently obvious. But on this very ground perhaps a complaint of this nature ought to receive its full weight as matter of recrimination. The matter here complained of ought to, and does oftentimes find a place in that general review of conjugal life which, on a question of cruelty or even of recrimination, is in such cases imposed on the Court. Such a matter may therefore find its way into the evidence, and though perhaps more rarely into the petition or answer, it is strong evidence of aversion, and may in many cases be far from immaterial. But the question is, whether it is material in this case, and I cannot decide that it is without holding that, standing alone as it does, and without any allegation of other misconduct, it would, if proved, constitute in itself a bar to the petitioner's suit. This I cannot say; it must therefore be struck out.

**[164]** COUSEN *v.* COUSEN. May and June, 1864; June 15 and July 18, 1865.—Wife's Petition.—Legal Cruelty.—Indifference, neglect, aversion to the wife's society, cessation of matrimonial intercourse, without personal violence or words of menace, do not amount to legal cruelty, though the husband is carrying on an adulterous intercourse with a servant under the same roof where he is residing with his wife.

[S. C. 34 L. J. (Mat.) 139; 11 Jur. (N. S.) 656; 12 L. T. 712.]

This was the wife's petition for dissolution of marriage by reason of the adultery and cruelty of the husband.

The evidence of the petitioner, as given below, was taken in the first instance before one of the Registrars of the Court, on account of her state of health.

The case came on in due course on the 4th of May, 1864, when the husband's adultery with a woman servant under the roof where he was living with his wife was proved, and the evidence of the petitioner, as follows, read:—

I was married to Mr. Cornet Bacon Cousen, the respondent, on the 23rd of April, 1861. My name was then Moncrieffe Macintosh. We were married at St. James's Church, Piccadilly. After spending a few days at Brighton, we went on May 1st to Bradford, to the house of the father of respondent. This was by arrangement; we had agreed to stay there for a year or a year and a half. My husband had stone quarries; he had a share in them. They were principally his father's. I had been acquainted with respondent for four years before our marriage. I had not seen much of him before the previous summer. We continued to reside with my husband's father until the last week in July, 1862. My husband's conduct was unkind during May, June, and July, but not so unkind as he became afterwards. I went to London by myself at the end of July to see my mother, who was ill. My husband had no objection. He gave me some of the money to pay the railway ticket from Bradford to London, but not **[165]** all; I had to supply the rest. He joined me in London the beginning of August. We stayed with my mother in Jermyn Street. We were in town together about a fortnight. His conduct during that fortnight was very unkind, inasmuch as he would go out about nine in the evening and stay out until five or six in the morning. He generally did that every evening; sometimes he stayed out until three, sometimes until five or six in the morning. I complained of his conduct, so far as that I told him I wished he would stay at home sometimes or take me with him. I did not sit up for him. He took no notice of my complaint. He spent part of the day during the fortnight with me. He took me to no places of amusement either during the day or evening. He did not tell me where he passed his nights. We returned to Bradford together about August 17th following. On his return his conduct was not so bad; he did not go out at night so much. I do not recollect he did so more than once. He went to the Isle of Man the third week in September. He did not ask me to go with him. He did not tell me he was going. I only found it out from his friends the night before. I told him I heard from his friends that he was going. He said, "Yes, he was." He remained at the Isle of Man three or four

days. On his return I thought he became more unkind, rather more disagreeable in all ways; he showed it in not speaking to me, not speaking so much as before. He did not court my society. He very seldom came to me. He was out of the house more than once or twice; he was out late at night. In November he went away about nine one evening and stayed away three or four days. I did not know he was off until he had gone. Neither before he went nor after he came home did he tell me where he had gone to. He was away three days. He gave me no reason for his absence. I asked him, but he gave me no reason. I cannot recollect that he gave me any reason, except that he chose to stay away. When he returned he remained at home one night. He went **[166]** away again in a pony-carriage about three in the afternoon, and stayed away all night. He did not tell me where he was going. I did not know he was going until he drove off. I had no quarrel with him. He was away one night. The next night he came back about twelve. I was in bed. He did not tell me where he had been. He brought a dog with him. This was the latter end of November. It was a cross, bad-tempered dog, not a very large dog. He insisted on having the dog in bed between us. I objected to it very much, and begged that the dog might be left downstairs. It was not taken downstairs. He insisted in keeping it in bed all night. We had the dog there (in bed) the first night and also one or two nights following. I could not sleep whilst the dog was there, I was so frightened. It was lying on the pillow between us near my shoulder. I complained to him of this, and said I particularly disliked dogs in bed. I do not know that any of his family complained to him about the dog at that time. The dog was afterwards sent away. My husband from that time was away for several days and nights too. He remained away the whole night on each occasion. Every week he would go away on Friday or Saturday night and stay until Monday. On other occasions he would go away Wednesday or Thursday and stop one night. He never gave any reason for his absence on these occasions. I asked him several times. I do not think business had anything to do with it; he never said that it had. This conduct continued from November until the time I left in July 1862. Whilst I remained in this house near Bradford he continued to live in the same house with me, and we occupied the same room and the same bed; although we occupied the same bed we ceased to cohabit as man and wife from November 1861 to July 1862. He gave me no reason for so doing. I used to remonstrate about his general unkindness and stopping away all night; but I was not cross very often. When he slept in my bed he left my bed for an hour or longer. His dressing-**[167]**-room was some way off at the end of the passage. After an absence for an hour or more he would return and remain in my bed for the rest of the night. When he left my bed he did not tell me on these occasions where he was going. When I was awake he would ask me why I was not asleep; he did not like people who were always awake. It would be about twelve o'clock he left my bed; the rest of the family had gone to bed. He undressed in his dressing-room. On several occasions he came into my room, undressed, and went away again without getting into bed. He did not speak to me. After that he would remain an hour before he came to bed; sometimes I would wake and find he was away. I spoke to him several times and asked him why he went away in that way, but he never gave any reason. I told him his father and mother must be surprised to hear him walking about in that way. From November to July 1862 it occurred most nights when he was sleeping at home. He came into the room and went away, or got up from bed and went out, more frequently the latter. I was not always awake when he went out; I woke up and found him absent. His conduct during the day at this time was generally very unkind. We hardly ever went out together. At home he objected to sitting in the same room with me. If we were alone, he told me to go away; if any one else was there, he would go away. He gave me no reason for this conduct; I asked him several times, he gave me no reason. He never told me he had taken a dislike to me. We had no sitting-room of our own; our sitting-rooms were common to the family. He sat in the kitchen when he left the room. If I spoke, he would find fault with my manner of expressing myself. Sometimes he would give me no answer at all. In January, 1862, I went over to Leeds with him. We had lunch together. He left me after lunch. He said he would come back at four o'clock. He left me about two P.M. I objected to his leaving. I was afraid I should not find him again. He did not appear the whole evening; I **[168]** stopped until seven, when the shop was closed at which I was. I

went home; I walked about until four, and stayed in the shop from four to seven. I saw nothing of him that night. I saw nothing of him until nine o'clock the following night. When he came home, he said he met some friends who detained him after the hour agreed upon. He did not say where he had been during the night. Towards the end of March, 1862, I went to Scarborough, on a visit to my mother and sisters, for four or five weeks. He did not object to my going, but he objected to give me money to pay for my ticket. He did not write to me whilst at Scarborough. I wrote once to him, but he took no notice of my letter. On my return to Bradford he continued to behave as before, quite as bad. On June 1st Mr. Cousen went to Inkley and returned the following night. I was in bed. He came to my bedroom. He was undressed. I was awake. He said he had come back. He brought the same dog he had before. He went away for a short time and returned, bringing the dog in his arms. The dog slept in the bed between us. I objected very much and told him so, for I knew I should get no sleep. The dog remained all night. I was awake. I was awake the whole night, and was stiff and pained the next day from lying in one position on account of it. The next day, in the afternoon, he tried to set the dog on me; it was savage. It rushed at me, and barked every time I came into the room. My husband urged the dog to bite me. In the evening, in the kitchen, he took the dog upon his knee and set the dog on me. I told him not to do it. My husband persisted, and I took up the poker and said I would strike the dog if it bit me. I was very much frightened. I have a horror of being bitten by dogs; my husband knew that. He persevered to make the dog bite me until his father and mother came in from the noise, and he desisted after that. I said that sooner than have the dog in bed I would sit up all night in the kitchen. I asked his mother **[169]** to interfere. She told him it was very unreasonable to have the dog in bed, as I disliked it so much. His conduct had an effect upon my health so far that I felt generally poorly. Shortly before I left, after I came back from Scarborough, several times I asked my husband the reason of his conduct; sometimes he would turn away and not answer. On one occasion I said I thought he might answer when I spoke to him, and he said, "What do you want me to say?" I said, "I think you might say you would behave a little better to me." He answered that I need not expect he would ever do so. He was writing all the time. He always pretended to take no notice when I spoke to him. On one occasion I asked him why he behaved as he did, and why he did not live with me as his wife. His answer was, he did not intend to do so again. He gave no reason, though I asked him several times. This conduct I have been speaking of continued down to the time when I left, 25th of July. I then went to Leeds. I knew an old lady who lived there. I told my husband I was going to leave him. He did not endeavour to prevent my leaving him. I have never heard from him since. He has never written or been to see me since. I have been living with my mother ever since.

Cross-examined by Dr. Swabey on behalf of the respondent:

I was on good terms with my mother-in-law, and, living under her roof for some time, I was tolerably intimate with her. Miss Cousen, a sister, and a brother of my husband, lived in the house at Bradford besides his father and mother. I was on good terms with my sister-in-law. Of the stone quarries, one was in Bradford, one two miles from Bradford, one still further distant. The care of the quarries did not oblige my husband to travel; he ought to have been at his office. His office was at Bradford. When I came to London he paid part of my railway fare. He paid all going to **[170]** Scarborough, after much grumbling. I paid the rest of the fare to London out of my pocket-money. I had no income of my own. My mother was in lodgings in Jermyn Street. I occupied a bedroom in Jermyn Street, near the top of the house. A bedroom to myself. The size of the dog was not so large as that of a Skye terrier. I did not on the night the dog slept in our bed offer to leave the room. On the first occasion I told my mother-in-law and sister-in-law that I disliked very much the dog being in bed. On the occasion in the kitchen the dog was never off the knees of my husband. He took it off the floor and held it; when his father and mother came in he let it down, and it then rushed at me. In the winter of 1861-62 my health was pretty good. I had a cold once, but it was nothing. Besides my husband's conduct as to the dog, I complained to Mrs. Cousen, my husband's mother, of his conduct two or three times some months before I left. I complained of the manner in which my husband lived with me, and of his general conduct. She said she was sorry to see we lived so unhappily. She did not like to interfere, but if I

wished it she would speak to him. I told Mrs. Cousen, before I went away on the 25th of July, that I was going. I told her I was going, and did not intend to return.

Re-examined:

My husband got £2000 belonging to me when I married him. It was not settled upon me, he got it altogether. On the first occasion, when the dog slept with us, I said I did not offer to leave the room, there was no other room in which I could have slept. I did, when I complained to Mrs. Cousen, the mother, tell her my husband had not lived with me as a husband for some time; I think I told her so: I cannot say my exact words. When I spoke to Mrs. Cousen about leaving on the 25th of July, I told her that it was on account of what I had found out about Walker, a servant, then in the house.

**[171]** This evidence shewed a case of aversion, howsoever arising, on the part of the husband towards the wife, but the question was whether it amounted to legal cruelty?

Dr. Spinks, for the petitioner, argued that the conduct of the husband, viewed in connection with his adulterous intercourse with a servant under the same roof, amounted to cruelty, so as, with the adultery, to found a decree of dissolution.

Dr. Swabey watched the case on behalf of the respondent.

The Judge Ordinary refused to make any decree till the petitioner was able to attend and be examined in court, which was done on the 14th of June, when she repeated in substance the evidence taken before the Registrar.

The Judge Ordinary again refused to make any decree till either the father, mother, brother, or sister of the husband under whose roof the cohabitation took place should have been produced as a witness.

On the 15th of June, 1865, the respondent's father was accordingly examined, but his evidence threw little if any further light on the matter, and the Court again desired time to consider the effect of the evidence.

On July the 18th, *The Judge Ordinary* gave the following judgment:—The Court is not at liberty to dissolve this marriage. Proof was given at the trial of a cohabitation extending only from April 1861 to the month of July 1862, when the petitioner left her husband and has ever since lived apart from him. That during this period the petitioner experienced much neglect and indifference there is little doubt; that the husband's ill-conduct extended to acts of positive violence, ill-treatment, or even abusive language, there was no pretence. **[172]** With the single exception I am about to notice, the whole of the wife's complaint falls within the category of coldness, want of affection, and at times even of proper consideration, isolation, and the like. And the question is, whether conduct of this nature, in the total absence of personal violence, or words of menace, can be pronounced legal cruelty. It is not pretended that, standing alone, it could bear that character, but it is argued that it does when taken in conjunction with the other fact, that the respondent was proved to have carried on an adulterous intercourse with a female servant in the house where he and his wife were residing; and the cases of *Popkin* v. *Popkin*, 1 Hagg. 768, in note; *Otway* v. *Otway*, 2 Phil. 96; and *Smith* v. *Smith*, Ib. 207, were cited. But in neither of these cases, nor in any other that I have been able to find, was a decree made on any such ground. In the first of those cases Lord Stowell spoke of the attempt to debauch servants in the house as "a strong act of cruelty," but added, "perhaps not alone sufficient to divorce, but which might weigh in conjunction with others as an act of considerable indignity and outrage to the wife's feelings." Very cautious language this, and falling far short of an authority on which to rest a decree. In all three of these cases there was personal violence, and in the two latter the decree passed by the question of cruelty to rest on adultery plainly proved. Such being the state of the law in the Ecclesiastical Courts, it is well also to bear in mind the language of the Divorce Act. The Legislature granted to a wife the remedy of divorce in certain cases of aggravated adultery, "incestuous adultery," and "adultery coupled with bigamy," but did not add "adultery" committed in the "household." When therefore the Act speaks of "adultery coupled with cruelty," something more, it would seem, was intended than adultery alone, though of an aggravated character. In fine, it is enough to say that grave inconvenience is likely to attend an evasion of the fixed limits within which the flexible **[173]** charge of cruelty has been hitherto confined; and as there is no authority for declaring the respondent's conduct to be legal cruelty, so as to carry a decree, I decline to make one. If the petitioner

desire a decree of judicial separation on the adultery proved, the Court is prepared to pronounce a decree for judicial separation.

POWER *v.* POWER. June 24 and July 18, 1865.—Wife's Petition for Dissolution.—Habits of Intoxication in connection with Cruelty.—On the question of cruelty, the Court will consider the liability of danger which the wife would incur by returning to cohabitation with a husband subject to uncontrollable fits of drunkenness, such husband having used a certain amount of violence to the wife while under the influence of drink; and particular acts of violence will be viewed in connection with the cumulative misconduct of the married life.

[S. C. 34 L. J. (Mat.) 137; 11 Jur. (N. S.) 800; 12 L. T. 824; 13 W. R. 1113.]

This was the wife's petition for dissolution of marriage by reason of the husband's adultery and cruelty.

The petition, dated the 10th of September, 1864, alleged marriage on the 24th of July, 1862, at St. George's, Hanover Square; cohabitation at divers places, particularly at Kenilworth, Atherstone, Rhyl and Deal; birth of a child on the 18th of June, 1863, and that petitioner was then (at date of petition) pregnant by her husband. The petition charged adultery in Bath in November, 1863, in June, 1864, at Canterbury and Margate, and on divers occasions since the 15th of July, 1864, at Deal; charged cruelty on divers occasions during cohabitation by abusing, threatening, assaulting, striking, knocking down, throwing things at, and otherwise treating the petitioner with cruelty; and alleged that, in consequence of the repeated ill-treatment of the petitioner by the respondent, down to their separation on the 28th of June, 1864, the petitioner's health was materially impaired.

**[174]** Particulars of the cruelty were obtained on summons. The answer of the respondent need not be particularized, the question as before the Court on evidence being whether a case of cruelty was established.

The cause was heard on the 24th of June by the Court itself without a jury.

The Queen's Advocate (Sir R. J. Phillimore) and Dr. Spinks for the petitioner.

Mr. Serjeant Ballantine and Dr. Swabey for the respondent.

The evidence on the part of the petitioner was to the following effect:—The petitioner, daughter of a retired surgeon at Bath, married the respondent, who was the son of a solicitor at Atherstone, in July, 1862. They lived together without interruptions, from that time till the end of June, 1864. The respondent, who was quite a young man, had from time to time fits of drinking, over which he seemed to have no control, and during which he lost all control over himself. Several unsuccessful attempts to break him of this propensity had been made. Before and since the separation, the respondent had committed adultery with prostitutes.

As to the cruelty, the petitioner said:—After the marriage we lived first at Kenilworth, and then at Atherstone, where we remained till August, 1863. The respondent's drunkenness shewed itself a few days after marriage. Soon after, he came home in the middle of the night, quite drunk; he got up early in the morning, and insisted on going to the public-house. When he came home again, he went up to his room; I followed, and found him trying to open my trinket-box with his razor. I tried to take it away from him, and struggled with him; he knocked me against the banisters outside the door. If I had not fallen against the banisters I should have fallen downstairs into a stone passage. It was a severe knock; he broke the razor in trying to open the **[175]** box. Between October, 1862, and March, 1863, he was pretty sober. In March, 1863, he went to London, and remained a week. His father fetched him home; he was not sober. He was always very bad-tempered when he was intoxicated, and sometimes used very bad language. In July, 1863, when we were in lodgings at Atherstone, he tried to cut my throat. He came home at half-past ten at night, quite drunk. I told him I should go home to my father's; he said I should not, that he would cut my throat first. He went to the sideboard and took out a carving-knife, and drew the back of it across my throat; he told me he would cut my throat. I was very much frightened, but I did not shew my fear. I told him the baby had not had its supper; and as soon as I had given it its supper I would return to him and have my throat cut. He was quite mad. He then let me go. I went to my room and locked the door, and I did not see him again that night. I was in serious bodily fear. I went to Derby to my father. The respondent was at Atherstone; he came over to Derby in August, 1863, and wished me to go back with him

to Atherstone. I said I would if he would not drink. I started to go back that evening. He got so drunk on the journey to Atherstone, that the station-master would not let him go on, and I would not go with him. I stayed away about two months, and then went with him to his father's house. He was pretty sober for about a week. We then went to Rhyl, in Wales. I asked him to keep from drinking; he said he would if he could. I told him I could not stay with him unless he did keep from it, for he had injured my health, and since he had attempted to cut my throat, I was afraid to be with him when he was drunk. He told me he was going to get drunk again, and that he was afraid of doing me some bodily injury when he was drunk, and that I had better return to my father. I did go to my father at Bath, in October, 1863. In Bath I only saw the respondent from a window. After that I went to Deal, and in March, **[176]** 1864, my husband joined me there. I tried to live with him again: he was articled to a solicitor there, and went on pretty steadily for a time; he then recurred to his old habits. On the 31st of May he went away. He did not tell me where he was going; he was not drunk when he went. On the 16th of June he came back to me with his father. His father said he was going to Bruges. He was absent from the Friday morning till the following Tuesday. He then came home to my lodgings drunk. We were then together for a week; he got sober, and then he got drunk. While we were at Deal, he boxed my ears frequently so as to hurt me.

Cross-examined:—He was not always kind to me when he was sober. I have had two children, the last born in February of this year. To the end of July, 1864, I wrote to my husband in the terms of the strongest affection. My father has not worked on my mind to institute this suit. I have not seen him during the suit. I have not been on terms with him. The estrangement between us was caused by my last return to my husband.

Mr. Serjeant Ballantine put in some letters of the petitioner, and addressed the Court on the point of cruelty.

The Queen's Advocate in reply. Cur. adv. vult.

*The Judge Ordinary* gave the following judgment:—An earnest appeal was made to the Court by the respondent's counsel in this case to forbear pronouncing for a dissolution of the marriage. The respondent did not deny his habitual intoxication, nor the immorality with several other women charged against him by the petitioner. But stress was laid upon his youth, in the hope, often before indulged, and as often defeated, that he might reform, and become fit to cohabit with his wife. Being of opinion that the petitioner has made out her case, the Court is not at liberty to indulge in a leniency to the respondent, which would be injustice to her. **[177]** Of the adultery nothing could be said. It was frequent and undisguised, with the commonest women of the town; and had this only excuse or palliation, that the respondent was rarely or never sober. The question of cruelty was more open to discussion, and, had each act of what the law calls cruelty stood alone, there would not perhaps have been enough to found a decree. But cruelty, in the sense in which the Court holds it proved as a ground of separation or divorce, lies in the cumulative ill-conduct which the history of the married life discloses. This aggregate is made up of those acts of personal violence or degrading conduct which are spoken of in the books as "acts of cruelty," palliated or inflamed, as the case may be, by the respective language, demeanour, and bearing of the parties, and the whole considered in connection with the general treatment which the party complaining may have received. In this case it was proved that, in addition to slight blows inflicted on several occasions, and some bruises, the respondent did on one occasion really attempt to cut his wife's throat. He was drunk at the time, and he seized her and drew a large knife across her throat. She describes that the knife was turned the wrong way, and so she escaped. But it was attempted seriously, and when the respondent was in a violent passion at her proposing to leave him. It also appeared that she only escaped from the room by a stratagem, or the most fatal results might have ensued. No doubt intoxication, and not permanent ill-will or want of affection, was the cause of this attack. But the constant habit of drinking to excess continued up to the filing of the petition, and there is no guarantee that such violence might not recur. The petitioner left him more than once, only to return on reliance on his promised reformation, and only to leave again in search of safety. If this were a suit for restitution of conjugal rights instituted by the husband, how could the Court order the wife to return to cohabita-

tion with a man thus given over to drink, and thus aggressive under **[178]** its influence? And if it were a suit for separation by her, how could the Court refuse relief from the duty of cohabitation to a woman who, ever since her marriage with an educated, and, as his letters shew, a talented man, has had her home disgraced and comfort destroyed by constant intemperance, and her name insulted by her husband's open and notorious profligacy, and her safety, if not her life, endangered by a murderous assault? If so, this conduct constitutes legal cruelty; and although the adultery would be sufficient to justify a decree of separation, and thus place the petitioner in safety without decreeing a dissolution of the marriage, still if it be legal cruelty a divorce is the right of the wife, and I am bound to decree it accordingly.

SIDNEY *v.* SIDNEY. July 4 and 25, 1865.—Wife's Petition.—Dissolution of Marriage.—Permanent Maintenance.—Where the wife obtains a decree of dissolution of marriage, the Court is inclined, so far as the circumstances of the case admit, to order the husband to secure her a permanent maintenance, on the principle, as to amount, of permanent alimony on a decree of judicial separation.

[S. C. 34 L. J. (Mat.) 122. See further, 1866, L. R. 1 P. & D. 78; reversed, 1867, 36 L. J. (Mat.) 73.]

This was the wife's petition for dissolution of marriage, by reason of the husband's cruelty and adultery.

An order for alimony pendente lite was taken by agreement at £4 a week.

A decree nisi was made on the 4th of March.

On the 4th of July Dr. Spinks moved to make the decree absolute, and for some permanent provision for the wife under the 32nd section of the Divorce Act.

Mr. T. H. Lewis, for the husband, cited *Fisher* v. *Fisher*, **[179]** 2 Swab. & Tris. 410, and contended that, as the wife had a separate income of about £150, she was not entitled to any provision from the respondent, whose income, from private and professional sources, was about £1100.

The Judge Ordinary, acting on the principle of permanent alimony as though it had been a suit for judicial separation, directed the respondent to secure a yearly sum of £245 to the petitioner, in addition to her own income.

An intention to appeal from this order on behalf of the respondent having been intimated,

On the 25th of July the learned *Judge Ordinary* gave the following reasons for the course he had pursued:—At the time when the Legislature was in the habit of passing Acts to dissolve marriages, it was well known that even in the case of an erring wife the husband was always expected to make some provision for the woman from whom he was about to be set free. In the Ecclesiastical Court, whenever a divorce à mensâ et thoro was decreed by reason of the husband's misconduct, an allowance in the shape of permanent alimony was imposed on him in his wife's favour. By the Divorce Act, the wife obtained a right in certain cases to claim a divorce, and section 32 was inserted to make this new remedy effectual by enabling the Court to order a proper provision for her. Now I am at a loss to discover any reason why the Court, in construing and applying this section, should deal with the subject in any more niggard spirit than that in which the Ecclesiastical Court regarded the question of permanent alimony. If a man, before the Divorce Act, treated his wife with cruelty and was also guilty of adultery, she could only obtain a divorce à mensâ et thoro, and an allowance called permanent alimony was made her, which was generally calculated at the rate of one-third of her husband's income. Since the Divorce Act, the same conduct on the part of the **[180]** husband entitles the wife to a dissolution of her marriage; but it is hard to say that she was intended by the Legislature to purchase that remedy by a surrender to any extent of the provision to which she would otherwise have been entitled. The needs of the wife and the wrong of the husband are the same in both cases. In both cases the husband has of his own wrong and wickedness thrust forth his wife from the position of participator in his station and means. Obliged in both cases to withdraw from his home, she is, without any fault of her own, deprived of her fair and reasonable share of such necessaries and comforts as lay at his command. Why should not the husband's purse be called upon to meet both cases alike? It has been said that in one case she remains a wife, and in the other she does not. This remark would carry great weight if the provision were intended to continue in the event of her second marriage; but it can hardly

affect the rate of allowance made and continued so long only as the wife remains chaste and unmarried. Again, it has been said that it is not desirable that the wife should have a pecuniary interest in preferring divorce to judicial separation; but it should also be borne in mind that it is still less desirable that an adulterous husband should have a pecuniary interest in adding cruelty and desertion to his adultery, and thus evading the permanent alimony allowed on judicial separation. And this he would have if the amount of the maintenance to be accorded to his wife varied not with his misconduct, but with the form of her remedy. Further, it was urged in argument that the wife was only entitled under the section in question to a "bare maintenance," and the case of *Fisher* v. *Fisher*, 2 Swab. & Tris. 410, was relied upon. It is very possible that the facts of that case warranted that view; but if the expression "bare maintenance" was intended as a rule of universal application binding the discretion of the Court, I must record my dissent therefrom. A very large number of the divorce cases since the Act [181] have been petitions by the wife for cruelty and adultery, or desertion and adultery. And among certain classes of the community a very common case indeed is that of a young husband, who, either not agreeing with his wife or getting tired of her shortly after marriage, endeavours to shake her off. In this endeavour he generally begins by treating her with neglect and contempt, often half-starves her, often beats her, often insults her by open adultery, and ends by deserting her and cohabiting with another woman. That the wife should desire a divorce in such a case can hardly be a matter of surprise, and that she should obtain it is but bare justice. But it is the very thing that the husband wants too. He has succeeded in shaking off the obligations of marriage, and that by his own voluntary breach of them. And if he can part with his wife at the door of the Divorce Court without any obligation to support her, and with full liberty to form a new connection, his triumph over the sacred permanence of marriage will have been complete. To him marriage will have been a mere temporary arrangement, conterminous with his inclinations, and void of all lasting tie or burden. To such a man the Court may truly say with propriety, "According to your ability you must still support the woman you have first chosen and then discarded. If you are relieved from your matrimonial vows it is for the protection of the woman you have injured, and not for your own sake. And so much of the duty of a husband as consists in the maintenance of his wife may be justly kept alive and enforced upon you in favour of her whom you have driven to relinquish your name and home." If this be to give the wife a pecuniary interest in obtaining a divorce, it is also to hold a pecuniary penalty over the head of the husband for the observance of married duty. And if it be wise to repress divorce, it is still wiser to go a step higher and repress that conduct which makes divorce possible. It is the foremost duty of this Court in dispensing the remedy of divorce to uphold the institution of [182] marriage. The possibility of freedom begets the desire to be set free, and the great evil of a marriage dissolved is, that it loosens the bonds of so many others. The powers of this Court will be turned to good account if, while meting out justice to the parties, such order should be taken in the matter as to stay and quench this desire and repress this evil. Those for whom shame has no dread, honourable vows no tie, and violence to the weak no sense of degradation, may still be held in check by an appeal to their love of money; and I wish it to be understood that, so far as the powers conferred by the section go, no man should, in my judgment, be permitted to rid himself of his wife by ill-treatment, and at the same time escape the obligation of supporting her. I only regret that the machinery created by the statute is not entirely suited to the circumstances of those who, with a sufficient income from their labour, have yet no realized property. If it be found insufficient, it will be for the Legislature to pronounce upon the views I have just expressed, and accord or withhold amended powers. In the case in hand no difficulty arises; the respondent is proved to possess very considerable property in addition to his professional income, and to have treated his wife very brutally; and, considering the conduct of the parties, I am of opinion that the petitioner ought to be secured an annual sum from the respondent of £245, which, with her own means, will give her an income of not less than £400 a year. This sum will by no means place the same comforts at her command as she enjoyed in the position from which her husband has put her forth; but it approaches, as nearly as I have been able to calculate, the sum she would have received in the Ecclesiastical Court as permanent alimony. The decree of the Court will therefore be, that the decree nisi be made

absolute, and that the respondent secure to the petitioner, dum sola et casta vixerit, the annual income of £245, and that it be referred to one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper instrument or deed for this purpose, to be executed by the necessary parties.

**[183]** MILNE *v.* MILNE. July 25, 1865.—Citation.—Personal Service.—Practice.—The 42nd sect. of the Divorce Act and the Rules founded thereon require personal service of the citation and copy of petition, unless the Court authorizes a substituted service, or gives the petitioner leave to proceed without service. Acceptance of service by an attorney on behalf of the respondent is not sufficient. [S. C. 34 L. J. (Mat.) 143.]

This was the wife's petition for dissolution of marriage. An answer on behalf of the respondent had been filed, and a replication to the answer.

Dr. Wambey moved for directions as to mode of trial. He called the attention of the Court to the fact that there had been no personal service of the citation and copy of petition; service of the citation had been accepted by the respondent's solicitor, and an appearance had been entered by him.

The 20 & 21 Vict. c. 85, s. 42, directs that, "Every such petition shall be served on the party to be affected thereby, either within or without her Majesty's dominions, in such manner as the Court shall, by any general or special order, from time to time direct. . . . Provided always, that the said Court may dispense with such service altogether, in case it shall seem necessary or expedient to do so."

The 4th Rule is that, "Every petitioner who files a petition and affidavit shall forthwith issue a citation to be served on the respondent in the cause according to the form No. 1."

6th Rule. "To each respondent in the cause shall be delivered, together with the citation, a copy of the petition certified under the seal of the Court."

9th Rule. "Before a party can proceed after the service of a citation, unless by the express leave of the Court, an ap-**[184]**-pearance must have been previously entered by, or on behalf of the party cited, or an affidavit of personal service of the citation must have been filed in the Registry."

10th Rule. "In cases where personal service cannot be effected application may be made to the Judge Ordinary, upon motion in open Court, to substitute some other mode of service or to dispense with service altogether."

The section and Rules taken together seem to intend a personal service, unless where the Court directs otherwise, though he understood that the practice had been to allow petitions to proceed on the acceptance of service by a solicitor.

Dr. Spinks said he believed the practice had been as stated by Dr. Wambey, though it seemed incorrect.

*The Judge Ordinary*: I think there is no warrant whatever for the practice. The Legislature intended that a respondent should be personally served. When he appears and answers, no harm is done; but in a great number of cases the respondent does not appear, and the suit might really proceed without the knowledge of the respondent upon some attorney stating that he was authorized to represent tht respondent. I shall give directions to discontinue the practice for the future; bus in this case, as the respondent has appeared and answered, I shall give directions ae to the mode of trial.

---

## **[185]** SUPPLEMENT TO CASES IN THE COURT OF PROBATE.

EVANS *v.* BURRELL. April 13 & 20, 1859. — Administration. — Deceased dying Abroad.—Service of Citation by Advertisement.—Jurisdiction.—Affidavit of Property in England.—When a wife and husband resident abroad have been served with a citation by advertisement, there should be an affidavit that neither of them has any agent in this country.—Where the party in respect of whose estate a grant is asked for died abroad, there should be an affidavit that he left personal property in England, otherwise the Court has no jurisdiction to make the grant. [S. C. 28 L. J. (Mat.) 82. Applied, *In the Goods of Butson*, 1882, 9 L. R. Ir. 21.]

Samuel Evans, late of Lancaster, in Van Diemen's Land, died on the 27th of July, 1845, at Lancaster, intestate, without child or father, leaving his widow, Phœbe Evans, since married to George Burrell, his lawful mother and next of kin (since deceased), and several brothers and sisters, parties entitled in distribution. Phœbe Burrell, the widow, was with her husband resident in Australia, and had been cited by advertising an abstract of the citation in four newspapers.

April 13. Mr. Pritchard moved for administration to be granted to George Evans, the natural and lawful brother of the deceased, and a party entitled in distribution.

**[186]** *Sir C. Cresswell*: Before I grant the motion, an affidavit should be filed that neither Phœbe Burrell nor her husband has any agent in this country.

Mr. Pritchard renewed motion. The required affidavit has been filed.

*Sir C. Cresswell*: It does not appear from the affidavits that the deceased left any property in this country. Unless he did so, there is nothing upon which the grant asked for would operate, and I should have no jurisdiction to decree letters of administration to be granted. If you can satisfy the registrar that the deceased left personal property in this country, you may have the grant.

IN THE GOODS OF BICKHAM SWEET ESCOT. November 30, 1858.—Administration.—Parties entitled Abroad.—Power of Attorney.—Section 73 of Probate Act.—Where the party solely entitled to the grant of administration of the estate of the deceased was abroad, and it was not known where she was or when she would return to this country, and there was a sum of money payable to the estate of the deceased, the Court made a grant of administration under the 73rd section of the Probate Act to a person whom she had duly authorized by power of attorney to manage her property in England.

[S. C. 28 L. J. (P.) 17.]

Bickham Sweet Escot died November 4th, 1853, intestate, leaving his widow and an only child, Anna Escot, the sole persons entitled in distribution. The widow took out administration, and died in 1857, intestate, and Anna Escot took out administration to her estate in March, 1858, and had since left England, having executed a power of attorney, dated April 19th, 1858, in favour of V. T. Langworthy, which after **[187]** reciting that she was possessed of property, and was indebted to divers persons, and had other affairs to be settled and transacted during her absence, appointed V. T. Langworthy to execute conveyances, pay debts, and generally to do and perform all other acts and things which should be fitting or reasonable or necessary to be done, etc. in and about the said premises. Under the will of Mr. Impey, the deceased, at the time of his death, had a vested share of a sum of money which was now payable to his estate, and amounted to £160. It was not known where Anna Escot was, or when she would return to this country.

Dr. Deane, Q.C., moved for administration de bonis non of the effects of the deceased B. S. Escot, to be granted to V. T. Langworthy, as the lawful attorney of Anna Escot, or under the 73rd section of the Probate Act, in order that he might receive and give a discharge for the said sum.

*Sir C. Cresswell*: The terms of the power of attorney are not sufficiently extensive to constitute Mr. Langworthy the attorney of Miss Escot, for the purpose of obtaining a grant of administration to her father's estate. The words "in and about the premises," limit his power to acting with reference to the matters before specified in the power, amongst which taking out administration is not included. I think, however, I may, under the power given me by the 73rd section of the Probate Act, make the grant to Mr. Langworthy.

**[188]** IN THE GOODS OF BURGESS (deceased). May 12, 1863.—Administration.—Practice.—One of Next of Kin of full Age, but abroad.—Limited Grant to the Guardian of the others, who were Minors.—20 & 21 Vict. c. 77, s. 73.—A. died intestate, leaving four children, of whom one was of age, but was abroad, and the other three were minors. An immediate grant of administration being necessary, the Court, under the 73rd section of 20 & 21 Vict. c. 77, granted administration to the duly elected guardian of the minors for their use and benefit, limited until one of the children should apply for a grant.

[S. C. 32 L. J. (P.) 158; 9 Jur. (N. S.) 553; 9 L. T. 86; 11 W. R. 687.]

Catherine Burgess, widow, died on the 16th of March, 1863, intestate, leaving

four children by three husbands. The eldest child, Edwin Green, the issue by the first husband, who was of full age, was absent from England. The other three, who were minors, of the respective ages of seventeen, fourteen, and ten years, had elected their uncle, Robert Watson, as their guardian. The value of the deceased's estate was £209.

It was necessary that an administrator should be immediately appointed, in order to get payment of a note of hand for £100, which formed part of the deceased's estate, and was just coming due, and to give notice to quit to the landlord of the house occupied by the deceased.

Dr. Spinks now moved the Court to grant letters of administration of the effects of the deceased to Robert Watson, the duly elected guardian of the minor children, for their use and benefit, limited until the eldest son of the deceased should apply for the grant. The uncle is willing to give justifying security.

*Sir C. Cresswell*: I am informed by the Registrar that, according to the practice of the Prerogative Court, adminis-**[189]**-tration would not, under these circumstances, have been granted, limited until the eldest son should apply for the grant, because he is entitled to it at any time. The 73rd section of the 20 & 21 Vict. c. 77, however, gives me a larger jurisdiction than the Prerogative Court had, and under it I think I may make the grant to the guardian, limited until some one of the children applies for it. He must give justifying security.

Motion granted.

IN THE GOODS OF STEWART SUTHERLAND (deceased). May 13, 1862.—Administration Bond.—Married Woman.—Husband's Refusal to execute Administration Bond. —Where a married woman is entitled to administration, and the husband refuses to join in the administration bond, or to assist his wife in obtaining the administration, the Court will grant the administration to her, allowing a third person to execute the bond for her.

[S. C. 31 L. J. (P.) 126; 8 Jur. (N. S.) 465. Applied, *In the Goods of Ross*, 1877, 2 P. D. 274.]

The deceased Stewart Sutherland, by a will made at sea, bequeathed his property after the death of his wife to be divided equally amongst his children. Probate of this will was granted to his widow, since deceased, in 1816, and Sarah Bessel, the wife of George Bessel, was now the only surviving child of the said testator, and was entitled to one-fifth part of a sum of £811, 3s. 3d., which had been transferred to the Court of Chancery.

Sarah Bessel was living within the same house as her husband, but maintained herself by her own industry. Her solicitor applied to her husband to join her in the administration bond; this he declined to do, stating that he wanted nothing from his wife, and that she wanted nothing from him.

**[190]** Dr. Spinks moved the Court to grant to Sarah Bessel letters of administration, with the will annexed, of the unadministered personal estate of the deceased, and that John Mercer be allowed to execute the usual administration bond in the place of her husband.

*Sir C. Cresswell*: What use could Mrs. Bessel make of the grant when made, if her husband declined to have anything to do with the matter?

Dr. Spinks: The grant will enable her to apply to the Court of Chancery to settle the fund upon herself.

*Sir C. Cresswell*: In *Bubbers* v. *Harby*, 3 Cur. 50, Sir H. Jenner refused to grant letters of administration, with the will annexed, to the attorney of a married woman upon her proxy alone, her husband refusing to join in the proxy. When the husband is abroad, another person has been allowed to execute the bond. The practice in the Registry in such a case as this is to require a certificate to be filed from the proctor or solicitor of the wife, to the effect that the wife can act under the letters of administration, if granted, without the consent of the husband; and, she must understand that if, after all, they turn out to be inoperative, they cannot be revoked. At present there is no evidence before the Court of the husband's refusal to execute the bond. The case must stand over.

May 13. Dr. Spinks renewed the motion upon a further affidavit of the husband's refusal, and a certificate that the wife would be enabled to administer the estate, if the grant were made.

*Sir C. Cresswell*: Since the previous motion day, an exact precedent has been found for making such a grant. In the year 1839, in the case of *Wookey* v. *Appleby* (not [191] reported) Sir H. Jenner allowed a bond to be given by the nominee of a wife in the place of her husband, he being in England at the time, and refusing to concur in assenting to the application. I will therefore grant the motion as prayed.

May 20. *Sir C. Cresswell*: The attention of the Registrar has been called to the case *In the Goods of Jaques*, 5 N. of Cas. 294, decided by Sir H. Jenner in 1849, as inconsistent with *Wookey* v. *Appleby*. There a married woman was willing to take out letters of administration to a child by a former husband, but as she could not procure the execution of the bond by her second husband, who had separated from her, and the place of whose residence she could not ascertain, she was willing to take the grant, provided the Court would accept a bond executed by an additional surety in the place of her husband, or to be passed over, and to allow the grant to go to a sister of the deceased. There the same learned Judge avoided giving a decision on the point now raised, but was willing to accept her renunciation and make the grant to the sister after the husband had been cited. He said, "There must be a decree against the husband. The wife cannot abandon his rights without his consent, or without giving him the means of knowing, so as to enable the Court to decree administration in his absence. It is an unfortunate case, but still the practice of the Court must be observed. I must reject the motion." The husband was afterwards cited, and did not appear, and administration was granted to the sister. It does not appear from the report that the question, whether the wife could take administration, giving a bond other than that of her husband, was raised. I mention this, that there may not be any misapprehension hereafter.

**[192]** IN THE GOODS OF GEORGE STREAKER (deceased). March 9, 1859.—Probate. —Will made before January, 1838.—Unattested Alterations.—Presumption of Date of Alterations.—Unattested alterations appearing in a Will executed prior to the Wills Act (1 Vict. c. 26) coming into operation, will, in the absence of any evidence as to their date, be presumed to have been made before the Act came into operation, and are therefore entitled to probate.

[S. C. 28 L. J. (P.) 50. Referred to, *Benson* v. *Benson*, 1870, L. R. 2 P. & D. 176. Applied, *In the Goods of Tweedale*, 1874, L. R. 3 P. & D. 204.]

George Streaker died on the 24th of August, 1855, leaving a will, dated the 12th of January, 1831, signed by him and attested by three witnesses, of which he appointed his wife, Elizabeth Streaker, sole executrix and residuary legatee. Elizabeth Streaker died in 1858 without having proved the will, which had been found by her executors amongst some of her papers. In the body of the will there was a legacy of three hundred guineas to the Leeds Infirmary; a line had been drawn through the words "three hundred guineas," and in the margin of the will there were, in the handwriting of the deceased, these words, "£200 to be paid out of my property after my decease," and there were similar alterations lower down the will, but there was no evidence to shew whether the alterations made before or after 1 Vict. c. 26, came into operation. Two of the attesting witnesses deposed that inquiries had been made without avail to ascertain when the cancellations and the additions in the margin had been made.

February 23. Dr. Spinks moved for administration of the effects of George Streaker, with the will annexed, to be granted to the executors of his widow, as the residuary legatee of the deceased, with the alterations appearing in the margin of the will as parts thereof. In the absence of evidence as to the time when the alterations were made, it must be presumed that they were made before the Wills Act came into operation. **[193]** *In the Goods of Pennington*, 1 N. of Cas. 399; *Pechell* v. *Jenkinson*, 2 Curt. 273. In the latter case the deceased died in January, 1839, leaving a will made before the Wills Act, and an unattested codicil without date. There were no circumstances to shew at what time the codicil was made, yet Sir H. Jenner pronounced for it, saying:—"Is a Court to hold, that because a paper is without date, it was written after the 1st of January, 1838, and consequently being unattested, is to fall under the new law? Is not the Court rather to be astute in finding means to carry into effect the intentions of the testator? I am of opinion that where a case is bare of circumstances like the present, and the deceased was as likely to do what she has done before as after the 1st of January, 1838, the presumption should rather be,

that it was done before that time." There is nothing here to lead to a contrary conclusion. Every person is presumed to know the law, and where a codicil is written without date, but signed by the deceased, the Court would, in the absence of circumstances tending to a contrary conclusion, be bound to presume that it had been executed according to the law as it stood at the time it was written.

*Sir C. Cresswell*: Those are certainly authorities in point, though the reasoning in the latter case does not seem to me perfectly satisfactory. The motion must stand over for further affidavits.

March 2. Dr. Spinks renewed the motion. He referred, in addition to the authorities previously cited, to rule 26. This rule, which applies to wills made before the 1st of January, 1838, is as follows:—"Alterations and interlineations made by the testator, if unattested, are to be proved by an affidavit of two persons to his handwriting. . . . Proof by affidavit that they existed in the paper at the time it was found in **[194]** the repositories of the testator recently after his death, may, under circumstances, suffice. Alterations and interlineations made since the 31st of December, 1837, are subject to the provisions of 1 Vict. c. 26." That rule seems to be founded on the cases cited. Cur. adv. vult.

*Sir C. Cresswell*: The question raised in this case was, whether certain unattested cancellations in the body of the will, and certain additions made in the margin of the will of the deceased George Streaker, and in his handwriting, were made before or after the Wills Act, 1 Vict. c. 26, came into operation, there being no evidence as to the time at which they were made. Dr. Spinks referred to two cases as authorities to shew that, under such circumstances, the presumption would be that the alterations were made before the Wills Act came into operation. The reasoning on which these decisions were founded is not to my mind quite satisfactory, but they are certainly authorities in favour of the existence of such presumption; and I also find this presumption recognised in the arguments of counsel on both sides in *Cooper* v. *Bockett*, 6 Moo. P. C. 419, before the Judicial Committee of the Privy Council, as an established rule of law. I shall, therefore, decree administration, with the will annexed, with the alterations in the margin as part thereof.

(Before *Sir C. Cresswell.*)

IN THE GOODS OF WILLIAM FAIRLIE CUNNINGHAM (deceased). January 11, 1860.

Probate.—Re-execution.—Attestation.—A testator having made some alterations in a duly-executed Will, he and the attesting witnesses traced their former signatures with a **[195]** dry pen, and the attesting witnesses placed their initials in the margin opposite each of the alterations.—The Court refused to regard the initials in the margin as evidence that the alterations had been duly executed and attested, and declined to grant probate of the Will with alterations.

[S. C. 29 L. J. (P.) 71.]

William Fairlie Cunningham, formerly of Brompton and of Chiswick, died on the 13th of June, 1859, leaving a will, which had been duly executed on the 2nd of April, 1859. After the execution, it was discovered that the Christian names of his brother and sister were incorrectly spelt in the will, and also that an error had been made in the Christian name of one of the executors. The testator sent back the will to his solicitor to make the necessary corrections, and on the 7th of April the will was returned to him, and he re-executed it, as he supposed, by tracing over his former signature with a dry pen, in the presence of the two attesting witnesses. The attesting witnesses also traced over their former signatures with a dry pen. Opposite the alterations, in the margin, there were the initials of the attesting witnesses.

Dr. Wambey moved for probate of the will with the alterations, and submitted that, although the tracing of the signatures with a dry pen by the attesting witnesses did not amount to a re-execution or a re-attestation, yet the initials of the attesting witnesses opposite the alterations was evidence from which the Court might infer that the testator had acknowledged his signature to the will so altered, in the presence of the persons whose initials were appended to the alterations.

*Sir C. Cresswell*: The initials were not written there animo attestandi.

Dr. Wambey: They were written animo attestandi as to the alterations.

**[196]** *Sir C. Cresswell*: But not as to the testator's signature. Mere initials in the margin would not be sufficient as an attestation to a testator's signature without an attestation clause at the end. It is clear they were not put there animo attestandi.

It cannot be too well understood that tracing with a dry pen is not equivalent to a signature.

Motion refused.

WYMAN *v.* ASHWELL. March 21, 1860.—Will affecting Real Estate.—Bastard.—Citing Queen's Proctor.—Section 61 of Probate Act.—When the Will of a bastard affecting real estate is propounded, if such real estate would devolve on the Crown in case of an intestacy, the Queen's Proctor may be cited to intervene in respect of the real estate.

[S. C. 29 L. J. (P.) 94.]

The plaintiff propounded the will of Annie Miller, a bastard, dated July 23, 1858, affecting real estate. The defendant alleged the revocation of this will by a subsequent will dated September 19, 1858. The plaintiff by his replication denied the validity of the later will.

Dr. Waddilove, for the plaintiff, moved for an order to cite the Queen's Proctor, under section 61 of the Probate Act and rule 34, on an affidavit, that if the deceased died intestate, her real estate would devolve upon the Crown, etc.

*Sir C. Cresswell* granted the motion.

**[197]** EMBERLEY *v.* TREVANION. March 21, 1860.—Will.—Same Person Legatee and Devisee.—Will propounded by her as Legatee only.—Cited as Devisee.—Sections 61 and 63 of Probate Act.—Where the same person was a legatee and devisee under a Will, and propounded the Will in her character of legatee only, the Court allowed her to be cited to see proceedings as devisee.

[S. C. 29 L. J. (P.) 142. Followed, *Beardsley* v. *Beardsley*, [1899] 1 Q. B. 746.]

The plaintiff propounded a will disposing of real and personal property as a legatee, being also a devisee under it. She had not appeared as devisee. The defendant, who was next of kin and heir-at-law, had appeared and opposed the will as next of kin.

Dr. Tristram, for the defendant, moved under section 61 of the Probate Act, for a citation to issue to the plaintiff to see proceedings as devisee. By section 63, the probate is only to bind a person interested in real estate, where such person has been cited or made a party to the proceedings. A question might be raised hereafter, whether a person who only appears, as the plaintiff has done, in his character of legatee, can be said to have been cited or made a party to the proceedings in respect of real estate.

Dr. Spinks for the plaintiff.

*Sir C. Cresswell*: It is plain that the object of the statute was to prevent the trial of the same question twice over; once in a Common Law Court, when it affected real property, and a second time in this Court, when it also affected personal property. I have always been of opinion that if parties are before the Court in a suit, in whatever capacity, and take part in the litigation, they are bound by the decision **[198]** in that suit, and that the practice of issuing a separate citation to parties as heirs-at-law who have already appeared as next of kin, is a work of supererogation. But if Dr. Tristram likes to issue the citation, there is no objection to his doing so.

Dr. Spinks asked whether it would be necessary to cite the plaintiff to appear as heir-at-law.

*Sir C. Cresswell*: You must do as you think proper.

Motion granted.

ANDREWS *v.* MURPHY. November 21, 1860.—Administration to a Creditor.—Substitution of one Creditor for another.—Costs.—Practice.—The Court will make a grant of administration to a creditor who has been substituted for the creditor who extracted the citation, and will allow the latter such costs as he necessarily incurred prior to the former one taking up the application.

[S. C. 30 L. J. (P.) 37.]

F. J. Murphy died June 17, 1860, intestate, leaving personal estate of the value of £1400. The deceased died indebted to the plaintiff, S. Sturgis, and other creditors. The plaintiff extracted the usual citation from the Registry, which he served on the next of kin of the deceased. No appearance had been entered by or for them, but on October 16, 1860, S. Sturgis entered an appearance, it having been agreed amongst

the creditors that he should apply for administration instead of the plaintiff, and that the costs incurred by the plaintiff should be paid by S. Sturgis as administrator.

Mr. Pritchard moved for the grant to be made to S. Sturgis. By the practice of the Prerogative Court, another **[199]** creditor might be substituted for the creditor who had extracted the citation.

Dr. Swabey, for the plaintiff, consented, provided S. Sturgis entered into a bond to pay the debts pro ratâ according to degree; and also that the plaintiff's costs should be taxed as between attorney and client, and be the first charge on the estate.

*Sir C. Cresswell*: The grant may be made to Sturgis. The plaintiff may have such costs as were necessarily incurred by him prior to the application of Sturgis,—such costs as would have been allowed to Sturgis if he had originally commenced proceedings. I cannot order them to be taxed as between attorney and client. Such was not the practice of the Prerogative Court.

Dr. Swabey asked that the plaintiff might have the costs of his appearance on this motion.

*Sir C. Cresswell*: The costs of his appearance to-day ought not to be allowed.

BOSTON *v.* FOX. January 13, 1860.—Proof in Solemn Form.—Costs.—Executor of Previous Will.—An executor of a former Will has the same right as a next of kin to put an executor of a later Will upon proof in solemn form, and to interrogate his witnesses.

[S. C. 39 L. J. (P.) 68.]

This was a business of proving in solemn form the will of the late Mrs. Lucy Braham. The will was propounded by the plaintiff as executor, and the defendant who called for proof in **[200]** solemn form was the executor of a previous will. The testatrix was a markswoman, and duly executed a will on the 8th of November, 1857. The will of which the defendant was executor, was executed in 1849.

The attesting witnesses were examined and cross-examined, but no witnesses were produced by the defendant.

Mr. H. James for the plaintiff.

Mr. D. Keane, for the defendant, said that he had waited for six months after the death of the testatrix, and then, no other will being propounded, he had produced the will of 1849. The plaintiff then propounded the will of 1857, and the defendant had a right, under the circumstances, to call upon him to prove it.

*Sir C. Cresswell*: I rather think that the privilege of a next of kin of putting an executor to proof in solemn form is not extended to the executor of a previous will.

Mr. D. Keane referred to Coote's Probate Practice, 207 gg. "By the practice of the Prerogative Courts, next of kin, an executor of a former will, and a creditor or other person in possession of administration, were permitted, before probate had been granted in common form, to put an executor on proof of a will without being liable for costs, provided they did not do so vexatiously, or did not plead or attempt to set up in the interrogatories, a case of fraud or conspiracy which the evidence did not justify them in doing." The authority cited for this proposition as to executors of former wills, was *Mansfield* v. *Shaw*, 3 Phill. 22. Sir John Nicholl, in that case, said, "The law gave him" (the executor under a former will) "the right to call upon the executor to propound his will in solemn form of law, and to interrogate the witnesses."

**[201]** *Sir C. Cresswell*: That is certainly a dictum that an executor, under a former will, has a right to call for proof in solemn form, of a subsequent will. I therefore decree probate without costs.

Probate without costs.

FOALE *v.* TRETHEWY AND BROWN. May 27 and June 9, 1863.—Earlier and later Wills.—Executors.—Costs.—Where the executors of an earlier Will, being disinterested persons, opposed on reasonable grounds a Will of later date, and the verdict of the jury established the later Will, the executors of the earlier Will were held to be entitled to their costs out of the estate of the deceased.

[S. C. 9 L. T. 87.]

This was a question as to costs. The plaintiff, as executor, propounded a will made in 1862: the defendants, as executors of a former will dated 1858, pleaded undue execution, incapacity, and not the will of the deceased; also that deceased duly executed his last will in 1858. Issues on these pleas were tried before Byles, J.,

at the assizes at Exeter, and a verdict found for the plaintiff on all issues as to the will of 1862.

As to the will of 1858, the verdict of the jury was in favour of the defendants.

Mr. Collier, Q.C., now moved for probate of the will of 1862, and for costs against the defendants.

Dr. Wambey, for the defendants, submitted it was a case in which so far from being condemned in costs, they should have their costs out of the estate; they had no interest themselves in the will of 1858, and, in resisting the latter will, merely discharged their duties to the legatees under the will of 1858. The notes of the learned judge who tried the cause may shew that there was considerable evidence of incapacity.

**[202]** *Sir C. Cresswell*: I must communicate with my brother Byles, who tried this case. Cur. adv. vult.

*Sir C. Cresswell*: I am informed by my brother Byles that he considered the verdict a right one, but that there was ample ground for disputing the will. That being so, and the defendants disinterested persons, I think their costs ought to be allowed out of the estate.

OWEN *v.* WILLIAMS. May 28, 1863.—Evidence.—Attesting Witnesses, Examination of.—Practice.—Where the party propounding a Will in a contested suit, the only issue being due execution, and notice under the 41st rule having been given, called one of the attesting witnesses, who gave evidence against the due execution, the Court held that he was bound to call the other attesting witness.

[S. C. 32 L. J. (P.) 159; 9 L. T. 86; 11 W. R. 808. Not applied, *Forster* v. *Forster*, 1864, 33 L. J. (P.) 113.]

The plaintiff in this case had called in the probate of the will of Hugh Jones, late of Dolgelly, and prayed that it might be revoked.

The defendant having propounded the will as executor thereof, the plaintiff pleaded that it was not duly executed, and gave notice under rule 41 of Rules for Contentious Business that he merely insisted upon having it proved in solemn form, and did not intend to call evidence.

The case came on for trial before Sir C. Cresswell, without a jury.

Mr. Collier, Q.C., and Dr. Spinks for the executor.

Mr. O'Malley, Q.C., and Mr. R. E. Turner for the party opposing the will.

**[203]** One of the attesting witnesses, Hugh Jones, was examined on behalf of the executor, and his evidence was, that the will was not duly executed. Evidence was given to contradict him, but the other attesting witness was not called.

At the close of the defendant's case,

Mr. O'Malley asked for leave to call the other attesting witness, notwithstanding the notice which had been given by the defendant.

*Sir C. Cresswell*: You are certainly at liberty to call him.

May 28.—The hearing was then adjourned. When it was resumed,

*Sir C. Cresswell* said he had been considering the question, and he was of opinion that the executor propounding the will was, in these circumstances, bound to call the other attesting witness.

The other attesting witness, Hugh Owen, was accordingly called on behalf of the executor, and he also gave evidence against the will.

The Court did not credit the evidence of the attesting witnesses, but pronounced for the will, and ordered probate to be delivered out to the defendant. It refused to make any order as to costs.

**[204]** IN THE GOODS OF MICHAEL WINTER (deceased). January 16, 1861.—Will of Foreign Property.—Will of English Property.—Probate.—A testator dying domiciled in England, having made two Wills in England, one relating exclusively to property in Peru, and the other to property in England, and appointing executors of both Wills:—Held, that the executor of the English Will, who was also one of the executors of the Peru Will, was entitled to probate of both instruments in this Court.

Michael Winter, formerly of Peru, died at Bayswater, December 20th, 1860. He left two wills. The first will, which was dated June 9th, 1860, began thus:—"In this, my first and only will, as relates to my property in Lima, Peru, the state of which is as follows." He then disposed of this property, and appointed executors

of this will, but it contained no residuary clause. The second will, which was dated June 12th, 1860, commenced thus:—"This is the last will of me, Michael Winter, of Bayswater, in the county of Middlesex, formerly resident in Peru, and now domiciled in and intending to remain in England, relative to my property other than that in the State of Peru." It then proceeded to dispose of his property in England, and to appoint executors and trustees, and contained a general residuary clause.

Dr. Phillimore moved for probate of the first as well as of the second will, in order that the opinion of a Court of Construction might be taken on them. The deceased being domiciled in England at the time of his making the wills and of his death, the Court had jurisdiction over his personal property wherever situated.

*Sir C. Cresswell*: You have not cited me any instance of an instrument having been included in probate which in terms deals with property not within the jurisdiction of this Court. **[205]** I think, however, that *Spratt* v. *Harris*, 4 Hagg. 405, is an authority upon this point. As the gentleman on behalf of whom you apply is entitled as executor under both documents, I shall decree a grant to him of probate of both. I do not exclude any other executor. Any of them may make such applications as he may think fit. I find that when a testator has left general executors and a limited executor, the practice has been to grant probate to each of them according to the terms of his appointment. I do not quite see the principle upon which that practice has obtained.

Probate granted of both instruments.

DICKINSON *v.* SWATMAN. July 30, 1860.—Dependent Relative Revocation.—Will.—The Court will not apply the doctrine of dependent relative revocation to a case where the deceased has destroyed a Will through a mistaken notion of the legal effect of its destruction, if it is satisfied that he intended entirely to revoke that Will. (Overruled. See *Powell* v. *Powell*, 1 L. Rep. (P. & M.) 209.)

[S. C. 30 L. J. (P.) 84; 6 Jur. (N. S.) 831. Referred to, *Newton* v. *Newton*, 1860, 5 L. T. 226. Dictum overruled, *Powell* v. *Powell*, 1866, L. R. 1 P. & D. 213. Referred to, *Cossey* v. *Cossey*, 1900, 69 L. J. (P.) 17.]

William Dickinson, the deceased in this case, died on the 1st of May, 1860. The plaintiff, Rebecca Dickinson, as executor, propounded a will, dated April 28th, 1826. The defendant pleaded, amongst other pleas, the revocation of this will by a later will, dated July 14th, 1851. The plaintiff replied that, after the execution of the last will, the deceased revoked the same by tearing and burning it when of sound mind. Issue joined.

The cause came on for hearing before the Court itself.

**[206]** Dr. Deane, Q.C., and Mr. Douglas Brown for the plaintiff.

Dr. Phillimore, Q.C., and Mr. Mandell for the defendant.

The plaintiff took the deceased's property absolutely under the first will, and only an interest in it during her widowhood under the second will.

There were two witnesses examined. 1stly. John Valentine, who deposed as follows: "I knew William Dickinson for several years. I saw him some time before Michaelmas, 1859. He told me he had made a will in 1851 in Swatman's office, and that he did not intend that this will should stand good, because the parties in whose favour he had made it were very troublesome to him, always wanting money, and that if they got his money they would squander it. I saw him then burn a document which looked like a will, saying at the same time, 'There is a will I made a long time ago that will do for my mistress. I shall leave her my sole executrix.' He had several conversations with me about the will before he destroyed it. Jane Barton came in at the time he destroyed the will. He gave it to her, and said, 'Mr. Swatman charged me one guinea for it.' I was in his house shortly before he died. He gave his wife a will, and said, 'You will want this if I depart this life. This is the will you are to go by.'" On cross-examination: "In substance, the deceased said he destroyed the will of 1851 that the will of 1826 might stand." 2ndly. Jane Barton, who deposed as follows:—"I knew the deceased, William Dickinson. I was at his house at Michaelmas, 1859. I saw him and the last witness at his house. They were looking over some papers. The deceased took up a paper consisting of two or three sheets. He said he should burn it. He tore it in a dozen pieces. He talked about another will. He said, 'I have another will, which I made many years ago, of which my mistress is executrix; she is to go by it.' I lived with **[207]** him for the last six

months of his life. About a month before he died he gave his wife a will (will of 1826), and said, 'Mistress, this is what you will have to go by.'"

Dr. Deane: To establish the will of 1826, I might contend that this will, having been executed before the Wills Act, is not governed by the rule introduced by that Act as to the revival of a revoked will, but by the old law, and that it has since its revocation been republished by the declarations of the deceased. But I can cite no authority in support of this proposition. The only authority is the other way. The result will be an intestacy.

Dr. Phillimore: The will of 1851 was destroyed under the erroneous impression that the will of 1826 was thereby revived. The destruction of the will could not have that effect, but the facts raise this curious question, namely, whether this is not a case of dependent relative revocation. (1 Wms. on Exors., 120, and *Onion* v. *Tyrer*, 1 P. Wms., 345.) If so, the defendant will be entitled to probate of a copy of the will.

*Sir C. Cresswell*: To make this a case of dependent relative revocation, you must introduce the ingredient that the deceased intended that, unless the will of 1826 stood, the will of 1851 was to stand. If he intended to make a new will, the doctrine would not apply. This question may also be suggested, namely, whether he would rather have no will at all than the will of 1851. Is there any case in which the doctrine of dependent relative revocation has been applied where the act of cancellation has been done with reference to a bygone act, where a new will duly executed has been destroyed with a desire to set up an old will?

Dr. Phillimore: I can cite no authority. The principle is laid down in *Hine* v. *Thason*.

**[208]** *Sir C. Cresswell*: I am clearly of opinion that the deceased intended entirely to revoke the will of 1851. The will of 1826 was not the last will of the deceased, and that of 1851 was revoked. It is a proper case for costs to come out of the estate.

Intestacy pronounced for.

DAVIS *v.* DAVIS. July 27, 1859.—Probate of Copy of Will.—Executor cited.—Non-appearance.—21 & 22 Vict. c. 95, s. 16.—An executor who has been cited to take probate of a missing Will, and has not appeared to such citation, is barred from taking probate of the original Will, when found.

[S. C. 31 L. J. (P.) 216.]

Lydia Davis died in 1857. In 1850 she duly executed a will, whereof she appointed the plaintiff sole executor. After her death the will could not be found; and in December, 1858, a citation was issued and served upon the plaintiff, calling upon him to take probate of a copy of the will. No appearance was entered by him; and in April, 1859, letters of administration, with a copy of the said will annexed, were granted to Ann Davis, the defendant. The original will had since been found, and brought into the registry.

Dr. Spinks moved for probate of the original will to be granted to the plaintiff, the executor. The executor in this case was not cited to take probate of the will, but only of a copy of the will. The 16th section of 21 & 22 Vict. c. 95, only bars an executor from his right to probate, who, when cited to take probate of a will, does not appear. This section therefore does not apply.

Dr. Phillimore, Q.C., contrà.

**[209]** *Sir C. Cresswell*: Upon the true construction of this section, the plaintiff is not now entitled to probate. He was the executor named in the will of the deceased; he was cited to take probate, and did not appear to such citation. His right to ask for probate, therefore, has wholly ceased. Although probate may be granted of a copy of a will, it is still probate of the will of the testator, and the executor must place faith in the Court that it will only grant probate of what is proved to be the will. Whether it is a copy or not is a matter for the Court. I reject the motion, with costs.

IN THE GOODS OF JOHN HUGHES (deceased). July 16, 1860.—Chain of Executorship.—Power.—Married Woman.—The chain of executorship is not continued by the appointment of an executor by a married woman in a Will made under a power.

[S. C. 29 L. J. (P.) 165. Followed, *In the Goods of Bridges*, 1878, 4 P. D. 80.]

John Hughes died, having appointed by his will his wife Phœbe sole executrix, and his nephew, John Smith, residuary legatee. Phœbe proved the will in 1843, and afterwards married William Griffiths. Upon her second marriage, certain property

was settled to her separate use, with a power of appointment over it by will. In 1857 she executed a will in pursuance of such power of appointment, and therein named two executors, and died. In October, 1858, this will was proved by one of her executors, power being reserved to the other executor. Her husband, William Griffiths, took out a cæterorum grant to her estate.

Dr. Spinks moved for administration de bonis non of the effects of John Hughes, with his said will annexed, to be granted to John Smith, as residuary legatee, without citing **[210]** the executors of Mrs. Griffiths' will. He submitted that they had no interest, and therefore need not be cited. According to the practice in the registry, the chain of an executorship is not continued by the appointment of executors to a will made under a power.

*Sir C. Cresswell*: I should think it was not. In *Tugman* v. *Hopkins* (4 M. & G. 400) Chief-Justice Tindal said that the executors of the will of a married woman made under a power took nothing jure repræsentationis; but that they took under the person that gave the power, but not under the testatrix. Administration may go to the residuary legatee as prayed.

YOUNG AND ANOTHER *v.* FERRIE AND OTHERS. Nov. 23, 1859.—Probate Act 20 & 21 Vict. c. 77, ss. 61 and 63.—Heir-at-law.—Caveat.—Declaration.—Costs.—An heir-at-law who has not been cited, cannot, by entering a caveat, prevent the executors of a Will affecting realty from obtaining probate in common form. If the heir-at-law has entered a caveat under those circumstances, it is not necessary for the executors to declare.

[S. C. 29 L. J. (P.) 619; 5 Jur. (N. S.) 1318.]

The plaintiffs were the executors of the late Miss Elgar, and they were proceeding to prove her will in common form, when a caveat was entered by the heir-at-law, although he had not been cited. The executors thereupon filed a declaration, but the heir-at-law did not plead.

Mr. Honeyman, for the executors, now moved for probate, and that the heir-at-law might be condemned in costs.

Mr. Hannen, for the heir-at-law, opposed the motion as to costs. The heir-at-law had done nothing beyond putting the **[211]** executors to prove the will, and he had a right to do so, as it affected the real estate.

*Sir C. Cresswell*: The heir-at-law had no right to intervene without being cited, because the executors were proceeding to prove in common form, not in solemn form, and the probate would not have affected him as he had not been cited (20 & 21 Vict. c. 77, ss. 61 and 63). But it was unnecessary for the executors to declare, because they knew from the appearance entered that it was the caveat of the heir-at-law, and they might have proceeded to obtain probate. I cannot therefore condemn the heir-at-law in the costs of the declaration. Probate will be granted upon the proper affidavits as to the due execution being brought into the Registry. There will be no order as to costs.

IN THE GOODS OF MARY ANN E. STEWART (deceased). March 17, 1863.—Incorporation.—Schedule written subsequent to Execution of Will, but prior to Execution of Codicil.—Probate.—A testatrix having directed her executors in her Will to distribute certain articles according to any list or lists signed by her, and having, prior to the execution of a second codicil, signed a list to which no reference was made in the second codicil, the Court, upon the authority of the case *In the Goods of Hunt* (2 Roberts, 622), allowed the list to be included in the probate.

[See 3 Sw. & Tr. 192.]

Mary Ann E. Stewart died January 6, 1863, leaving a will dated May 24, 1861, and two codicils, dated respectively September 23, 1861, and November 29, 1862, of which she appointed the Reverend C. Smyth and C. Stewart executors. In the will there was the following clause: "I direct my **[212]** executors to distribute to the parties whose names may be inscribed upon the same such packets as I may leave for that purpose, and also all pictures, books, and other articles according to any list or lists signed by me." This clause was inserted in the will on the suggestion of Mr. C. Stewart, in consequence of the deceased expressing to him that she felt a difficulty how to dispose of certain articles, and thereupon he suggested that a list should be

prepared by her from time to time as she made up her mind to dispose of them. After her death he found the paper E amongst her papers, which had been written by him and signed by the deceased after the execution of the will, but before the execution of the second codicil. It commenced, "List referred to in my will and codicils. 'I give and bequeath,'" etc. The second codicil contained this clause: "I hereby confirm my said last will and testament, and all the codicils thereto signed by me, except," etc. It did not appear that the deceased had made more codicils than the two found.

Dr. Middleton moved for probate of the will, the two codicils, and the list marked E. He cited *In the Goods of Hunt*, 2 Roberts, 622. In that case the deceased bequeathed certain articles of plate "specified in schedules A and B to be annexed to this document." Two schedules marked A and B were found, which were written after the execution of the will, but before that of the codicil, but were not referred to in the codicil. Sir John Dodson granted probate of the two schedules, with the will and codicil.

*Sir C. Cresswell*: I think the decision of Sir John Dodson which you have cited is sufficient to authorize me in including the paper E in the probate. But for that decision, I should have considered it doubtful whether I ought to have granted your motion.

Probate granted as prayed.

**[213]** IN THE GOODS OF DAVID DAVIS (deceased). January 18, 1860.—Intermeddling with the Estate by Administrator.—Administration with Will annexed. —An administrator with the Will annexed cannot be forced to take out administration with a later Will annexed, when the first administration is revoked, although he has intermeddled with the estate.

[S. C. 29 L. J. (P.) 72.]

David Davis died on the 26th of April, 1854, and administration with the will annexed was granted to Eleanor Morgan. The will was dated June, 1841, but after that grant a later will was discovered, dated July, 1849. The administratrix had been cited to bring in the letters of administration of the will of 1841 from the Caermarthen registry, and she had done so, but she refused to take out administration with the will of 1849 annexed.

Dr. Spinks, at the instance of two devisees under the will of 1849, moved for a citation calling on her to take out administration with that will annexed, on the ground that she had intermeddled with the estate.

*Sir C. Cresswell*: There are two difficulties in your way. Your clients are merely devisees of real estate; they have no interest in the personal estate.

The other difficulty is, that there is no instance to be found in which an administrator has been compelled to take a grant. An executor who has intermeddled can be compelled to take probate, but an administrator who has intermeddled cannot be compelled to take a grant.

Motion refused.

**[214]** IN THE GOODS OF HANNAH JOYS. December 5, 1860.—Wills made under different Powers by a Married Woman.—Effect of general Revocatory Clause in later Will.—A feme covert made two Wills during different covertures, the one in 1848 under one power, and the other in 1857 under another power. The latter Will contained a general revocatory clause, but did not refer to the previous Will or to the power under which it was made. Held that the Will of 1848 was entitled to probate.

[S. C. 30 L. J. (P.) 169. Discussed, *Sotheran* v. *Dening*, 1881, 20 Ch. D. 99. Not followed, *In re Kingdon*, *Wilkins* v. *Pryer*, 1886, 32 Ch. D. 604; *Cadell* v. *Wilcocks*, [1898] P. 21.]

Hannah Joys, the deceased in this case, was twice married. By the will of her first husband, C. Campbell, she had a power of appointment by will over certain property, and by a will dated the 24th of July, 1848, she appointed such property to the said John Joys, her then husband, but named no executor.

On the 3rd of March, 1857, she executed a will appointing certain property to the said John Joys over which she had a power of appointment, under the settlement made on her marriage with him, and named John Joys her executor. The disposi-

tions of this will were limited to the property contained in the settlement, but it contained a general revocatory clause.

Probate of the will of the 3rd of March, 1857, had been granted by the Consistory Court of Chester on the 25th of August, 1857.

Mr. A. Bailey moved the Court to revoke this grant, and to decree administration with the two wills annexed, as together containing the last will of the deceased; inasmuch as the last will contained no reference to the former will, or to the power creating it, it was not revoked by the general revocatory clause contained in the last will.

*In the Goods of Merritt*, 1 Swab. & Tris. 112.

*In the Goods of Meredith*, 29 L. J. P. & M. 155.

**[215]** *Sir C. Cresswell*: I am of opinion that the will of the 24th of July, 1848, was not revoked by the later will. The probate granted by the Chester Court of the will of 1847 will therefore be revoked, and letters of administration with the two wills annexed will be granted, and also a cæterorum grant.

The decree made was as follows:—"Administration with the wills bearing date the 24th of July, 1848, and the 3rd of March, 1857, as together containing the last will and testament of the deceased annexed, of the personal estate and effects of the said deceased to be committed and granted to John Joys, the lawful husband of the said deceased, and the sole person entitled to her personal estate and effects, over which she had no disposing power, and concerning which she is dead intestate, and revoked the probate of the will dated the 3rd of March, 1857."

IN THE GOODS OF ELEANOR REAY (deceased). June 17, 1862.—Married Woman. —Will.—General Grant of Letters of Administration, with Will annexed, to the Executors of a Married Woman.—Revocation of previous Limited Grant.—Where a married woman who, with her husband's consent, had made investments in her own name, and had made a Will in his life disposing of property over which she had a power of appointment, and of all her other property, and her husband had, in writing, consented to and approved of the said Will, and the wife died in the husband's lifetime,—the Court revoked a limited grant made to the wife's executors, and decreed a general grant of administration with the Will annexed to them, upon the consent of the personal representative of the husband to such grant being filed.

[S. C. 31 L. J. (P.) 154; 8 Jur. (N. S.) 596.]

Eleanor Reay, the wife of the Rev. S. Reay, by her will, **[216]** dated January 30th, 1847, disposed of all the property to which she was entitled, whether under settlement or not, and appointed Henry Hargreaves and George Hargreaves executors.

Her husband afterwards, on the same day, signed a memorandum consenting to her making the above will, and giving his approval thereto in all respects. Mrs. Reay died on the 1st of January, 1861, and her husband died on the 20th of January, 1861.

On the 14th of May, 1861, probate was granted to her executors, limited to such personal estate and effects as she, by virtue of her marriage settlement dated 6th of April, 1832, had a right to appoint or dispose of, and had by her said will appointed or disposed of.

Subsequently to the date of her marriage, she became entitled to some real estate, and had, with her husband's concurrence, received the rents of these estates, and had during coverture accumulated considerable sums of money, which she had invested in her own name in London and North-Western Railway Shares, and in Consols. The London and North-Western Railway Company and the Bank of England had refused to register the probate or to permit the sale and transfer of the shares and stock.

Dr. Spinks moved the Court to revoke the limited probate, and to grant a general probate to the executors without limitation.

*Sir C. Cresswell*: Is not the husband always entitled to the general cæterorum grant?

Dr. Spinks: I believe a cæterorum grant is only made when no executors have been appointed, but that when executors have been appointed by the will of a married woman, and such will is made with the husband's consent, the executors are entitled to the grant.

**[217]** *Sir C. Cresswell*: Have you any authority to that effect? A different opinion seems to prevail in the Registry.

Dr. Spinks: I can adduce no authority, but I believe the practice is as I have stated.

*Sir C. Cresswell*: Mr. Justice Williams, in his able work on the "Law of Executors and Administrators," says, "That in order to establish the will of a married woman, the husband's consent to it should be given when it is proved." As in this case, in consequence of the husband's death, such consent cannot be obtained, would not his personal representative be entitled to the cæterorum grant?

Dr. Spinks: Yes; if there were property of the wife's other than that disposed of by the will, but not otherwise. However, a proxy of consent to the probate of this will being granted, has been executed by the personal representative of the husband, and is in Court, but has not yet been stamped.

*Sir C. Cresswell*: I am informed by the Registrar that it is not the practice to grant general probate of the will of a married woman, but that it must be limited to such property as she has the power to dispose of; and also that if the husband were living, and were to go with the executors to the Registry, and consent to a general grant being made, the grant would in form be a general grant of administration with the will annexed, and not of probate, because, as stated by Williams, J., by his consent the husband waives his rights to administration. With the proxy of consent by the husband's representatives, the executors must, in some form or other, be entitled to represent the wife, and, in virtue of that representation, take all her property. Upon such proxy being left in the Registry I will revoke the probate, and decree a general **[218]** grant of administration, with the will annexed, to be granted to the executors.

The grant was made as follows:—

"The Judge having read the affidavits of," etc. . . . "revoked the probate of the last will and testament of the said Eleanora Reay (wife of Stephen Reay), deceased, heretofore granted, to wit, on the 17th of May, 1861, at the District Registry attached to the Court at Oxford, under certain limitations, to the said Henry Hargreaves and George Hargreaves, the executors therein named, and decreed letters of administration, with the said will annexed, of all and singular the personal estate and effects of the said deceased to the said Henry Hargreaves and George Hargreaves, the executors named in the said will, on giving the usual security; the said Stephen Reay, the lawful husband of the said deceased, having survived the said deceased, and Isabella Douglas, the administratrix of all and singular the personal estate and effects of the said Stephen Reay, having consented."

IN THE GOODS OF GLASTONBURY NEVILLE (deceased). January 31, and March 2 and 23, 1859.—Military Will.—Proof of Signature of Testator.—Rules.—Practice.—Where a Will made by an officer whilst engaged on active military service was signed by him, but not attested, the Court required, in accordance with the practice of the Registry, that there should be an affidavit of two disinterested persons, stating in terms the signature to be in his handwriting, and that the form for an affidavit given in the Rules should be strictly followed.

[S. C. 28 L. J. (P.) 52.]

Glastonbury Neville, late a lieutenant in the Royal Engineers, was killed in action, January 31, 1858, at Barodia in **[219]** the East Indies, being a bachelor. While serving in the Crimean War, in 1855, he made a will and codicil. The will, commencing, "Camp before Sebastopol, April 2nd, 1855," was written on three sides of a sheet of note-paper, with the testator's signature at the end of the second side, but not at the end of the third side. On the fourth side was endorsed "My will, G. Neville, April 2nd, 1855." The codicil was written on the fourth side, and was dated June 7th, 1855, but was unsigned. The testator had told his brother, Lieut-Col. Neville, in April, 1855, that he had made his will, and had then shewn to him, as he believed, the will in question.

January 31.—Mr. J. B. Karslake moved for administration, with will annexed, to be granted to Lieutenant-Colonel Neville as a legatee.

*Sir C. Cresswell*: There is a difficulty in my granting this motion. The only person who makes an affidavit of the will and codicil being in the handwriting of the deceased, is Lieut.-Col. Neville, who takes an interest under the will as a legatee. When it is necessary to prove the signature to a will to be in the testator's handwriting, the rules require this to be proved by the affidavit of two disinterested persons.

Motion adjourned.

March 2.—Dr. Spinks renewed the motion.

*Sir C. Cresswell*: The further affidavits are defective. They do not follow the Form 24, given in the rules for an affidavit of handwriting. Again, one of the deponents, Col. Chapman, does not state how he became acquainted with the deceased's handwriting, and neither of the deponents state in terms that the name of the deceased, which is at the end of the second and third pages of the will, is in his handwriting. The invariable practice of the Registry is that the affidavit **[220]** should in terms state the signature to be in the handwriting of the deceased.

Dr. Waddilove renewed the motion on fresh affidavits.

*Sir C. Cresswell* granted the motion.

IN THE GOODS OF WILLIAM HACKETT (deceased). February 9, 1859.—Military Will.—Practice.—Rules for Non-contentious Business, R. 59 (1857).—Where a Will made by a soldier while engaged on active military service was signed by his mark, before the Will can be proved an affidavit must be filed in the Registry in compliance with the rules, that the deceased had at the time of its execution a knowledge of its contents.

[S. C. 28 L. J. (P.) 42.]

William Hackett, late of the 60th Rifles, died on the 17th of September, 1857, at Delhi, of wounds received during the siege of that place. He left a will made while in active military service, which he executed by affixing his mark, and which was attested by two witnesses, who were supposed to be still in India. The Registrar had refused to grant letters of administration with the said will annexed, on the ground that it was on the face of it the will of an illiterate person, and that, therefore, there should be an affidavit of its having been read over to the deceased before execution, in compliance with Rule 59 (1857).

Dr. Wambey moved for the grant. Rule 59 was not intended to apply to the wills of soldiers made on active military service. The spirit of legislation for centuries has **[221]** been to exempt such wills from the formalities required in the case of other wills.

*Sir C. Cresswell*: Rule 59 is in general terms and applies to wills made by soldiers, as well as to wills made by other persons. A hardship may occasionally result from adhering strictly to the rules, but I have no authority to dispense with them. As the testator executed the will as a marksman, he is an illiterate person within the meaning of the rule, and I cannot make the grant until I am satisfied that he had at the time of its execution knowledge of its contents. If in any way I am satisfied of that fact, I will decree administration as prayed.

THE QUEEN'S PROCTOR *v.* WILLIAMS. March 18, 1862.—Trial by Jury.—Interest Suit.—Pedigree.—In an interest suit in which a question of legitimacy was raised between a person claiming to be the lawful nephew and next of kin of a deceased intestate and the Queen's Proctor, the Court directed the issues joined to be tried by a jury, on the application of the next of kin, although the application was opposed by the Queen's Proctor.

[S. C. 31 L. J. (P.) 86.]

This was an interest suit.

The Queen's Proctor, on behalf of the Crown, alleged that Mary Emsley, the deceased, died a bastard, intestate, and a widow. The defendant Samuel Williams alleged that he was the lawful nephew and next of kin of the deceased.

Dr. Spinks, for the Queen's Proctor, moved that the case might be heard before the Court without a jury. It was a **[222]** question of pedigree, for which a jury was not the most satisfactory tribunal. The 35th section of the Probate Act (20 & 21 Vict. c. 77) gave the Court a discretion as to the trial of questions of fact by jury, except in cases where the heir-at-law intervened. In those cases the trial by jury was compulsory.

Dr. Wambey, for the defendant, moved for a jury. The defendant claimed to be heir-at-law, although he did not allege it in the pleadings.

*Sir C. Cresswell*: I think the leaning of the statute is in favour of trial by jury.

Order that the issues should be tried by a jury accordingly.

(Before *The Judge Ordinary.*)

BAYLEY *v.* BAYLEY. November 16 and December 7, 1859.—Sequestration Attachment.—Writ of Assistance.—Practice.—A writ of sequestration having been issued to enforce an order for the payment of costs, the sequestrator demanded possession of the property, which was in the hands of parties holding under the person whose estate had been sequestered, and was refused possession. The Court declined to enforce the sequestration by an attachment against those parties, but granted a writ of assistance to the sheriff for that purpose.

[S. C. 29 L. J. (P.) 72.]

A writ of sequestration having been granted by the Court to enforce an order for the payment of costs by Bayley, the sequestrator had demanded the rents and profits of the estate, but the parties in possession, who were tenants under Bayley, refused payment.

**[223]** Mr. Baker Green moved for an attachment against the persons who had refused payment of the rents to the sequestrator. The 25th section of the Probate Act (20 & 21 Vict. c. 77) enacted that the Court of Probate should have the like powers, jurisdiction, and authority for "enforcing all orders, decrees, and judgments made or given by the Court under this Act, and otherwise in relation to the matters to be inquired into or done by, or under the orders of the Court under this Act, as are by law vested in the High Court of Chancery for such purposes, in relation to any suit or matter depending in such Court."

*The Judge Ordinary*: A sequestration cannot be enforced in this manner per saltum. An attachment against the tenants is out of the question.

Motion refused.

December 7.—Mr. C. Pollock moved for a writ of assistance. The sequestrator having demanded possession, and having been refused, his proper course was to ask the assistance of the sheriff to enforce the writ. Not having been able to obtain peaceable possession, the sheriff was required to be present when the writ was enforced, in order that no illegal act might be committed. (Seton on Decrees, p. 425; 2 Daniel's Chancery Practice, 957.)

*The Judge Ordinary*: Can a sequestrator, under a sequestration issued by the Court of Chancery, turn a man vi et armis out of his house, and take possession without any preliminary proceeding in the nature of an ejectment?

Mr. C. Pollock: There is no rule in the books of Chancery practice as to the proper mode of proceeding in a case like the present.

**[224]** *Sir C. Cresswell*: You may have a writ of assistance, and take the consequences, whatever they may be.

Writ of assistance granted.*

IN THE GOODS OF CARMICHAEL (deceased). February 3, 1863.—Survivorship.—Presumption.—Testator and Legatee drowned at same time.—Where the testator and his residuary legatee have been drowned at the same time in the same ship, the legacy is extinguished, and the grant will be made as in case of an intestacy.

[S. C. 32 L. J. (P.) 70; 11 W. R. 462.]

James Carmichael sailed on January 2, 1861, in command of the steam-ship "Vedra," together with his son James Carmichael, who was a petty officer on board her, from Sunderland for Copenhagen. The ship and all the crew were supposed to have been lost at sea. James Carmichael, the father, had left a will, of which he appointed John Gray sole executor and residuary legatee in trust, and his wife, Lettes Carmichael, residuary legatee for life or widowhood, and his son, James Carmichael, residuary legatee after her death or re-marriage. John Gray had renounced his right to the grant, and letters of administration had been granted to Lettes Carmichael, as beneficial residuary legatee for life or during widowhood. She had since married John Burn, whereupon the grant ceased.

Mr. G. S. Percival moved for a grant of cessate letters of **[225]** administration (with will annexed) to Mrs. Burn, as the lawful relict of the deceased. It being impossible to ascertain whether the father or son was the survivor, the residuary bequest over would not take effect, and the deceased was therefore now intestate as to his residuary estate.

---

* A form of a writ of sequestration is to be found in Daniel, Ch. Pr. p. 815 (3rd edit.), and that of an order for a writ of assistance in Seton on Decrees, p. 425.

*Sir C. Cresswell*: Mrs. Burn is entitled to the grant. The only question was, whether Mrs. Burn should take out administration to her son. In Williams on Executors, 5th ed. p. 1084, is this passage:—"It has been established from the earliest periods, both in the Ecclesiastical Courts and in Equity, that unless the legatee survive the testator, the legacy is extinguished; neither can the executors or administrators of the legatee demand the same." And Swinburne puts the case of the testator and legatee being drowned in the same ship, or both being struck to death by the fall of a house; in which case he lays it down:—"That as they both died at the same time the legacy is not due, and consequently not transmissible to the executors or administrators of the legatee." Mrs. Burn, therefore, cannot take the legacy as administratrix of her son, and need not take out administration to him.

Motion granted.

---

## [226] SUPPLEMENT TO CASES IN THE COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

D'OYLEY *v.* D'OYLEY AND BALDIE. March 9, 1859.—Alimony pendente Lite.—Dissolution of Marriage.—Practice.—Alimony pendente lite was allotted after there had been a verdict of adultery against the wife, but before the case came on for a final decree before the full Court.

[S. C. 29 L. J. (Mat.) 165.]

In this case the issue of adultery was tried before the Judge Ordinary and a common jury, who found a verdict against the wife. The case had not yet come before the full Court.

Dr. Addams, Q.C., moved for alimony pendente lite.

Dr. Swabey appeared for the petitioner.

*The Judge Ordinary*: As it may be some time before there is a sitting of the full Court, alimony pendente lite may be allotted.

**[227]** KELLY *v.* KELLY. April 21, 1863.—Alimony pendente Lite.—Wife a convicted Felon.—Alimony pendente lite will be allotted to a wife, even though at the time of the allotment she is in gaol undergoing a sentence for felony.

[S. C. 32 L. J. (Mat.) 181; 11 W. R. 958.]

This was an application for alimony pendente lite in a suit by the husband for a dissolution of marriage. The husband's answer to the petition for alimony was filed on the 19th of March, 1863, and he had since filed an affidavit that the wife was convicted on the 27th of March, 1853, of felony, upon her own confession, and was sentenced to imprisonment for six months with hard labour, which sentence she was now undergoing.

Dr. Spinks moved the Court to allot alimony pendente lite.

Mr. Martin, contrà: The principle upon which alimony is allotted, is that the wife ought not to be left without means of support. This principle has no application in the present case, for the wife is maintained at the expense of the country.

*The Judge Ordinary*: That is no ground for refusing alimony.

Mr. Martin: By the conviction all the wife's property is forfeited to the Crown She, therefore, cannot receive alimony.

*The Judge Ordinary*: Then let the Crown take it. I think she is entitled to alimony. I allot alimony at the rate of £44 per annum, payable monthly.

**[228]** SMITH *v.* SMITH AND TREMSAUX. January 20, 1863.—Alimony pendente Lite.—No Answer filed by Wife.—Where a wife is charged in her husband's petition with adultery, and has filed no answer to it, she is still entitled to have alimony pendente lite allotted to her.

[S. C. 32 L. J. (Mat.) 91; 11 W. R. 257.]

Dr. Spinks moved for an allotment of alimony pendente lite.

Mr. Patchett: The wife has filed no answer in the suit, and her time for answering has expired. She must be taken, therefore, to have admitted the charge of adultery.

*The Judge Ordinary*: During the first year of my presiding in this Court, I think I must have decided in some fifty cases that a wife, when she applies for alimony

pendente lite, must be considered as innocent. Those decisions were in accordance with the practice of the Ecclesiastical Court. There was no appeal from them. I shall therefore adhere to this rule, and make the order.

DAVIS *v.* DAVIS. July 14, 1863.—Permanent Alimony.—Diminution of Husband's Income.—Affidavits.—Where a husband's income has diminished since the allotment of alimony pendente lite, he may, on a motion for permanent alimony, prove such diminution by affidavit.

In this case the Court had allotted alimony pendente lite on an income of £300 per annum upon the husband's answer.

**[229]** Mr. R. Pritchard moved for an allotment of permanent alimony on the same income.

Dr. Deane, Q.C.: The husband has filed affidavits, shewing that his income has diminished since alimony pendente lite was allotted.

Mr. R. Pritchard: He should have alleged this in a petition. The affidavits cannot be used.

*The Judge Ordinary*: I think the affidavits may be used.

PARR *v.* PARR AND WHITE. March 24, 1860.—Attachment.—Non-payment of Alimony.—Office Copy of an Order for Alimony.—Attachment.—Right to Object.—It is competent to a party to object, on a motion for attachment for non-compliance with an Order of the Court, to the sufficiency of the service of the Order on him.—Service of an Order for the payment of Alimony is effected by shewing to the party to be served an office copy of the Order, and by leaving with him a copy of it.

Dr. Spinks moved for an attachment against the husband for non-payment of alimony pendente lite. Service of the order had been effected on the petitioner by leaving with him a copy of the order, and at the same time shewing him the original office copy.

Mr. R. Pritchard: The service was insufficient. The original order should have been produced. In *Davies* v. *Davies*, 2 Swab. & Tris. 437, which was a motion for attachment for **[230]** non-payment of costs, it was held that the original order should be produced.

Dr. Spinks: The original order in this case was entered in the Court Book, and therefore could not have been produced. Moreover, the petitioner, by appearing by counsel, has waived objection to the service.

*The Judge Ordinary*: The petitioner is not precluded from objecting to the sufficiency of the service by his appearing to oppose this application for an attachment. There is this distinction between the case cited and the present one. According to the practice of the Registry, an order for payment of costs is signed by the judge, and that is the original order which is delivered to the party in whose favour it is made; but in the case of alimony, the original order for payment of alimony is entered in the Court Book, and is not signed by the judge. The party in whose favour it is made can, therefore, only have an office copy of it. I think the service is sufficient, and shall grant the attachment.

Motion granted.

SEATEL *v.* SEATEL. July 25, 1860.—Maintenance of Children.—Order for Settlement of Wife's Property.—Power of Appointment.—The Court made an order for the trustees of a wife's settled property, against whom a decree of judicial separation had been pronounced, on the ground of her adultery, to pay a moiety of the income of such property for the maintenance and education of the children.—The Court cannot vary a power of appointment vested in a guilty wife.

[S. C. 30 L. J. (Mat.) 216. See *Michell* v. *Michell*, [1891] P. 208.]

This was a husband's petition for a judicial separation on **[231]** the ground of the wife's adultery. The adultery was proved, on February 18th, 1860; but the decree was suspended in order that an application might be made for the settlement of some property belonging to the wife.

Dr. Phillimore, Q.C., moved, under section 45 of 20 & 21 Vict. c. 85, for an order for a settlement of the wife's property for the benefit of the petitioner and his children.

The respondent did not appear.

The petitioner was a surgeon, dependent on his profession, and the respondent was entitled to £160 a year, the income of £4000, over which she had a power of appointment amongst her five children.

July 25.—*The Judge Ordinary*: I cannot interfere with the power of appointment; that is not the property of the wife. Under the 45th section of 20 & 21 Vict. c. 85, the Court must order a settlement of the property. The language differs from that of 22 & 23 Vict. c. 61, s. 5, which enables the Court "to make such orders with reference to the application of the property settled as to it shall seem fit." The wife's property is the interest of a sum of £4000. If I make an order that a portion of the interest be paid to the husband, upon his death the order would be at an end. But if I order a settlement, and that it be paid to the trustees under it, in the event of their death, the Court of Chancery would appoint others. The opinion of Lord Campbell was, that the 45th section of 20 & 21 Vict. c. 85, gave the Court no power to alter settlements. I think the better course will be, for the petitioner to name a trustee, and then for the Court to order the wife's trustees to pay a certain portion of the interest to that trustee, to be applied to the maintenance and education of the children; or I might order the trustees to retain a **[232]** certain portion of the interest, and apply it for the benefit of the children. The motion had better stand over.

Dr. Phillimore suggested that the petitioner's mother should be the trustee.

July 25.—*The Judge Ordinary*: Though there would be no legal objection to her acting as trustee, it is not usual to have a female trustee.

Mr. F. Russell appeared for the respondent.

Two trustees were afterwards named by the petitioner.

July 25.—*The Judge Ordinary* now said: In this case I shall make an order that the trustees in whom the property to which the wife is entitled is vested, pay over £80 per annum, a moiety of her income, to the trustees who have been named by the petitioner, to be applied by them toward the maintenance and education of the children of the marriage.

HARRIS *v.* HARRIS AND LAMBERT. June 11, 1862.—Collusion.—Dissolution of Marriage.—Respondent assisting in Identification.—Where the respondent, who did not appear, and gave the petitioner's solicitor a photograph to aid in her identification, and attended in Court for the same purpose, for which attendance she received from the petitioner's solicitor £1, the Court having reason to believe that the parties were not acting in collusion, pronounced the decree.

[S. C. 31 L. J. (Mat.) 160.]

In this case the respondent did not appear, but at the hearing it appeared that she had been in communication with the petitioner's attorney, had given him a photograph of her-**[233]**-self to enable him to identify her, and that she was in attendance in the Court at the hearing for the purpose of being identified, for which attendance she had received £1 from the petitioner's attorney.

Dr. Phillimore, Q.C. (Mr. E. Lewis with him) appeared for the petitioner.

*The Judge Ordinary*: I must take time to consider whether the above facts constitute such collusion as to disentitle the petitioner to his decree. Cur. adv. vult.

*The Judge Ordinary*: In this case the adultery was fully established, for it appears that during the absence of the petitioner in Australia, whither he had gone to improve his circumstances, the respondent had been leading a most profligate life; but I reserved my judgment, in consequence of some communication which took place between the petitioner's attorney and the respondent. The respondent had given the petitioner's attorney a photograph of herself to assist in her identification; she also attended in Court at the trial for the purpose of being identified, and for so doing received a small sum of money from the petitioner's attorney. Such communications are always dangerous, and cannot fail to excite some suspicion of collusion. I took time to examine the evidence, and I see no reason to believe that the parties were acting in collusion, and therefore pronounce a decree.

Decree nisi.

**[234]** (Before the Full Court: *Lord Campbell, C.J., Martin, B.*, and *The Judge Ordinary.*)
CURTIS *v.* CURTIS. January 8, 1859.—Condonation not Pleaded.—Cruelty.—Condonation proved at the hearing will be noticed by the Court, although it has not been pleaded.

[Referred to, *Moss* v. *Moss*, [1916] P. 157.]

This was an appeal by the husband against the decree of the Judge Ordinary pronouncing for a judicial separation in favour of the wife, on the ground of cruelty (1 Sw. and Tr. 75). The appellant argued the case in person.

Mr. Forsyth, Q.C., and Mr. Mundell appeared for the respondent.

The principal objections taken by the appellant to the decree were, that the acts of cruelty charged prior to September, 1850, had been condoned by his wife; and secondly, that evidence was received of acts of cruelty done by the appellant in 1857, although the petition contained no charge of cruelty subsequent to June, 1852.

*Lord Campbell, C.J.*: I see no reason to doubt the propriety of the decree for a judicial separation pronounced by the Judge Ordinary. I agree with the conclusions arrived at by the Judge Ordinary, both as to the law and the facts of this case. The law with respect to cruelty and condonation, laid down by the learned Judge, has not been disputed by the appellant, and is perfectly sound. There being, then, no question as to the law laid down, we have only to apply it to the facts proved at the hearing. It seems to me that Mr. Curtis was proved to have been guilty of conduct at times when he was responsible for his acts, both before he went **[235]** to America and after his return, which amounted to legal cruelty. I agree with the Judge Ordinary, that, if there had been proof at the hearing that the cruelty had been condoned, the Court would, even without a plea of condonation, be bound to take notice of the condonation; but I found no proof of such condonation. The conduct of Mr. Curtis, after he returned from Spain, was such upon the evidence as to remove the effect of any previous condonation, and amounted in itself to sævitia. I refer to his conduct when he went over to Ireland. From his own account, his then state of mind, as evinced by his actions and words, was such as to render it impossible for Mrs. Curtis, with any regard to her own safety, to live with him again. He acknowledged to have said to her, in the interview he had with her at her father's house in Ireland, "May God curse you, and may God curse your father." This expression, coming from a man who made a great profession of his religious and Christian conduct (in which I have no doubt he is quite sincere), shows clearly that Mr. Curtis has no control over his feelings or words. Mrs. Curtis, after such an interview, could not with propriety have consented to have returned to him. It appeared, too, that this was not a sudden ebullition of passion, afterwards repented of; for, subsequently, when Mrs. Curtis, in order to escape from him, had assumed another name, he issued placards, giving a most degrading description of her, and in doing so, says that he acted under advice. I feel no doubt that it is impossible for Mrs. Curtis to continue further cohabitation with her husband with safety to herself, and the decree for a judicial separation will therefore be affirmed.

*Martin, B.*, concurred.

Decree affirmed.

**[236]** HOOKE *v.* HOOKE. December 20, 1858.—Confrontation.—Dissolution of Marriage.—Practice.—The Court has no power to decree confrontation in a suit for dissolution of marriage, for the purpose of identification.

[S. C. 28 L. J. (Mat.) 29.]

This was a petition for dissolution of marriage on the ground of the wife's adultery, who had filed an answer.

Dr. Spinks moved for an order to be made on the respondent to attend to be confronted with the petitioner's witnesses for the purpose of her identification.

Mr. Geo. Brown, contrà. By the practice of the Ecclesiastical Courts, a decree of confrontation was only made in a suit for nullity of marriage. The 22nd section of the Divorce Act, which directs this Court to follow the practice of the Ecclesiastical Courts, excepts from its operation suits for dissolution.

*The Judge Ordinary*: The practice of the Ecclesiastical Courts to decree confrontation, does not apply to a suit for dissolution. By giving the Court, under the 43rd section of 20 & 21 Vict. c. 85, express power to order the petitioner to attend at the hearing, the Legislature seems to have assumed that, without express power, the Court could not compel the attendance of the parties. It might have, but has not, given a similar power to compel the attendance of respondents.

**[237]** NORRIS *v.* NORRIS, LAWSON, AND MASON. January 28, 1861.—Costs.—Condonation.—Co-respondent.—Where a husband has condoned adultery com-

mitted with a co-respondent, which has been revived by adultery committed by another person, costs will not be given against the co-respondent whose adultery was condoned.

[S. C. 30 L. J. (Mat.) 111. Distinguished, *Pomero* v. *Pomero and Hadley*, 1884, 10 P. D. 174. Discussed, *Bernstein* v. *Bernstein*, [1893] P. 292.]

The respondent in this case was guilty of adultery with Lawson in 1851, which was condoned by the petitioner. In October, 1857, she eloped with the co-respondent, Mason.

The adultery with Lawson in 1851 was proved, and there was evidence of adultery with Mason against the respondent, but not against Mason himself.

*The Judge Ordinary*: The petitioner is entitled to a decree nisi for dissolution of the marriage against the respondent, but there is not sufficient evidence to justify a decree as against Mason.

Dr. Spinks asked for costs against Lawson. Condonation of the adultery with Lawson would be a bar to a suit by the husband against her, but it would not affect his remedy against the adulterer.

*The Judge Ordinary*: I cannot condemn Lawson in costs. The petitioner, by condoning his wife's adultery with Lawson, has waived all right to any proceedings against him in this Court. The usual course is to grant costs against a co-respondent when his conduct has made a suit necessary. Here the wife's subsequent misconduct, and not her adultery with Lawson, rendered the suit necessary.

Decree nisi: no order as to costs.

**[238]** (Before the Full Court: *The Judge Ordinary*, *Channell*, *J.*, and *Keating*, *J.*)

PRISKE *v.* PRISKE AND GOLDBY. January 23, 1860.—Costs.—Co-respondent.—Where there was no evidence to show that the co-respondent when he first formed the connection with the respondent, knew that she was a married woman, the Court refused to condemn him in costs.

[S. C. 29 L. J. (Mat.) 195. Referred to, *Butterworth* v. *Butterworth*, [1920] P. 155; *Cramp* v. *Cramp and Freeman*, ibid., 159.]

This was an undefended case. The adultery was proved, and the decree pronounced.

Dr. Spinks, for the petitioner, asked for the co-respondent to be condemned in costs.

*The Judge Ordinary*: If it had appeared that the co-respondent at the time when his connection with the respondent began, knew that she was a married woman, living apart from her husband, and receiving an allowance from him, the Court would decidedly have condemned him in costs. But it appears that the respondent was a dissolute woman, of drunken and profligate habits, and that she had been separated a considerable time from her husband when she met with Goldby: and there is nothing to shew that he had the least knowledge as to who or what she was when he met with her, except that she was disposed to become a prostitute.

*Channell*, *B.*, concurred.

*Keating*, *J.*: I entertained considerable doubt whether the co-respondent ought not to pay costs, in consequence of an expression which one of the witnesses heard him use, that **[239]** "he found it very convenient to have a little allowance." But it is better to adhere to the strict rule; and on the whole, I agree with the Judge Ordinary that the case is not within it.

Marriage dissolved, without costs against co-respondent.

(Before the Full Court: *Cockburn*, *C.J.*, *Whiteman*, *J.*, and *The Judge Ordinary*.)

KAYE *v.* KAYE. June 14, 1858.—Costs.—Practice.—Dissolution Decreed in favour of Wife.—A wife, in whose favour a decree for a dissolution of marriage is made, is entitled to costs against her husband, where no order has been made.

[S. C. 27 L. J. (Mat.) 54.]

The Court in this case had pronounced a decree dissolving the wife's marriage on the ground of her husband's adultery and desertion.

Mr. Overend, Q.C. (Dr. Spinks with him), asked the Court to condemn the respondent in the petitioner's costs.

*The Judge Ordinary*: The petitioner is entitled to her costs as a matter of course in this case, without any order of the Court. Such was the practice in the Ecclesiastical Courts, where the wife was the successful suitor, and though this Court

has, under the 51st section of 20 & 21 Vict. c. 85, a discretionary power as to ordering the payment of costs, yet, where no order is made, the practice of the Ecclesiastical Court as to costs will be adhered to.

**[240]** *Cockburn, C.J.*: Where the Court pronounces a decree for a dissolution of marriage in favour of the wife, and makes no order as to costs, they will follow the decree as a matter of course.

MILNER *v.* MILNER. July 27, 1861.—Cruelty.—Treating a Wife as a Prostitute in the Street.—Where a husband assaulted his wife in the street in such a manner as to induce a passer-by to believe her to be and to treat her as a prostitute.—Held, that although the respondent had inflicted no personal injury upon her, yet that he was guilty of cruelty.

[S. C. 31 L. J. (Mat.) 159. Discussed, *Russell* v. *Russell*, [1897] A. C. 395.]

This was a wife's petition for dissolution of marriage, on the ground of cruelty and adultery. The evidence of cruelty was substantially as follows:—The parties were married in 1843. In 1846 the respondent in a quarrel struck the petitioner with a slipper upon her back, and in another quarrel in the same year he struck her across the shoulders with a leather strap. He constantly neglected her. In April, 1858, whilst they were staying in the house of a friend in London, the petitioner insisted upon accompanying the respondent against his will on a certain occasion when he was leaving the house. They went together in an omnibus to the City, and upon getting out she followed him to Fenchurch Street, when he turned round and said she should go no further, and taking her by the shoulders and making use of the most filthy language, he pushed her against the wall, and thrust his umbrella against her person. The blow inflicted no pain, but in consequence of his conduct a man passing by at the time took her for a prostitute, and seized hold of her **[241]** leg. She being indignant at this treatment, released herself from her husband's grasp, and returned to the friend's house. She lived with him for a month afterwards, and then left him. The friend at whose house she was staying was examined, and stated that she remembered the petitioner coming home on the night of the assault much distressed, and that the respondent had stated to her that he had been served with the petition in this suit, and that his conduct on this occasion, as stated in the petition, looked very ugly in black and white.

Dr. Phillimore, Q.C., and Mr. R. Pritchard for the petitioner.

The respondent did not appear.

*The Judge Ordinary*: A man who has insulted his wife by treating her in the street like a common prostitute is guilty of at least as great an indignity as if he had spat in her face. I can imagine nothing more insulting or shocking to a woman of proper feeling than being so treated. If there had been no evidence but that of the petitioner's, I should have felt some doubt, whether the respondent had been guilty of the act imputed to him. But that act was described in detail in the petition as an act of such a character, and done in such a manner, as to hold out to passers-by that he was dealing with a common prostitute. The respondent on reading that petition said, "It was all true, and that it did look ugly enough in black and white," and he does not now appear to defend himself. It is a case of the grossest and most abominable cruelty, and, combined with the adultery, entitles the petitioner to a decree of dissolution of marriage.

Decree nisi, with costs.

**[242]** (Before the Full Court: *The Judge Ordinary, Bramwell, B.*, and *Byles, J.*)

MACDONALD *v.* MACDONALD. November 19, 1859. — Desertion. — Effect of an Allowance to Wife by Husband.—A wife is entitled to the society and protection of her husband, and if, after refusing to live with her, he gives her an allowance, the payment of such allowance to her is no answer to the charge of wilful desertion.

This was the wife's petition for dissolution of marriage on the ground of adultery and desertion.

Dr. Phillimore, Q.C., and Mr. J. D. Coleridge appeared for the petitioner.

The respondent had entered no appearance.

The parties were married in the Bombay Presidency in 1847, the petitioner being a member of a Scotch family, and the respondent a lieutenant in the 22nd Regiment,

Bombay Infantry. They lived in harmony in India until February, 1852. Shortly before this, the respondent, who through reckless extravagance had become greatly involved, was imprisoned at Bombay for debt, when his wife lived with him and nursed him in gaol. On his release in February, 1852, he supplied her with funds, and sent her home in order that she might get assistance from their friends in England to enable him to remain in the army. During her absence in England he sold out of the army, and proceeded to Australia, and wrote to request her to join him there. She accordingly went out to Australia, and found him there living with another woman as his wife, and he, after repeated applications from the petitioner, refused to live with her. Some correspondence was put in evidence, from which, as well as from the peti-**[243]**-tioner's own evidence, it appeared that the respondent had engaged to make her an allowance.

*The Judge Ordinary* (after consultation): We have been considering whether the circumstance of a husband supplying a wife, whom he has abandoned, with an allowance is a good answer to a charge of wilful desertion, and we are of opinion that it is not. A wife is entitled to the society and protection of her husband, and we think, that he is not to be permitted, after having refused her his society and protection, to turn round and say that he has not been guilty of wilful desertion, merely because he has made her an allowance.

Upon hearing further evidence, a decree was pronounced in favour of petitioner upon the ground of adultery and desertion.

SOPWITH *v.* SOPWITH. December 23 and 24, 1859.—Direct Evidence of Adultery.—Employment of Private Detectives.—In support of a petition by a wife for a judicial separation, direct evidence was given of several acts of adultery committed by the husband; but, in consequence of the improbability of that evidence, of the discrepancies in the statements of the witnesses, and of the improper manner in which it had been got up by the private detectives employed by the petitioner, the Court refused to act upon it, and dismissed the petition.

The petitioner, Matilda Sopwith, alleged a marriage with Henry Lidsell Sopwith, in June, 1857, and cohabitation until May, 1858; and charged him with divers acts of adultery with Mary Ann Prickett in 1858 and subsequently, and **[244]** prayed for a judicial separation. The respondent pleaded a denial of the adultery charged.

Mr. Sopwith was a surgeon, who had practised at Tunbridge Wells for 25 years. At the time of his marriage with the respondent he was a widower, his age being about 50; and he had a daughter residing with him who had attained her majority. The petitioner was 35 years of age; she was the daughter of a Mr. and Mrs. Deane, and she made the acquaintance of Mr. Sopwith in 1856, when she was staying with her father and mother at Tunbridge Wells, through his attending her in an illness. After the marriage Mr. and Mrs. Deane continued to live near them at Tunbridge Wells, and they were all for a short time on friendly terms. In the course of a few months complaints were made by Mr. and Mrs. Deane that Mr. Sopwith did not pay sufficient attention to his wife, and by Mr. Sopwith that Mr. and Mrs. Deane did not treat him with proper kindness and respect. On the 18th of May, 1858, Mrs. Sopwith, with her husband's sanction, accompanied Mr. and Mrs. Deane to Cheltenham to stay for a few days, and the following day she wrote to him in affectionate terms, giving an account of her journey and of the place where she was staying. He returned an answer, also in affectionate terms, but referring to the conduct of her father and mother, and mentioning one or two particulars of their behaviour to him, of which he thought he had a right to complain; and he said, "I shall, on your return, expect you not to visit them, nor they you." Mrs. Sopwith in her reply accused him of want of affection in wishing to deprive her of the society of her parents, and suggested a separation. Some further correspondence passed, and Mrs. Sopwith never returned to her husband's house. With the sanction of her father and mother, she engaged a private detective named Shaw, and afterwards another named Topp, to make inquiries at Tunbridge Wells with respect to Mr. Sopwith's mode of life; and in consequence of the evidence they collected the **[245]** present petition was presented in June, 1859. The person with whom the adultery was charged to have been committed was a young woman of 24 years of age, Mary Ann Prickett, who went into Mr. Sopwith's service at the age of 14, when his first wife was alive, and remained in it until May, 1857, with the exception of two years, when she was obliged to stay at home from ill-health;

she then went to London to assist in carrying on a millinery business, and returned to Tunbridge Wells in January, 1858, in order to see her father who was then on his death-bed, and lived in the house adjoining Mr. Sopwith's house, and remained there and re-entered Mr. Sopwith's service.

Dr. Phillimore, Q.C., and Dr. Spinks, for the petitioner.

Mr. K. Macaulay, Q.C., and Dr. Wambey for the respondent.

December 24.—*The Judge Ordinary*: This is a case of very great importance; perhaps of more importance to one of the parties than to the other, and I have considered it with much anxiety. Last night, after the bulk of the evidence for the petitioner had been given, I examined it carefully, minutely, and I hope dispassionately; and having now heard the evidence on the other side, and the very able addresses of the learned counsel, I have formed a very decided opinion upon the case, and I think I am bound to express it at once, without going through the form of taking time to reconsider it.

The case is an unhappy one. It appears that Mr. Sopwith was married in 1857; that in 1858 his wife's father and mother were residing at Tunbridge Wells, and that an estrangement arose between him and his wife and her parents. The estrangement appears to have been carried to much greater lengths between Mr. Sopwith and the father and the mother than between him and his wife; and it is possible that a little more consideration and conciliation on the part of Mr. and **[246]** Mrs. Deane would have prevented his parting with them upon bad terms when his wife went with them to Cheltenham, and if so the unfortunate discussion about a separation that followed would never have taken place. That discussion, however, did take place; and Mr. and Mrs. Deane and Mrs. Sopwith, being all arrayed hostilely against Mr. Sopwith, began to cast about for some explanation of his apparent coldness towards his wife. Naturally enough, they hit on the idea that he preferred some other woman; and accordingly one Shaw, a professed discoverer of malpractices of that sort, was employed to find out, if he could, some delinquency on the part of Mr. Sopwith. No suggestion was made from the beginning to the end of the case that the least suspicion existed in their minds, or that there was the slightest foundation for any suspicion against Mr. Sopwith up to that period. Mr. Deane's statement upon this point appeared to me so extraordinary, that although I believed I had accurately written upon my notes the date he gave for the employment of Shaw, I could not persuade myself that I had not been mistaken; but when I questioned him to-day he repeated that his daughter told him as early as August, 1858, that she had communicated with Shaw. Shaw, a person professionally employed in such matters, was at work from August, 1858, to June, 1859, without producing any result at all.

I feel bound here to make one or two observations upon the subject of the employment of men of the class to which Shaw belongs. They may be very useful for some purposes,—they may be instrumental in detecting malpractices which would otherwise remain concealed, but they are most dangerous agents. I say it advisedly,—it is my opinion, that they are most dangerous agents. Police detectives are most useful; they are employed in a government establishment, they are responsible to an official superior, they have no pecuniary interest in the result of their investigations beyond the wages they receive for the occupation that they follow, and they may **[247]** be and are constantly employed, not only with safety, but with benefit to the public. But when a man sets up as a hired discoverer of supposed delinquencies, when the amount of his pay depends upon the extent of his employment, and the extent of his employment depends upon the discoveries he is able to make, then that man becomes a most dangerous instrument.

Shaw not having been sufficiently clever, or sufficiently vigilant, another person was set to work to make discoveries; and that man, Topp, appears to have been intrusted by the attorney for the petitioner to do that duty which properly belonged to the attorney. He has had the seeking out of all the witnesses, he has had communications with them again and again, three or four times repeated, and it is not until the last moment, after the briefs have been prepared, that the attorney's clerk sees and examines them. I trust the time is far distant when professional men, educated for their profession, and admitted on the rolls of the Courts, to which they are responsible for their conduct, will abandon their proper functions into the hands of such persons as appear to have been engaged in getting up this case.

[The learned Judge then proceeded to comment on the evidence given by the

petitioner's witnesses.] One of them is a man of the name of Buss, who has been a coachman in the employ of Mr. Sopwith, and stated that he had on one occasion, when looking through a keyhole, seen Mr. Sopwith kiss Mary Ann Prickett, and that on another occasion he had seen Prickett go with Mr. Sopwith into his house late at night, and had afterwards seen the figures of two persons, that of a male and female, undressing in Mr. Sopwith's bedroom. There were other witnesses who spoke to having frequently seen Mr. Sopwith go to Mary Ann Prickett's house, and also to having seen them together one night under suspicious circumstances on a Common near the house; and one boy deposed to having witnessed an act of adultery, if he were right as to identity? [The learned Judge, having commented **[248]** on the improbabilities and contradictions which appeared in the evidence of these witnesses, proceeded :—]

In one of the first cases I ever heard tried, I remember that half-a-dozen witnesses swore point-blank to something that they said they had seen, but the learned judge told the jury,—"It is not enough that witnesses should swear to that which is possible; the least we can expect is that they should swear to something that is rather probable." The character of a decent man would be in much peril if on such testimony as this, and contrary to all probability, the Court could arrive at the conclusion of his guilt. A vast deal of the evidence against Mr. Sopwith I throw overboard without any hesitation as unworthy of credit. What is the evidence on the other side? The people of the house to which he is said to have resorted so often give an account of the occasions on which he went there. The young woman with whom he is alleged to have committed the adultery has been exposed to the test of cross-examination, and has undergone it very satisfactorily, and she gave a reasonable account of the cause of her visits to his house. Comparing their evidence with that of the witnesses for the petitioner, and thinking that the case of the petitioner has been intrusted to hands that ought never to be employed in preparing cases of this kind for trial, I am not at all satisfied that the petitioner has established such a case as she was bound to establish against the respondent in order to entitle her to a decree. I therefore dismiss Mr. Sopwith from the suit.

Petition dismissed.

*The Judge Ordinary*: I find I cannot condemn the petitioner in costs. It is very hard upon Mr. Sopwith, but he must suffer.

**[249]** CARTLEDGE *v.* CARTLEDGE. May 6, 1862.—A Wife's Suit for Judicial Separation turned into a Suit for Dissolution of Marriage.—Re-service of Petition.—Where both parties are before the Court, a wife's suit for judicial separation may be turned into one for a dissolution of marriage without issuing a fresh citation, but there must be a re-service of the petition on the respondent.

The wife had filed a petition for judicial separation, on the ground of cruelty. The husband had filed an answer denying the cruelty.

Dr. Spinks moved for leave for the petitioner to amend her petition by alleging adultery which had been committed by the husband before, but had come to the knowledge of the petitioner after the commencement of this suit, and to substitute a prayer for the dissolution of the marriage.

*The Judge Ordinary*: Can a suit for judicial separation be turned into one for a dissolution of marriage? Should not a fresh citation be issued?

Dr. Spinks: Not by analogy to the practice of the Ecclesiastical Court, both parties being before the Court. In a suit for restitution of conjugal rights, the other party might answer and pray for a divorce à mensâ et thoro.

Aspland, contrà.

*The Judge Ordinary*: I must consider whether a fresh citation is not necessary.

Cur. adv. vult.

*The Judge Ordinary*: I have felt some difficulty in this matter. A case somewhat similar in its circumstances was **[250]** before the Court recently, but the application was of a different character. I was asked to grant the petitioner leave to withdraw his petition, and file a fresh one. I granted the application as a matter of course, upon certain terms. It occurred to me that there might be this objection to granting the present application; that if I did so, and a decree should be made, it might hereafter appear from the papers in the suit filed in the Registry that a decree of dissolution of marriage had been pronounced, whereas, the citation was to answer a petition

for judicial separation. I think, however, that no such inconvenience would result, inasmuch as the order of the Court allowing the amendment would be filed, and it would appear upon the face of the papers that the original suit had been altered into one for dissolution of marriage; I think, therefore, that the amendment asked may be made, but the petition, when amended, must be reserved. The costs of the motion must not be taxed against the husband.

Motion granted.

CIOCCI *v.* CIOCCI. November 13, 1859.—Divorce à mensâ et thoro.—Judicial Separation.—Adultery.—Petition by a wife divorced à mensâ et thoro by an Ecclesiastical Court.—A wife who had obtained a decree from the Consistory Court of London for a divorce à mensâ et thoro, on the ground of adultery, filed a petition for a judicial separation, containing the same allegations as those on which the former decree was founded. The Judge Ordinary did not decline to receive the petition, but intimated a doubt whether he had jurisdiction to re-hear the case.

Mrs. Ciocci instituted a suit against her husband in the Consistorial Court of London for a divorce à mensâ et thoro, **[251]** on the ground of adultery and cruelty The husband appeared and denied these charges, and the Court, after evidence and argument, pronounced for the prayer of the wife, on the ground of adultery but not on that of cruelty. (1 Spinks, p. 121.) She had since filed a petition in this Court for a judicial separation, on the ground of adultery, in which she alleged the same facts as those upon which the decree of the Consistory Court was founded.

Dr. Phillimore, Q.C. (Dr. Tristram with him), moved, under the 5th section of the 21 & 22 Vict. c. 108, that the evidence taken in the suit in the Ecclesiastical Court might be used in support of the petition for a judicial separation. The object of the petitioner was to obtain protection for her property.

*The Judge Ordinary*: I doubt whether you can call on this Court to re-hear all the divorce cases which have been decided in the Ecclesiastical Courts whenever a petitioner thinks some advantage can be gained by a decree of this Court. She perils nothing, for if I dismiss her petition she still remains divorced. My present impression is against the jurisdiction of the Court to try over again cases which have been tried in the Ecclesiastical Courts. The proceedings in those Courts were a necessary preliminary to an application to the House of Lords, and the jurisdiction of this Court is substituted for that of the House of Lords in cases of dissolution of marriage. I shall not refuse to receive the petition, but I hope when it comes on for hearing, the question will be fully discussed, as it is one of considerable importance. I dare say there are many cases in which wives will be anxious to avail themselves of the powers of this Court, which are beyond those of the Ecclesiastical Court, as to custody of children and giving them the control of their property.

Application granted.

**[252]** The case was not proceeded with, in consequence of an arrangement come to between the parties.

THE COUNTESS OF LIMERICK *v.* THE EARL OF LIMERICK. February 15, 1863.—Evidence.—Marriage in a British Colony.—Proof of the solemnization of a marriage in a British Colony by a clergyman of the Church of England, according to the rites of that Church, is sufficient evidence of a marriage for the purposes of a divorce.

[S. C. 32 L. J. (Mat.) 92; 11 W. R. 503.]

This was a petition of the Right Honourable Margaret Jane, Countess of Limerick, for a judicial separation from the Right Honourable William Tennyson Terry, Earl of Limerick, by reason of his adultery. The respondent had appeared, but had not filed an answer.

Dr. Wambey appeared for the petitioner.

Mr. Herbert, for the respondent.

The adultery was proved, and the only point raised was, whether the evidence of the marriage in Norfolk Island was sufficient.

Captain Horsley, the petitioner's father, stated:—

"In 1842 I was stationed with my regiment, her Majesty's 96th Foot, in Norfolk Island. The respondent was then holding a Government appointment there. I was

present at his marriage with the petitioner, who is my daughter, and which took place on the 6th of April, 1842, in a room there used for the purpose of celebrating marriages. The Divine Service for civilians was held in this room, but Divine Service for the troops was held in the barracks. The cere-**[253]**-mony was performed by the Rev. Mr. Naylor, a clergyman of the Church of England, according to the rites and forms of the Church of England. My daughter and Lord Limerick afterwards lived together in Norfolk Island and in England as man and wife.

"The signature to the certificate is that of the clergyman who performed the ceremony. I know his handwriting."

*The Judge Ordinary*: Can you shew that the register of which the certificate is a copy was kept in obedience to any law?

Dr. Wambey: No. The Common Law of England, as it existed before Lord Hardwicke's Act (26 Geo. II. c. 33), prevails with regard to marriages celebrated in British Colonies, unless varied by the local legislatures. "Semper præsumitur pro matrimonio." (*Catterall* v. *Catterall*, 1 Robert. 180.)

*The Judge Ordinary*: Can I take judicial notice of the law of a Colony of which there is no evidence? I will consider whether the proof of the marriage is sufficient.

Cur. adv. vult.

*The Judge Ordinary*: The Marriage Act, 4 Geo. IV. c. 76, has made no alteration in the law as it previously stood with regard to the question under consideration. Norfolk Island is a Colony planted by this country, and the Common Law, therefore is in force in it. The proof of the fact of the marriage is, therefore, sufficient, and the petitioner is entitled to a decree.

**[254]** (Before the Full Court: *The Judge Ordinary*, *Channell*, *B.*, and *Keating*, *J.*)

ABBOTT *v.* ABBOTT AND GODOY. January 20, 1860.—Evidence.—Marriage in Chili.—Proof of a marriage in Chili was established by the production of a certified extract of the entry of the marriage in the Marriage Register, proved to be kept in Chili, in compliance with the requirements of the laws of Chili, and to be admissible in evidence in Chili, upon the Court being satisfied of the identity of the parties named in the certificate, and of the curate rector who gave the certificate.

[S. C. 29 L. J. (Mat.) 57.]

Dr. Twiss, Q.C., and Dr. Tristram appeared for the petitioner.

No appearance had been entered by the respondent or co-respondent.

The marriage in this case was celebrated at Santiago, in Chili, and the only point raised was, whether the evidence adduced in support of it was sufficient.

John Sewell stated:—"I was formerly a merchant at Valparaiso. The petitioner and respondent were married at Santiago. I was not present at the marriage, but I frequently saw them before and after the marriage. I first went to Chili thirty-seven years ago. All marriages contracted there are inserted in a parish book; and if a certificate of a marriage is wanted, it can be obtained on request or by petition. I believe it is the law of Chili that a book is to be kept for the purpose of registration, whenever marriages are contracted there. I know as a fact that the register book is kept."

**[255]** Dr. Twiss: The course I propose to adopt will be to satisfy the Court that the register book would be admissible in evidence, if produced from the proper custody, and then to tender an extract from it of the entry of the marriage in question, certified by the officer who has the custody of it. This certified extract will be good evidence under 13 & 14 Vict. c. 99, s. 14.

*The Judge Ordinary*: That section is limited in its application to books or documents that would, per se, be evidence in this country when their character is proved. I do not say that if you had the book here, and you proved by proper evidence that it was a book kept in the execution of a public duty by an officer of the Government of Chili, it would not be admissible; but at all events, before you can prove a copy, you must prove that it is a copy of an instrument that would be evidence in this country, if it were here. It is not sufficient to prove that it would be evidence in a foreign country.

Dr. Twiss referred to the *Taff Peerage Case* (not reported), in which a witness was called conversant with the law of the country in which the marriage was contracted, who stated on oath, from his own knowledge, that by the law, certain books, if produced in a Court of Justice would be received as evidence.

*The Judge Ordinary*: It may be, that if the book was kept by a public authority

abroad, that would be sufficient. If you could prove that the law of Chili requires every person who celebrates a marriage to make an entry of it at the time, and you produced the book containing an entry of the marriage, and shewed that it was made by the proper officer in pursuance of the duty cast upon him by the law, his record of [256] the marriage would be admissible, without calling for evidence that it actually took place.

*Keating J.*: In *Biddulph* v. *Lord Camoys* (not reported), it was necessary to prove a marriage in France, which was celebrated before the Revolution. It was proved by French advocates that registers of marriage were kept at Lille by official authority, and that those registers were authentic documents both before and since the Revolution, and copies of the documents were admitted in evidence.

Witness: "A book is kept in every church. I was married in Chili myself, and my marriage was entered in the same way. The book is in the legal custody of the curé, and is kept by the sacristan, who is the curé's servant. The curé, or rector, is bound to keep it."

A certificate of the entry of the marriage was then put in purporting to be signed by the curate rector, whose signature was certified by a public notary; the notary's certificate being countersigned by the British Consul in Chili.

*The Judge Ordinary* to Witness: This certificate purports to be signed by the rector. Do you know him by name?

Witness: "I know that there is such a person. The certificate is received as evidence of a marriage in Chili."

*The Judge Ordinary*: The fact of its being admissible in foreign courts may be necessary to prove that it is an authorized register to give it a character, but it would not be admissible here simply because it is admissible in foreign courts.*[1] [257] Do you know that Mrs. Abbott is the person described in this certificate?

Witness: "I do."

*The Judge Ordinary*: Do you know those witnesses whose names are mentioned as being present at the marriage?

Witness: "I am well acquainted with them."

*The Judge Ordinary*: I think that is sufficient.

Marriage dissolved.

(Before the Full Court: *The Judge Ordinary, Channell, B.*, and *Keating, J.*)

PLUMER *v.* PLUMER AND BYGRAVE.*[2] January 21, 1859.—Dissolution of Marriage.—Evidence of Recriminatory Charges not pleaded.—Amendment of Answer.—Costs.—A co-respondent whose answer merely traversed the allegation of adultery, was not allowed to cross-examine the witnesses called to establish that allegation, for the purpose of eliciting that the petitioner had been guilty of adultery, or of such misconduct as would induce the Court to exercise its discretion by withholding a decree; but upon a statement being made that the co-respondent would probably be able to establish a case of such misconduct on the part of the petitioner if he had the opportunity, the Court allowed him to amend his answer by the insertion of various counter-charges against the petitioner, and reserved the question of the costs of the day until the merits of the case had been ascertained.—[258] Evidence tendered by a co-respondent of declarations by the wife to a third person, when the husband was not present, with regard to the conduct of the husband during cohabitation, is not admissible.

The petitioner, William Plumer, prayed for a dissolution of his marriage with Louisa Plumer, on the ground of her adultery with Henry Bygrave. The respondent did not appear. The co-respondent appeared and pleaded a denial of the adultery.

Mr. Patchett, for the petitioner, called witnesses, who proved the marriage in 1838 and cohabitation until 1851.

Mr. D. Keane, for the co-respondent, asked one of these witnesses, the respon-

*[1] But see the *Perth Peerage Case*, 2 H. of L. Cases, 873, where a marriage celebrated in France was held to be proved, by putting in evidence examined copies of the register, and upon further proof that the register was kept according to the law of France, and that it would be received as evidence of the marriage in the Courts of that country.

*[2] Reported by R. Searle, Esq.

dent's brother, whether the respondent had ever complained to him of the petitioner's cruelty to her.

*The Judge Ordinary*: Your answer only traverses the adultery charged in the petition. You do not charge cruelty. And how can you make her declarations evidence against the petitioner?

Mr. D. Keane submitted that he was entitled to put questions for the purpose of eliciting that the petitioner had been guilty of misconduct, such as adultery, cruelty, or unreasonable delay, which would induce the Court to exercise its discretion by refusing a decree, notwithstanding the adultery of the respondent. If a decree were made, the co-respondent might be condemned in costs, and he therefore had a right to establish facts which would induce the Court to withhold a decree. Upon the question of his right to give evidence of the respondent's statements to the witness with regard to the conduct of the petitioner, he referred to *Winter* v. *Wroot* (1 Moody & Robinson, 404), cited in Roscoe's N. P. 563. That was an action for crim. con., in which counsel for the defendant, in cross-examination, asked a witness for the **[259]** plaintiff who had been called to prove the terms on which the parties lived together before the alleged criminal intercourse, whether he had ever heard the plaintiff's wife complain of the plaintiff's treatment of her. An objection to this question being made by counsel for the plaintiff, the learned Judge, Lord Lyndhurst, said, "I think the complaints of the wife are evidence as shewing the terms upon which the parties lived together. That is made up of a number of acts of the two parties, of which the complaints form part. I think, therefore, the witness may be asked generally whether the wife made complaints of the manner in which her husband treated her." Also *Trelawny* v. *Coleman*, 2 Starkie, N. P. C. 191.

*The Judge Ordinary*: In *Winter* v. *Wroot*, the witness, in his examination in chief, said that the parties had lived harmoniously together. In cross-examination, he was asked whether he had ever heard the wife complain of the husband's conduct. That question was put for the purpose of ascertaining the weight to be given to the statement in the examination in chief; for if he had heard such a complaint, it would have detracted from the value of his evidence as to their having lived together harmoniously. If the ruling cannot be justified on that ground, I cannot but say that I dissent from it.

The question was accordingly withdrawn.

Mr. D. Keane then put some questions with the view of eliciting the fact that the petitioner had been guilty of adultery, and referred to a MS. note of *Tollemache* v. *Tollemache*.*

---

* In *Tollemache* v. *Tollemache* (1 Sw. & Tr. 557), tried before the Judge Ordinary, Wightman, J., and Williams, J., on the 8th July, 1859, the petitioner, a husband, alleged that he was, and had been since his birth, domiciled in England; that he was married to the respondent in Scotland, and afterwards in England; that in 1841 she committed adultery at Glasgow, and that the Scotch Court pronounced a sentence of divorce in consequence of that adultery; and he prayed for a dissolution of his marriage. The respondent, in her answer, traversed the allegation that the petitioner had always retained an English domicil, and alleged that he had acquired a Scotch domicil before the marriage, and retained it until after the Scotch decree of divorce. Issue was joined before a special jury on the question of domicil only. The respondent examined witnesses in support of her allegation, the petitioner examined witnesses in opposition to it, and the jury returned a verdict for the petitioner.

On the 9th July, 1859 (before the Judge Ordinary, Williams, J., and Martin, B.), the Queen's Advocate (Sir J. Harding) and Mr. Mundell, for the petitioner, proceeded to examine witnesses to prove those allegations in the petition which had not been traversed by the respondent.

Dr. Deane, Q.C. (with him Mr. J. A. Russell and Mr. Kinnear), for the respondent, objected to one of the questions put to the first of these witnesses in his examination in chief.

*The Judge Ordinary*: What is your locus standi?

Dr. Deane: We have appeared and pleaded, and therefore we do not come within the rule that where a respondent has not appeared and answered, her counsel cannot cross-examine the petitioner's witnesses.

*The Judge Ordinary*: Do you apprehend that you have a right to dispute facts which, as far as your client is concerned, are admitted on the record?

**[260]** *The Judge Ordinary*: The Court no doubt has jurisdiction to enter into an inquiry whether there are any circumstances which should induce it to refuse a decree; but my impression is, that you have no right to enter into such an inquiry. You would be taking a great advantage of the other **[261]** side by eliciting evidence of matters which you have not pleaded, and of which they have had no notice.

Mr. D. Keane: A petitioner should be prepared to stand the test of an inquiry into all these matters without notice.

*The Judge Ordinary*: A petitioner should be prepared to prove all that is necessary to entitle him to a decree. **[262]** But he cannot come prepared to disprove the statements of his own witnesses. By traversing adultery on the record, and not pleading anything else, you lead him to believe that adultery is the only question you will raise.

After conferring with the other learned Judges,

*The Judge Ordinary* said,—I do not think it would be at all a proper course to allow any of the parties to the record as a matter of right to cross-examine the petitioner's witnesses in the manner you propose when the pleadings are in this state. The Court may examine any witnesses brought before it to elicit information which may guide it in the exercise of its discretion, and it cannot be precluded from entering into any inquiry by the pleadings which the parties may have thought fit to put on the record. In many cases, facts have been elicited by the Court which not only justified it in refusing, but made it incumbent on it to refuse a decree, although both parties were anxious to obtain it. In one remarkable case, although there was no plea of collusion, facts were elicited which established collusion, and the petition was dismissed, to the great mortification no doubt of the three parties to the suit.* But it would be very improper to allow a party to the suit, who had simply pleaded a denial of one of the

---

Dr. Deane: We have a right to cross-examine.

*The Judge Ordinary*: If, when the allegations in a petition are uncontradicted on the record, the respondent can controvert them at the hearing, he must have a right to call witnesses as well as to cross-examine.

*Williams, J.*: We are of opinion that it is not competent to Dr. Deane to cross-examine the petitioner's witnesses, or in any way to dispute the facts which his client has admitted on the record.

After evidence had been given of the allegations in the petition, a witness was called to explain the delay that had taken place, since the adultery was committed, in the institution of proceedings for a divorce in England.

*Williams, J.*: It is competent to Dr. Deane to raise a question as to the propriety of a decree being granted by the Court, but he must assume that the case of the petitioner has been made out to the satisfaction of the Court; that is to say, that the facts which are not denied on the record have been proved. He may therefore put questions to this witness, and address the Court.

At the conclusion of the witness's examination,

*Williams, J.*, said,—We think the petitioner should be called for the purpose of being examined by Dr. Deane.

Dr. Deane said he did not wish to examine him. He then addressed the Court upon the questions of unreasonable delay and of the effect of the Scotch divorce.

The Court finally dissolved the marriage.

And in *Parker* v. *Parker and M'Leod*, tried on the 9th July, 1859, before *The Judge Ordinary*, *Williams, J.*, and *Martin, B.*, the petitioner prayed for a decree of dissolution on the ground of his wife's adultery. The respondent did not traverse the adultery, but pleaded connivance. Issue was joined on this plea by the petitioner. The respondent began and examined witnesses in support of the plea, but the jury found that it had not been established.

Pigott, Serjt., and Dr. Spinks, for the petitioner, then called witnesses in support of the allegations in the petition which had not been traversed.

Dr. Swabey for the respondent.

*By the Court*: Dr. Swabey is precluded from interfering with regard to those matters which have not been traversed on the record; but he will be allowed to interfere with regard to any matters which go to the discretion of the Court as to withholding a decree.

The marriage was dissolved.

* *Lloyd* v. *Lloyd and Chichester*, ante, p. 39.

facts alleged in the petition, and had thereby given notice to the petitioner that that fact only would be contested, to spring a mine upon the petitioner at the hearing, by eliciting evidence of some counter-charge which the petitioner might perhaps have been prepared to meet if he had [263] had notice of it. At the same time, when it is intimated to the Court that there are facts in a case which ought to be brought before it, and that they can be proved by one of the parties if an opportunity is afforded him, the Court is very reluctant to proceed and determine the case in the dark. We therefore think the co-respondent ought now to be allowed to plead the facts which he thinks he has the means of proving.

Mr. D. Keane said, the co-respondent had been managing his own case, and it was not until two or three days ago that the papers were handed to his attorney.

Mr. Patchett applied for the costs of the day.

Mr. D. Keane: The question of the costs of the day should be reserved until the whole case is before the Court.

*The Judge Ordinary*: These cases are not like ordinary nisi prius causes. It is for the interest of public morality that the Court should not proceed to a decree when there appear to be circumstances which ought to be inquired into. I can see no injustice in allowing the answer to be amended, and in making the costs depend upon the merits of the parties.

Leave was accordingly given to the co-respondent to add to his answer charges of adultery, cruelty, connivance, and condonation against the petitioner, the amendment to be made within a week; and the question of costs was reserved.

**[264]** WALKER *v.* WALKER, NICOLL, AND CRAIG. November 5, 1861.—New Trial. —Verdict against two Co-respondents.—Where there is a verdict against two co-respondents, and the Court is dissatisfied with the verdict against one only of the two co-respondents, it will grant a new trial as to both.—Semble, If the petitioner will allow a verdict to be entered for the co-respondent applying for a new trial, the Court may grant the decree.

[S. C. 31 L. J. (Mat.) 26.]

In this case the jury found that the respondent had been guilty of adultery with both of the co-respondents, and a decree nisi was pronounced.

Mr. J. D. Coleridge, Q.C., on behalf of the co-respondent Nicoll, moved for a new trial, on the ground that the verdict was against the weight of the evidence, etc.

Dr. Phillimore, Q.C., for the petitioner, moved, notwithstanding this application, for the decree nisi to be made absolute. If Nicoll was struck out altogether, the petitioner would still be entitled to a decree.

*The Judge Ordinary*: I cannot grant a partial new trial. If I grant a new trial at all, it must be on the ground that the jury made a mistake. If the verdict is wrong as to one of the co-respondents, and if I grant a new trial, there must be a new trial as to both. If the petitioner were to consent that the verdict should be entered for the co-respondent Nicoll, and were content to rely upon the verdict against the other co-respondent, I might possibly make the decree.

The motion for a new trial was subsequently refused, and the rule nisi was made absolute.

**[265]** (Before *The Judge Ordinary.*)

BEVAN *v.* BEVAN. December 7, 1859.—New Suit.—Dissolution of Marriage.— Second Petition.—22 & 23 Vict. c. 61, s. 6.—A wife had filed a petition for a dissolution of marriage, on the ground of adultery, coupled with desertion and cruelty. The case was tried before the passing of the 22 & 23 Vict. c. 61, which renders the wife competent to give evidence of desertion and cruelty. The full Court refused to dissolve the marriage, on the ground that there was not sufficient evidence of desertion and cruelty, but pronounced a decree of judicial separation, on the ground of adultery. After the passing of the 22 & 23 Vict. c. 61, the Petitioner applied for leave to file a second petition for a dissolution of marriage, containing the allegations that she had before failed to establish. The Judge Ordinary granted leave, but expressed a strong opinion that the full Court would refuse to re-hear the case.

[S. C. 29 L. J. (Mat.) 45.]

On the 16th of August, 1858, Amelia Bevan filed a petition for dissolution of marriage, on the ground of adultery, coupled with cruelty and desertion. On the

30th of June, 1859, the case was heard by the full Court. The Court, not being satisfied with the evidence of desertion or of cruelty, refused to dissolve the marriage, but pronounced a decree for judicial separation on the ground of adultery.

Dr. Spinks now moved that she might have leave to file a petition for dissolution of marriage, containing the same allegations of adultery, as well as of cruelty and desertion, as were in the former petition. She would be able to establish those allegations by her own evidence under the 6th section of 22 & 23 Vict. c. 61. At the hearing of the former petition she was not a competent witness.

**[266]** *The Judge Ordinary*: If your object is to ascertain the impression now upon my mind as to the result, I do not hesitate to say that if such a petition were brought before the full Court they would dismiss it. In former days, many trials in the Common Law Courts took place when the evidence of the parties was excluded, and judgment was pronounced on the evidence then laid before the jury. I never heard that, after the alteration in the law by which parties were allowed to be examined in their own behalf, fresh actions were brought for old causes of action which had before been adjudicated. It appears to me, therefore, that this case, the party having had her petition for a dissolution of marriage heard, is *res judicata*. Such is my impression, but I do not refuse you permission to file the petition.

Application granted.

POLLOCK *v.* POLLOCK, DEAN AND MACNAMARA (The Queen's Proctor intervening). November 11, 1862. — Queen's Proctor.— Intervention after Decree Nisi. — Where the Queen's Proctor has intervened after the decree nisi, and the attendance of the petitioner at the hearing is necessary for the purpose of proving his identity, the Court will order the proceedings to be stayed until his appearance. —Query, whether the Court has power to order the petitioner to attend under section 43 of the Divorce Act, when the Queen's Proctor has intervened after the decree nisi?

The Queen's Proctor had obtained leave to intervene in this suit after the decree nisi was pronounced, and had filed pleas alleging Collusion and Condonation.

Dr. Spinks (for the Queen's Proctor) moved that the hearing should be postponed until next term, and that the peti-**[267]**-tioner should be ordered to attend at the hearing. An affidavit had been filed by the Queen's Proctor that his presence was necessary for the purpose of identification. He cited *Marris* v. *Marris and Burke*, 31 L. J. (P. & M.) 69.

*The Judge Ordinary*: In that case the Queen's Proctor intervened before the hearing of the petition, and his case and the petitioner's was heard at the same time, and the order was made under the 43rd section of 20 & 21 Vict. c. 85. I doubt whether the power given by that section extends to proceedings under 23 & 24 Vict. c. 144, s. 7, unless the Queen's Proctor intervenes and becomes a party whilst the suit is pending. In this case the hearing of the petition has taken place, and the case now assumes a quasi criminal aspect. I will help you in this way. I will order that the proceedings in the suit be stayed until the petitioner appears. You may hereafter renew your application.

The order made was in these terms: "Upon hearing counsel for the Queen's Proctor, the judge directed the proceedings to be stayed until the appearance of the petitioner."

(Before the Full Court: *The Judge Ordinary, Wightman, J.*, and *Byles, J.*)

MIDGELEY (falsely called WOOD) *v.* WOOD.* November 25 and December 7, 1859. —Nullity of Marriage.—Undue Publication of Banns.—4 Geo. IV. c. 76, ss. 7 and 22.—Costs.—A marriage by banns, where by the consent of both parties the name of the man was falsely stated to be "John," his baptismal name being "Bower" only, was declared null and void.—**[268]** The man was condemned in costs because he induced the woman to consent to the undue publication by telling her that it would not render the marriage invalid.—Query, whether a respondent in a suit of nullity by reason of undue publication of banns, who pleaded in confirmation of the petition, would be precluded by the dismissal of that petition from presenting another founded upon the same allegations?

[S. C. 30 L. J. (Mat.) 57.)

* Reported by R. Searle, Esq.

The petitioner, Margaret Midgeley, prayed to have a marriage de facto between herself and the respondent, Bower Wood, declared null and void, alleging that there was no due publication of the banns, the respondent being called John instead of Bower, with the knowledge of both parties, for the purpose of concealment. The respondent pleaded that at the time of the publication the petitioner assented to the use of a false name knowing its purpose.

The banns were published on the 28th of March, 4th of April, and 11th of April, 1852, and the de facto marriage was celebrated on the 12th of April, 1852, at Manchester. Miss Midgeley was described in the register as a spinster aged 20, and Mr. Wood as a bachelor aged 22. The publication in the false name of John was for the purpose of concealing the marriage from the grandfather of Wood, upon whom (his father and mother being dead), he was dependent. A short time after April, 1852, the grandfather became acquainted with the fact of a marriage, but the certificate was shewn to him to induce him to believe that the John Wood who had been married was not the same person as his grandson Bower Wood. Soon after the marriage the respondent entered the Military Academy at Chelsea, to qualify himself as an army schoolmaster, and he passed as a single man until 1853. The petitioner saw him in 1853, but from 1854 to 1858 there was no communication between them. Upon his recommendation she engaged herself as a domestic servant, and so maintained herself. In 1858 Wood was a pay-clerk at Chatham, and had a small farm in the neighbourhood. In 1855 the grandfather had **[269]** died, and left him by will £1000 and an annuity of £50, which in the event of his death, bankruptcy, or insolvency, was to go to his wife if he were married.

Dr. Deane, Q.C. (Mr. J. D. Coleridge with him), for the petitioner, cited *Wiltshire* v. *Prince* (3 Hag. Ec. 332); *Wright* v. *Elwood* (1 Curt. 662); *Tongue* v. *Tongue* (1 Moore's P. C. 90), and 4 Geo. IV. c. 76, ss. 7 and 22.*

Margaret Midgeley, the petitioner, was examined: It was after the first publication of the banns, but before the marriage, that Wood told me his real name. He had said before that his name was John Philip Bower Wood. After the marriage I sometimes called him John, but I generally called him Philip. He promised to introduce me to his grandfather, but he never did. I spoke to him several times about his name, because I thought that John was not his real name. **[270]** I asked him if the marriage would be legal in that name if it were not his real name, and he said "Yes." I objected to it, and it was a long time before I would consent to marrying him in that name. He said I must marry him, and trust in him afterwards.

Dr. Phillimore, Q.C. (for the respondent), applied for leave to cross-examine the petitioner. The respondent had pleaded in confirmation of the petition; but there was no collusion. He had no desire whatever to continue his connection with the petitioner. He had not heard of her for a number of years, and imagined that she was dead, but in 1858 he was disagreeably reminded of her existence, and this suit was soon afterwards instituted. The petition originally alleged that only one party was cognizant of the fraudulent publication, and therefore it was demurrable. The greatest doubt was entertained by the respondent's advisers whether the petition had

---

* 4 Geo. IV. c. 76, s. 7.—"Provided always, and it is hereby further enacted, that no parson, vicar, minister, or curate shall be obliged to publish the banns of matrimony between any persons whatsoever, unless the persons to be married shall, seven days at the least before the time required for the first publication of such banns, respectively deliver or cause to be delivered to such parson, vicar, minister, or curate a notice in writing, dated on the day on which the same shall be so delivered, of their true Christian names and surnames, and of the house or houses of their respective abodes within such parish or chapelry as aforesaid, and of the time during which they have dwelt, inhabited, or lodged in such house or houses respectively."

4 Geo. IV. c. 76, s. 22.—"Provided always, and be it further enacted, that if any person shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may be lawfully published, unless by special licence as aforesaid, or shall knowingly and wilfully intermarry without due publication of banns, or licence from a person or persons having authority to grant the same first had and obtained, or shall knowingly and wilfully consent to, or acquiesce in, the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void to all intents and purposes whatsoever."

been drawn up in that form intentionally, in order that there might be a failure of proof and a decree in favour of the marriage, or whether it was a bonâ fide error. The respondent then, as now, wished the marriage to be set aside, on the ground of the undue publication of banns, and he was therefore advised to plead the knowledge of both parties. Subsequently the petition was amended and the plea was unnecessary, but stood as a confirmation of the petition. Both parties were equally anxious for the success of the suit. He proposed to cross-examine the petitioner, and afterwards to examine the respondent, if necessary, in support of his plea. He was not aware of any precedent for such a state of the pleadings in a suit for nullity.

*The Judge Ordinary*: The point is of great importance. You desire not only to question the petitioner, but to tender affirmative evidence for the respondent. Suppose the petition should ultimately be dismissed, would that decree be **[271]** binding on both parties for the future? If a suit had been instituted in the Ecclesiastical Court for nullity, on this ground of undue publication, and the husband had appeared and given in an answer to the libel, confessing the different articles alleged, and then, the witnesses having been examined, the Ecclesiastical Court had dismissed the suit, could the husband afterwards have instituted a suit for nullity?

Dr. Phillimore: I am inclined to think it would have been res judicata.

Dr. Deane was of the same opinion.

*The Judge Ordinary*: I should like to hear the question discussed on the part of the husband. If this petition were to result in a decree refusing a declaration of nullity, and that decree were to be binding upon both parties, it would tend to support the view that the respondent should be at liberty to call affirmative evidence. Otherwise, the wife might institute a suit of this description and procure a decree which would be binding upon him. At all events you may cross-examine this witness de bene esse.

Margaret Midgeley was accordingly cross-examined by Dr. Phillimore: I last saw the respondent in 1854; I occasionally received 10s. a week from him, but never after he came to reside in London. I was quite aware before the publication that the name was changed in order to conceal the marriage. I do not know whether I was aware of it before the first publication or not.

*To the Court*: My object in presenting the petition is to know whether my marriage is legal or not. I made inquiries for Wood after he left Chelsea, but I could not ascertain what had become of him, until just before this petition was presented. My relations wanted me to see whether I was married or not. A clergyman in Yorkshire was very anxious to know whether the marriage was legal.

**[272]** A witness proved that the respondent was baptized in the name of Bower only.

*The Judge Ordinary* delivered judgment: It is unnecessary to say anything about the cross-examination of the petitioner. Independently of that, the allegations in the petition are established. There is ample authority for saying that a party to a fraud of this sort may by law come forward and avail herself of the wrong done, so as to get the marriage voided. Where parties marry, knowing that there is not a due publication of banns, the marriage is null. Although in this case the woman might suppose that John was one of the man's names, and might believe it sufficient to make the marriage a good one; yet at the same time she knew it was not a proper publication of both his Christian names. As to the time when she became cognizant of the fact, she states that it was communicated to her before the banns were put up, and, at all events, she must have known it before the marriage. If she intermarried under those circumstances, that is sufficient. The Court pronounces the marriage null.

Dr. Deane applied for costs.

*Wightman, J.*: They are both equally to blame.

*The Judge Ordinary*: The Court will consider the question of costs.

December 7.—*The Judge Ordinary*: This case stood over upon a question of costs. It was a suit by a woman for a declaration of nullity of marriage in consequence of a fraud perpetrated by both parties to the marriage, by putting up banns in a false name. It was suggested that the Court was bound to grant costs to the petitioner, according to the usual practice in the **[273]** Ecclesiastical Court. But I think I am not bound to grant cost to her upon any such principle. She is not a wife, and she never was a wife. The marriage was null from the beginning. But there is another ground upon which I think I ought to grant her costs. It appeared that the re-

spondent allured the woman into this form of marriage, by telling her that it would be a good marriage, and so did her a grievous wrong. She supposed that she should become his wife. She consented to the use of the false name, thinking that it would be a good marriage. He led her into a most distressing position, and she said, very naturally, "I was strongly urged not to remain in this doubtful state, but to have it ascertained whether I was a wife or not." The Court will therefore grant her costs.

Marriage declared null and void, with costs against the respondent.

GAPP *v.* GAPP AND LEVERSON. March 24, 1859.—Practice.—Heading of Affidavit verifying Petition.—The affidavit verifying the petition should be headed "In the matter of the Petition of A. B."

The proposed petitioner in this case had filed a petition for the dissolution of his marriage, with an affidavit verifying the same, the affidavit being headed C. Gapp *v.* A. J. Gapp and Leverson. The registry had refused to issue a citation without the directions of the Court.

Dr. Waddilove moved for the citation to issue.

*The Judge Ordinary*: I think the affidavit should be re-**[274]**-sworn. At present it is entitled in a cause which is non-existent. Until a citation has issued, I think that the affidavit should not be entitled in a cause, and should be sworn either without a heading or "In the matter of the Petition of A."

WATTS *v.* WATTS. November 26, 1861.—Practice.—Two Motions for Attachment for Non-payment of Money.—Costs for one only allowed.—An application for an attachment against a husband for non-payment of alimony and costs should be made in one motion. The costs for two motions will not be allowed against the husband.

Two cases for motion were filed in this case, one for an attachment against the husband for non-payment of alimony, the other for an attachment against him for non-payment of costs.

Dr. Spinks moved in each case.

*The Judge Ordinary*: The attachment may issue, but the husband ought not to be burdened with the expense of two motions. The application should have been made in one motion, the ground of both motions being the non-payment of money.

**[275]** COTTON *v.* COTTON AND KINNIS. Dec. 2, 1862.—Practice.—Name of Co-respondent mis-spelt in Citation.—Fresh Citation.—Where co-respondent's name had been mis-spelt in the citation served, the Court made an order for a fresh citation to issue.

[S. C. 32 L. J. (Mat.) 133.]

The respondent and co-respondent had been served with a citation in this cause, but the co-respondent's name had been mis-spelt "Kennis" in the citation.

Dr. Wambey moved that the service of such citation should be deemed sufficient service, or that the petitioner might extract a fresh citation.

*The Judge Ordinary*: I cannot make an order that the service of the citation is sufficient. You may take a fresh citation.

# TABLE OF CASES IN VOLUME IV.


| | PAGE |
|---|---|
| A. *v.* B., 1 Sp. Ecc. & Ad. 12 | 7 |
| Abbott *v.* Abbott and Godoy, 4 Sw. & Tr. (Supp.) 254 | 1513 |
| "Abo," In re The, 1 Sp. Ecc. & Ad. 347 ; 1 Sp. P. C. 42 | 200 |
| "Actæon," In re The, 1 Sp. Ecc. & Ad. 176 | 102 |
| Afford *v.* Afford, 2 Sw. & Tr. 387 | 1046 |
| "Africa," In re The, 1 Sp. Ecc. & Ad. 299 | 173 |
| "Aina," In re The, 1 Sp. Ecc. & Ad. 313 ; 1 Sp. P. C. 8 | 181 |
| "Aina," In re The, 1 Sp. Ecc. & Ad. 316 | 183 |
| Aldridge, Ex parte, 1 Sw. & Tr. 88 | 641 |
| Alexander *v.* Alexander, 2 Sw. & Tr. 385 | 1045 |
| Alexander *v.* Alexander and Amos, 2 Sw. & Tr. 95 | 928 |
| Alford *v.* Alford, Deane, 322 | 590 |
| "Aline and Fanny," In re The, Sp. P. C. 322 | 461 |
| "Aliwal," In re The, 1 Sp. Ecc. & Ad. 96 | 55 |
| Allen, In re William, 3 Sw. & Tr. 559 | 1392 |
| Allen *v.* Allen and D'Arcy, 2 Sw. & Tr. 107 | 933 |
| Allison, In re Joseph, 3 Sw. & Tr. 574 | 1398 |
| Allnutt, In re John, 3 Sw. & Tr. 167 | 1237 |
| Almosnino, In re Ann, 1 Sw. & Tr. 508 | 835 |
| Anderson, In re, 3 Sw. & Tr. 489 | 1365 |
| Anderson *v.* Laneuville, 2 Sp. Ecc. & Ad. 41 | 296 |
| Andrews *v.* Murphy, 4 Sw. & Tr. (Supp.), 198 | 1492 |
| Anonymous, 2 Sw. & Tr. 249 | 990 |
| Anonymous, Deane, 295 | 581 |
| Anonymous, Deane, 333 | 593 |
| Anthony *v.* Anthony, 1 Sw. & Tr. 594 | 875 |
| "Araminta," In re The, 1 Sp. Ecc. & Ad. 224 | 130 |
| Argent *v.* Argent, 4 Sw. & Tr. 52 | 1434 |
| "Argo," In re The, 1 Sp. Ecc. & Ad. 375 ; 1 Sp. P. C. 52 | 216 |
| Armitage, Ex parte, 1 Sw. & Tr. 71 | 634 |
| Ash, In re A. M., Deane, 181 | 542 |
| Ashley *v.* Ashley, 2 Sw. & Tr. 388 | 1046 |
| "Atlantic," In re The, 2 Sp. Ecc. & Ad. 93 ; 1 Sp. P. C. 104 | 325 |
| Austen *v.* Graham, 1 Sp. Ecc. & Ad. 357 | 206 |
| Axford, In re Charles, 1 Sw. & Tr. 540 | 851 |
| B———n *v.* B———n, 1 Sp. Ecc. & Ad. 248 | 144 |
| Bacon *v.* Bacon and Bacon, 2 Sw. & Tr. 53 | 911 |
| Bacon *v.* Bacon and Bacon, 2 Sw. & Tr. 86 | 925 |
| Badcock *v.* Badcock and Chamberlain, 1 Sw. & Tr. 189 | 686 |
| Badenoch, In re George, 3 Sw. & Tr. 465 | 1355 |
| Bailey, In re Eliza, 2 Sw. & Tr. 156 | 953 |
| Bailey, In re Maria, 2 Sw. & Tr. 135 | 944 |
| Baily *v.* Baily and Della Rocca, 2 Sw. & Tr. 112 | 935 |
| Baker *v.* Baker, 2 Sw. & Tr. 380 | 1043 |
| Baker *v.* Baker, 3 Sw. & Tr. 213 | 1255 |
| Baker and Marshman *v.* Brooks ; Marshman *v.* Hughes, 3 Sw. & Tr. 32 | 1183 |
| Ballingall, In re William, 3 Sw. & Tr. 441 | 1346 |
| "Baltica," In re The, Sp. P. C. 264 | 440 |
| Bancroft *v.* Bancroft, 4 Sw. & Tr. 84 | 1447 |
| Bancroft *v.* Bancroft and Rumney, 3 Sw. & Tr. 597 | 1407 |

PAGE
Bancroft *v.* Bancroft and Rumney, 3 Sw. & Tr. 610 . . . . 1411
Basing *v.* Basing, 3 Sw. & Tr. 516 . . . . . 1375
"Batavier," In re The, 1 Sp. Ecc. & Ad. 169 . . . . . 98
"Batavier," In re The, 1 Sp. Ecc. & Ad. 378 . . . . . 218
Bawden *v.* Bawden, 2 Sw. & Tr. 417 . . . . . 1057
Bayley *v.* Bayley, 4 Sw. & Tr. (Supp.) 222 . . . . . 1502
Baylis, In re Edward, 2 Sw. & Tr. 613 . . . . . 1135
Bayne, In re Rachael, 1 Sw. & Tr. 132 . . . . . 661
Baynes *v.* Harrison, Deane, 15 . . . . . 487
Beavan, Arthur Henry *v.* Emily Louisa Beavan, 2 Sw. & Tr. 652 . . 1151
Bedwell, In re Frederick, 1 Sw. & Tr. 15 . . . . . 608
Belbin *v.* Skeats, 1 Sw. & Tr. 148 . . . . . 669
Bell, In re Jane, 1 Sw. & Tr. 288 . . . . . 733
Bell *v.* Bell and Marquis of Anglesley, 1 Sw. & Tr. 565 . . . 861
Bellew *v.* Bellew and Others, 4 Sw. & Tr. 58 . . . . . 1437
Benbow, In re William, 2 Sw. & Tr. 488 . . . . . 1086
"Benedict," In re The, Sp. P. C. 314 . . . . . 456
Bennett, In re William, 1 Sp. Ecc. & Ad. 247 . . . . . 143
Bent *v.* Bent and Footman, 2 Sw. & Tr. 392 . . . . . 1047
Bernard, In re William Henry, 2 Sw. & Tr. 489 . . . . . 1087
Bevan *v.* Bevan, 4 Sw. & Tr. (Supp.) 265 . . . . . 1517
Bevan *v.* M'Mahon, 2 Sw. & Tr. 230 . . . . . 983
Bevan *v.* M'Mahon and Bevan, 2 Sw. & Tr. 55 . . . . . 912
Bevan *v.* M'Mahon and Bevan, 2 Sw. & Tr. 58 . . . . . 913
Bewsher *v.* Williams, Ball, and Others, 3 Sw. & Tr. 62 . . . 1195
Bianchi, In re Luigi, 3 Sw. & Tr. 16 . . . . . 1177
Bianchi, In re Luis, 1 Sw. & Tr. 511 . . . . . 837
Birks *v.* Birks, 4 Sw. & Tr. 23 . . . . . 1423
Bishop, In re Henry, 1 Sw. & Tr. 303 . . . . . 740
"Blenheim," In re The, 1 Sp. Ecc. & Ad. 285 . . . . . 165
Body, In re, 4 Sw. & Tr. 9 . . . . . 1418
Bonaparte, In re Napoleon, 1 Sp. Ecc. & Ad. 9 . . . . . 5
Bond *v.* Bond, 2 Sw. & Tr. 93 . . . . . 927
Bostock *v.* Bostock, 1 Sw. & Tr. 221 . . . . . 701
Boston *v.* Fox, 4 Sw. & Tr. (Supp.) 199 . . . . . 1493
Boulting *v.* Boulting, 3 Sw. & Tr. 329 . . . . . 1302
Boulton *v.* Boulton and Page, 2 Sw. & Tr. 405 . . . . . 1053
Boulton *v.* Boulton and Page, 2 Sw. & Tr. 551 . . . . . 1111
Boulton *v.* Boulton and Page, 2 Sw. & Tr. 638 . . . . . 1146
Bouverie, In re petition of John Augustus Shiel, 2 Sw. & Tr. 548 . . 1109
Bowen *v.* Bowen and Evans, 3 Sw. & Tr. 530 . . . . . 1381
Bowles *v.* Jackson, 1 Sp. Ecc. & Ad. 294 . . . . . 170
Boyd *v.* Boyd and Collins, 1 Sw. & Tr. 562 . . . . . 860
Boyle, In re, 3 Sw. & Tr. 426 . . . . . 1340
Boynton *v.* Boynton, 1 Sw. & Tr. 324 . . . . . 749
Boynton *v.* Boynton, 2 Sw. & Tr. 275 . . . . . 1001
Braine *v.* Braine and Braine, 1 Sw. & Tr. 271 . . . . . 724
Bramley and Another *v.* Bramley, 3 Sw. & Tr. 430 . . . . . 1342
Brandreth *v.* Brandreth and Wife, 2 Sw. & Tr. 446 . . . . . 1069
Bremer *v.* Freeman and Bremer, 2 Sp. Ecc. & Ad. 65 . . . . . 309
Bremer *v.* Freeman and Bremer, Deane, 192 . . . . . 546
Bremner *v.* Bremner and Brett, 3 Sw. & Tr. 249 . . . . . 1270
Bremner *v.* Bremner and Brett, 3 Sw. & Tr. 378 . . . . . 1321
Brewis, In re John, 3 Sw. & Tr. 473 . . . . . 1359
Broadwood *v.* Holland, 1 Sp. Ecc. & Ad. 5 . . . . . 3
Brocas *v.* Brocas, 2 Sw. & Tr. 383 . . . . . 1044
Brodie *v.* Brodie, 2 Sw. & Tr. 259 . . . . . 995
Brookes *v.* Brookes, 1 Sw. & Tr. 326 . . . . . 750
Brown, In re William, 1 Sw. & Tr. 32 . . . . . 615
Brown *v.* Brown, 1 Sp. Ecc. & Ad. 423 . . . . . 243

PAGE
Brown *v.* Brown, 4 Sw. & Tr. 144 . . . . . 1471
Brown *v.* Brown and Simpson, 3 Sw. & Tr. 217 . . . . 1257
Browne *v.* Thomas, 1 Sp. Ecc. & Ad. 29 . . . . . 18
Browning, In re James, 2 Sw. & Tr. 634 . . . . . 1144
Budd, In re Mary, 3 Sw. & Tr. 196 . . . . . 1249
Burch, In re Eleanor, 2 Sw. & Tr. 139 . . . . . 946
Burder *v.* Selmes, 1 Sp. Ecc. & Ad. 114 . . . . . 66
Burgess, In re, 4 Sw. & Tr. (Supp.) 188 . . . . . 1488
Burrell, In re Mary, 1 Sw. & Tr. 64 . . . . . 631
Burroughs *v.* Burroughs, 2 Sw. & Tr. 303 . . . . . 1012
Burroughs *v.* Burroughs, 2 Sw. & Tr. 544 . . . . . 1108
Burt *v.* Burt, 2 Sw. & Tr. 88 . . . . . 925
Busby *v.* Busby and Vine, 2 Sw. & Tr. 383 . . . . . 1044
Butts, In re Edward Herringham, 2 Sp. Ecc. & Ad. 58 . . . 305

Cadywold, In re Thomas, 1 Sw. & Tr. 34 . . . . . 617
Callwell *v.* Callwell and Kennedy, 3 Sw. & Tr. 259 . . . . 1274
Campbell *v.* Campbell, Deane, 285 . . . . . 578
Cargill *v.* Cargill, 1 Sw. & Tr. 235 . . . . . 708
"Carl," In re The, 2 Sp. Ecc. & Ad. 261; 1 Sp. P. C. 238 . . . 422
Carless *v.* Thompson, 1 Sw. & Tr. 21 . . . . . 611
Carmichael, In re, 4 Sw. & Tr. (Supp.) 224 . . . . . 1502
"Caroline" In re The, Sp. P. C. 252 . . . . . 433
Carr, In re, James, 1 Sw. & Tr. 111 . . . . . 652
"Carron," In re The, 1 Sp. Ecc. & Ad. 91 . . . . . 53
Carryer *v.* Carryer and Watson, 4 Sw. & Tr. 94 . . . . 1451
Carstairs *v.* Carstairs, Dickenson and Others, 3 Sw. & Tr. 538 . . . 1384
Cartledge *v.* Cartledge, 4 Sw. & Tr. (Supp.) 249 . . . . 1511
Cartlidge *v.* Cartlidge, 2 Sw. & Tr. 567 . . . . . 1117
Cartlidge *v.* Cartlidge, 3 Sw. & Tr. 406 . . . . . 1333
Case *v.* Case, 2 Sw. & Tr. 65 . . . . . 916
"Catalina," In re The, 2 Sp. Ecc. & Ad. 23 . . . . . 286
Cattrall, In re, 3 Sw. & Tr. 419 . . . . . 1337
Cawthron, In re William, 3 Sw. & Tr. 417 . . . . . 1336
Charlton *v.* Hindmarsh, 1 Sw. & Tr. 433 . . . . . 800
Charlton *v.* Hindmarsh, 1 Sw. & Tr. 519 . . . . . 840
Cherry *v.* Cherry, 1 Sw. & Tr. 319 . . . . . 747
Chesnutt *v.* Chesnutt, 1 Sp. Ecc. & Ad. 196 . . . . . 114
Chetwynd *v.* Chetwynd, 4 Sw. & Tr. 108 . . . . . 1457
Chetwynd *v.* Chetwynd, 4 Sw. & Tr. 151 . . . . . 1474
Chichester *v.* Mure, 3 Sw. & Tr. 223 . . . . . 1259
Child *v.* Child, 3 Sw. & Tr. 537 . . . . . 1384
"Chrissys," In re The, Sp. P. C. 343 . . . . . 474
"Christine," In re The, 2 Sp. Ecc. & Ad. 24; 1 Sp. P. C. 82 . . . 286
Christmas and Christmas *v.* Whinyates, 3 Sw. & Tr. 81 . . . 1203
Ciocci *v.* Ciocci, 1 Sp. Ecc. & Ad. 121 . . . . . 70
Ciocci *v.* Ciocci, 4 Sw. & Tr. (Supp.) 250 . . . . . 1512
"Clarence," In re The, 1 Sp. Ecc. & Ad. 206 . . . . . 119
Clark *v.* Clark and Bouck, 2 Sw. & Tr. 520 . . . . . 1098
Clark *v.* Clark, Perrin and Cumins, 4 Sw. & Tr. 111 . . . . 1458
Clarke, In re Susanna, 1 Sw. & Tr. 22 . . . . . 611
Clarkington, In re Charles, 2 Sw. & Tr. 381 . . . . . 1043
Clarkson *v.* Clarkson, 2 Sw. & Tr. 497 . . . . . 1090
Clarkson *v.* Waterhouse, 2 Sw. & Tr. 378 . . . . . 1042
Clayton *v.* Davis, 3 Sw. & Tr. 290 . . . . . 1286
Clements *v.* Clements and Thomas, 3 Sw. & Tr. 394 . . . . 1327
Cleverly and Another *v.* Gladdish, 2 Sw. & Tr. 335 . . . . 1025
Clout *v.* Clout and Hollebone, 2 Sw. & Tr. 391 . . . . . 1047
"Clyde," In re The, 2 Sp. Ecc. & Ad. 27 . . . . . 288
Cock *v.* Cock, 3 Sw. & Tr. 514 . . . . . 1375

PAGE
Cockayne, In re C., Deane, 177 . . . . . 541
Codrington *v.* Codrington and Anderson, 3 Sw. & Tr. 368 . . . 1317
Codrington *v.* Codrington and Anderson, 3 Sw. & Tr. 496 . . . 1367
Codrington *v.* Codrington and Anderson, 4 Sw. & Tr. 63 . . . 1439
Coleman, In re Henry Hart, 2 Sw. & Tr. 314 . . . . . 1016
Coles, In re William, 3 Sw. & Tr. 181 . . . . . 1243
Collett, In re H. P., Deane, 274 . . . . . 574
Collier, In re Thomas, 2 Sw. & Tr. 444 . . . . . 1069
Cook and Another *v.* Lambert and Others, 3 Sw. & Tr. 46 . . . 1189
Cooke *v.* Cooke, 3 Sw. & Tr. 126 . . . . . 1221
Cooke *v.* Cooke, 3 Sw. & Tr. 246 . . . . . 1268
Cooke *v.* Cooke, 3 Sw. & Tr. 248 . . . . . 1269
Cooke *v.* Cooke, 3 Sw. & Tr. 374 . . . . . 1320
Cooke *v.* Cooke and Allen, 3 Sw. & Tr. 603 . . . . . 1409
Cooke *v.* Cooke and Quaile, 2 Sw. & Tr. 50 . . . . . 910
Cooke, In re Harriet, 1 Sw. & Tr. 267 . . . . . 723
Cooper, In re P. A., Deane, 9 . . . . . 486
Cooper, In re Robert, 1 Sw. & Tr. 66 . . . . . 631
Cooper *v.* Cooper, 3 Sw. & Tr. 392 . . . . . 1327
Cooper and Sparks *v.* Moss and Moss, 1 Sw. & Tr. 143 . . . . 667
Corby, In re Henry, 1 Sp. Ecc. & Ad. 292 . . . . . 169
Cordeux *v.* Trasler, 4 Sw. & Tr. 48 . . . . . 1433
"Cosmopolitan" In re The, 1 Sp. Ecc. & Ad. 179 . . . . . 104
Cotton *v.* Cotton and Kinnis, 4 Sw. & Tr. (Supp.) 275 . . . . 1521
Court, In re Michael, 2 Sw. & Tr. 485 . . . . . 1085
Cousen *v.* Cousen, 4 Sw. & Tr. 164 . . . . . 1479
Coward, In re, 4 Sw. & Tr. 46 . . . . . 1432
Cox *v.* Cox, 2 Sw. & Tr. 306 . . . . . 1013
Crause, In re Jane Elizabeth, 1 Sw. & Tr. 146 . . . . . 668
Crispin *v.* Doglioni, 1 Sw. & Tr. 522 . . . . . 842
Crispin *v.* Doglioni, 2 Sw. & Tr. 17 . . . . . 897
Crispin *v.* Doglioni, 2 Sw. & Tr. 493 . . . . . 1088
Crispin *v.* Doglioni, 3 Sw. & Tr. 44 . . . . . 1188
Crispin *v.* Doglioni, 3 Sw. & Tr. 96 . . . . . 1209
Critchell *v.* Critchell, 3 Sw. & Tr. 41 . . . . . 1187
Croft *v.* Croft, 4 Sw. & Tr. 10 . . . . . 1418
Crookenden *v.* Fuller, 1 Sw. & Tr. 441 . . . . . 804
Cross *v.* Cross and Others, 3 Sw. & Tr. 292 . . . . . 1287
Cruttwell and Others *v.* Clancy, Deane, 310 . . . . . 586
Cudlipp *v* Cudlipp, 1 Sw. & Tr. 229 . . . . . 705
Cunliffe and Ormerod *v.* Cross, 3 Sw. & Tr. 37 . . . . . 1185
Cunningham, In re William Fairlie, 4 Sw. & Tr. (Supp.) 194 . . . 1491
Cunnington *v.* Cunnington and Noble, 1 Sw. & Tr. 475 . . . . 820
Curtis *v.* Curtis, 1 Sw. & Tr. 75 . . . . . 636
Curtis *v.* Curtis, 1 Sw. & Tr 192 . . . . . 688
Curtis *v.* Curtis, 4 Sw. & Tr. (Supp.) 234 . . . . . 1505
Cutto *v.* Gilbert, 1 Sp. Ecc. & Ad. 276 . . . . . 160
Cutto *v.* Gilbert, 1 Sp. Ecc. & Ad. 417 . . . . . 240

Dadds, In re Ann, Deane, 290 . . . . . 579
Darke, In re Elizabeth, 1 Sw. & Tr. 516 . . . . . 839
Dart *v.* Dart, 3 Sw. & Tr. 208 . . . . . 1254
Davidson *v.* Davidson, Deane, 132 . . . . . 526
Davidson *v.* Davidson, Deane, 167 . . . . . 537
Davies *v.* Davies and Dalby, 2 Sw. & Tr. 437 . . . . . 1065
Davies *v.* Davies and Hughes, 3 Sw. & T. 221 . . . . . 1258
Davis, In re David, 4 Sw. & Tr. (Supp.) 213 . . . . . 1498
Davis *v.* Davis, 4 Sw. & Tr. (Supp.) 208 . . . . . 1496
Davis *v.* Davis, 4 Sw. & Tr. (Supp.) 228 . . . . . 1504
Davy, In re, Robert, 1 Sw. & Tr. 262 . . . . . 720

PAGE
Day *v.* Thompson; In re James Alexander Frampton, 3 Sw. & Tr. 169 . 1238
Deane *v.* Deane, 1 Sw. & Tr. 90 . . . . . 642
Deck *v.* Deck, 2 Sw. & Tr. 90 . . . . . 926
De Chatelain *v.* Pontigny, 1 Sw. & Tr. 34 . . . . 616
De Chatelain (Jean) and Clara de Chatelain *v.* Victor de Pontigny, 1 Sw. & Tr. 411 . . . . . 790
De la Farque, In re Louisa Maria, 2 Sw. & Tr. 631 . . . . 1143
Dempster *v.* Dempster, 2 Sw. & Tr. 438 . . . . . 1066
Denison *v* Ditcher, Deane, 334 . . . . . 594
Dent *v.* Dent, 4 Sw. & Tr. 105 . . . . . 1455
Depit and Chapot *v.* Delerieleuse, 2 Sw. & Tr. 131 . . . . 942
Deshais, In re, Therese Henriette Aimée, 4 Sw. & Tr. 13 . . . 1419
Dewell, In re Thomas, 1 Sp. Ec. & Ad. 103 . . . . . 60
Dickens *v.* Dickens, 2 Sw. & Tr. 103 . . . . . 931
Dickens *v.* Dickens, 2 Sw. & Tr. 521 . . . . . 1099
Dickens *v.* Dickens, 2 Sw. & Tr. 645 . . . . . 1148
Dickinson *v.* Swatman, 4 Sw. & Tr. (Supp.) 205 . . . . 1495
Dinmore, In re Richard, 1 Sp. Ecc. & Ad. 2 . . . . . 2
Dixon (Thomas) and Wm. Dickenson *v.* John Allinson and Mary his wife, 3 Sw. & Tr. 572 . . . . . 1397
Dixson, In re Ellen, 2 Sp. Ecc. & Ad. 205 . . . . . 390
Dodgson, In re Christopher, 1 Sw. & Tr. 259 . . . . . 719
Dolby *v.* Dolby and Hewitt, 2 Sw. & Tr. 228 . . . . . 982
Domvile and Others *v.* Domvile, 4 Sw. & Tr. 17 . . . . 1421
D'Orléans, In re Her Highness the Duchess, 1 Sw. & Tr. 253 . . . 716
Douce, In re Thomas, 2 Sw. & Tr. 593 . . . . . 1127
Downer, In re David, 1 Sp. Ecc. & Ad. 106 . . . . . 61
Downward *v.* Dickinson and Others, 3 Sw. & Tr. 564 . . . . 1394
D'Oyley *v.* D'Oyley and Baldie, 4 Sw. & Tr. (Supp.) 226 . . . 1503
Drewe *v.* Long, Rolf, and Cayford, 1 Sp. Ecc. & Ad. 391 . . . 225
Drinkwater, In re Job, 2 Sw. & Tr. 611 . . . . . 1135
Drummond, In re Henry, 2 Sw. & Tr. 8 . . . . . 893
Drummond *v.* Drummond, 2 Sw. & Tr. 269 . . . . . 998
Duane, In re Thomas, 2 Sw. & Tr. 590 . . . . . 1127
Dunn *v.* Dunn, 1 Sw. & Tr. 521 . . . . . 841
Du Terreaux *v.* Du Terreaux, 1 Sw. & Tr. 555 . . . . . 857
Dutton, In re William Walter Holmes, 3 Sw. & Tr. 66 . . . 1197
Dyce Sombre *v.* Troup, Deane, 22 . . . . . 489
Dyke (Queen's Proctor) *v.* Wallis and Others, 2 Sw. & Tr. 466 . . 1077
Dyke (Queen's Proctor) *v.* Williams, 2 Sw. & Tr. 465 . . . . 1077
Dyke (H. M. Procurator-General) *v.* Williams, 2 Sw. & Tr. 491 . . 1087

E—— *v.* T——, 3 Sw. & Tr. 312 . . . . . 1295
"E. U.," In re The, 1 Sp. Ecc. & Ad. 63 . . . . . 37
"Earl Grey," In re The, 1 Sp. Ecc. & Ad. 180 . . . . . 105
Edwards, In re Louisa, 1 Sw. & Tr. 10 . . . . . 605
Edwards *v.* Payne and Reeve, 1 Sw. & Tr. 276 . . . . . 727
Eeles, In re Thomas, 2 Sw. & Tr. 600 . . . . . 1130
Ekins *v.* Brown, 1 Sp. Ecc. & Ad 400 . . . . . 231
"Elize," In re The, 2 Sp. Ecc. & Add. 31; 1 Sp. P. C. 88 . . . 290
Ellaytt *v.* Ellaytt, Taylor, and Halse, 3 Sw. & Tr. 503 . . . . 1370
Ellis *v.* Ellis and Smith, 4 Sw. & Tr. 154 . . . . . 1475
Elms *v.* Elms, 1 Sw. & Tr. 155 . . . . . 672
Elwell, In re John, junr., 1 Sw. & Tr. 27 . . . . . 613
Emberley *v.* Trevanion, 4 Sw. & Tr. (Supp.) 197 . . . . 1492
English, In re Thomas, 3 Sw. & Tr. 586 . . . . . 1403
Enobin and Others *v.* Wylie, 1 Sw. & Tr. 118 . . . . . 655
Enticknap *v.* Rice (falsely called Enticknap), 4 Sw. & Tr. 136 . . . 1468
Ernest *v.* Eustace, Deane, 271 . . . . . 574
"Ernst Merck," In re The, 3 Sp. Ecc. & Ad. 87; 1 Sp. P. C. 98 . . 322

PAGE
Escot, In re Bickham Sweet, 4 Sw. & Tr. (Supp.) 186 . . . . 1488
Evans *v.* Evans, 1 Sw. & Tr. 78 . . . . . 637
Evans *v.* Burrell, 4 Sw. & Tr. (Supp.) 185 . . . . . 1487
Evans *v.* Evans and Robinson, 1 Sw. & Tr. 173 . . . . 680
Evans *v.* Evans and Robinson, 1 Sw. & Tr. 216 . . . . 699
Evans *v.* Evans and Robinson, 1 Sw. & Tr. 328 . . . . 751
Ewart, In re Lieut. Col. Frederick, 1 Sw. & Tr. 258 . . . . 718
Ewen *v.* Franklin and Others, Deane, 7 . . . . . 485

F——— (falsely called D———) *v.* D———, 4 Sw. & Tr. 86 . . . 1448
Fairweather, In re Thomas, 2 Sw. & Tr. 588 . . . . . 1126
"Fairy," In re The, 1 Sp. Ecc. & Ad. 298 . . . . . 172
Faraday, In re Betty, 2 Sw. & Tr. 369 . . . . . 1039
Farlar *v.* Farlar, 1 Sw. & Tr. 124 . . . . . 658
Farmer *v.* Brock, Deane, 187 . . . . . 544
Farrell *v.* Brownbill, 3 Sw. & Tr. 467 . . . . . 1356
Federici, In re Vincenzo, 1 Sp. Ecc. & Ad. 109 . . . . 63
Fell, In re William Walker, 2 Sw. & Tr. 126 . . . . . 941
Ferrey *v.* King, 3 Sw. & Tr. 51 . . . . . 1191
"Fidentia," In re The, 1 Sp. Ecc. & Ad. 344; 1 Sp. P. C. 39 . . . 198
"Fidentia," In re The, Sp. P. C. 85 . . . . . 425
Fisher *v.* Fisher, 2 Sw. & Tr. 410 . . . . . 1055
Fitzgerald *v.* Fitzgerald, 3 Sw. & Tr. 397 . . . . . 1329
Fitzgerald *v.* Fitzgerald, 3 Sw. & Tr. 400 . . . . . 1330
Fitzroy, In re Charles Augustus, 1 Sw. & Tr. 133 . . . . 662
"Flecha," In re The, 1 Sp. Ecc. & Ad. 438 . . . . . 252
Fletcher *v.* Fletcher, 2 Sw. & Tr. 434 . . . . . 1064
Foale *v.* Trethewy and Brown, 4 Sw. & Tr. (Supp.) 201 . . . 1493
Foley, In re Agnes Maria, 2 Sp. Ecc. & Ad. 206 . . . . 391
Foot *v.* Stanton, Deane, 19 . . . . . 489
Forrest, In re Jane, 2 Sw. & Tr. 334 . . . . . 1024
Forster *v.* Forster and Berridge, 3 Sw. & Tr. 144 . . . . 1229
Forster *v.* Forster and Berridge, 3 Sw. & Tr. 151 . . . . 1231
Forster *v.* Forster and Berridge, 3 Sw. & Tr. 158 . . . . 1234
Forster *v.* Forster and Berridge, 4 Sw. & Tr. 131 . . . . 1466
Forster *v.* Forster and Evans, 1 Sw. & Tr. 167 . . . . . 677
Forster *v.* Forster and Thomas, 2 Sw. & Tr. 553 . . . . 1111
"Fortuna," In re The, Sp. P. C. 307 . . . . . 453
Foxwell *v.* Poole and Wife, 3 Sw. & Tr. 5 . . . . . 1172
Fozard, In re Amelia, 3 Sw. & Tr. 173 . . . . . 1240
"Franciska," In re The, 2 Sp. Ecc. & Ad. 113; 1 Sp. P. C 111 . . 337
"Franciska," In re The, Sp. P. C. 287 . . . . . 453
Freckleton, In re George, 1 Sw. & Tr. 16 . . . . . 608
Frith, In re William, 1 Sw. & Tr. 8 . . . . . 604
Furness *v.* Furness, 2 Sw. & Tr. 63 . . . . . 915
Fyler *v.* Fyler, 2 Sp. Ecc. & Ad. 69 . . . . . 311
Fyler *v.* Fyler, Deane, 175 . . . . . 540
Fyson and Others *v.* Westrope and Cutting, 1 Sw. & Tr. 279 . . . 728

G———s *v.* T———e, 1 Sp. Ecc. & Ad. 389 . . . . . 224
Gapp *v.* Gapp and Leverson, 4 Sw. & Tr. (Supp.) 273 . . . . 1521
Gardner, In re Herbert Calthorpe, 1 Sw. & Tr. 109 . . . . 651
Garstin *v.* Garstin, 4 Sw. & Tr. 73 . . . . . 1443
Gausden, In re John, 2 Sw. & Tr. 362 . . . . . 1036
Geale, In re, 3 Sw. & Tr. 431 . . . . . 1342
Geaves *v.* Price, 3 Sw. & Tr. 71 . . . . . 1199
Gent, In re Matthew, 1 Sw. & Tr. 54 . . . . . 626
Gethin *v.* Gethin, 2 Sw. & Tr. 406 . . . . . 1053
Gethin *v.* Gethin, 2 Sw. & Tr. 560 . . . . . 1114
Gill *v.* Gill and Hogg, 3 Sw. & Tr. 359 . . . . . 1314

PAGE
Gipps *v.* Gipps and Hume, 3 Sw. & Tr. 116 . . . . . 1217
Glen *v.* Burgess and Glover, 3 Sw. & Tr. 43 . . . . . 1188
Glennie *v.* Glennie and Bowles, 3 Sw. & Tr. 109 . . . . . 1214
Godfrey, In re Elizabeth, 2 Sw. & Tr. 133 . . . . . 944
Goldsborough, In re Charles, and Others, 1 Sw. & Tr. 295 . . . 736
Goodburn *v.* Bainbridge and Others, 2 Sw. & Tr. 4 . . . . . 891
Goode *v.* Goode and Hamson, 2 Sw. & Tr. 253 . . . . . 992
Goodenough, In re Joseph, 2 Sw. & Tr. 141 . . . . . 947
Goodheim *v.* Goodheim and Frankinson, 2 Sw. & Tr. 250 . . . 991
Goodyar, In re Louisa, 1 Sw. & Tr. 127 . . . . . 660
Goold, In re, 4 Sw. & Tr. 20 . . . . . 1422
Gordon, In re Colonel, 2 Sw. & Tr. 622 . . . . . 1139
Goss, In re John, 1 Sp. Ecc. & Ad. 413 . . . . . 237
"Graff Arthur Bernstorff," In re The, 2 Sp. Ecc. & Ad. 30 . . . 290
Graham, In re, 3 Sw. & Tr. 69 . . . . . 1198
Grant (Alexander) *v.* Harriet Sophia Grant and Bowles and Pattison, 2 Sw. & Tr. 522 . . . . . 1099
Graves *v.* Graves, 3 Sw. & Tr. 350 . . . . . 1310
Gray *v.* Gray, 2 Sw. & Tr. 263 . . . . . 996
Gray *v.* Gray, 2 Sw. & Tr. 266 . . . . . 997
Gray *v.* Gray, 2 Sw. & Tr. 554 . . . . . 1112
Greata, In re W., Deane, 266 . . . . . 572
Greves, In re Edward, 1 Sw. & Tr. 250 . . . . . 715
Griffith *v.* Griffith, 3 Sw. & Tr. 355 . . . . . 1312
Grimwood *v.* Cozens and Others, 2 Sw. & Tr. 364 . . . . . 1037
Guardians of Poor of Mile-End *v.* Findlay, 3 Sw. & Tr. 265 . . . 1276
Gullan, In re Thomas, 1 Sw. & Tr. 23 . . . . . 612
Gwillim and Another *v.* Gwillim and Others, 3 Sw. & Tr. 200 . . . 1251

H——— *v.* C———, 1 Sw. & Tr. 605 . . . . . 880
Hackett, In re William, 4 Sw. & Tr. (Supp.) 220 . . . . . 1501
Haddon *v.* Fladgate, 1 Sw. & Tr. 48 . . . . . 623
Hagger, In re Charlotte Elizabeth, 3 Sw. & Tr. 65 . . . . . 1196
Hakewell, In re Emma, Deane, 14 . . . . . 487
Hall *v.* Hall, 3 Sw. & Tr. 347 . . . . . 1309
Hall *v.* Hall, 3 Sw. & Tr. 390 . . . . . 1326
Hamer *v.* Boreham, 1 Sw. & Tr. 26 . . . . . 613
Hammond, In re W., 3 Sw. & Tr. 90 . . . . . 1207
Hancock *v.* Lightfoot, 3 Sw. & Tr. 557 . . . . . 1391
Harding *v.* Harding and Lance, 2 Sw. & Tr. 549 . . . . . 1110
Harding *v.* Harding and Lance, 4 Sw. & Tr. 145 . . . . . 1471
Hare *v.* Hare, 3 Sw. & Tr. 218 . . . . . 1257
Harenc *v.* Dawson & Clucas, 3 Sw. & Tr. 50 . . . . . 1190
Hargreaves & Others *v.* Wood and Others, 3 Sw. & Tr. 602 . . . 1131
Harmar *v.* Harmar, Deane, 282 . . . . . 577
"Harriet," In re The, 1 Sp. Ecc. & Ad. 180 . . . . . 104
Harris, In re Ann Durrant, 3 Sw. & Tr. 485 . . . . . 1364
Harris, In re Henry, 1 Sw. & Tr. 536 . . . . . 849
Harris v. Berrall, 1 Sw. & Tr. 153 . . . . . 671
Harris and Another *v.* Bradbury and Halladay, 2 Sw. & Tr. 459 . . 1075
Harris *v.* Harris and Lambert, 4 Sw. & Tr. (Supp.) 232 . . . . 1505
Harrison *v.* Harrison, 3 Sw. & Tr. 362 . . . . . 1315
Hart *v.* Hart. 2 Sp. Ecc. & Ad. 193 . . . . . 383
Harvey *v.* Allen, 1 Sw. & Tr. 151 . . . . . 670
Haswell *v.* Haswell and Sanderson, 1 Sw. & Tr. 502 . . . . . 832
Haviland *v.* Haviland, 3 Sw. & Tr. 114 . . . . . 1216
Hawarden *v.* Dunlop, 2 Sw. & Tr. 450 . . . . . 950
Hawarden *v.* Dunlop, 3 Sw. & Tr. 340 . . . . . 1027
Hawarden (The Viscountess) *v.* Dunlop, 2 Sw. & Tr. 614 . . . 1136
Hay, In re George James, 3 Sw. & Tr. 273 . . . . . 1279

PAGE
Haynes *v.* Matthews, 1 Sw. & Tr. 460 . . . . . 813
Hayward *v.* Hayward, 1 Sw. & Tr. 81 . . . . . 638
Hayward *v.* Hayward, 1 Sw. & Tr. 85 . . . . . 640
Hayward *v.* Hayward, 1 Sw. & Tr. 333 . . . . . 753
"Hedwig," In re The, 1 Sp. Ecc. & Ad. 19 . . . . . 11
Hepworth *v.* Hepworth, 2 Sw. & Tr. 414 . . . . . 1057
Hepworth *v.* Hepworth, 2 Sw. & Tr. 514 . . . . . 1096
Herbert *v.* Herbert, Deane, 10 . . . . . 486
Herbert *v.* Sheill and Others, 3 Sw. & Tr. 479 . . . . . 1361
Hewlett, In re Rev. John, 1 Sp. Ecc. & Ad. 3 . . . . . 2
Hilhouse, In re Richard, 1 Sp. Ecc. & Ad. 111 . . . . . 64
Hill *v.* Hill, 2 Sw. & Tr. 407 . . . . . 1054
Hill *v.* Hill and Wood, 2 Sw. & Tr. 515 . . . . . 1096
Hingeston *v.* Tucker and Her Majesty's Proctor, 2 Sw. & Tr. 596 . . 1129
Hitchcock *v.* Hitchcock, 2 Sw. & Tr. 513 . . . . . 1096
Holgate, In re John, 1 Sw. & Tr. 261 . . . . . 720
Holland *v.* Holland, 4 Sw. & Tr. 78 . . . . . 1445
Hook *v.* Hook, 1 Sw. & Tr. 183 . . . . . 684
Hooke *v.* Hooke, 4 Sw. & Tr. (Supp.) 236 . . . . . 1506
Hooper *v.* Hooper, 1 Sw. & Tr. 602 . . . . . 879
Hooper *v.* Hooper, 3 Sw. & Tr. 251 . . . . . 1270
Hope *v.* Hope, 1 Sw. & Tr. 94 . . . . . 644
"Hopewell," In re The, 2 Sp. Ecc. & Ad. 249 . . . . . 415
Horne *v.* Horne, 2 Sw. & Tr. 48 . . . . . 909
"Houthandel," In re The, 1 Sp. Ecc. & Ad. 25 . . . . . 15
How, In re Elizabeth, 1 Sw. & Tr. 53 . . . . . 626
Hudson v. Hudson, 3 Sw. & Tr. 314 . . . . . 1296
Hughes, In re John, 4 Sw. & Tr. (Supp.) 209 . . . . . 1496
Hunt *v.* Hunt, Deane, 121 . . . . . 522
Hunt *v.* Hunt and Duke, 2 Sw. & Tr. 574 . . . . . 1120
Hutcheson, In re William, 3 Sw. & Tr. 165 . . . . . 1236
Hyde *v.* Hyde, 4 Sw. & Tr. 80 . . . . . 1445

"Ida," In re The, 1 Sp. Ecc. & Ad. 331; 1 Sp. P. C. 25 . . . . 191
"Industrie," In re The, 1 Sp. Ecc. & Ad. 444; 1 Sp. P. C. 54 . . . 256
Inkson *v.* Jeeves and Others, 3 Sw. & Tr. 39 . . . . . 1186
Ionian Ships, In re The, 2 Sp. Ecc. & Ad. 212; 1 Sp. P. C. 193 . . 394
Iredale *v.* Ford and Bramworth, 1 Sw. & Tr. 305 . . . . . 740
Isherwood *v.* Cheetham, 2 Sw. & Tr. 607 . . . . . 1133

Jago *v.* Jago and Graham, 3 Sw. & Tr. 103 . . . . . 1211
James, In re Elizabeth Stone, 1 Sw. & Tr. 238 . . . . . 709
"Jan Hendrik," In re The, 1 Sp. Ecc. & Ad. 181 . . . . . 105
"Jeanne Marie," In re The, 2 Sp. Ecc. & Ad. 165; 1 Sp. P. C. 167 . . 367
Jeffreys *v.* Jeffreys and Smith, 3 Sw. & Tr. 493 . . . . . 1366
Jenkins *v.* Gaisford and Thring, 3 Sw. & Tr. 93 . . . . . 1208
Jenkyn *v.* Jenkyn, Deane, 268 . . . . . 573
Jessop *v.* Jessop, 2 Sw. & Tr. 301 . . . . . 1011
Jewell *v.* Jewell, 2 Sw. & Tr. 573 . . . . . 1119
"Johann Christoph," In re The, 2 Sp. Ecc. & Ad. 2; 1 Sp. P. C. 60 . . 274
"Johanna Emilia," In re The, 1 Sp. Ecc. & Ad. 317, 1 Sp. P. C. 12 . . 183
"Johanna Maria," In re The, Sp. P. C. 287, 307 . . . . . 453
"Johannes Christoph," In re The, 2 Sp. Ecc. & Ad. 93 . . . . . 325
Johnson, In re George, 2 Sw. & Tr. 595 . . . . . 1128
Johnson, In re Henrietta, 1 Sw. & Tr. 17 . . . . . 609
Johnson *v.* Weldy, 2 Sw. & Tr. 313 . . . . . 1016
Jones, In re James, 2 Sw. & Tr. 155 . . . . . 952
Jones, In re John, 1 Sw. & Tr. 13 . . . . . 607
Jones, In re William, Deane, 3 . . . . . 483
Jones, In re William, 3 Sw. & Tr. 28 . . . . . 1182

PAGE
Jones, In re William, 4 Sw. & Tr. 1 . . . . . 1414
Jones *v.* Williams & Others, 4 Sw. & Tr. 19 . . . . . 1422
Joys, In re Hannah, 4 Sw. & Tr. (Supp.) 214 . . . . . 1498
"Julindur," In re The, 1 Sp. Ecc. & Ad. 71 . . . . . 42

Kaye *v.* Kaye, 4 Sw. & Tr. (Supp.) 239 . . . . . 1507
Keats *v.* Keats and Montezuma, 1 Sw. & Tr. 334 . . . . 754
Keene, In re Francis, 1 Sw. & Tr. 265 . . . . . 722
Kelly *v.* Kelly, 1 Sp. Ecc. & Ad. 412 . . . . . 237
Kelly *v.* Kelly, 4 Sw. & Tr. (Supp.) 227 . . . . . 1503
Kenworthy *v.* Kenworthy and Watson, 3 Sw. & Tr. 64 . . . 1196
Killick, In re Mary Ann, 3 Sw. & Tr. 578 . . . . . 1399
Kimpton, In re Sarah, 3 Sw. & Tr. 427 . . . . . 1340
King George III., In re, 3 Sw. & Tr. 199 . . . . . 1250
King, In re William, 2 Sw. & Tr. 621 . . . . . 1139
"Kingalock," In re The, 1 Sp. Ecc. & Ad. 263 . . . . . 153
Klingemann, In re, 3 Sw. & Tr. 18 . . . . . 1178
Knight *v.* Knight, 4 Sw. & Tr. 103 . . . . . 1455

L——— (falsely called H———) *v.* H———, 4 Sw. & Tr. 115 . . 1459
"Lady Worsley," In re The, 2 Sp. Ecc. & Ad. 253 . . . . 417
Lainson *v.* Naylor, 2 Sw. & Tr. 7 . . . . . 892
Lakin *v.* Lakin, 1 Sp. Ecc. & Ad. 274 . . . . . 159
"Lanarkshire," In re The, 2 Sp. Ecc. & Ad. 189 . . . . 380
Lancaster, In re Eleanor, 1 Sw. & Tr. 464 . . . . . 815
Laneuville *v.* Anderson and Guichard, 2 Sw. & Tr. 24 . . . 899
Lansdowne, In re Marquis of, 3 Sw. & Tr. 194 . . . . . 1249
Latham and Dee *v.* Woolbert, 1 Sw. & Tr. 1 . . . . . 601
Latham *v.* Latham and Gethin, 2 Sw. & Tr. 299 . . . . . 1011
Latour *v.* Latour and Weston, 2 Sw & Tr. 524 . . . . . 1100
Lawrence *v.* Lawrence, 2 Sw. & Tr. 575 . . . . . 1120
Lawrence *v.* Lawrence, 3 Sw. & Tr. 207 . . . . . 1253
Leach, In re Sarah, Deane, 294 . . . . . 581
Lean *v.* Viner and Another, 3 Sw. & Tr. 469 . . . . . 1357
Leese, In re Matthew, 2 Sw. & Tr. 442 . . . . . 1068
Leeson, In re Joseph, 1 Sw. & Tr. 463 . . . . . 814
Leete *v.* Leete, 2 Sw. & Tr. 568 . . . . . 1118
Leigh *v.* Leigh, 1 Sw. & Tr. 164 . . . . . 676
"Leucade," In re The, 2 Sp. Ecc. & Ad. 228; 1 Sp. P. C. 217 . . 403
Lewis, In re Samuel William, 1 Sw. & Tr. 31 . . . . . 615
Lewis *v.* Lewis, 2 Sw. & Tr. 153 . . . . . 952
Lewis *v.* Lewis, 2 Sw. & Tr. 394 . . . . . 1048
Limerick (Countess of) *v.* Limerick (Earl of), 4 Sw. & Tr. (Supp.) 252 . 1512
Ling *v.* Ling and Croker, 1 Sw. & Tr. 180 . . . . . 683
Ling *v.* Ling and Croker, 1 Sw. & Tr. 187 . . . . . 685
Ling *v.* Ling and Croker, 4 Sw. & Tr. 99 . . . . . 1453
Lister and Others *v.* Smith, 3 Sw. & Tr. 53 . . . . . 1191
Lister and Others *v.* Smith and Others, 3 Sw. & Tr. 282 . . . 1282
Lloyd *v.* Lloyd and Chichester, 1 Sw. & Tr. 567 . . . . . 862
Loftus, In re William Kennett, 3 Sw. & Tr. 307 . . . . . 1293
Lorimer, In re Charles, 2 Sw. & Tr. 471 . . . . . 1079
Lovegrove, In re Letitia, 2 Sw. & Tr. 453 . . . . . 1072
Lowe, In re Daniel, 3 Sw. & Tr. 478 . . . . . 1361
Lowe *v.* Lowe, Deane, 130 . . . . . 525
Lucas *v.* Johnson, 1 Sp. Ecc. & Ad. 107 . . . . . 62
Ludlow, In re Sophia Henderson, 1 Sw. & Tr. 29 . . . . . 614

M——— (falsely called B———) *v.* B———, 3 Sw. & Tr. 550 . . 1389
M——— (falsely called H———) *v.* H———, 3 Sw. & Tr. 517 . . 1376
M——— (falsely called H———) *v.* H———, 3 Sw. & Tr. 592 . . 1405
M'Cabe, In re Peter Francis, 2 Sw. & Tr. 474 . . . . . 1080

PAGE
Maccann *v.* Maccann, 3 Sw. & Tr. 142 . . . . . 1228
Macdonald *v.* Macdonald, 4 Sw. & Tr. (Supp.) 242 . . . . 1508
M'Kechnie *v.* M'Kechnie, 1 Sw. & Tr. 550 . . . . . 855
Mackenzie, In re D., Deane, 17 . . . . . 488
Maclean and Maclean *v.* Dawson and Others, 1 Sw. & Tr. 425 . . . 796
Maddock *v.* Allen, Deane, 325 . . . . . 591
Magellan Pirates, The, 1 Sp. Ecc. & Ad. 81 . . . . . 47
Main, In re Andrew, 1 Sw. & Tr. 11 . . . . . 606
Manfredi, In re Biagio, 1 Sw. & Tr. 135 . . . . . 663
Manly, In re Martha, 3 Sw. & Tr. 56 . . . . . 1193
Manton *v.* Manton and Stevens, 4 Sw. & Tr. 159 . . . . 1477
March *v.* March, 2 Sw. & Tr. 49 . . . . . 910
Marchmont *v.* Marchmont, 1 Sw. & Tr. 228 . . . . . 705
"Maria," In re The, Sp. P. C. 321 . . . . . 461
Marris *v.* Marris and Burke, 2 Sw. & Tr. 530 . . . . . 1102
Marsden, In re Peter, 1 Sw. & Tr. 542 . . . . . 851
Marsh *v.* Marsh, 1 Sw. & Tr. 312 . . . . . 744
Marsh and Others *v.* Marsh and Others, 1 Sw. & Tr. 528 . . . 845
Marsh and Others *v.* Corry, 3 Sw. & Tr. 458 . . . . . 1353
Martin, In re George, 3 Sw. & Tr. 1 . . . . . 1171
Martindale, In re John J., 1 Sw. & Tr. 8 . . . . . 605
Mason, In re William, 2 Sp. Ecc. & Ad. 193 . . . . . 383
Mason *v.* The Next of Kin of William Robinson, 4 Sw. & Tr. 43 . . 1431
Mathias, In re Lydia, 3 Sw. & Tr. 100 . . . . . 1211
Matthews *v.* Matthews, 1 Sw. & Tr. 499 . . . . . 831
Matthews *v* Matthews, 3 Sw. & Tr. 161 . . . . . 1235
"Medora" In re The, 1 Sp. Ecc. & Ad. 17 . . . . . 10
Mendes da Silva, In re Solomon, 2 Sw. & Tr. 315 . . . . 1017
Merritt, In re Elizabeth, 1 Sw. & Tr. 112 . . . . . 652
Mette *v.* Mette, 1 Sw. & Tr. 416 . . . . . 792
Middleton, In re Elizabeth, 3 Sw. & Tr. 583 . . . . . 1402
Midgeley (falsely called Wood) *v.* Wood, 4 Sw. & Tr. (Supp.) 267 . . 1518
Miller *v.* Miller and Hicks, 2 Sw. & Tr. 427 . . . . . 1062
Mills *v.* Mills, 2 Sw. & Tr. 310 . . . . . 1015
Milne *v.* Milne, 4 Sw. & Tr. 183 . . . . . 1487
Milner *v.* Milner, 4 Sw. & Tr. (Supp.) 240 . . . . . 1508
"Minerva," In re The, 1 Sp. Ecc. & Ad. 271 . . . . . 157
Mitchell and Mitchell *v.* Gard and Kingwell, 3 Sw. & Tr. 75 . . . 1200
Mitchell and Mitchell *v.* Gard and Kingwell, 3 Sw. & Tr. 275 . . . 1280
Mitchell *v.* Mitchell, Sp. Ecc. & Ad. 102 . . . . . 59
Mobbs, In re William, 2 Sp. Ecc. & Ad. 59 . . . . . 306
Money *v.* Money, 1 Sp. Ecc. & Ad. 117 . . . . . 68
Moore *v.* Moore, 3 Sw. & Tr. 606 . . . . . 1410
Moore *v.* Whitehouse, 3 Sw. & Tr. 567 . . . . . 1395
Morley, In re, 3 Sw. & Tr. 425 . . . . . 1339
Morris, In re Louisa, 2 Sw. & Tr. 360 . . . . . 1035
Morrison, In re Robert, 2 Sw. & Tr. 129 . . . . . 942
Morton, In re Francis, 3 Sw. & Tr. 422 . . . . . 1338
Morton *v.* Thorpe and Others, In re Ashton Morton, 3 Sw. & Tr. 179 . . 1242
Moss and Others *v.* Bardswell, 3 Sw. & Tr. 187 . . . . . 1245
Muir, In re James, 1 Sw. & Tr. 294 . . . . . 735
Mullineux, Ex parte, 1 Sw. & Tr. 77 . . . . . 636
Mulock, In re, 3 Sw. & Tr. 599 . . . . . 1407
Mundy, In re Edward Miller, 2 Sw. & Tr. 119 . . . . . 938
Munt (Jane) *v.* William Munt, 2 Sw. & Tr. 661 . . . . . 1155

N——— *v.* N———, 3 Sw. & Tr. 234 . . . . . 1264
Narracott *v.* Narracott and Hesketh, 3 Sw. & Tr. 408 . . . . 1333
Narracott *v.* Narracott and Hesketh, 4 Sw. & Tr. 76 . . . . 1444
Nash *v.* Yelloly, 3 Sw. *v.* Tr. 59 . . . . . 1194

PAGE
Neale, In re Elizabeth Ann, 1 Sp. Ecc. & Ad. 112 . . . . 65
"Neptune," In re The, Sp. P. C. 281 . . . . . 450
Neville, In re Glastonbury, 4 Sw. & Tr. (Supp.) 218 . . . . 1500
Nicholls *v.* Nicholls, 2 Sw. & Tr. 637 . . . . . 1145
Nickalls, In re, 4 Sw. & Tr. 40 . . . . . 1430
Nichols and Freeman *v.* Binns, 1 Sw. & Tr. 19 . . . . . 610
Nichols and Freeman *v.* Binns, 1 Sw. & Tr. 239 . . . . . 710
Nicholson *v.* Nicholson and Ratcliffe, 3 Sw. & Tr. 214 . . . . 1256
"Nina," In re The, Sp. P. C. 276 . . . . . 447
"Nina," In re The, Sp. P. C. 345 . . . . . 475
"No," In re The, 1 Sp. Ecc. & Ad. 184 . . . . . 107
Noddings, In re Robert, 2 Sw. & Tr. 15 . . . . . 896
Nokes *v.* Nokes, 3 Sw. & Tr. 529 . . . . . 1381
"Norden," In re The, 1 Sp. Ecc. & Ad. 185 . . . . . 107
"Nornen," In re The, 2 Sp. Ecc. & Ad. 169; 1 Sp. P. C. 171 . . . 369
Norris, In re W. T., 1 Sw. & Tr. 6 . . . . . 603
Norris *v.* Allen, 2 Sw. & Tr. 601 . . . . . 1131
Norris *v.* Norris and Gyles, 1 Sw. & Tr. 174 . . . . . 680
Norris *v.* Norris, Lawson, and Mason, 4 Sw. & Tr. (Supp.) 237 . . 1506
"Northampton," In re The, 1 Sp. Ecc. & Ad. 152 . . . . . 89
Norton *v.* Bazett, Deane, 259 . . . . . 569
"Nostra Senora Del Carmine," In re, 1 Sp. Ecc. & Ad. 303 . . . 175
Nosworthy, In re Elizabeth, 4 Sw. & Tr. 44 . . . . . 1431

O'Brien, In re John, 2 Sw. & Tr. 604 . . . . . 1132
"Ocean Bride," In re The, 2 Sp. Ecc. & Ad. 8; 1 Sp. P. C. 66 . . 277
"Odessa," In re The, Sp. P. C. 208 . . . . . 428
O'Dwyer *v.* John Geare and Another, 1 Sw. & Tr. 465 . . . . 815
Ogden, In re John Henry, 1 Sp. Ecc. & Ad. 113 . . . . . 66
Oliphant, In re Thomas H., 1 Sw. & Tr. 525 . . . . . 843
Olliver, In re William, 2 Sp. Ecc. & Ad. 57 . . . . . 305
Onslow and Allardice *v.* Cannon, 2 Sw. and Tr. 136 . . . . 945
"Orbona," In re, 1 Sp. Ecc. & Ad. 161 . . . . . 93
Osborne, In re Thomas, Deane, 4 . . . . . 484
Osborne *v.* Osborne, 3 Sw. & Tr. 327 . . . . . 1301
"Ostsee," In re The, 2 Sp. Ecc. & Ad. 170; 1 Sp. P. C. 174 . . . 370
"Otto and Olaf," In re The, Sp. P.C. 257 . . . . . 436
Ouchterlony, In re, 3 Sw. & Tr. 175 . . . . . 1241
Owen *v.* Davies, 3 Sw. & Tr. 588 . . . . . 1404
Owen *v.* Williams, 4 Sw. & Tr. (Supp.) 202 . . . . . 1494
Owston, In re Francis, 2 Sw. & Tr. 461 . . . . . 1075

Page *v.* Donovan and Hankey, Deane, 278 . . . . . 576
Palmer *v.* Maclear and M'Grath, 1 Sw. & Tr. 149 . . . . . 670
Palmer *v.* Palmer, 1 Sw. & Tr. 551 . . . . . 855
Palmer *v.* Palmer, 2 Sw. & Tr. 61 . . . . . 914
Palmer *v.* Palmer, 4 Sw. & Tr. 143 . . . . . 1471
"Panaja Drapaniotisa," In re The, Sp. P. C. 336 . . . . . 469
"Panther," In re The, 1 Sp. Ecc. & Ad. 31 . . . . . 19
"Paris," In re The, 1 Sp. Ecc. & Ad. 289 . . . . . 168
Parker, In re Jane, 1 Sw. & Tr. 523 . . . . . 842
Parker, In re John, 2 Sw. & Tr. 375 . . . . . 1041
Parker *v.* Hick, 3 Sw. & Tr. 436 . . . . . 1344
Parr *v.* Parr and White, 4 Sw. & Tr. (Supp.) 229 . . . . . 1504
Patten *v.* Poulton and Others, 1 Sw. & Tr. 55 . . . . . 626
Peach, In re Martha, 1 Sw. & Tr. 138 . . . . . 664
Peacock *v.* Peacock, 1 Sw. & Tr. 183 . . . . . 684
Pearman *v.* Pearman and Burgess, 1 Sw. & Tr. 601 . . . . . 878
Pearson *v.* Pearson, 2 Sw. & Tr. 546 . . . . . 1109
Peck, In re Charles William, 2 Sw. & Tr. 506 . . . . . 1093

PAGE
Peck, In re Elisha, 1 Sw. & Tr. 141 . . . . . 666
Peckover *v.* Peckover and Jolly, 1 Sw. & Tr. 219 . . . . . 700
Pegg *v.* Chamberlain and Others, 1 Sw. & Tr. 527 . . . . . 844
Pellew *v.* Pellew and Berkeley, 1 Sw. & Tr. 553 . . . . . 856
Pembroke, In re The Countess Dowager of, Deane, 182 . . . . 542
Perry *v.* F. H. Dyke, 1 Sw. & Tr. 12 . . . . . 606
"Persia," In re The, 1 Sp. Ecc. & Ad. 166 . . . . . 97
Peters *v.* Peters and Willett, 3 Sw. & Tr. 264 . . . . . 1275
Phillips *v.* Phillips and Medlyn, 4 Sw. & Tr. 129 . . . . . 1465
"Phœnix," In re The, 1 Sp. Ecc. & Ad. 306; 1 Sp. P. C. 1 . . . 177
Pile, In re Alexander, 2 Sw. & Tr. 628 . . . . . 1142
Plumer *v.* Plumer and Bygrave, 4 Sw. & Tr. (Supp.) 257 . . . 1514
Podmore *v.* Whatton, 3 Sw. & Tr. 449 . . . . . 1349
"Polka," In re The, 1 Sp. Ecc. & Ad. 447; 1 Sp. P. C. 57 . . . 257
Pollack *v.* Pollack, and Deane, and Macnamara, 2 Sw. & Tr. 648 . 1149
Pollard *v.* Pollard and Hemming, 3 Sw. & Tr. 613 . . . . . 1413
Pollock *v.* Pollock, Dean, and Macnamara, 4 Sw. & Tr. (Supp.) 266 . 1518
Porter *v.* Porter and Jaggard, 3 Sw. & Tr. 596 . . . . . 1406
Potts *v.* Potts and Another, 1 Sw. & Tr. 181 . . . . . 683
Pounsford *v.* Pounsford and Bulpin, 2 Sw. & Tr. 389 . . . . . 1046
Powell, In re James, 4 Sw. & Tr. 34 . . . . . 1427
Power *v.* Power, 4 Sw. & Tr. 173 . . . . . 1483
Poyer, In re John Poyer, Deane, 184 . . . . . 543
Presant and Presant *v.* Goodwin, 1 Sw. & Tr. 544 . . . . . 852
Prichard *v.* Prichard, 3 Sw. & Tr. 523 . . . . . 1378
"Primus," In re The, 1 Sp. Ecc. & Ad. 353; 1 Sp. P. C. 48 . . . 203
"Primus," In re The, 2 Sp. Ecc. & Ad. 1; 1 Sp. P. C. 59 . . . 273
Priske *v.* Priske and Goldby, 4 Sw. & Tr. (Supp.) 238 . . . . 1507
Proctor *v.* Proctor, and Smith, and Pitman, 4 Sw. & Tr. 140 . . . 1469
Procurator-General (Her Majesty's) *v.* Samuel Williams, 2 Sw. & Tr. 353 . 1032
Pugh, In re Richard, 1 Sp. Ecc. & Ad. 416 . . . . . 239
Pulman, In re Tyrrwhit, 3 Sw. & Tr. 269 . . . . . 1277
Purdey and Others *v.* Field and Another, and Hatch, 3 Sw. & Tr. 576 . 1399
Pyne *v.* Pyne, 1 Sw. & Tr. 80 . . . . . 637
Pyne *v.* Pyne, 1 Sw. & Tr. 178 . . . . . 682

Queen's Proctor (The) *v.* Williams, 4 Sw. & Tr. (Supp.) 221 . . . 1501
Quick *v.* Quick and Quick, 3 Sw. & Tr. 442 . . . . . 1347
Quick *v.* Quick and Another, 3 Sw. & Tr. 460 . . . . . 1354
Quicke *v.* Quicke, 2 Sw. & Tr. 419 . . . . . 1058

Raffenel, In re Emily Susan Graham, 3 Sw. & Tr. 49 . . . . 1190
Raine, In re Joseph, 1 Sw. & Tr. 144 . . . . . 667
Rainier, In re Peter, Deane, 317 . . . . . 588
"Rapid," In re The, Sp. P. C. 80 . . . . . 424
"Rapida," alias "Rapide," Sp. P. C. 172 . . . . . 427
Ratcliffe *v.* Ratcliffe and Anderson, 1 Sw. & Tr. 217 . . . . 700
Ratcliffe *v.* Ratcliffe and Anderson, 1 Sw. & Tr. 467 . . . . 816
Ratcliffe and Another *v.* Barnes, 2 Sw. & T. 486 . . . . . 1085
Rawlins *v.* Rawlins, 4 Sw. & Tr. 158 . . . . . 1477
Rawlinson *v.* Burnell and Others, 3 Sw. & Tr. 479 . . . . . 1361
Reay, In re Eleanor, 4 Sw. & Tr. (Supp.) 215 . . . . . 1499
Reed, In re Mary, 2 Sp. Ecc. & Ad. 202 . . . . . 388
Reed, In re, Thomas, 3 Sw. & Tr. 439 . . . . . 1345
Reeves *v.* Reeves, 3 Sw. & Tr. 139 . . . . . 1227
Richards *v.* The Queen's Proctor, 1 Sp. Ecc. & Ad. 235 . . . . 136
Richardson, In re Samuel, 1 Sw. & Tr. 515 . . . . . 839
Ridgway *v.* Abington and Others, 3 Sw. & Tr. 3 . . . . . 1172
Ripley, In re John Peter, 1 Sw. & Tr. 68 . . . . . 632
Rippon, In re, 3 Sw. & Tr. 177 . . . . . 1242

PAGE
Roadnight *v.* Carter and Another, 3 Sw. & Tr. 421 . . . . . 1338
Robins and Paxton *v.* Dolphin, 1 Sw. & Tr. 37 . . . . . 618
Robins and Paxton *v.* Dolphin, 1 Sw. & Tr. 518 . . . . . 840
Robinson *v.* Robinson and Lane, 1 Sw. & Tr. 362 . . . . . 767
Robinson v. Robinson and Lane, 1 Sw. & Tr. 179 . . . . . 682
Roberts, In re Sarah Hannah, 1 Sw. & Tr. 64 . . . . . 631
Roberts *v.* Roberts, 2 Sw. & Tr. 337 . . . . . 1026
Robotham *v.* Robotham, 1 Sw. & Tr. 190 . . . . . 687
Robson *v.* Robson, 3 Sw. & Tr. 568 . . . . . 1396
Rogers *v.* Rogers, 4 Sw. & Tr. 82 . . . . . 1446
Rogers and Andrews *v.* Goodenough, 2 Sw. & Tr. 342 . . . . . 1028
Rogers, otherwise Briscoe (falsely called Halmshaw) *v.* Halmshaw, 3 Sw. & Tr. 509 . . . . . 1373
Rolt *v.* Rolt, 3 Sw. & Tr. 604 . . . . . 1409
Rooker *v.* Rooker and Newton, 3 Sw. & Tr. 526 . . . . . 1379
"Rosalie," In re The, 1 Sp. Ecc. & Ad. 188 . . . . . 109
Rosbotham and Others *v.* Rosbotham, 2 Sw. & Tr. 121 . . . . . 939
"Rosehaugh," In re The, 1 Sp. Ecc. & Ad. 267 . . . . . 155
Rosser, In re Sarah, 3 Sw. & Tr. 490 . . . . . 1366
Rowbotham *v.* Rowbotham, 1 Sw. & Tr. 73 . . . . . 635
Rowe *v.* Rowe, 4 Sw. & Tr. 162 . . . . . 1478
Rowley *v.* Rowley, 1 Sw. & Tr. 487 . . . . . 826
Rowley *v.* Rowley, 3 Sw. & Tr. 338 . . . . . 1305
Rowley *v.* Rowley, 4 Sw. & Tr. 137 . . . . . 1468
"Royal Stuart," In re The, 2 Sp. Ecc. & Ad. 258 . . . . . 420
Rudall *v.* Warren, Deane, 306 . . . . . 584
Ryder, In re Anne Hill, 2 Sw. & Tr. 127 . . . . . 941
Ryder *v.* Ryder, 2 Sw. & Tr. 225 . . . . . 981

S——— *v.* E———, 3 Sw. & Tr. 240 . . . . . 1266
Sandrey *v.* Mitchell and Another, 3 Sw. & Tr. 25 . . . . . 1180
"Santipore," In re The, 1 Sp. Ecc. & Ad. 231 . . . . . 134
Saunders *v.* Saunders, 1 Sw. & Tr. 72 . . . . . 634
Sawtell, In re James White, 2 Sw. & Tr. 448 . . . . . 1070
Scott *v.* Scott, 1 Sw. & Tr. 258 . . . . . 719
Scott *v.* Scott, 3 Sw. & Tr. 319 . . . . . 1298
Scott *v.* Scott, 4 Sw. & Tr. 113 . . . . . 1458
"Sea Park," In re The, 1 Sp. Ecc. & Ad. 186 . . . . . 108
Seatel *v.* Seatel, 4 Sw. & Tr. (Supp.) 230 . . . . . 1504
Seaver *v.* Seaver, 2 Sw. & Tr. 665 . . . . . 1156
Seddon *v.* Seddon and Doyle, 2 Sw. & Tr. 640 . . . . . 1146
"Segredo" otherwise "Eliza Cornish," 1 Sp. Ecc. & Ad. 36 . . . . 22
Seller *v.* Seller, 1 Sw. & Tr. 482 . . . . . 823
Serrell *v.* Serrell, and Bamford, 2 Sw. & Tr. 422 . . . . . 1060
Serrell *v.* Serrell and Bamford, 2 Sw. & Tr. 636 . . . . . 1145
Seymour *v.* Seymour, 1 Sw. & Tr. 332 . . . . . 753
Shaw, In re Mary, 1 Sw. & Tr. 62 . . . . . 630
Shaw *v.* Neville, 2 Sp. Ecc. & Ad. 203 . . . . . 389
Shaw *v.* Shaw, 2 Sw. & Tr. 517 . . . . . 1097
Shaw *v.* Shaw, 2 Sw. & Tr. 642 . . . . . 1147
Shawe and Dickens *v.* Marshall and Others, 1 Sw. & Tr. 129 . . . . 660
Shedden *v.* Patrick, 2 Sw. & Tr. 170 . . . . . 958
Sheldon *v.* Sheldon, 4 Sw. & Tr. 75 . . . . . 1444
Shilling, In re James, Deane, 183 . . . . . 543
Shirley *v.* Wardrop, 1 Sw. & Tr. 317 . . . . . 746
Shoolbraid, In re, 1 Sp. Ecc. & Ad. 246 . . . . . 142
Sidney *v.* Sidney, 4 Sw. & Tr. 178 . . . . . 1485
Silver Bullion, 2 Sp. Ecc. & Ad. 70 . . . . . 312
Simkin, In re William, 1 Sp. Ecc. & Ad. 1 . . . . . 1
Simonin *v.* Mallac, 2 Sw. & Tr. 67 . . . . . 917

PAGE
"Sir George Seymour," In re The, 1 Sp. Ecc. & Ad. 67 . . . 39
Skipper and Skipper *v.* Bodkin and Others, 2 Sw. & Tr. 1 . . . 890
Slumbers, Charles Adolphus, 4 Sw. & Tr. 32 . . . . . 1426
Smallwood *v.* Smallwood, 2 Sw. & Tr. 397 . . . . . 1050
Smethurst *v.* Tomlin and Bankes, 2 Sw. & Tr. 143 . . . . 947
Smith, In re Eliza, 3 Sw. & Tr. 561 . . . . . 1393
Smith, In re Esther, 3 Sw. & Tr. 589 . . . . . 1404
Smith, In re George Augustus Frederick, 2 Sw. & Tr. 371 . . . 1040
Smith, In re Rebecca, 1 Sw. & Tr. 125 . . . . . 659
Smith, In re Thomas, 1 Sp. Ecc. & Ad. 105 . . . . . 61
Smith, In re William George, 2 Sw. & Tr. 508 . . . . . 1094
Smith *v.* Hoad and Others, 3 Sw. & Tr. 462 . . . . . 1354
Smith *v.* Smith, 1 Sw. & Tr. 359 . . . . . 765
Smith *v.* Smith, 3 Sw. & Tr. 216 . . . . . 1257
Smith *v.* Smith, 4 Sw. & Tr. 3 . . . . . 1415
Smith *v.* Smith and Tremsaux, 4 Sw. & Tr. (Supp.) 228 . . . 1503
"Soglasie," In re The, 2 Sp. Ecc. & Ad. 101; 1 Sp. P. C. 104 . . . 330
Sopwith *v.* Sopwith, 2 Sw. & Tr. 105 . . . . . 932
Sopwith *v.* Sopwith, 2 Sw. & Tr. 160 . . . . . 954
Sopwith *v.* Sopwith, 4 Sw. & Tr. (Supp.) 243 . . . . . 1509
Southall and Huxley *v.* Jones, 1 Sw. & Tr. 298 . . . . . 737
Spering *v.* Spering, 3 Sw. & Tr. 211 . . . . . 1255
Sperling, In re Charles Robert, 3 Sw. & Tr. 272 . . . . . 1279
Spilsbury *v.* Spilsbury, 3 Sw. & Tr. 210 . . . . . 1254
Spratt *v.* Spratt, Deane, 276 . . . . . 575
Spratt *v.* Spratt, 1 Sw. & Tr. 215 . . . . . 699
Squires *v.* Squires, 3 Sw. & Tr. 541 . . . . . 1385
Stacpoole, In re Hugh, 2 Sw. & Tr. 316 . . . . . 1017
Staines *v.* Stewart and Jones, 2 Sw. & Tr. 320 . . . . . 1019
"Steen Bille," In re The, 2 Sp. Ecc. & Ad. 159: 1 Sp. P. C. 161 . . 364
Steinorth, In re Ellen, Deane, 270 . . . . . 573
Stewart, In re M. A. E. J., 3 Sw. & Tr. 192 . . . . . 1247
Stewart, In re Mary Ann E., 4 Sw. & Tr. (Supp.) 211 . . . . 1497
Stoate *v.* Stoate, 2 Sw. & Tr. 223 . . . . . 980
Stoate *v.* Stoate, 2 Sw. & Tr. 384 . . . . . 1045
Stoddart, In re Alexander, 2 Sw. & Tr. 356 . . . . . 1034
Stone *v.* Stone and Appleton, 3 Sw. & Tr. 212 . . . . . 1255
Stone *v.* Stone and Appleton, 3 Sw. & Tr. 608 . . . . . 1411
Stone *v.* Stone and Brownrigg, 3 Sw. & Tr. 113 . . . . . 1215
Stone *v.* Stone and Brownrigg, 3 Sw. & Tr. 372 . . . . . 1319
Stracey, In re Sir Josias and Diana, Deane, 6 . . . . . 484
Streaker, In re George, 4 Sw. & Tr. (Supp.) 192 . . . . . 1490
Stuart *v.* Stuart, 3 Sw. & Tr. 219 . . . . . 1258
Studdy *v.* Studdy, 1 Sw. & Tr. 321 . . . . . 747
Suggate *v.* Suggate, 1 Sw. & Tr. 489 . . . . . 827
Suggate *v.* Suggate, 1 Sw. & Tr. 492 . . . . . 828
Suggate *v.* Suggate, 1 Sw. & Tr. 497 . . . . . 830
Summerell *v.* Clements, 3 Sw. & Tr. 35 . . . . . 1184
Sutherland, In re Stewart, 4 Sw. & Tr. (Supp.) 189 . . . . . 1489
Sutherland *v.* Crombie, 3 Sw. & Tr. 210 . . . . . 1254
"Swanland," In re The, 2 Sp. Ecc. & Ad. 107 . . . . . 333
Swatman *v.* Swatman, 4 Sw. & Tr. 135 . . . . . 1467
Sweetland *v.* Sweetland, 4 Sw. & Tr. 6 . . . . . 1416
Swinfen *v.* Swinfen, 1 Sw. & Tr. 283 . . . . . 730
"Sylph," In re The, 2 Sp. Ecc. & Ad. 75 . . . . . 315
Symes *v.* Green, 1 Sw. & Tr. 401 . . . . . 785
Symons *v.* Symons and Pike, 2 Sw. & Tr. 435 . . . . . 1065

Tatham *v.* Tatham and Nutt, 3 Sw. & Tr. 511 . . . . . 1374
Teagle *v.* Teagle and Nottingham, 1 Sw. & Tr. 188 . . . . . 686

PAGE
"Temiscouata," In re The, 2 Sp. Ecc. & Ad. 208 . . . . . 392
Terrible, In re James, 1 Sw. & Tr. 140 . . . . . 665
Thomas, In re Jane, 1 Sw. & Tr. 255 . . . . . 717
Thomas *v.* Crowther, 2 Sw. & Tr. 501 . . . . . 1091
Thomas *v.* Thomas, 2 Sw. & Tr. 64 . . . . . 915
Thomas *v.* Thomas, 2 Sw. & Tr. 89 . . . . . 926
Thomas *v.* Thomas, 2 Sw. & Tr. 113 . . . . . 935
Thompson *v.* Thompson, 1 Sw. & Tr. 231 . . . . . 706
Thompson *v.* Thompson and Barras, 2 Sw. & Tr. 649 . . . . 1150
Thompson *v.* Thompson and Sturmfels, 2 Sw. & Tr. 402 . . . 1052
Thorncroft and Clarke *v.* Lashmar, 2 Sw. & Tr. 479 . . . . 1083
Thorne, In re George, 4 Sw. & Tr. 36 . . . . . 1428
Todd and Price *v.* Sumpsion and Sprigges, 1 Sw. & Tr. 269 . . 723
"Toivo," In re The, 1 Sp. Ecc. & Ad. 185 . . . . . 108
Tollemache *v.* Tollemache, 1 Sw. & Tr. 557 . . . . . 858
Tomkin *v.* Tomkin and Another, 1 Sw. & Tr. 182 . . . . . 683
Tomkins *v.* Tomkins, 1 Sw. & Tr. 163 . . . . . 675
Tomkins *v.* Tomkins, 1 Sw. & Tr. 168 . . . . . 678
Tonar, In re John, Deane, 267 . . . . . 572
Toomy, In re Thomas, 3 Sw. & Tr. 562 . . . . . 1393
Tooth *v.* Barrow, 1 Sp. Ecc. & Ad. 371 . . . . . 214
Tourle *v.* Tourle and Another, 1 Sw. & Tr. 165 . . . . . 676
Tourle *v.* Tourle & Renshaw, 1 Sw. & Tr. 176 . . . . . 681
"Trident," In re The, 1 Sp. Ecc. & Ad. 217 . . . . . 126
"Troija," In re The, 1 Sp. Ecc. & Ad. 342 ; 1 Sp. P. C. 37 . . 198
Trott and Trott *v.* Skidmore and Others, 2 Sw. & Tr. 12 . . . 894
Tucker, In re Hannah, 3 Sw. & Tr. 585 . . . . . 1402
Tucker, In re Thomas, 2 Sw. & Tr. 123 . . . . . 939
Turner, In re Charles, 3 Sw. & Tr. 476 . . . . . 1360
Turner *v.* Turner, 2 Sw. & Tr. 426 . . . . . 1061
Turrell, In re Augustus, 3 Sw. & Tr. 456 . . . . . 1073
Twells *v.* Clarke and Others, 3 Sw. & Tr. 280 . . . . . 1282
"Two Sisters," In re The, 1 Sp. Ecc. & Ad. 99 . . . . . 57

"Union," In re The, 2 Sp. Ecc. & Ad. 161 ; 1 Sp. P. C. 164 . . 365

Valentine *v.* Cleugh, 1 Sp. Ecc. & Ad. 427 . . . . . 246
Van Drom, In re Rt. Hon. Hendrik Jacob Baron, 1 Sp. Ecc. & Ad. 245 . 142
Van Straubenzee and Wife *v.* Monck, 3 Sw. & Tr. 6 . . . . 1173
Veiga, In re Joaquim Jose Ferreira, 3 Sw. & Tr. 13 . . . . 1176
Velho *v.* Leite, 3 Sw. & Tr. 456 . . . . . 1352
Vinnicombe *v.* Butler and Another, 3 Sw. & Tr. 580 . . . . 1400
"Virtue," In re The, 1 Sp. Ecc. & Ad. 77 . . . . . 45

W——— *v.* H———, 2 Sw. & Tr. 240 . . . . . 987
Waddell *v.* Waddell, 2 Sw. & Tr. 584 . . . . . 1124
Wainwright, In re Frederick, 1 Sw. & Tr. 257 . . . . . 718
Walker, In re John, 2 Sw. & Tr. 354 . . . . . 1033
Walker *v.* Walker, Nicoll, and Craig, 4 Sw. & Tr. (Supp.) 264 . . 1517
Wallich, In re Nath. David Scott, 3 Sw. & Tr. 423 . . . . 1339
"Wansfell," In re The, 1 Sp. Ecc. & Ad. 269 . . . . . 156
Ward *v.* Ward, 1 Sw. & Tr. 185 . . . . . 685
Ward *v.* Ward, 1 Sw. & Tr. 484 . . . . . 824
Ware and Grove *v.* Claxton and Claxton, 1 Sw. & Tr. 251 . . . 715
Warren *v.* Kelson, 1 Sw. & Tr. 290 . . . . . 733
Watson, In re Jenny, 1 Sw. & Tr. 110 . . . . . 651
Watts *v.* Watts, 4 Sw. & Tr. (Supp.) 274 . . . . . 1521
Watts, In re William, 1 Sw. & Tr. 538 . . . . . 850
"Wear Packet," In re The, 2 Sp. Ecc. & Ad. 256 . . . . . 419
Weatherley *v.* Weatherley, 1 Sp. Ecc. & Ad. 193 . . . . . 112

PAGE
Webb, In re Eleanor, 3 Sw. & Tr. 482 . . . . . 1362
Webb, In re Jane, Deane, 1 . . . . . 483
Weber *v.* Weber and Pyne, 1 Sw. & Tr. 219 . . . . . 701
Webster *v.* Webster and Mitford, 3 Sw. & Tr. 106 . . . . 1212
Weir, In re Harriet S. L., 1 Sw. & Tr. 506 . . . . . 834
Weir, In re Mary, 2 Sw. & Tr. 451 . . . . . 1071
Welch, In re Jonas, Deane, 314 . . . . . 587
Wells *v.* Cottam, 3 Sw. & Tr. 364 . . . . . 1316
Wells *v.* Wells, 1 Sw. & Tr. 308 . . . . . 742
Wells *v.* Wells, 2 Sw. & Tr. 607 . . . . . 1133
Wells *v.* Wells and Cottam, 3 Sw. & Tr. 593 . . . . . 1445
Wells *v.* Wells and Hudson, 3 Sw. & Tr. 542 . . . . . 1386
West and Nicholl *v.* West, 4 Sw. & Tr. 22 . . . . . 1423
Westerton *v.* Davidson, 1 Sp. Ecc. & Ad. 385 . . . . . 222
Wharram *v.* Wharram, 3 Sw. & Tr. 301 . . . . . 1290
Whieldon *v.* Whieldon, 2 Sw. & Tr. 388 . . . . . 1046
Whiston, In re Charles, 2 Sw. & Tr. 318 . . . . . 1018
White, In re Sarah, 2 Sw. & Tr. 457 . . . . . 1074
White *v.* White, 1 Sw. & Tr. 591 . . . . . 874
White *v.* White and Cato, 2 Sw. & Tr. 504 . . . . . 1092
Whiting *v.* Deal and Orchard, 2 Sp. Ecc. & Ad. 56 . . . . 304
Williams *v.* Davies, 3 Sw. & Tr. 437 . . . . . 1344
Williams *v.* Henery and Others, 3 Sw. & Tr. 463 . . . . 1355
Williams *v.* Henery and Others, 3 Sw. & Tr. 471 . . . . 1358
Williams *v.* Williams, 3 Sw. & Tr. 547 . . . . . 1388
Willmot, In re Percival, 1 Sw. & Tr. 36 . . . . . 617
Wilton *v.* Wilton and Chamberlain, 1 Sw. & Tr. 563 . . . . 861
Wing *v.* Taylor, 2 Sw. & Tr. 278 . . . . . 1002
Wingate, In re Andrew, 2 Sw. & Tr. 625 . . . . . 1140
Winn, In re John Moss, 2 Sw. & Tr. 147 . . . . . 949
Winscom *v.* Winscom and Plowden, 3 Sw. & Tr. 380 . . . . 1322
Winstone *v.* Winstone and Dyne, 2 Sw. & Tr. 246 . . . . 989
Winter, In re Michael, 4 Sw. & Tr. (Supp.) 204 . . . . 1494
Wiseman, In re William Hay, 2 Sp. Ecc. & Ad. 63 . . . . 308
Witt *v.* Witt and Klindworth, 3 Sw. & Tr. 143 . . . . . 1228
Woodgate *v.* Taylor, 2 Sw. & Tr. 512 . . . . . 1095
Woodley, In re, 3 Sw. & Tr. 429 . . . . . 1341
Worman, In re Maria, 1 Sw. & Tr. 513 . . . . . 838
Wright, In re, 4 Sw. & Tr. 35 . . . . . 1428
Wright *v.* Wright, 1 Sw. & Tr. 80 . . . . . 638
Wyatt, In re Matthew Cotes, 2 Sw. & Tr. 494 . . . . . 1088
Wyckoff, In re Peter Richmond, 3 Sw. & Tr. 20 . . . . . 1178
Wyman *v.* Ashwell, 4 Sw. & Tr. (Supp.) 196 . . . . . 1492

Y——— *v.* Y———, 1 Sw. & Tr. 598 . . . . . 877
Yeatman *v.* Yeatman, 3 Sw. & Tr. 361 . . . . . 1315
Yelverton *v.* Yelverton, 1 Sw. & Tr. 574 . . . . . 866
Young and Another *v.* Ferrie and Others, 4 Sw. & Tr. (Supp.) 210 . . 1497
Young *v.* Oxley, 1 Sw. & Tr. 25 . . . . . 612

Zycklinski *v.* Zycklinski, 2 Sw. & Tr. 420 . . . . . 1059

PRINTED IN GREAT BRITAIN BY NEILL AND CO., LTD., EDINBURGH.

LAW LIBRARY
UNIVERSITY OF CALIFORNIA
LOS ANGELES

UC SOUTHERN REGIONAL LIBRARY FACILITY
A 000 981 541 6

LAW LIBRARY,
Supreme Court